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Appendix A

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

No. 18-4013

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, a federally recognized
Indian Tribe and a federally chartered corporation;
UINTAH AND OURAY TRIBAL BUSINESS
COMMITTEE; UTE ENERGY HOLDINGS, a
Delaware LLC,

Plaintiffs-Appellants,

v.

BARRY G. LAWRENCE, District Judge, Utah Third
Judicial District Court, in his individual and official
capacities; LYNN D. BECKER,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:16-CV-00579-CW)
Filed: January 6, 2022

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(Thomas W. Fredericks and Jeremy J. Patterson,

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with them on the briefs), Fredericks Peebles & Morgan LLP, Louisville, Colorado, for Plaintiffs-Appellants.

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Nancy J. Sylvester (Brent M. Johnson, with her on the brief), Administrative Office of the Courts, Utah District Court, Salt Lake City, Utah, for Defendant-Appellee Judge Barry G. Lawrence.

Before MORITZ, BRISCOE, and EID, Circuit Judges.

MORITZ, Circuit Judge.

This appeal marks the latest chapter in a long-running contract dispute between the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe)¹ and Lynn Becker, a non-Indian. The contract

¹ As in prior iterations of this dispute, this appeal is brought not only by the Tribe but also “the Uintah and Ouray Tribal Business Committee (the Tribe’s elected governing body)” and “Ute Energy Holdings, LLC (whose 100% owner and sole member is the Tribe).” *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 875 F.3d 539, 540 n.1 (10th Cir. 2017). “Because the appellants raise identical arguments, we will generally refer to them all as the Tribe.” *Id.*

concerned Becker's work marketing and developing the Tribe's mineral resources on the Ute reservation. Almost seven years ago, Becker sued the Tribe in Utah state court for allegedly breaching the contract by failing to pay him a percentage of certain revenue the Tribe received from its mineral holdings. Later, the Tribe filed this lawsuit, challenging the state court's subject matter jurisdiction under federal law. The district court denied the Tribe's motion for a preliminary injunction against the state-court proceedings, and the Tribe appeals.

We reverse and hold that the Tribe is entitled to injunctive relief. The district court's factual findings establish that Becker's state-court claims arose on the reservation because no substantial part of the conduct supporting them occurred elsewhere. And because the claims arose on the reservation, the state court lacks subject-matter jurisdiction absent congressional authorization. But contrary to the district court's ruling, 25 U.S.C. § 1322 does not provide such authorization. Section 1322 requires tribal consent to state-court jurisdiction, and tribal consent is obtained only by holding a special election under 25 U.S.C. § 1326. Here, the Tribe never provided such consent. Thus, the Tribe succeeds on the merits of its claim that the state court lacks subject-matter jurisdiction. The Tribe further satisfies the other requirements for obtaining injunctive relief. Accordingly, under the particular circumstances of this appeal, we close this chapter in Becker's dispute with the Tribe by ordering the district court to permanently enjoin the state-court proceedings.

Background

The contract dispute at the heart of this appeal has spawned lawsuits in federal, state, and tribal court. Our court alone has issued four separate opinions. See *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 770 F.3d 944 (10th Cir. 2014) (*Becker I*); *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 868 F.3d 1199 (10th Cir. 2017) (*Becker II*); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 875 F.3d 539 (10th Cir. 2017) (*Lawrence*); *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 11 F.4th 1140 (10th Cir. 2021) (*Becker III*).² Those opinions provide detailed accounts of both the underlying contract dispute and the dense procedural history that followed. We therefore provide an abridged version of this history, covering only the events relevant to the appeal before us.

Becker's formal relationship with the Tribe began in 2004, when the Tribe hired him to help market and develop the Tribe's vast mineral resources. During Becker's time working for the Tribe, those resources were located exclusively within the borders of the Ute reservation. Becker and the Tribe executed a contract, which we refer to as "the Agreement," under which Becker would receive for his services an annual salary and 2% of certain revenue the Tribe accrued through its various mineral holdings. After Becker and the

² *Becker III* was initially consolidated with this appeal, and the cases were argued together.

Tribe terminated their relationship in late 2007 or early 2008, a dispute arose over the Tribe's purported failure to pay Becker the 2% interest. So in 2014, Becker sued the Tribe in Utah state court for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.³ Judge Barry Lawrence denied the Tribe's motion to dismiss for lack of subject-matter jurisdiction and eventually set the case for trial.

In June 2016, about a year after Judge Lawrence denied the Tribe's motion to dismiss the state-court action, the Tribe filed this federal lawsuit against Becker and Judge Lawrence, challenging in part the state court's subject-matter jurisdiction under federal law. Initially, the district court determined that it lacked federal subject-matter jurisdiction to consider the Tribe's challenge and dismissed the case. We reversed and remanded for further proceedings, holding that "the Tribe's claim—that federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation—presents a federal question that sustains federal jurisdiction." *Lawrence*, 875 F.3d at 540.

On remand, the Tribe reasserted its position that the state court lacked subject matter jurisdiction in a motion for both preliminary and permanent injunctions against the state-court proceedings.

³ Becker initially brought these claims in federal court, but the district court dismissed them for lack of federal subject-matter jurisdiction under 28 U.S.C. § 1331, and we affirmed. *See Becker I*, 770 F.3d at 948–49.

Rather than take up those motions, the district court sua sponte directed the parties to address a different issue, resulting in an order that purported to avoid consideration of the Tribe's motions on supplemental jurisdiction grounds.⁴

The Tribe then filed this appeal, but we abated it, instructing the district court to follow *Lawrence's* mandate and “decide the Tribe's request for injunctive relief against the state[-]court proceedings.” App. vol. 8, 1541. The district court ultimately denied a preliminary injunction, finding that the Tribe was unlikely to succeed on the merits of its claim that the Utah state court lacks jurisdiction. In so doing, it reasoned that even assuming Becker's claims involve events that occurred on the reservation, a federal statute authorizes state-court jurisdiction over such claims.⁵ See 25 U.S.C. § 1322.

⁴ The district court may have misinterpreted our statement in *Lawrence* that on remand, it “should address in the first instance whether the Tribe's claims for declaratory relief fall within its supplemental jurisdiction.” 875 F.3d at 548. As the Tribe pointed out below, the only declaratory claims “that conceivably require[d] the exercise of supplemental jurisdiction [we]re the Tribe's alternative claims” about the Agreement's validity and sovereign immunity. App. vol. 3, 510 (emphasis omitted). Supplemental jurisdiction was not required for the Tribe's primary claim, that the state court lacked jurisdiction; *Lawrence* held that federal-question jurisdiction existed for that claim. See 875 F.3d at 543–44.

⁵ Four days before the district court ruled, the Tribe moved to sanction Becker and his counsel for making allegedly disparaging comments about the Tribe. In this appeal, the

We then lifted the abatement. But following oral argument, we abated the appeal for a second time, ordering the district court to make supplemental factual findings on the issue it had merely assumed—whether Becker’s state-court claims arose from events that occurred on the reservation. The district court eventually issued supplemental findings⁶ and certified the supplemental record to this court. Having lifted the second abatement, we now resolve the Tribe’s appeal.

Analysis

We review the district court’s decision to deny a preliminary injunction for abuse of discretion. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011). The district court abuses its discretion if it “commits a legal error,” if it “relies on clearly erroneous factual findings,” or if “there is no rational basis in the evidence for its ruling.” *Id.* (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)).

To obtain a preliminary injunction, the moving party must show that (1) it is substantially likely to prevail on the merits; (2) it will suffer irreparable

Tribe argues that “the district court erred in denying” this motion. Aplt. Br. 51 (capitalization omitted). Yet it acknowledges that “[t]he district court has never ruled on the . . . motion,” and it suggests that the district court erred in failing to do so. *Id.* Because the motion remains pending in the district court, it is not ripe for our review and we do not resolve it here.

⁶ We discuss those findings, as relevant, below.

harm without the injunction; (3) this threatened injury outweighs the harm that granting the injunction may cause the opposing parties; and (4) the injunction will not adversely affect the public interest. *Becker II*, 868 F.3d at 1202. Here, the district court concluded that the Tribe failed the first requirement—it had not shown a substantial likelihood of success on its claim that federal law precludes the state court from exercising jurisdiction over Becker’s lawsuit. On appeal, the Tribe challenges that conclusion, arguing that it can show even more than a likelihood of success on the merits—it can show *actual* success on the merits. The Tribe further argues that it satisfies the remaining injunction requirements and thus asks, as a remedy, that we order the district court to grant a permanent injunction.

I. The State Court’s Jurisdiction

The Tribe argues that the Utah state court lacks subject-matter jurisdiction over Becker’s lawsuit as a matter of federal law. Admittedly, federal law usually plays a limited role in assessing whether a state court has jurisdiction because state courts, as courts of general jurisdiction, can hear a wide variety of cases. 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3522 (3d ed. 2021) (“Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary.”); *cf.* *Aldinger v. Howard*, 427 U.S. 1, 15 (1976) (“[F]ederal courts, as opposed to state trial courts of general

jurisdiction, are courts of limited jurisdiction marked out by Congress.”). But this general jurisdiction does not necessarily hold true when a case involves a tribe or its members. Instead, state courts’ “adjudicative authority over Indians for on-reservation conduct is greatly limited by federal law.” *Lawrence*, 875 F.3d at 542.

These limits reflect a longstanding federal policy—enforceable against the states under the federal government’s plenary and exclusive constitutional authority “to legislate in respect to Indian tribes”—of “leaving Indians free from state jurisdiction and control.” *Id.* at 541–42 (first quoting *United States v. Lara*, 541 U.S. 193, 200 (2004), and then quoting *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 168 (1973)); see also *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959) (noting that Congress has “acted consistently upon the assumption that the [s]tates have no power to regulate the affairs of Indians on a reservation” and that judicial precedents “have consistently guarded the authority of Indian governments over their reservations”). Thus, when a case brought against a tribe or its members “aris[es] from conduct in Indian country,” state courts lack jurisdiction “absent clear congressional authorization.” *Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018). On the other hand, such authorization is generally not

required if the claims stem from events occurring off tribal land.⁷

Accordingly, to assess the Tribe’s argument that the state court lacks jurisdiction over this dispute, we consider (1) whether Becker’s claims arose on the reservation; and (2) if they did, whether Congress has authorized state-court jurisdiction over such claims.

A. Where Becker’s Claims Arose

The Supreme Court has never set out a precise standard for determining whether a lawsuit or a claim arose in Indian country. Even so, its precedents make clear that the inquiry requires examination of where the material factual events underlying the plaintiffs’ claims occurred.⁸ In

⁷ We say “generally” because specific treaties and federal statutes limit state court jurisdiction over specific off-reservation claims “that might otherwise be brought in state court.” 1 Cohen’s Handbook of Federal Indian Law § 7.03(1)(a)(i) (2019). And of course, even if a state court has *jurisdiction* over such claims, tribal sovereignty may independently prevent it from ultimately adjudicating them. *Id.* (noting that tribal sovereign immunity “bars suits against tribes in state court, even for cases involving off-reservation conduct”); *see also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014) (declining to revisit “prior decisions holding that, absent [congressional abrogation or waiver], Indian tribes have immunity even when a suit arises from off-reservation commercial activity”).

⁸ The Tribe sometimes frames this inquiry in terms of “minimum contacts,” a phrase typically associated with the standard for *personal* jurisdiction. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that states may exercise

Williams, for example, a non-Indian sued a Navajo couple in state court to recover a debt stemming from goods sold at the non-Indian’s store located on tribal land. 358 U.S. at 217–18. The Court held that the state court lacked jurisdiction over that claim, which it described as “aris[ing] on an Indian reservation.” *Id.* at 218; *see also id.* at 223 (noting that plaintiff “was on the [r]eservation and the transaction with an Indian took place there”). And in *Fisher v. District Court of Montana*, the Court stated that an adoption proceeding between tribal parties who resided on a reservation could not be brought in state court because the proceeding was “appropriately characterized as litigation arising on the Indian reservation.” 424 U.S. 382, 389 (1976) (per curiam). In doing so, it noted one party’s failure to argue that “any substantial part of the conduct supporting the adoption petition took place off the reservation.” *Id.*; *see also id.* at 389 n.14 (“[I]t

personal jurisdiction over out-of-state defendants with “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). But whether the Utah state court may assert *personal* jurisdiction over the Tribe is distinct from the issue we face here—whether federal law deprives the state court of *subject-matter* jurisdiction. *See* 1 Cohen’s Handbook of Federal Indian Law § 7.03(1)(b) n.15 (2019) (noting that jurisdictional bar “against state courts hearing actions that arise on the reservation is broader than the [personal-jurisdiction] requirement that a dispute have minimum contacts with the forum”).

appears that none of the acts giving rise to the adoption proceedings occurred off the reservation.”).

For some claims, determining that the material conduct occurred on tribal land is a straightforward task. A tort claim based on a slip-and-fall injury at a casino on a reservation, for instance, clearly “aris[es] on Indian land.” *Dalley*, 896 F.3d at 1200, 1204–05. So does a lawsuit “springing from [an] on-reservation automobile accident[.]” *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991). We cannot so easily classify Becker’s claims as arising on the reservation, however, because the district court’s supplemental factual findings suggest that at least some of the underlying events took place off the reservation.

As a result, we assess the district court’s factual findings to determine whether any “substantial part of the conduct supporting the [claims] took place off the reservation.”⁹ *Fisher*, 424 U.S. at 389; *cf. also* 1 Cohen’s Handbook of Federal Indian Law § 6.01(5) (2019) (“Where activities occur partially within and partially outside Indian country, and a substantial part of the activity takes place outside, courts have generally upheld nondiscriminatory applications of state jurisdiction.”). In a contract case like Becker’s,

⁹ In so doing, we review the district court’s factual findings for clear error. *See Crowe & Dunlevy*, 640 F.3d at 1157. Whether those findings establish that Becker’s claims arose on the reservation, however, is a legal question we consider de novo. *See Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1242 (10th Cir. 2017) (noting de novo review of legal conclusions in preliminary-injunction appeal).

this inquiry involves several factors, including where the parties executed, negotiated, and performed the contract; where the contract subject matter is located; and where the parties reside. *See R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 985 (9th Cir. 1983). When weighing these factors, we “evaluat[e] each [one] according to its relative importance with respect to the dispute.” *Id.*

The district court’s findings establish that the parties executed the Agreement on the reservation. The district court found that the Tribe’s Business Committee Chair signed the Agreement at tribal headquarters on the reservation, citing undisputed statements to that effect from two witnesses. As for Becker, the district court concluded it was “unclear where [he] executed” the Agreement. Supp. App. vol. 3, 25. But the record reveals no such uncertainty. True, Becker himself testified that he did not recall where he signed the Agreement. But he also specifically testified that he and the Chair signed the Agreement at the same time. Supp. App. vol. 2, 483 (stating that during conversation with Chair, “*we signed the Agreement*” (emphasis added)). Thus, given the undisputed evidence that the Chair signed on the reservation, the only reasonable inference is that Becker also signed on the reservation, and the district court clearly erred in concluding otherwise. *See McDonnell v. City & Cty. Of Denver*, 878 F.3d 1247, 1256–57 (10th Cir. 2018) (factual finding supporting district court’s preliminary-injunction analysis was clearly erroneous “[b]ecause there [wa]s no record support for [it]”). Because both parties signed on the reservation, the place-of-

execution factor favors concluding that Becker's contract claims arose on the reservation.

The place-of-performance factor likewise supports the conclusion that Becker's claims arose on the reservation. The district court interpreted the record as inconclusive on where the Tribe performed, explaining that "[n]o evidence was submitted to suggest that [it] performed [its] obligations on, or off of, [t]ribal [l]and." Supp. App. vol. 3, 24. That statement is puzzling given the district court's recognition that, "[b]ecause the Tribe is not a natural person," its conduct "must be interpreted through its . . . ordinances, resolutions, and actions." *Id.* at 6. Such conduct necessarily occurred on the reservation where, as the district court also recognized, the Tribe conducts its business from tribal headquarters. Thus, absent any contrary evidence, we fail to see how the Tribe could have performed (or failed to perform) its contractual duties from anywhere but the reservation. *See Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1184 (10th Cir. 2009) ("[I]nternally inconsistent findings constitute clear error." (quoting *John Allan Co. v. Craig Allen Co.*, 540 F.3d 1133, 1139 (10th Cir. 2008))).

As for Becker, the district court found that he devoted a substantial amount of time to working both on and off the reservation. We take no issue with the district court's factual findings on this point. The district court estimated that Becker worked off the reservation "[a]pproximately half" or "[a]t least half" of the time, either working remotely

(rather than in his on-reservation office) or traveling out of state or to other Utah cities for business meetings. *Id.* at 23, 25. Becker's appellate brief points to a similar figure and emphasizes this off-reservation work.

Yet as the district court acknowledged, all that off-reservation work served the Tribe's minerals interests which were located entirely within reservation boundaries. For example, when Becker attended meetings in other states, he did so "to effectively market and monetize [the Tribe's] minerals," which "were located on [t]ribal [l]and." *Id.* at 22. The same is true for meetings Becker attended within Utah but off the reservation, which were "devoted to issues 'relating . . . to . . . the Tribe's surface or mineral estate within the exterior boundaries of the reservation.'" *Id.* at 23 (quoting Supp. App. vol. 2, 490). Thus, the nature of Becker's duties diminishes the significance of Becker's off-reservation work. Moreover, at least half of Becker's time was devoted to working on the reservation.

Finally, we find the location of the Agreement's subject matter especially significant. *See R.J. Williams*, 719 F.2d at 985 ("When a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant."). The Agreement concerned Becker's work marketing and developing tribal mineral assets located exclusively within the reservation; as the district court put it, "[a]t all times relevant to this matter, the Tribe did not acquire or own oil, gas, or mineral interests in lands off of" the

reservation. Supp. App. vol. 3, 5. And as mentioned, while Becker may have performed some tasks off tribal land, his actions were always in furtherance of his role managing those resources. This factor overwhelmingly supports the conclusion that Becker's claims arose on the reservation.

To summarize, both parties signed the Agreement on the reservation, and the Tribe necessarily performed its duties there. And crucially, even though Becker performed his duties off the reservation about half of the time, his work was always in service of his role managing tribal mineral resources located on the reservation. For these reasons, we conclude that no "substantial part" of the conduct supporting Becker's claims occurred off the reservation. *Fisher*, 424 U.S. at 389. Becker's case is therefore "appropriately characterized as litigation arising on [an] Indian reservation." *Id.*

B. Whether Congress Authorized State-Court Jurisdiction

Because Becker's claims against the Tribe arose on the reservation, the Utah state court could exercise jurisdiction over the dispute only with "clear congressional authorization." *Dalley*, 896 F.3d at 1204. The district court determined that 25 U.S.C. § 1322 supplies such authorization. As explained in more detail below, that statute allows states to acquire jurisdiction over "civil causes of action arising within . . . Indian country" and involving

Indian parties.¹⁰ § 1322(a), (b). But state-court jurisdiction under § 1322 “requires certain prelitigation action.” *Lawrence*, 875 F.3d at 545–46. The Tribe argues that one such prelitigation action is tribal consent; that is, a tribe must agree in advance to a state’s assumption of § 1322 jurisdiction. And because the Tribe has never consented to Utah courts exercising § 1322 jurisdiction, the Tribe contends, that statute does not supply the Utah state court with jurisdiction over Becker’s case.

We agree. States may only assume jurisdiction under § 1322(a) “with the consent of the tribe occupying the particular Indian country . . . which would be affected by such assumption.”¹¹ § 1322(a).

¹⁰ More precisely, the statute applies to claims arising in Indian country “between Indians or to which Indians are parties.” § 1322(a). “Because this language refers only to individual Indians,” it arguably does not apply to suits against tribes themselves. 1 Cohen’s Handbook of Federal Indian Law § 6.04(3)(b)(v) (2019); *see also Lawrence*, 875 F.3d at 546 n.4 (acknowledging that “there may be a question whether [§ 1322] applies to suits against tribes, as opposed to individual Indians”). Indeed, the Tribe argues as much in this appeal. The dissent likewise submits (and would find dispositive on the § 1322 issue) that “§ 1322 addresses only suits involving individual Indians, not [t]ribes.” Dissent 10. We need not consider this issue: Regardless of whether § 1322 applies to suits against tribes, it does not apply here because—as we explain in the text—the Tribe did not consent.

¹¹ Congress added the tribal-consent requirement in 1968 and made it applicable to all future assumptions of civil jurisdiction by states. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 493 n.40

A neighboring provision, 25 U.S.C. § 1326, specifies the procedure for obtaining a tribe's consent: "[T]he enrolled Indians within the affected area" must "accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose." If a tribe has not expressed its consent by holding a special election, a state's courts cannot exercise § 1322 jurisdiction. *Kennerly v. Dist. Ct. of Mont.*, 400 U.S. 423, 429 (1971) (per curiam) ("[T]he tribal consent that is prerequisite to the assumption of state jurisdiction . . . must be manifested by majority vote of the enrolled Indians within the affected area of Indian country."). Here, Becker does not suggest that the Tribe ever held a special election accepting Utah's assumption of § 1322 jurisdiction; nor does any record evidence suggest that such an election took place. See *Lawrence*, 875 F.3d at 546 n.4; 1 Cohen's Handbook of Federal Indian Law § 6.04(3)(a) & n.49 (2019) (noting that "Utah passed legislation accepting jurisdiction subject to subsequent tribal consent" but that "no tribes . . . have consented to the state's jurisdiction"). And the absence of a special election forecloses the possibility that § 1322 applies because the Tribe has not provided the necessary consent.

(1979) ("The 1968 legislation provides that [s]tates that have not [yet] extended . . . civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected."). The tribal-consent requirement applies to Utah because it did not pass legislation accepting § 1322 jurisdiction until after the 1968 amendment. See *Lawrence*, 875 F.3d at 546 n.4.

The district court resisted this straightforward conclusion by accepting Becker’s argument that a special election is not always necessary for a tribe to consent to the exercise of state jurisdiction under § 1322(a). Specifically, it found that although a tribe must conduct a special election before it can consent to “permanently authorize the state to assume *global* jurisdiction over [it],” it need not hold a special election before it can “selectively consent”—in a contract like the Agreement, for example—“to a state’s exercise of . . . jurisdiction” over a *specific* legal action. App. vol. 15, 3729–30 (emphases added). In other words, according to the district court, a tribe must hold a special election if it “intends to surrender all of its own jurisdiction over tribal matters to a state” but need not do so if it instead intends simply to “waive[] . . . its sovereign immunity over selected matters” in particular litigation. *Id.* at 3727. Based on this view, the district court reasoned that the Tribe’s “likelihood of success on the merits” rests not on whether it held a special election authorizing Utah state courts to assume jurisdiction under § 1322 but on “whether there is a valid selective waiver of the Tribe’s sovereign immunity in [the Agreement].” *Id.* at 3734. The district court then held that the Agreement validly waives tribal sovereign immunity, thus supplying the Utah state court with jurisdiction over Becker’s claims. The district court’s analysis is flawed in several significant respects.

First, we agree with the Tribe that the district court’s interpretation is inconsistent with the explicit statutory text. Section 1326 makes clear

that “[s]tate jurisdiction acquired pursuant to *this subchapter* . . . shall be applicable in Indian country *only where* the enrolled Indians within the affected area . . . accept such jurisdiction” by holding a special election. § 1326 (emphases added). Congress included § 1322 in the same statutory subchapter as § 1326, so jurisdiction acquired under § 1322 can apply in Indian country “only where” the Tribe has held a special election accepting such jurisdiction. *Id.* The use of the limiting term “only” conveys that a special election is a necessary event that must occur before a state court may assert § 1322 jurisdiction. *See* Merriam-Webster’s Collegiate Dictionary 867 (11th ed. 2003) (defining adverbial use of “only” as “solely, exclusively”); *Shell Oil Co. v. Manley Oil Corp.*, 124 F.2d 714, 715 (7th Cir. 1941) (“The word ‘only’ is a limiting and restrictive term . . . and in th[is] sense means ‘solely’ or the equivalent of the phrase ‘and nothing else.’”). Yet the district court’s interpretation would allow a state court to assert such jurisdiction despite the nonoccurrence of this necessary event, so long as the tribe has waived sovereign immunity. Because the district court’s permissive construction of § 1326’s special-election requirement reads “only” out of the statute, we decline to adopt it.¹² *See Dalley*, 896 F.3d at 1215

¹² We also reject the district court’s suggestion that § 1326 does not apply because it “relates to a *tribe’s* ability to independently relinquish to a state the *tribe’s* jurisdiction over tribal matters, whether or not the state has accepted the federal government’s jurisdiction.” App. vol. 15, 3727. Again, this suggestion is contrary to the express language of the statute. The opening words of § 1326 explicitly identify the

(noting that courts generally “give effect to all statutory provisions, so that no part will be inoperative or superfluous—each phrase must have distinct meaning” (quoting *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1283 n.15 (10th Cir. 2017))).

The district court’s interpretation also contradicts the Supreme Court’s controlling decision in *Kennerly*, 400 U.S. 423. There, the Court held that a Montana state court lacked jurisdiction over a non-Indian’s lawsuit against several tribe members to collect a debt incurred on that tribe’s reservation. 400 U.S. at 424, 429–30. The tribal government had passed an ordinance granting state courts concurrent jurisdiction over civil cases involving tribe members named as defendants. *Id.* at 425. The Court considered whether this ordinance satisfied the tribal-consent requirement. *Id.* at 428–29. After quoting § 1322 and § 1326 in full, the Court determined that “the meaning of these provisions is clear: [T]he tribal consent that is prerequisite to the assumption of state jurisdiction . . . must be manifested by majority vote of the enrolled Indians within the affected area of Indian country.” *Id.* And because the tribal ordinance “d[id] not comport with

subject to which it applies—“[s]tate jurisdiction acquired pursuant to this subchapter.” Such jurisdiction, the statute says, “shall be applicable in Indian country only where” a special election occurs. § 1326. Thus, § 1326 addresses the circumstances in which *states* may apply the jurisdiction transferred to them by the federal government elsewhere in the subchapter.

the explicit requirements of the Act” for obtaining tribal consent, the Montana state court lacked jurisdiction. *Id.* at 429.

The district court attempted to distinguish *Kennerly* by highlighting statements in the majority opinion about selective consent, statements the majority offered in response to the dissent.¹³ But a close reading of *Kennerly* reveals the flaw in this approach. Justice Stewart’s dissent in *Kennerly* suggested that the majority’s opinion would “reduce[] the [self-government] options available to [tribes] with respect to state[-]court jurisdiction.” *Id.* at 431. The dissent further speculated that “reservation Indians must now choose between exclusive tribal[-]court jurisdiction on the one hand and permanent, irrevocable state jurisdiction on the other.” *Id.*

Although the *Kennerly* dissent offered no explanation for this all-or-nothing interpretation, the *Kennerly* majority explained that the dissent had inferred “from the express allowance for selective state exercise of jurisdiction” in § 1322 that Congress somehow intended “to exclude selective tribal consent to state exercise of jurisdiction.” *Id.* at 430 n.6. The majority rejected this inference, clarifying that “th[e] case present[ed] no question concerning *the power of the Indian tribes* to place time, geographical, or other conditions on the ‘tribal

¹³ The district court did so without input from Becker, who did not discuss, or even mention, *Kennerly* when responding to the Tribe’s motion for injunctive relief.

consent’ to state exercise of jurisdiction.” *Id.* at 429 (emphasis added). Instead, the Court reiterated that it was “presented solely with a question of *the procedures* by which ‘tribal consent’ must be manifested under the [statute].” *Id.* (emphasis added). In other words, the *Kennerly* majority left open the possibility that tribes could consent to state-court jurisdiction over some cases and not others.

Nevertheless, the district court here stretched the *Kennerly* majority’s suggestion that § 1322 may allow selective tribal consent to mean that § 1326’s special-election procedure is only a prerequisite to state-court jurisdiction when a tribe “globally” consents to such jurisdiction. App. vol. 15, 3730. But even if *Kennerly*’s dictum supports a tribe’s ability to selectively consent to state-court jurisdiction, its holding explicitly reinforces how this consent must be expressed— through a special election following § 1326’s particular procedures. *See Kennerly*, 400 U.S. at 429. And it is undisputed here that the Tribe never held a special election to allow Utah state courts to adjudicate any civil cause of action arising on the reservation, much less Becker’s lawsuit against the Tribe.

Next, as the Tribe asserts, the district court conflated tribal sovereign immunity with subject-matter jurisdiction. To support its conclusion that the Tribe’s purported waiver of sovereign immunity rendered the special-election requirement inapplicable, the district court quoted Supreme Court caselaw noting that “[a]s a matter of federal

law, an Indian tribe is subject to suit only where Congress has authorized the suit *or* the tribe has waived its immunity.” App. vol. 15, 3732 (emphasis added) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). Becker likewise emphasizes this statement on appeal, noting also that the Court cited it favorably three years later in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

But both *Kiowa* and *C & L Enterprises* concern issues of sovereign immunity. Their statements about when a tribe is “subject to suit” address the circumstances in which a tribe cannot assert sovereign immunity as a defense: when “Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa*, 523 U.S. at 754; *see also id.* at 760 (“Congress has not abrogated this immunity, nor has [the tribe] waived it, so the immunity governs this case.”); *C & L Enters.*, 532 U.S. at 418 (“To abrogate tribal immunity, Congress must ‘unequivocally’ express that purpose. Similarly, to relinquish its immunity, a tribe’s waiver must be ‘clear.’” (citation omitted) (first quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and then quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991))). And as we emphasized in *Lawrence*, tribal “sovereign immunity and a court’s lack of subject-matter jurisdiction are different animals.” 875 F.3d at 545. Waiving sovereign immunity simply renders a party “amenable to suit in a court properly possessing jurisdiction; it does not guarantee a forum.” *United States v. Park Place Assocs., Ltd.*, 563

F.3d 907, 923 (9th Cir. 2009). Put differently, “the absence of immunity does not establish the presence of subject[-]matter jurisdiction.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007). So, contrary to the district court’s view, even if the Agreement waives tribal sovereign immunity, that waiver does not resolve whether the Utah state court has subject matter jurisdiction over Becker’s case. Resolving that issue, we have explained, depends instead on whether the requirements of § 1322 and § 1326 are met. And because here they are not, Congress has not authorized state-court jurisdiction over Becker’s lawsuit.¹⁴

¹⁴ This conclusion makes it unnecessary to address the Tribe’s argument that the district court also erred by overlooking the so-called “infringement barrier.” The Supreme Court has referred to the infringement barrier as one of two “independent but related barriers to the assertion of state regulatory authority over tribal reservations”—the other being federal preemption—either of which “standing alone[] can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980). Assuming, as the Tribe suggests, the infringement barrier remains a separate basis for concluding that the state court lacks jurisdiction, we have reached that conclusion under the preemption prong. *See Fisher*, 424 U.S. at 386 (explaining that state jurisdiction “depend[s], *absent a governing Act of Congress*, on ‘whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them’” (emphasis added) (quoting *Williams*, 358 U.S. at 220)); *Kennerly*, 400 U.S. at 425–26 (rejecting state court’s reasoning—that permitting state-court jurisdiction would be “consistent with the exercise of tribal powers of self-government”—because there was “a ‘governing Act of

In short, the Tribe’s argument that the state court lacks jurisdiction rests on two issues: (1) where Becker’s lawsuit arose, and (2) if it arose on the reservation, whether Congress authorized state-court jurisdiction. On the first issue, we hold that Becker’s claims arose on the reservation because, based on the district court’s factual findings, no substantial part of the conduct supporting those claims took place off the reservation. On the second issue, we hold that Congress has not authorized state court jurisdiction over Becker’s claims because, although § 1322 provides Utah with the means to assume such jurisdiction, the Tribe never consented by holding a successful special election as required by § 1326.¹⁵ Thus, the state court lacks subject-

Congress” whose procedures had not been followed); 1 Cohen’s Handbook of Federal Indian Law § 7.03(1)(a)(ii) (2019) (“The Court also has held that state jurisdiction is preempted by federal legislation prescribing ways for states to obtain jurisdiction over aspects of Indian country.”).

¹⁵ The dissent “agree[s] that § 1322 does not afford the Utah state courts with jurisdiction over Becker’s action against the Tribe,” Dissent 10, although for a different reason, as we noted earlier, *supra* note 10. From that point of agreement, the dissent turns to what it considers the real “jurisdictional issue” in this case: “whether a Tribe, by way of a written agreement with a non-Indian, may selectively agree to subject itself to state[-]court jurisdiction . . . for disputes arising out of the agreement.” Dissent 10. But resolution of that perceived issue necessarily depends on the antecedent question of whether the state court has jurisdiction in the first place, because parties cannot create, by contract, jurisdiction that would not otherwise exist. *Cf. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“[N]o action of the parties

matter jurisdiction, and the district court abused its discretion in concluding that the Tribe was unlikely to succeed on that claim.¹⁶ *Crowe & Dunlevy*, 640 F.3d at 1157.

II. Remedy

Next, we must consider the appropriate disposition of this appeal. Our conclusion that the state court lacks jurisdiction means that, contrary to the district court's ruling, the Tribe satisfies the first preliminary-injunction element.¹⁷ *See Becker II*, 868

can confer subject-matter jurisdiction upon a federal court.”); *U.S. for Use of B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117–18 (10th Cir. 1995) (invalidating forum-section clause requiring that claim subject to exclusive federal subject-matter jurisdiction be brought in state court). The dissent does not explain why or how the state court has jurisdiction in the first place. And as we have explained, because Becker's claims against the Tribe arose on the reservation—which the dissent does not dispute—the Utah state court's jurisdiction existed only if authorized by Congress. *See Dalley*, 896 F.3d at 1204. So unless some other federal statute besides § 1322 authorized state-court jurisdiction (a suggestion neither the parties nor the dissent makes), the Agreement could not have, as the dissent posits, allowed the Tribe to “selectively agree to subject itself to state[-]court jurisdiction.” Dissent 10. Without approval from Congress, the Utah state courts never had jurisdiction over this particular dispute to begin with.

¹⁶ Because we conclude that the state court lacks jurisdiction, we do not reach the Tribe's alternative argument that both the Agreement and its purported waiver of tribal sovereign immunity are invalid under tribal and federal law.

¹⁷ It also means that we cannot, as the dissent proposes, abstain under *Colorado River Water Conservation District v.*

F.3d at 1202. But to obtain a preliminary injunction, the Tribe must also prove the remaining three elements, which the district court did not consider. *See id.* Under these circumstances, our usual practice is to remand for the district court to reweigh all four elements anew. *E.g., Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998) (reversing district court’s analysis on irreparable harm factor and “remand[ing] for further consideration of the Tribe’s request” because district court “did not address the other three conditions required for issuance of a preliminary injunction”). The Tribe asks that we deviate from this practice and instead order the district court to enter a permanent injunction against the state-court

United States, 424 U.S. 800 (1976). Notably, the appellees do not invoke this—or any other—abstention doctrine on appeal: Judge Lawrence raised *Colorado River* early on in the district-court proceedings (even before our decision in *Lawrence*), but neither he nor Becker has mentioned it since. And even if we were to consider the issue sua sponte, as the dissent proposes, this case does not present the “exceptional circumstances” required to abandon our duty to “adjudicate a controversy properly before [us].” *Colorado River*, 424 U.S. at 813 (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959)). Indeed, *Colorado River* itself recognized that such exceptional circumstances do not exist “if the state court ha[s] no jurisdiction to decide th[e] claims.” *Id.* at 809; *see also Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 560 (1983) (“[A] dismissal or stay of the federal suits would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits.”). Because we conclude that the Utah state court lacks jurisdiction, abstention is not an option.

proceedings. Given the unique circumstances of this appeal, we agree with the Tribe's proposed resolution.

As an initial matter, the requirements for obtaining a permanent injunction are “remarkably similar” to those for obtaining a preliminary injunction. *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 822 (10th Cir. 2007). Indeed, the same four elements apply to both types of injunctive relief, and “[t]he only measurable difference between the two is that a permanent injunction requires showing *actual success* on the merits, whereas a preliminary injunction requires showing a *substantial likelihood of success* on the merits.” *Id.* (emphases added).

Moreover, circumstances sometimes arise in which “a decision on the merits underlying the . . . denial of a preliminary injunction” best serves the interests of judicial economy. *Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (“That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, not a limit on judicial power.”), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). That is, we have discretion, when appropriate, to decide not only that a party “has shown a *likelihood* of success on the merits,” but also that “it is altogether clear that [the party] *will* succeed on the merits.” *Solantic, LLC v. City of*

Neptune Beach, 410 F.3d 1250, 1272 (11th Cir. 2005).

The circumstances here warrant a judgment on the merits. The Tribe's argument involves a pure legal issue about the applicability of a federal statute, making it a good candidate for a merits decision on appeal from a preliminary-injunction denial. See *Thornburgh*, 476 U.S. at 757 (approving Third Circuit's decision to resolve underlying merits in preliminary-injunction appeal because "district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance"); *Okla. ex rel. Okla. Tax Comm'n*, 455 F.3d at 1113 (deciding underlying merits in appeal from denial of preliminary injunction because "[t]he issue [wa]s purely legal, the facts [we]re not in dispute, and immediate resolution [would] avoid wasteful future litigation").

We acknowledge that the issue of the state court's jurisdiction involves assessing the district court's findings on where Becker's claims arose. But crucially, because we remanded for supplemental findings on that issue, we have "a full record before [us]" that is "unusually complete" for the preliminary-injunction stage. *Thornburgh*, 476 U.S. at 757 (quoting *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986)). Indeed, the district court held a two-day evidentiary hearing resembling a full-blown trial at which it "heard testimony from fifteen witnesses and received over 140 exhibits." Supp. App. vol. 3, 2. And neither party suggests that

any additional evidence remains to be presented, were we to remand for additional proceedings. *Cf. Friarton Ests. Corp. v. City of New York*, 681 F.2d 150, 161 (2d Cir. 1982) (directing dismissal of complaint in addition to reversing grant of preliminary injunction because “[t]he facts critical to a decision . . . are found in the record” and “there is no indication that anything more could be produced at a trial”). Nor do they suggest that any of the remaining injunction requirements involve factual issues requiring a remand.¹⁸ Doing so would only prolong the litigation, while “immediate resolution may avoid wasteful future litigation.” *Okla. ex rel. Okla. Tax Comm’n*, 455 F.3d at 1113.

With that in mind, we have no trouble concluding that the Tribe satisfies all four requirements for a permanent injunction.¹⁹ On the first element, we have already explained why the Tribe succeeds on its claim that the Utah state court lacks

¹⁸ Indeed, although the Tribe requested a permanent injunction in its opening brief, Becker argued only that the Tribe was unlikely to succeed on the merits and did not address the remaining prongs.

¹⁹ Consideration of the requirements for injunctive relief “ordinarily must be performed by the district court in the first instance.” *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014). Even so, when the district court “fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed.” *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009). We see no reason why the same principle should not apply to permanent injunctions given the “remarkabl[e] similar[ity]” between the two standards. *Wagnon*, 476 F.3d at 822.

jurisdiction.²⁰ And because the Tribe, with its “sovereign status,” “should not be compelled ‘to expend time and effort on litigation in a court that does not have jurisdiction,’” it satisfies the second requirement of irreparable harm. *Hoover*, 150 F.3d at 1171–72 (quoting *Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)).

The Tribe likewise satisfies the third requirement, that the injury to the Tribe “outweighs the harm that the injunction may cause” to Becker. *Wagnon*, 476 F.3d at 822 (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)). Though granting the injunction will leave Becker unable to sue the Tribe in state court—“something [he] ha[d] no legal entitlement to do in the first place,” given our conclusion that Congress has not authorized jurisdiction—this harm does not outweigh the damage to tribal sovereignty that would result from denying the injunction. *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015); *see also id.* (weighing this factor in favor of granting temporary

²⁰ The dissent disagrees, based on its view that although § 1322 does not apply, the Agreement may independently supply the Utah state court with jurisdiction. We explained earlier why this view is misplaced: The Utah state court needed congressional authorization to assert jurisdiction over Becker’s on-reservation claims; no one suggests that any federal statute besides § 1322 authorized such jurisdiction; and the parties could not contractually create state-court jurisdiction that would not otherwise exist. *See supra* note 15.

injunction because doing so would only prevent state defendants from prosecuting tribal members).²¹

Fourth, enjoining the state-court action will not adversely affect the public interest. *See Wagnon*, 476 F.3d at 822. In the district court, Becker argued otherwise based on Utah’s alleged interest in adjudicating novel contract disputes between tribes and private parties that are governed by Utah law. But again, Utah had no such interest to begin with: This contract dispute arose on the reservation, and the federal law prerequisites for state-court jurisdiction are not met. In sum, because the Tribe has shown all the required elements, it is entitled to a permanent injunction against Becker’s state-court lawsuit.²²

²¹ The Tribe argues that this 2015 case—as well as other related *Ute v. Utah* cases dating back to 1981—provide an independent basis for granting an injunction in this case. Given our holding in the Tribe’s favor on other grounds, we need not and do not reach this argument.

²² We recognize that the Anti-Injunction Act (AIA), 28 U.S.C. § 2283, generally bars federal courts from enjoining ongoing state-court proceedings. In *Lawrence*, we flagged this issue as one that could “be addressed by the district court in the first instance.” 875 F.3d at 548. We also noted authority suggesting that one of the AIA’s exceptions may apply to lawsuits like this one brought by a tribe. *See id.* at 548 n.5; *compare* § 2283 (permitting injunction against state-court proceedings if “expressly authorized by Act of Congress”), *with Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 n.1 (10th Cir. 1995) (“It is possible that [28 U.S.C. § 1362] authorizes federal courts to enter injunctions against state proceedings.”). Despite our urging, and even though the Tribe’s motion for injunctive

Conclusion

The district court erred in denying the Tribe's motion to enjoin Becker's lawsuit in Utah state court. Becker's claims arose on the reservation because no substantial part of the conduct supporting them occurred elsewhere, so the state court could assert jurisdiction only with congressional authorization. Section 1322 does not supply such authorization because the Tribe never consented to jurisdiction under that provision by holding a special election as provided in § 1326. For these reasons, the Tribe succeeds on the merits of its claim that the state court lacks jurisdiction. And the Tribe also satisfies the remaining elements required for a permanent injunction. Thus, we reverse the district court's decision to deny the Tribe's motion for a preliminary injunction and remand with directions to (1) enter an order permanently enjoining Becker's lawsuit in Utah state court and (2) resolve the Tribe's pending motion for sanctions, assuming it has not been withdrawn.

relief preemptively argued that one or more AIA exceptions apply here, Becker mentioned the AIA only in passing on remand. On appeal, neither Becker nor Judge Lawrence mention the AIA, let alone argue that it applies. Accordingly, we decline to invoke the AIA as an alternative ground for affirming. See *United States v. Woodard*, 5 F.4th 1148, 1154 (10th Cir. 2021) (“[W]e don’t typically ‘craft[] arguments for affirmance completely sua sponte and . . . without the benefit of the parties’ adversarial exchange.” (second alteration in original) (quoting *United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020))).

As a final matter, we deny the Tribe's motion to reassign this case to a different judge on remand. Having carefully examined the record, we conclude that the Tribe has fallen short of establishing the "personal bias" or "extreme circumstances" required under our precedents to grant the "extraordinary" relief of reassignment. *Mitchell v. Maynard*, 80 F.3d 1433, 1448 (10th Cir. 1996).

BRISCOE, Circuit Judge, dissenting.

I dissent. In my view, the majority errs in three respects: by proceeding to address in the first instance the question of whether the Utah state courts have jurisdiction over Becker's pending action against the Tribe; in the manner in which it decides that issue; and by issuing permanent injunctive relief.

Given the history of this litigation, it is my view that we should abstain pursuant to the *Colorado River* doctrine from deciding whether the Utah state courts have jurisdiction over Becker's pending action against the Tribe. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–821 (1976). It is indisputable that the Utah state courts are capable of determining for themselves whether or not they have jurisdiction over Becker's action against the Tribe. And, in the event that the Utah state courts finally rule against the Tribe on this issue, the Tribe can seek review from the United States Supreme Court. I therefore would remand to the district court with directions to dismiss this case without prejudice.

As for the merits, the majority errs by ignoring the provisions of the parties' written agreement that address how and where disputes should be resolved, and in turn suggesting that 25 U.S.C. § 1322 wholly resolves the jurisdictional issue. And in terms of relief, the majority takes the remarkable, but wholly unwarranted, step of awarding the Tribe permanent injunctive relief.

I
A

It is of course true that in a prior related appeal we held “that whether the state court has jurisdiction to hear . . . Becker’s claim” against the Tribe “is a matter of federal law.” *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017) (*Lawrence I*). But we have never held that there is *exclusive* federal jurisdiction over that issue. To the contrary, it is well established that, at least “[u]nder normal circumstances, . . . state courts . . . can and do decide questions of federal law.” *El Paso Nat. Gas Co. v. Neztosie*, 526 U.S. 473, 485 n.7 (1999). It is also well established that such questions include issues of state court jurisdiction over civil disputes involving Indian tribes. *E.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (reviewing decision of the Supreme Court of Washington addressing tribal sovereign immunity in a civil in rem dispute).

The Tribe has effectively conceded these points. After Becker filed his action in Utah state district court, the Tribe did not respond by immediately filing this federal action. Instead, the Tribe moved to dismiss Becker’s action against it for lack of subject matter jurisdiction. After the state district court denied the Tribe’s motion, the Tribe appealed to the Utah Court of Appeals. The Utah Court of Appeals summarily dismissed the Tribe’s appeal due to the lack of a final, appealable order. On remand to the state district court, the Tribe continued, unsuccessfully, to obtain a dismissal for lack of

subject matter jurisdiction. Only after unsuccessfully litigating the jurisdictional issue in the Utah state courts for approximately a year and a half did the Tribe file this federal action seeking to enjoin Becker's state court action.

In light of this history, I conclude that abstention under the *Colorado River* doctrine is the proper course of action here. More specifically, I conclude, as this court did under similar circumstances in *D.A. Osguthorpe Family Partnership v. ASC Utah, Inc.*, 705 F.3d 1223 (10th Cir. 2013), that "the *Colorado River* doctrine wisely counsels our abstention from duplicative interference with the exceptionally protracted state proceedings present here." 705 F.3d at 1226.

B

The question of whether the district court should abstain from exercising jurisdiction over the Tribe's case has been lurking in this matter since shortly after the Tribe filed its federal complaint. To begin with, Judge Lawrence moved to dismiss the Tribe's federal complaint on the basis of a number of abstention doctrines, including the *Colorado River* doctrine. The Tribe responded to Lawrence's motion, but the district court never ruled on the motion. Subsequently, on January 17, 2018, the district court declined to exercise supplemental jurisdiction over the Tribe's case pursuant to 28 U.S.C. § 1367. The district court also offered three alternative rationales for why it should not reach the merits of the Tribe's claims. In particular, it concluded that "*Younger* abstention should apply

here because of the pending state action, the fact that state claim issues predominate[d], and because the Tribe ha[d] a meaningful remedy in the state courts if the state [district] court [wa]s incorrect about its jurisdiction.” Aplt. App., Vol. IV at 727–28. The district court also concluded that, “as a matter of comity,” it “should defer to the state court to decide its own jurisdiction.” *Id.* at 728. It was the district court’s January 17, 2018 decision that gave rise to the appeal that is now before us.

To be sure, on February 16, 2018, a two-judge panel of this court, acting upon a motion filed by the Tribe in connection with this appeal, “abate[d] the Tribe’s appeal,” “direct[ed] a limited remand,” and instructed the district court on remand “to exercise its original jurisdiction in accord with the mandate in [*Lawrence I*], and decide the Tribe’s request for injunctive relief against the [Utah] state court proceedings.” Feb. 16, 2018 Order at 2. But nothing in that order addressed, let alone obviated, the district court’s alternative rationales for declining to exercise jurisdiction. And for good reason: the two judge panel lacked authority to address those alternative rationales on the merits. As outlined in 28 U.S.C. §§ 46(b) and (c), appellate courts may hear and decide cases and controversies by panels consisting of three judges. Of course, two-judge panels may act in the absence of an originally designated third judge, but that is not what occurred in this case. Rather, the two-judge panel, which had not been assigned to the case as a merits panel and which lacked a third member, was acting only pursuant to Federal Rule of Appellate Procedure

27(c), which states, in pertinent part, that “[a] circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding.”

Thus, the district court’s January 17, 2018 decision offering the alternative rationales for abstaining from exercising jurisdiction remains subject to review by this court. More specifically, as a result of the two-judge order of this court issued on February 16, 2018, we now have before us in this appeal two related, but alternative rulings from the district court: (1) the district court’s original January 17, 2018 decision concluding, in pertinent part, that the Tribe’s case should be dismissed under the *Younger* abstention doctrine; and (2) the district court’s supplemental decision and order of April 30, 2018, concluding that, even if it exercised jurisdiction over the Tribe’s action, the Tribe was unlikely to prevail on the merits thereof and thus was not entitled to a preliminary injunction.

Moreover, even aside from the district court’s January 17, 2018 decision, it is beyond dispute that we possess the authority to raise the issue of abstention *sua sponte*. See *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976) (indicating “that abstention may be raised by the court [*sua sponte*.”); *D.A. Osguthorpe*, 705 F.3d at 1231 (“[A] court may raise the issue of abstention *sua sponte*.”). Thus, I proceed to address the issue of abstention, starting first with the *Younger* doctrine that the district court relied on, and concluding with the *Colorado River* doctrine.

C

“Abstention from the exercise of federal jurisdiction is the exception, not the rule.” *Colorado River*, 424 U.S. at 813. Therefore, “federal courts are obliged to decide cases within the scope of federal jurisdiction,” and “[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013).

The district court in this case concluded that *Younger* abstention was appropriate. Reviewing that conclusion de novo, I disagree. See *D.A. Osguthorpe*, 705 F.3d at 1231 (outlining standard of review). “*Younger* exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution.” *Sprint Commc’ns*, 571 U.S. at 72. The Supreme Court “has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, or that implicate a State’s interest in enforcing the orders and judgments of its courts.” *Id.* at 72–73 (citations omitted). On the record before us, I am not persuaded that Becker’s state court proceeding—which involves a civil dispute between private parties over a written contract—falls into any of these narrow categories.

I do, however, agree with Judge Lawrence that abstention is warranted under the *Colorado River* doctrine. In *Colorado River*, the Supreme Court recognized that, in exceptional circumstances,

“reasons of wise judicial administration’ must weigh in favor of ‘permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding.” *D.A. Osguthorpe*, 705 F.3d at 1233 (quoting *Colorado River*, 424 U.S. at 818).

The focus of the *Colorado River* doctrine is on “efficiency and economy” and “the avoidance of duplicative litigation.” *Id.* The Supreme Court in *Colorado River* “declined to prescribe a hard and fast rule” for application of the doctrine, “but instead described [four] factors relevant to the decision.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983). Those four factors include: “(1) whether the state or federal court first assumed jurisdiction over the same res; (2) ‘the inconvenience of the federal forum’; (3) ‘the desirability of avoiding piecemeal litigation’; and (4) ‘the order in which jurisdiction was obtained by the concurrent forums.” *D.A. Osguthorpe*, 705 F.3d at 1234 (quoting *Colorado River*, 424 U.S. at 818). The Court has since identified three additional factors that may be relevant: (5) the vexatious or reactive nature of either the federal or the state action; (6) whether federal or state law provides the rule of decision; and (7) the adequacy of the state court action to protect the federal plaintiff’s rights. *Moses H. Cone*, 460 U.S. at 17 n.20, 23, 26–27. “The weight to be given any one factor may vary greatly from case to case, depending on the particular setting of the case.” *Id.* at 16.

The first two of these factors carry little, if any, weight in the case at hand. To begin with, “this is

not an action in rem or quasi in rem” and thus “[n]either the state nor district court has acquired jurisdiction over property in the course of this litigation.” *D.A. Osguthorpe*, 705 F.3d at 1234. The second factor—the inconvenience of the federal forum—is essentially irrelevant because “[t]he state and federal courthouses involved in this case are at no great geographical distance from each other, and no party has suggested any physical or logistical inconvenience suffered as a result of litigating in dual forums.” *Id.*

All of the remaining factors, however, weigh heavily in favor of dismissing the Tribe’s federal action. Becker filed his state court action against the Tribe on December 11, 2014. Since that time, the parties have litigated extensively in the state district court, as well as in the Utah appellate courts, and the case is ready for trial. In contrast, the Tribe did not file its federal court action until June 13, 2016, approximately eighteen months after Becker filed his state court action. Moreover, the record makes abundantly clear that the Tribe’s filing of its federal lawsuit was reactive in nature, coming only after the Tribe had unsuccessfully attempted in both the state district court and the Utah appellate courts to have Becker’s suit dismissed for lack of subject matter jurisdiction. Relatedly, the Tribe’s federal lawsuit was never intended to fully litigate the parties’ dispute regarding the Agreement, but rather only to stop the state court proceedings. In other words, the claims raised in the Tribe’s federal lawsuit would effectively require the district court, and in turn this court, to serve as an appellate

tribunal over the state court's decision regarding subject matter jurisdiction. Thus, allowing the Tribe's federal lawsuit to proceed could only result in piecemeal litigation, i.e., the federal courts weighing in on the matter of the state court's jurisdiction over the Tribe, and not a full resolution of the parties' dispute. And, even assuming that the Tribe's defenses to Becker's state court action implicate federal law, it appears that the majority of the parties' dispute—to the extent that dispute is properly before the Utah state courts—will be governed by Utah state law. Indeed, the parties' written Agreement expressly provides that Utah state law will govern any disputes arising out of the agreement. Lastly, any defenses the Tribe may have to Becker's state court action—including defenses that implicate federal law— can, without question, be fully and fairly litigated in the Utah state court system and, if appropriate, the United States Supreme Court. *See Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (noting that state courts are “independently authorized to decide issues of federal law”); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988) (noting that the Court can, in its discretion, undertake review of any issues of federal law decided by the state courts).

Having considered all of the relevant factors, I conclude that the Tribe's federal action is indeed the exceptional case warranting *Colorado River* abstention. I therefore vote to remand to the district court with directions to dismiss this action without prejudice.

II

A

The majority ignores the procedural history of this case and Judge Lawrence's abstention arguments, and proceeds to decide the jurisdiction issue in the first instance. In doing so, however, the majority makes what I believe to be three key errors.

First, the majority makes no mention of the fact that the parties' Agreement, which was drafted by the Tribe's attorneys, expressly provided that all disputes arising out of the Agreement would be governed by Utah state law, waived any requirement that disputes be brought in Tribal court, and purported to waive the Tribe's sovereign immunity. Although the Agreement did not expressly mention the Utah state courts, I submit that the only reasonable inference that can be drawn from reading the contractual language is that the parties intended for any disputes to be heard in the Utah state courts in the event that the United States District Court for the District of Utah lacked jurisdiction over such disputes.¹

Second, the majority concludes that the Utah state courts lack subject matter jurisdiction over Becker's claims against the Tribe because "25 U.S.C. § 1322 does not provide such authorization." Maj.

¹ Of course, however, the validity of the Agreement remains in dispute and must be resolved in the first instance by the Tribal courts. *See Becker v. Ute Indian Tribe of Uintah and Ouray Reservation*, 11 F.4th 1140, 1150 (10th Cir. 2021).

Op at 3. I agree that § 1322 does not afford the Utah state courts with jurisdiction over Becker's action against the Tribe. But that is because § 1322 addresses only suits involving individual Indians, not Tribes. See *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 389 (1976) (noting "there is notably absent" from the statute "any conferral of state jurisdiction over tribes themselves"); 1 Cohen's Handbook of Federal Indian Law § 6.04(3)(b)(v) (2019). In other words, § 1322 simply does not address, nor does the majority, the jurisdictional issue that this case actually poses, i.e., whether a Tribe, by way of a written agreement with a non-Indian, may selectively agree to subject itself to state court jurisdiction and state law for disputes arising out of the agreement.

Finally, the majority takes the remarkable step of granting the Tribe permanent, rather than preliminary, injunctive relief. Of course, the standards for preliminary and permanent injunctions are nearly identical. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). But there is one important difference between the two standards: a plaintiff seeking a preliminary injunction "must show a likelihood of success on the merits" of its claim, while a plaintiff seeking a permanent injunction must establish "actual success" on the merits of its claim. *Id.* According to the majority, this appeal is "a good candidate for a merits decision" because, in part, "[t]he Tribe's argument involves a pure legal issue about the applicability of a federal statute," i.e., 25 U.S.C. § 1322. Maj. Op. at 24. As I have explained,

however, § 1322 simply has no relevance to the question of whether the Utah state courts have civil jurisdiction over the Tribe with respect to disputes arising out of the Agreement. Thus, it is apparent, at least to me, that the Tribe has not established actual success on the merits of its claim (or, indeed, a likelihood of success on the merits) and is not entitled to a permanent injunction.

B

The majority responds to my criticisms by noting that I have “not explain[ed] why or how the state court has jurisdiction in the first place.” Maj. Op. at 23 n.15. That is because, as I have already outlined, I am of the view that we should abstain from addressing that question and allow the Utah state courts to resolve this question in the first instance.

That said, I will proceed to highlight several related points that I believe are relevant to the ultimate resolution of this jurisdiction question. It is well established that “[a] state court’s jurisdiction is general” and thus quite broad. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Broad enough, in fact, to encompass actions brought by Tribes and tribal members against non-Indians for disputes arising on Indian land. *E.g.*, *Williams v. Lee*, 358 U.S. 217, 219 (1959) (“suits by Indians against outsiders in state courts have been sanctioned”). That said, we know that Congress has, by way of Public Law 280 (including § 1322), announced a “federal policy governing” and effectively limiting “the assumption by States of civil and criminal jurisdiction over the Indian Nations.” *Three Affiliated Tribes of Fort*

Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 884 (1986) (*Three Affiliated Tribes II*). But if, as the Supreme Court itself has suggested, Public Law 280 does not address “state jurisdiction over tribes,” that leaves open the question of whether Indian tribes may, by way of a commercial contract with a non-Indian, voluntarily subject themselves to state jurisdiction and state law. *Bryan*, 426 U.S. at 389; see *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 150 (1984) (*Three Affiliated Tribes I*) (“Nothing in the language or legislative history of Pub.L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction.”). In resolving that open question, it is crucial to recognize “the federal interests in promoting Indian self-governance and autonomy” and ensure that our answer promotes those interests. *Three Affiliated Tribes II*, 476 U.S. at 884. Given the facts presented here, I “fail to see how the exercise of state-court jurisdiction” over Becker’s claims against the Tribe “interfere[s] with the right of” the Tribe “to govern [itself] under [its] own laws.” *Three Affiliated Tribes I*, 467 U.S. at 148. Indeed, in my view, the majority’s holding is directly contrary to the principles of Indian autonomy and self-governance because it prohibits a Tribe from affirmatively choosing, in the context of a commercial contract with a non-Indian, to subject itself to state jurisdiction and state law for disputes arising out of the contract.

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Appendix B

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

Nos. 18-4030 & 18-4072
(D.C. No. 2:16-CV-00958-CW)
(D. Utah)

LYNN D. BECKER,

*Plaintiff Counterclaim
Defendant - Appellee,*

v.

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, a federally chartered
corporation and a federally recognized
Indian tribe, et al.,

*Defendants Counterclaimants Third-Party
Plaintiffs – Appellants,*

v.

JUDGE BARRY G. LAWRENCE,

Third-Party Defendant – Appellee.

Filed: August 3, 2021

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ORDER

Before MORITZ, BRISCOE, and EID, Circuit
Judges.

This matter is before us on the *Ute Indian Tribe's Motion for Clarification*. Upon careful consideration, the motion is granted. Our August 3, 2021 opinion is withdrawn and replaced by the attached revised opinion effective *nunc pro tunc* to the date the original opinion was filed.

Entered for the Court,



CHRISTOPHER M. WOLPERT, Clerk

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

Nos. 18-4030 & 18-4072

LYNN D. BECKER,

*Plaintiff Counterclaim Defendant -
Appellee,*

v.

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, a federally chartered
corporation and a federally recognized Indian
Tribe, UINTAH AND OURAY TRIBAL BUSINESS
COMMITTEE; UTE ENERGY HOLDINGS, a
Delaware LLC,

*Defendants Counterclaimants Third-Party
Plaintiffs – Appellants,*

v.

BARRY G. LAWRENCE, District Judge,
Utah Third Judicial District Court,
in his individual and official capacities,

Third-Party Defendant – Appellee.

Appeal from the United States District Court
for the District of Utah

(D.C. No. 2:16-CV-00958-CW)

Frances C. Bassett and Thomasina Real Bird (Thomas W. Fredericks and Jeremy J. Patterson, with them on the briefs), Fredericks Peebles & Morgan LLP, Louisville, Colorado, appearing for Appellants Ute Indian Tribe of the Uintah and Ouray Reservation.

Nancy J. Sylvester (Brent M. Johnson, with her on the briefs), Administrative Office of the Courts, Utah District Court, Salt Lake City, Utah, appearing for Appellee Barry G. Lawrence.

David K. Isom, Isom Law Firm, PLLC, Salt Lake City, Utah, appearing for Appellee Lynn D. Becker.

Before MORITZ, BRISCOE, and EID, Circuit Judges.

BRISCOE, Circuit Judge.

These appeals stem from an Independent Contractor Agreement (the Agreement) entered into by the Ute Indian Tribe of the Uintah and Ouray Reservation (the Tribe) and a non-Indian, Lynn D. Becker (Becker). Becker alleges that the Tribe breached the Agreement and owes him a substantial

amount of money under the terms of the Agreement. The Tribe disputes Becker's allegations and asserts a host of defenses, including, in part, that the Agreement is void both because it was never approved by the Department of the Interior and because it purported to afford Becker an interest in Tribal trust property.

The dispute between Becker and the Tribe regarding the Agreement has spawned five separate lawsuits in three separate court systems. Becker first filed suit in federal district court against the Tribe alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. That suit was dismissed, however, for lack of subject matter jurisdiction. Becker then filed suit in Utah state district court alleging the same claims against the Tribe. After seventeen months of litigation in the Utah state courts, the Tribe, frustrated with the Utah state courts' refusal to dismiss Becker's suit for lack of subject matter jurisdiction, filed suit in federal district court seeking to enjoin the Utah state court proceedings. The Tribe also filed suit in Tribal Court seeking a declaration of the Agreement's invalidity. Becker responded by filing his own suit in federal district court seeking to enjoin the Tribal Court proceedings.

Currently before us are two appeals filed by the Tribe challenging interlocutory decisions issued by the district court in Becker's most recent federal action, including a decision by the district court to preliminarily enjoin the Tribal Court proceedings

and to preclude the Tribal Court's orders from having preclusive effect in other proceedings.¹ Exercising jurisdiction over these appeals pursuant to 28 U.S.C. § 1291, we conclude that the tribal exhaustion rule requires Becker's federal lawsuit to be dismissed without prejudice. Consequently, we reverse the district court's decision preliminarily enjoining the parties from proceeding in the Tribal Court action and enjoining the Tribal Court's orders having preclusive effect in other proceedings, and we remand to the district court with directions to dismiss Becker's federal lawsuit without prejudice.

I

a) The Tribe's oil and gas interests

The Tribe operates its own tribal government, including an Energy and Minerals Department, and oversees approximately 1.3 million acres of trust lands, some of which contain significant oil and gas deposits. According to the Tribe, revenue from the development of those oil and gas deposits constitutes the primary source of the Tribe's income, which is in turn used to fund the Tribe's government and its health and social welfare programs for tribal members.

¹ We note that Appeal No. 18-4013, in which the tribe challenges a number of interlocutory rulings made by the district court in the Tribe's federal lawsuit seeking to enjoin the Utah state court proceedings, remains pending. Nothing in the present opinion is intended as dispositive of the issues in Appeal No. 18-4013.

Prior to late 2001, the Tribe's Business Committee managed the Tribe's oil and gas deposits in a "passive" manner. ECF No. 251 at 7. This meant that the Tribe would wait for oil and gas companies to contact the Bureau of Indian Affairs (BIA) for permission to enter into an oil and gas lease or development agreement on Tribal lands, and then the Tribe would allow the BIA to finalize all such agreements on the Tribe's behalf.

On December 4, 2001, the Tribe's Business Committee adopted Ordinance 01-007, which reflected the Business Committee's decision to change its "management of the Tribe's assets, revenues and expenses from a passive to an active management methodology, targeting ... optimal use and deployment of its resources to increase and diversify revenues for the benefit of the Tribe and the Membership." *Id.* (quotation marks omitted). Under this active management methodology, the Business Committee intended to actively market the Tribe's mineral assets to industry.

Ordinance 01-007 authorized the Tribe's financial advisor, John Jurrius, to develop an active management methodology and a long-term financial plan to assist the Business Committee in active management of the Tribe's oil and gas deposits. Jurrius used the power and authority he was granted under Ordinance 01-007 to, among other things, restructure the Tribe's Energy and Minerals Department and begin to actively market the Tribe's mineral assets to developers.

b) The beginning of Becker's work for the Tribe

In the early 2000's, Becker worked as a consultant for a private company and, in that role, worked on projects involving the Tribe. Those projects included creating the Tribe's land database and mapping system and their land administration system.

In February 2004, Jurrius recommended that the Business Committee approve hiring Becker as a contractor to the Tribe. The Business Committee, at its February 24, 2004 meeting, voted unanimously to adopt Jurrius's recommendation and hire Becker to oversee the Tribe's Energy and Minerals Department. At that time, the Business Committee envisioned hiring Becker on a temporary basis and then contracting with him on a longer-term basis.

Becker began working with the Tribe in that role on or about March 1, 2004.

c) The Agreement

On April 27, 2005, the Tribe, including its subsidiaries and affiliates, entered into an "INDEPENDENT CONTRACTOR AGREEMENT" (the Agreement) with Becker. Appeal No. 18-4013, Aplt. App., Vol. V at 854. The Agreement was retroactively made effective as of March 1, 2004.

Article 1 of the Agreement, entitled "Description of Services," stated, in pertinent part, that Becker was "currently ... serving as Land Division Manager of the Energy and Minerals Department" and "agree[d] to hold th[at] Position pursuant to the

terms of th[e] Agreement.” *Id.* Article 3 of the Agreement stated that Becker would “perform the Services” called for in the Agreement “as an independent contractor and not as an employee of the Tribe.” *Id.* at 855.

The “Contract Term” was defined in “Exhibit A — Services” to the Agreement. *Id.* at 856. Exhibit A stated that Becker “w[ould] be retained by the Tribe for an initial period of twenty-four (24) months commencing with the Contract Date of th[e] Agreement[, which was March 1, 2004,] and for an unlimited number of additional twelve (12) month periods thereafter ..., unless and until th[e] Agreement [wa]s terminated as provided for [t]herein.” *Id.* at 864. Article 5 of the Agreement mimicked this language, providing, in pertinent part, that “[a]t the end of the Contract Term, th[e] Agreement w[ould] renew automatically for an unlimited number of successive one year terms unless one Party g[ave] the other Party written notice of termination no later than thirty days before the end of a yearly Contract Term” *Id.* at 856.

Exhibit B to the Agreement, entitled “PARTICIPATION PLAN,” provided, in pertinent part:

1. In recognition of [Becker’s] services, [Becker] shall receive a beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC (and net of any administrative costs of Ute Energy Holdings)

2. In the future, a) if the Tribe participates in any projects involving the development, exploration and/or exploitation of minerals in which the Tribe has any participating interest and/or earning rights, or similar commercial interests and [Becker] is providing services under this agreement, and b) the Tribe elects not to place such interests in Ute Energy Holding, LLC, then [Becker] shall receive a two percent (2%) beneficial net revenue interest in such assets, provided however, that in the event the Tribe should enter into an agreement under which the Tribe would be required to pay any project costs or expenses without the benefit of financing or a form of carried interest, then [Becker] agrees that in the event [Becker] elects to participate in such projects, [Becker] shall in the same manner as the Tribe pay two percent (2%) of any project costs and expenses and receive the net revenue attributable to such participation interest.

4. If, at any time, [Becker] wishes to sell [his] Rights, [Becker] agrees to notify the Tribe of his intention. The Tribe shall have 60 days to exercise this preferential right to purchase with a bona fide, market value offer to purchase on the same terms and conditions that any legitimate offer would entail.

Id. at 866.

Article 21, entitled “Governing Law and Forum,” stated:

This Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah. All disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah.

Id.

Article 23 of the Agreement, entitled “Limited Waiver of Sovereign Immunity; Submission to Jurisdiction,” provided as follows:

If any Legal Proceeding (definition follows) should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a “Legal Proceeding” means any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement. To the extent the course of dealing between the Parties might be interpreted to have modified or extended the terms of this Agreement, the limited waiver of sovereign immunity shall apply to such modification or extension. A

Legal Proceeding shall not include proceedings related to royalty or similar interests in lands held by the Tribe that are not expressly subject to the terms of this Agreement. The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding.

The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts. The court or courts so designated shall have, to the extent the Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.

Each Party hereto consents to service of processing [sic] for any such Legal Proceeding filed in the court or courts so designated. The Tribe's limited waiver of sovereign immunity

and submission to jurisdiction also extends to any arbitration and all review and enforcement of any decision or award of the panel so convened in the court or courts so designated. The Tribe's limited waiver of sovereign immunity shall be further evidenced by a Tribal Resolution delivered at the time of execution of this Agreement in accordance with Tribal Laws, that expressly authorizes the foregoing submission to jurisdiction of the courts so designated and the execution of this Agreement.

Id. at 861-62.

d) The Tribal resolution affirming the Agreement

On April 27, 2005, all six members of the Tribe's Business Committee signed Tribal Resolution 05-147. Resolution 05-147 stated: "Becker should be engaged pursuant to the terms and conditions of the ... Agreement" Appeal No. 18-4030, Aplt. App., Vol. I at 54. The resolution further stated that the "Business Committee hereby agrees to enter into the ... Agreement." *Id.* A copy of the Agreement was attached to the resolution.

e) Becker's resignation

On October 31, 2007, Becker resigned from his work for the Tribe under the terms of the Agreement.

f) Becker's first federal lawsuit

On February 15, 2013, Becker filed a complaint in federal district court in Utah against the Tribe

alleging three causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; and (3) unjust enrichment. According to Becker, the Tribe made some, but not all, of the payments required under the Agreement, and also refused to provide Becker with the information necessary to determine the precise amount owed under the Agreement.

On November 5, 2013, the federal district court dismissed Becker's complaint for lack of subject matter jurisdiction. Becker appealed to this court. On October 21, 2014, this court issued an opinion affirming the district court's order of dismissal. *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944 (10th Cir. 2014) (*Becker I*).

g) Becker's state lawsuit

On December 11, 2014, Becker filed suit against the Tribe, the Tribe's Business Committee, and Ute Holdings, in the Third Judicial District Court in and for Salt Lake County, Utah. The suit was essentially identical to the action he filed in federal district court. Specifically, the suit alleged that the Tribe (a) breached the Agreement, (b) breached the covenant of good faith and fair dealing that applied to the Agreement, and (c) was unjustly enriched by its actions. The Honorable Barry G. Lawrence (Judge Lawrence) was assigned as the judge to preside over the case.

The Tribe moved to dismiss the case for lack of subject matter jurisdiction based on sovereign

immunity. Although the Tribe conceded that its Business Committee had passed a resolution approving the Agreement, the Tribe argued that the resolution failed to expressly reference the issue of sovereign immunity, and thus the Tribe had never expressly agreed to the waiver of sovereign immunity contained in the Agreement. On July 23, 2015, the state district court issued an order denying the Tribe's motion to dismiss.

On August 21, 2015, the Tribe filed a notice of appeal from the state district court's order. On September 30, 2015, the Utah Court of Appeals entered an order summarily dismissing the appeal for lack of jurisdiction due to the absence of a final, appealable order.

The case was remanded to the state district court, and the parties began the discovery process. On September 2, 2016, the Tribe filed a motion for summary judgment on grounds of federal preemption, infringement on Ute Indian tribal sovereignty, and lack of subject matter jurisdiction. The Tribe also simultaneously filed a motion seeking a stay of the state court proceedings until the state court had ruled on the Tribe's jurisdictional challenge. On December 5, 2016, the Tribe filed a second motion for summary judgment, citing Becker's failure to join the United States as a necessary and indispensable party. On February 9, 2017, the state district court denied the Tribe's two motions for summary judgment. The state district court also denied the Tribe's motion for a stay.

On March 1, 2017, the Tribe filed a petition with the Utah Court of Appeals for permission to file an interlocutory appeal from the state district court's decision denying the two motions for summary judgment. On April 3, 2017, the Utah Court of Appeals summarily denied the Tribe's petition. On May 3, 2017, the Tribe filed a petition for writ of certiorari with the Utah Supreme Court. That was summarily denied by the Utah Supreme Court on June 23, 2017.

On June 14, 2017, the Tribe filed a petition for writ of prohibition and writ of mandamus or other extraordinary relief with the Utah Supreme Court. That petition was summarily denied on August 21, 2017.

On July 31, 2017, the state district court scheduled a nine-day jury trial to begin on February 20, 2018. The state district court has since stayed the trial pending the outcome of the federal proceedings filed by the Tribe and Becker.

h) The Tribal Court proceedings

On August 18, 2016—approximately twenty months after Becker filed his state court action, and approximately two months after the Tribe filed its own suit in federal court seeking to enjoin the state court proceedings—the Tribe filed suit against Becker in Tribal Court seeking a declaration that the Agreement was void *ab initio* under federal and tribal law. The Tribe alleged in its complaint that the Agreement was void because it granted Becker a tribal trust asset without federal-government

approval, in violation of both federal and tribal law, and because the Agreement's purported waiver of sovereign immunity was executed in violation of tribal law. The suit also sought damages from Becker for breach of fiduciary duty, constructive fraud, theft and/or conversion of tribal assets, unjust enrichment and/or equitable disgorgement, and restitution.

The Tribe subsequently moved for summary judgment on its claims. On February 28, 2018, the Tribal Court issued an opinion concluding that it had jurisdiction over the Tribe's claims against Becker and Becker's claims against the Tribe. The opinion granted the Tribe's motion for summary judgment on the issue of the illegality of the Agreement under federal and tribal law.

i) Becker's federal lawsuit to enjoin the Tribal Court proceedings

On September 14, 2016—approximately three months after the Tribe filed its federal lawsuit, and approximately one month after the Tribe filed its Tribal Court lawsuit—Becker filed suit against the Tribe in federal district court in Utah seeking to enjoin the Tribal Court proceedings (*Becker v. Ute Indian Tribe of the Uinta & Ouray Reservation*, No. 2:16cv958 (D. Utah filed Sept. 14, 2018)). Together with his complaint, Becker filed a motion for temporary restraining order and preliminary injunction. On September 20, 2016, the district court issued a temporary restraining order directing the Tribe not to take any action to advance the litigation

in the Tribal Court pending resolution of the issues asserted by Becker.

The Tribe responded by filing a counterclaim against Becker and a third-party complaint against Judge Lawrence. The Tribe also filed a motion to dismiss for failure to state a claim.

On September 27, 2016, the district court granted Becker's motion for preliminary injunction, but denied Becker's motion for judgment on the pleadings. The district court also dismissed the Tribe's counterclaims against Becker and its third-party complaint against Judge Lawrence. In its preliminary injunction order, the district court concluded that Becker's allegation "that the defendants [we]re asserting claims in the Tribal Court Action that appear[ed] to be contrary to the Agreement of the parties, contrary to prior rulings of the state court, and contrary to limits upon a tribal court to subject a nonmember of the tribe to tribal court jurisdiction under the circumstances here[,] present [ed] a federal issue 'arising under' federal law within the meaning of Section 1331." *Becker*, No. 2:16cv958, slip op. at 4-5 (D. Utah Sept. 28, 2016). The district court concluded that it was unnecessary for Becker to exhaust his tribal court remedies before filing suit in state court due to the Tribe's "waiver" of its sovereign immunity in the Agreement. *Id.* at 6. The district court thus concluded "that the [T]ribal [C]ourt lack[ed] jurisdiction and the [tribal] judicial proceedings would serve no purpose other than delay." *Id.* (quotation marks omitted). The district court "also

conclude[d] that the question of the state's jurisdiction [wa]s not at issue in th[e] motion [before it] and that the principles of comity and respect to the state tribunal support[ed] the decision not to interfere with those proceedings." *Id.* Lastly, the district court "conclude[d] that the [T]ribe ha[d] not raised any factual issues to demonstrate that the governing law, forum, and waiver portions of the Agreement [we]re invalid and [could not], if necessary, be severed from the other portions of the Agreement." *Id.*

On September 29, 2016, the Tribe filed a notice of appeal from the district court's orders. On August 25, 2017, this court affirmed the dismissal of the Tribe's § 1983 counterclaim and third-party claim, reversed the dismissal of the Tribe's non-§ 1983 counterclaims and third-party claims, and also reversed the district court's preliminary injunction order and remanded to the district court for further proceedings. *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 868 F.3d 1199 (10th Cir. 2017) (*Becker II*). In that opinion, this court agreed with the Tribe "that the district court should have abstained on the issue" of the Tribal Court's jurisdiction. *Id.* at 1201. Although this court acknowledged that the Agreement "contain[ed] a waiver of the tribal-exhaustion rule," it concluded that "on the record and arguments before [it] on th[e] appeal, [Becker] ha[d] not shown a likelihood of success based on the validity of th[at] waiver." *Id.*

On September 8, 2017, Becker filed a petition for panel rehearing and rehearing *en banc*. On

December 13, 2017, this court issued an order denying Becker's petition. In that order, this court emphasized that it "did not decide the merits of the issues of exhaustion or the need for federal approval of the" Agreement. *Becker II*, No. 16-4175, Order at 2 (10th Cir. Dec. 13, 2017). The court also explained that, "[t]o the extent [it] addressed those issues, [it] did so only in the context of reversing a preliminary injunction on the record then before the district court." *Id.* The court noted that "[u]pon remand to the district court, the parties [we]re free to address those or other issues on the merits." *Id.*

On remand, Becker filed a motion for preliminary injunction seeking again to enjoin the Tribal Court proceedings. In support, Becker argued, in pertinent part, that Judge Lawrence had concluded in the state court proceedings that there was no requirement that the Agreement be approved by the Secretary of the Interior, the Secretary of the Interior had determined that his approval was not required, and tribal exhaustion was not required under the circumstances of the case. The Tribe, for its part, filed a motion for summary judgment on grounds of federal preemption, infringement on tribal sovereignty, and lack of subject matter jurisdiction. The Tribe also filed a motion for permanent injunction, as well as an emergency motion for temporary restraining order.

On February 14, 2018, the district court denied Becker's renewed motion for preliminary injunction, as well as the Tribe's motions for a temporary restraining order and injunctive relief. On February

20, 2018, the district court issued an order holding that the Tribal Court should “address in the first instance whether it has jurisdiction to hear the dispute between the Tribe and ... Becker,” and “[o]nce the Tribal Court has made that determination, and any appeals through the Tribal Court system have been completed, the parties shall report the Tribal Court’s determination to this court.” *Becker*, No. 2:16cv958, Order at 2 (D. Utah Feb. 20, 2018).

On February 21, 2018, the Tribe filed a notice of appeal from the district court’s denial of its motions for temporary restraining order and injunctive relief.

That resulted in Appeal No. 18-4030. The Tribe also filed a motion for clarification and/or reconsideration of the portion of the district court’s February 20, 2018 order stating that the Tribal Court was to address in the first instance whether it had jurisdiction to hear the dispute between the Tribe and Becker. In particular, the Tribe asked the district court to clarify whether it intended for the Tribal Court to stay all proceedings until it had decided the jurisdictional question.

On April 30, 2018, the district court issued a memorandum decision and order “conclud[ing] that the Tribe’s waiver of tribal exhaustion” set forth in Article 23 of the Agreement “[wa]s substantially likely to be valid under both federal and tribal law[,] and that the Tribal Court’s February 28 Opinion should not otherwise be given preclusive effect or comity.” *Becker*, No. 2:16cv958, slip op. at 4 (D. Utah

Apr. 30, 2018). The district court also denied the portions of the Tribe's pending motions that sought preliminary and permanent injunctive relief, and reserved the remainder of the summary judgment motion for further disposition. *Id.* at 5. In addition, the district court *sua sponte* revised its denial of Becker's motion for preliminary injunction, and granted Becker's motion for preliminary injunction enjoining the parties from proceeding in the Tribal Court action and from the Tribal Court's orders having preclusive effect in other proceedings. *Id.*

On May 15, 2018, the Tribe filed a notice of interlocutory appeal from the district court's April 30, 2018 decision. That resulted in Appeal No. 18-4072.

II

The Tribe argues in these appeals, in pertinent part, that the interlocutory orders issued by the district court are inconsistent with the tribal exhaustion rule. We agree.

The Supreme Court has recognized "that Congress is committed to a policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Consistent therewith, the Supreme Court has held: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or

federal statute.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citations omitted). We in turn have held that, “absent exceptional circumstances, federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.” *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1149 (10th Cir. 2011) (quotation marks omitted).

To be sure, the Supreme Court has acknowledged that exhaustion is not required in the following instances: (1) “where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith”; (2) “where the action is patently violative of express jurisdictional prohibitions”; or (3) “where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.” *Nat’l Farmers*, 471 U.S. at 856 n.21. The Supreme Court has also held that exhaustion may be excused “where it is clear that the tribal court lacks jurisdiction and that judicial proceedings would serve ‘no purpose other than delay.’” *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014) (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). We have required a party invoking any of these exceptions to “make a substantial showing of eligibility.” *Id.*

The Supreme Court of Utah likewise recognizes the tribal exhaustion doctrine. In *Harvey v. Ute Indian Tribe*, 416 P.3d 401 (Utah 2017), the Supreme Court of Utah held that when a tribe’s jurisdiction over a non-Indian is at issue, the

litigants “should exhaust their remedies in tribal court before getting a review in any other court.” 416 P.3d at 418. “This is because,” the court explained, “the tribe’s right to ‘manage the use of [tribal] territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation’ is necessary to protect tribal self-government.” *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983)).

At the heart of the dispute before us is a written contract—i.e., the Agreement—between the Tribe and a non-Indian that was to be performed, in part, on Tribal lands and the purpose of which was to promote the Tribe’s mineral assets in order to produce revenues for the Tribe and its people. It is undisputed that the Agreement expressly purported to waive the Tribe’s sovereign immunity and to have all disputes settled in a non-Indian court by way of Utah state law. Nevertheless, the Tribe has raised serious questions regarding the validity of the contract as a whole, as well as the validity of the purported waiver of sovereign immunity in particular. Out of respect for tribal self-government and self-determination, we conclude that the 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. In reaching this conclusion, we note that defendants have not persuaded us that any of the narrow exceptions to the tribal exhaustion rule apply here. Of course,

Becker asserts, in reliance on the Agreement itself, that the Tribe expressly waived Tribal Court jurisdiction. But that waiver provision is only applicable if the Agreement itself is determined to be valid, and, as we have noted, the Tribe has asserted nonfrivolous challenges to the validity of the Agreement. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (holding that tribal court exhaustion was necessary where “the Tribes [we]re challenging the very validity of a management contract “containing language giving the Tribal Court limited jurisdiction”).

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.” *Becker II*, 868 F.3d at 1205. 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. *Iowa Mut.*, 480 U.S. at 17. “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.* “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.” *Id.* at 19. 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. It also obviates any need for us, in Appeal No. 18-4030, to address the district court’s denial of the Tribe’s motion for injunctive relief.²

III

We therefore REVERSE the district court’s April 30, 2018 preliminary injunction order and REMAND with directions to DISMISS Becker’s pending federal action without prejudice pursuant to the tribal exhaustion rule. We also DENY as moot the Tribe’s motions for recusal and reassignment.

² The Tribe raises similar issues in Appeal No. 18-4013 which, as we have noted, remains pending.

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Appendix C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

Case No. 2:16-cv-00958

LYNN D. BECKER,

Plaintiff,

v.

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, et al.,

Defendants.

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, et al.,

*Counterclaim and Third-Party
Plaintiffs,*

v.

LYNN D. BECKER, et al.,

*Counterclaim and Third-Party
Defendants.*

Filed: April 30, 2018

MEMORANDUM DECISION AND ORDER
REVERSING DENIAL OF AND GRANTING
PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION

Judge Clark Waddoups

This is the fifth case in a series of actions in federal, state, and tribal court beginning in 2013 involving these parties. In this action, Mr. Becker seeks to enjoin the parties from proceeding in the Ute Tribal Court action filed by the tribal parties as *Ute Indian Tribe v. Becker*, Case No. CV-16-253, Ute Indian Tribal Court of the Uintah and Ouray Reservation, Fort Duchense, Utah. This case is a companion to the tribal parties' action in federal court, *Ute Indian Tribe v. Lawrence*, 2:16-cv-958-CW, United States District Court, Central Division, District of Utah. The companion case seeks to enjoin Becker and state court Judge Barry G. Lawrence from proceeding in Becker's action in state court. *See Becker v. Ute Indian Tribe*, Case No. 140908394, Third Judicial District Court, Salt Lake County.

On August 25, 2017, in this action, the Tenth Circuit reversed and remanded this court's initial preliminary injunction in Mr. Becker's favor. *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017). The Tenth Circuit concluded, based on the limited record before it, that Mr. Becker was unlikely to

succeed on his claim that his Independent Contractor Agreement contained a valid waiver of tribal exhaustion, as well as his claim that the Agreement did not need federal government approval because it did not transfer property held in trust for the Tribe by the federal government. *Id.* at 1201. As a result, the Tenth Circuit directed this court, based on the tribal exhaustion rule, to allow the Tribal Court to “consider in the first instance whether it has jurisdiction.” *Id.* at 1205.

On December 30, 2016, the Tenth Circuit stayed this court’s preliminary injunction against the parties proceeding in Tribal Court. Following additional litigation there, the Tribal Court issued two conflicting rulings about its jurisdiction. (App’x 4, ECF No. 122-3; App’x 408, ECF No. 122-8.) Following the first ruling, which was in Becker’s favor, Becker filed a second motion for preliminary injunction in this action. (ECF No. 70.) The tribal parties, for their part, moved the Tribal Court for reconsideration of its jurisdictional ruling in Becker’s favor. (App’x 144, ECF No. 122-7.) The tribal parties, in this court, also filed a motion for preliminary injunction against the state court action, (ECF No. 75), based on the Tenth Circuit’s reversal of this court’s dismissal of the tribal parties’ counterclaims and third-party claims, *Becker v. Ute Indian Tribe*, 868 F.3d 1199 (10th Cir. 2017).

On February 14, 2018, this court held oral argument in this action on both parties’ motions for preliminary injunction. Based on the Tenth Circuit’s mandate, the court denied both motions and stayed

the case to allow the Tribal Court to first determine its own jurisdiction. (ECF No. 106.) Shortly thereafter, the Tenth Circuit issued an order in the companion case, *Ute Indian Tribe v. Lawrence*, requiring this court to decide the tribal parties' motion for preliminary injunction on the same substantive grounds for relief that are argued here. (Order dated February 16, 2018, No. 18-4013 (D.C. No. 2:16-CV-00579-CW) (D. Utah).) As a result, on February 21, 2018, this court issued a written order clarifying that this case would be stayed only until the Tribal Court had determined, in the first instance, whether it has jurisdiction to hear this dispute. (ECF No. 107.) At that time, the court would lift the stay and address how the case should proceed. (*Id.*)

The tribal parties subsequently filed a motion asking this court to clarify and/or reconsider its February 21, 2018 Order. (ECF No. 108.) They stated that the Ute Indian Rules of Civil Procedure do not permit interlocutory appeals. (*Id.*) Thus, it is not possible for the Tribal Court's jurisdictional rulings to receive tribal appellate review prior to a final ruling on the merits of the case. The tribal parties then proceeded to obtain the second jurisdictional ruling in their favor from the Tribal Court on February 28, 2018.¹ (App'x 408, ECF No. 122-8.) This ruling went far beyond the question of

¹ The Tribal Court issued its ruling on the same day this court conducted an evidentiary hearing in the companion case on jurisdictional issues pursuant to the Tenth Circuit's mandate. (*See* ECF No. 106, Case No. 2:16-cv-579.)

the Tribal Court's jurisdiction. Nevertheless, the tribal parties moved this court to give preclusive effect to that ruling in the companion case. (See ECF No. 110, 2:16-cv-579.)

Today in the federal companion case, *Ute Indian Tribe v. Lawrence*, 2:16-cv-579, the court issues an 83-page Memorandum Decision and Order denying the tribal parties' motion for a preliminary injunction to enjoin the state court action. To reach that decision, the court necessarily ruled on the merits of the substantive jurisdictional issues that this case presents. The court concluded that the tribal parties are unlikely to succeed on the merits of their jurisdiction claims. Instead, it is substantially likely the Utah state court has subject matter jurisdiction over the parties' claims because Utah accepted the federal government's offer of jurisdiction in 25 U.S.C. § 1322(a). The court concluded it was substantially likely that the Tribe selectively and appropriately waived its sovereign immunity in Resolution 05-147 under tribal law. The court also concluded that the Becker Independent Contractor Agreement does not involve restricted property held in trust for the Tribe by the United States and that the contract is therefore valid under both federal and tribal law. Finally, the court concluded that the Tribal Court's February 28 Opinion should not be given preclusive effect or comity, and that because the contract is valid, tribal exhaustion—which was explicitly waived in the contract—is both unnecessary and futile. As these issues directly apply to this case, the court adopts its decision in the companion case of *Ute Indian Tribe*

v. Lawrence, Case No. 2:16-cv-579 (Memorandum Decision and Order, ECF No. 136.)

Specifically regarding the tribal exhaustion issue, which the Tenth Circuit directed to this court's attention, Article 23 of the Becker Independent Contractor Agreement states the exhaustion waiver as follows:

[T]he Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court *or that Tribal remedies be exhausted*.

(App'x 99, ECF No. 55-1, 2:16-cv-579 (emphasis added).) For the reasons set forth in the companion decision, the court concludes that the Tribe's waiver of tribal exhaustion is substantially likely to be valid under both federal and tribal law and that the Tribal Court's February 28 Opinion should not otherwise be given preclusive effect or comity.

As a result of this conclusion, the court finds that tribal exhaustion is no longer required under the Tenth Circuit's mandate in this case.

Therefore, the court issues the following rulings here:

1. The stay is lifted in this matter;
2. The tribal parties admit the interpretation of the Tribe's Charter is a matter of law, not of fact. (ECF No. 93-7, p. 10, 2:16-cv-958.) There being no evidence that the Section 17 Corporation of the Ute

Indian Tribe of the Uintah and Ouray Reservation had any involvement in the contract at issue here, the court concludes as a matter of law that the Charter's provisions do not apply and the Corporation shall be DISMISSED as a defendant and third-party plaintiff;

3. The court DENIES those portions of the tribal parties' pending motions seeking preliminary and/or permanent injunctions (ECF No. 73, 74), and RESERVES the remainder of the summary judgment motions for further disposition;

4. The court GRANTS IN PART and DENIES IN PART the tribal parties' motion for clarification and/or reconsideration of the court's February 14, 2018 ruling to the extent substantively clarified herein, (ECF No. 108);

5. Pursuant to Federal Rule of Civil Procedure 54(b) and to correct legal error, the court *sua sponte* revises its denial of Mr. Becker's motion for preliminary injunction. For the reasons stated herein and in the companion case decision, the court GRANTS Mr. Becker's motion for a preliminary injunction enjoining the parties from proceeding in the Tribal Court action and from the Tribal Court orders having preclusive effect in other proceedings on these facts, (ECF No. 70);

6. The court DENIES as MOOT the tribal parties' motion to amend or correct their Answer to Complaint, Third Party Complaint, and Counterclaim, (ECF No. 124);

7. The court DENIES the tribal parties' emergency motion for protective order against the deposition of former Business Committee member Arrowchis because the court finds it substantially likely that the tribal parties have waived sovereign immunity, (ECF No. 130);

8. The court GRANTS the tribal parties' Motion for Leave to Supplemental Legal Authority, (ECF No. 145), and considered it in connection with the rest of the record.

9. The court GRANTS the tribal parties' Motion to Supplement the Record. (ECF No. 147.)

DATED this 30th day of April, 2018.

BY THE COURT:

A handwritten signature in blue ink, reading "Clark Waddoups", written over a horizontal line.

Clark Waddoups
United States District Judge

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Appendix D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

Case No. 2:16-cv-00579

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, et al.,

Plaintiffs,

v.

HONORABLE BARRY G. LAWRENCE,
District Judge, Utah Third Judicial District,
and
LYNN D. BECKER,

Defendants.

Filed: April 30, 2018

MEMORANDUM DECISION AND ORDER
DENYING PRELIMINARY INJUNCTION

Judge Clark Waddoups

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INTRODUCTION

This case arises from the uncertainty inherent in the overlapping jurisdictional reach of the Utah state courts and the Ute tribal courts when a dispute arises between the Tribe and a non-Indian under a series of complex commercial contracts that create an issue of whether there is an enforceable waiver of sovereign immunity. The case puts at issue the interests of three sovereigns: the United States, the state of Utah, and the Ute Tribe. It is undisputed that Congress, exercising its power as the sovereign, has and may grant—as well as limit—the authority of both the state and the Tribe to exercise their separate jurisdictional authority. And the boundaries of that authority have and continue to evolve.

Traditionally, state courts have general subject matter jurisdiction to resolve disputes that arise within the state's boundaries. When Congress, as the sovereign, has not waived immunity or reserved to the federal courts exclusive jurisdiction in certain areas, the state court's jurisdiction extends to disputes arising within the state's geographic boundaries. Similarly, the doctrine of tribal immunity preempts state court jurisdiction for disputes arising within tribal boundaries. The scope and breadth of tribal immunity and preemption have evolved and continue to evolve, both by congressional action and court decisions. This case requires the court to determine the circumstances under which such tribal sovereign immunity preempting state court jurisdiction may be waived.

Inherent in the recognition of tribal sovereign immunity is the goal of supporting tribal self-governance and control over the Tribe's property, assets, and the management of tribal affairs. The tribal lands have been held in trust by the federal government for the benefit of the tribal members. To avoid misappropriation and abuse, the federal government, as the guardian for the tribal members, has been required to approve alienation of trust assets. As valuable resources have been found on tribal lands, the motivation for non-Indians to engage in corruption and deceit to deprive tribal members of the value of these resources has often been astounding and a sad commentary on the development of the West's natural resources.¹

The natural and appropriate response by the tribes has been to be increasingly vigilant and zealous in asserting and protecting their right to control their own affairs. The principal legal mechanism has been for the tribes to assert their rights to sovereign immunity, arguing that disputes over trust assets must be resolved in tribal courts. The tribes, however, have also recognized the value of participating in the commercial development of their resources. These commercial transactions by their very nature are often complex and require significant capital contribution from non-Indian

¹ One of these tragedies is detailed in the history of the Osage Tribe in Oklahoma, where in the 1920s and '30s at least 24 Osage Indians, and likely more, were murdered to gain control of and rights to their valuable oil resources. See David Grann, *Killers of the Flower Moon* (2017).

entities. These commercial arrangements, as is customary in all similar complex transactions, require agreements between the parties on how disputes will be resolved, and by which courts. In this case, the agreements have ripened the uncertainty about the overlapping jurisdiction of the state and tribal courts, and about when and under what circumstances tribal sovereign immunity comes into play. The very nature of the agreements themselves requires the parties to determine whether sovereign immunity has been waived and the jurisdiction of the state courts recognized.

The Indian tribes rightly are strongly motivated to enjoy the fullest protection possible to control the resolution of such disputes. Similarly, non-Indians are also appropriately motivated to protect the value of their capital and labor investments. The motivations and intentions of both sides are understandable and cannot be faulted. This case requires the court to resolve how those interests, in compliance with existing law, statutes, and agreements, should be resolved.

For the reasons stated below, the court concludes that this contract dispute should be resolved in Utah state court and the pending action in the Ute Tribal Court enjoined. The court reaches this conclusion after reviewing hundreds of pages of briefing, considering extensive oral argument, and conducting a careful analysis of a record of more than 5,000 pages. The transaction is complex and the parties' attempts to simplify in order to support their positions have sometimes missed the essential

facts and terms upon which the decision must be based.

To address these issues, the court has been required to provide detail and analysis beyond what would be typical or even desired on a motion for preliminary injunction. The detailed analysis has been necessary, however, to fairly and adequately address the facts and legal issues raised. Because of the complexity of the agreements, laws, and issues, the court provided the parties with a draft copy of this memorandum decision as a tentative ruling and held an additional hearing on Friday, April 13, 2018, for the parties to address any errors or misunderstanding in the draft decision. The final decision incorporates relevant issues raised by the parties.

PROCEDURAL BACKGROUND

This action is before the court on the tribal parties' motion for a preliminary and/or permanent injunction against Mr. Lynn Becker and Judge Barry G. Lawrence proceeding in the matter of *Becker v. Ute Indian Tribe et al*, Case No. 140908394, Third Judicial District Court, Salt Lake County.² (ECF No. 54.) A brief history of how this

² Throughout this opinion, the court refers to Mr. Lynn Becker as "Becker," the Ute Indian Tribe of the Uintah and Ouray Reservation, the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC as "the tribal parties," and, separately, the Ute Indian Tribe of the Uintah and Ouray Reservation as "the Tribe."

court came to consider this motion is set forth in the Memorandum Decision and Order Granting Temporary Restraining Order dated February 17, 2018.³ (ECF No. 85.) The motion concerns the provisions of Article 23 of Becker's Independent Contractor Agreement and its implications for the jurisdictional conflict and the issue of tribal exhaustion. In its entirety, Article 23 states:

Article 23. Limited Waiver of Sovereign Immunity; Submission to Jurisdiction.

If any Legal Proceeding (definition follows) should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a "Legal Proceeding" means any judicial, administrative, or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement. To the extent the course of dealing between the Parties might be interpreted to have modified or

³ This court was confused about the Tenth Circuit's mandate including a direction to consider supplemental jurisdiction under 28 U.S.C. § 1367. *Ute Indian Tribe v. Lawrence*, 875 F.3d 539, 548 (10th Cir. 2017). Further direction from the Court clarified that this court was to resolve the jurisdictional questions, perhaps under 28 U.S.C. § 1362, rather than § 1367. *Id.*, February 16, 2018 Order.

extended the terms of this Agreement, the limited waiver of sovereign immunity shall apply to such modification or extension. A Legal Proceeding shall not include proceedings related to royalty or similar interests in lands held by the Tribe that are not expressly subject to the terms of this Agreement.

The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding. The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only if, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts or courts with jurisdiction to review actions of such courts. The court or courts so designated shall have, to the extent the Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.

Each Party hereto consents to service of processing [sic] for any such Legal Proceeding filed in the court or courts so designated. The Tribe's limited waiver of sovereign immunity and submission to jurisdiction also extends to any arbitration and all review and enforcement of any decision or award of the panel so convened in the court or courts so designated. The Tribe's limited waiver of sovereign immunity shall be further evidenced by a Tribal Resolution delivered at the time of execution of this Agreement in accordance with Tribal Laws, that expressly authorizes the foregoing submission to jurisdiction of the courts so designated and the execution of this Agreement.

(App'x 98–99, ECF No. 55-1.)

The Temporary Restraining Order was scheduled to expire on March 3, 2018. Thus, the court held an evidentiary hearing on the tribal parties' motion on February 28, 2018, during which no party objected to the court extending the Temporary Restraining Order enjoining the state court action until the court could issue its written opinion. (ECF No. 106.) At the hearing, the court also took evidence and clarified the purpose for which all evidence would be considered. The court further stated that in deciding this motion, it should consider all documents and exhibits on record in this case as well as in the record of companion case *Becker v. Ute Indian Tribe et al*, Case No. 2:16-cv-958, United States District Court for the Central

Division of Utah.⁴ The parties did not object to this statement. (Feb. 28 Hrg. Tr. 154, 161; ECF No. 111.) The court therefore DENIES as MOOT the tribal parties' motions in limine seeking to limit the evidence the court should consider. (ECF Nos. 97, 98, & 99.)⁵ At the hearing, the court also authorized Mr. Becker to submit additional authority for the

⁴ As a result of the court's conclusions in this action, a memorandum decision is issued simultaneously in the companion case that clarifies the court's February 14, 2018 ruling there and grants Mr. Becker's motion for a preliminary injunction enjoining the parties from proceeding in the tribal court action *Ute Indian Tribe v. Becker*, Case No. CV-16-253, Ute Indian Tribal Court of the Uintah and Ouray Reservation, Fort Duchense, Utah.

⁵ At the April 13, 2018 hearing on the court's tentative ruling, the tribal parties noted that the state court had previously excluded the July 2, 2007 Bureau of Indian Affairs (BIA) letter and that this court should similarly grant a motion to exclude, or at least preserve their objection to the court's consideration of the letter. (Apr. 13 Hrg. Tr. 50–51; ECF No. 132.) The state court excluded the July 2, 2017 BIA letter at the same time it excluded the tribal parties' four expert witnesses from testifying about the necessity of federal approval of the Becker Independent Contractor Agreement under either federal or tribal law. (Ruling on Motions in Limine, Jan. 18, 2018 & Order Nunc Pro Tunc, Feb. 14, 2018; *Becker v. Ute Indian Tribe et al*, Case No. 140908394, Third Judicial District Court, Salt Lake County.) This was due, however, to the state court's previous conclusion on the tribal parties' motion for summary judgment that the Agreement did not involve trust property and did not require federal approval. This court considered the BIA letter along with all other materials in the record except as otherwise noted herein.

court's consideration, (ECF No. 106), which he has now done, (ECF No. 109).

On February 28, 2018, the Ute Indian Tribal Court issued an opinion (February 28 Opinion) granting the tribal parties' Motion for Summary Judgment on Grounds of Illegality Under Federal and Tribal Law. (ECF No. 108-1.) On March 1, 2018, the day after the hearing in this court on the tribal parties' motion for preliminary injunction, the tribal parties filed a notice of the February 28 Opinion. (ECF No. 108.) The tribal parties subsequently moved this court to give preclusive effect to the Tribal Court's February 28 Opinion and to consolidate and advance the court's consideration and ruling on the questions of preliminary and permanent injunctive relief as set forth in the tribal parties' motions for summary judgment and/or preliminary and permanent injunctive relief. (ECF No. 110.) Becker has objected to their motion. (ECF No. 115).⁶ For the reasons stated below, the court DENIES the tribal parties' motion to give preclusive effect to the February 28 Opinion and to consolidate and advance consideration of their other motions. (ECF No. 110.) Based on the court's review of the evidence, the arguments, the briefing, and relevant case law, the court DENIES the tribal parties'

⁶ The court did not consider the Declaration of Lynn Becker and its exhibits B-B-5 in Becker's opposition to the tribal parties' preclusion motion, (ECF No. 115), and thus DENIES as MOOT the tribal parties' motion to strike those materials, (ECF No. 124).

motions for preliminary injunction. (ECF No. 54 and the injunction portions of ECF Nos. 52 & 53.)

PRELIMINARY INJUNCTION STANDARD

Because this court has previously set forth the factual background in this matter in its January 31, 2018 Memorandum Decision, (ECF No. 78), the court begins here with the legal standard it must follow when ruling on a preliminary injunction. The court may grant a preliminary injunction, in its sound discretion, if the movant shows a substantial likelihood of success on the merits of the relief sought, irreparable harm to the moving party absent an injunction issuing, that the damage an injunction will cause to the non-moving party is outweighed by the threatened injury to the moving party, and that if issued, an injunction will not be adverse to the public interest. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1995). The court first addresses the most disputed—and dispositive—element of the standard in this case: whether the tribal parties have met their burden to show a substantial likelihood of success on the merits.

I. SUBSTANTIAL LIKELIHOOD OF SUCCESS

A. The State Court Has Subject Matter Jurisdiction.

The tribal parties first seek to enjoin the Utah state court from proceeding, arguing that it lacks subject matter jurisdiction over Becker's contract

claims against the tribal parties. Citing case law from as early as 1832, the tribal parties argue that it is a fundamental tenet of federal law that states lack jurisdiction over Indians for conduct occurring within Indian country.⁷ See *Worcester v. Georgia*, 31 U.S. 515, 561–63 (1832) (concluding that the 1791 treaty of Holston between the United States and the Cherokee nation precluded the state of Georgia from criminally adjudicating non-Indians for actions that occurred on tribal land). While the tribal parties' initial premise is generally correct, it is not an unequivocal statement of the law, nor does it apply without further analysis in this case. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries” (alteration in original (quoting *Worcester*, 31 U.S. at 561))). *Worcester* addressed a state criminal adjudication against non-Indians for actions occurring on tribal land, and the opinion is “perhaps the most expansive declaration of Indian independence from state regulation ever uttered by this Court, pertain[ing] to one of the original 13 States, unbound by any Enabling Act whatsoever.” *Ariz. v. San Carlos Apache Tribe*, 463 U.S. 545, 563

⁷ While Becker argues that at least 45% of his activities occurred off-reservation, (Hrg. Tr. 2/28/18 at 23:8–9, ECF No. 111), the Tribe claims that Becker’s contract claim arose on and was performed on the reservation. For the purpose of this opinion, the court assumes without deciding, that the stricter standards applicable to on-reservation conduct apply.

(1983). Because a state’s jurisdiction may be bound by its Enabling Act, the court begins its analysis of state court subject matter jurisdiction with Utah’s Enabling Act.

In 1894, Utah adopted “[a]n Act to enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original states.” 28 Stat. 107. Known as the Utah Enabling Act, it contains a disclaimer of Indian lands and jurisdiction over those lands as a condition of statehood:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*

28 Stat. 107, Sec. 3 (Second) (emphasis added). Article III, Sec. 2 of the Constitution of Utah repeats this disclaimer verbatim. The tribal parties argue that the jurisdictional disclaimer contained in these founding documents means that the state of Utah has no subject matter jurisdiction over “Indian lands and Indian people on Indian lands in Utah” and that only the United States Congress can grant such

jurisdiction. (Pl.’s Reply 11, ECF No. 101.)⁸ The tribal parties acknowledge that where Congress has provided “clear federal authorization,” (Pl.’s Emerg. Mot. 18, ECF No. 54 (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.03(1)(a)(ii), p. 608 (2012 ed.))), and when “Congress has expressly so provided,” *Cal. v. Cabazon Band of Indians*, 480 U.S. 202, 207 (1987), state courts have jurisdiction over “actions against Indians arising within Indian country,” (Pl.’s Emerg. Mot. 18, ECF No. 54). Indeed, since *Worcester*, Congress has authorized state jurisdiction over a number of types of actions involving Indian parties on Indian lands, and even over Indian water rights in state courts. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 570 (stating that “we must conclude that the District Courts were correct in deferring to the state proceedings”).

Nonetheless, the tribal parties argue here that Congress has not spoken and that there is not “a single act of Congress that empowers the State of Utah to exercise adjudicatory jurisdiction over the Ute Indian Tribe for actions undertaken by the Tribe within the exterior boundaries of its reservation.” (Pl.’s Reply 12, ECF No. 101.) Without such authorization, they argue, the Tribe’s alleged

⁸ Because the record in this matter is so voluminous and includes materials from four related proceedings in state, federal, and tribal court, all citations to page numbers of the record in this opinion refer to the page number in the ECF header rather than to the page number within any given document cited. The court hopes that this makes location and review of these materials easier.

contractual waiver of sovereign immunity is ineffective because, even if Becker's Independent Contractor Agreement is valid, Congress has not authorized Utah to exercise subject matter jurisdiction over this civil action. But the tribal parties are incorrect. The Indian Civil Rights Act of 1968, codified in 25 U.S.C. § 1321 *et seq.*, addresses congressional grants of authority for states to exercise jurisdiction over criminal and civil actions involving Indians. Because Becker's action is a civil action, § 1322 governs. It states:

Consent of the United States; force and effect of civil laws. *The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.*

25 U.S.C. § 1322(a) (emphases added). By its plain language, section (a) of this statute is express federal consent and authorization for the Utah state court—which otherwise has general jurisdiction over civil matters under Utah Code Ann. § 78A-5-102—to exercise territorial subject matter jurisdiction over “civil causes of action between Indians or to which Indians are parties,” including those “which arise in the areas of Indian country situated within such State,” as long as the state has the “consent of the tribe.” 25 U.S.C. § 1322(a). Then, § 1324 authorized states to amend their constitutions, Enabling Acts, or existing statutes to remove legal impediments to the exercise of congressionally authorized subject matter jurisdiction over tribal matters.⁹ 25 U.S.C. § 1324. Utah did so via statute. In Utah Code Ann. § 9-9-201, Utah accepted the jurisdiction, granted by Congress, to preside over civil matters involving Indians.¹⁰ Thus, pursuant to 25 U.S.C. § 1322(a),

⁹ 25 U.S.C. § 1324 states:

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. . . .

¹⁰ Utah Code Ann. § 9-9-201 states:

The state of Utah hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and

assuming that the Tribe has consented and the issue does not involve trust property (both of which will be discussed *infra*), Congress has otherwise authorized the Utah state court to be a court of competent subject matter jurisdiction over this action.¹¹

Indian territory, country, and lands or any portion thereof within this state in accordance with the consent of the United States given by the Act of Congress of April 11, 1968, 82 Stat. 78–80 (Public Law 284, 90th Congress), to the extent authorized by that act and this chapter.

¹¹ At the April 13 hearing on the tentative ruling, the tribal parties argued that Utah did not comply with § 1324 by enacting Utah Code. §§ 9-9-201 to 9-9-213, because these statutes do not remove the legal impediment to jurisdiction that still exists in Utah’s Enabling Act and Constitution. The court disagrees that Utah’s statutes failed to remove the state’s legal impediment to jurisdiction. They were enacted in 1971 in direct response to Congress’ invitation. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.04[3][a], p. 538 (2012 ed.). Furthermore, the tribal parties argued that the Utah statutes only assume jurisdiction contingent on a Tribe’s consent by special election because these sections must be read *in pari materia*, just as § 1322 must be read *in para materia* with § 1326. (Apr. 13 Hrg. Tr. 8-10; ECF No. 132.) Even reading the statutes *in pari materia*, Utah Code § 9-9-206 specifically supports the court’s interpretation here. It states:

The jurisdiction assumed pursuant to this chapter is subject to the limitations and provisions of the federal Act of Congress of April 11, 1968, 82 Stat. 78-80 (Public Law 284, 90th Congress), and the specific limitations set forth in each [tribal] resolution ceding jurisdiction to the state, both as to geographical area and subject matter.

The tribal parties argue that *Ute Tribe v. Utah*, 521 F. Supp. 1072, 1157 (D. Utah 1981) (*Ute I*), *aff'd in part, rev'd in part on other grounds*, 773 F.3d 1087 (10th Cir. 1985) (*Ute III*) (*en banc*), “holds that the State of Utah lacks jurisdiction over the Ute Tribe for actions undertaken by the Tribe inside the exterior boundaries of its reservation.” They further argue that the decision is binding upon Judge Lawrence in state court under the doctrine of res judicata, upon Becker under the doctrine of collateral estoppel, and upon this court under the doctrine of stare decisis. (See Pl.’s Reply 12, ECF No. 101.) The argument overstates the holding of the case. They more correctly state the holding of these related cases by quoting *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1530 (10th Cir. 1997) (“*Ute V*”):

the Tribe *and the federal government* retain jurisdiction over all trust lands, the National

Id. This section foreshadows what the Tribe has done with respect to the single contract at issue in this case; specifically, authorized its properly elected Tribal Business Committee to enact a resolution that waived its sovereign immunity, selected Utah law to govern, and submitted to jurisdiction in a court of competent jurisdiction that includes the Utah courts. While other sections speak to special election requirements for broader Indian acceptance of state jurisdiction, this section speaks to the narrower grounds under which the Utah courts have jurisdiction by “each resolution ceding jurisdiction to the state, both as to geographical area and subject matter,” such as the Becker contract. Utah Code § 9-9-206. The court considered the supplemental legal authority submitted by the tribal parties (ECF No. 133), but it does not change the court’s opinion.

Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902–1905 allotment legislation.

Id. (See Pl.’s Expedited Mot. 29, ECF No. 52 (emphasis added).) In other words, as to criminal adjudications in Indian country as defined by 18 U.S.C. § 1151, these opinions clarify the geographic boundaries over which the state of Utah has original criminal jurisdiction versus the boundaries over which the Tribe *and the federal government* retain original criminal jurisdiction as Congress has divided between them. The Tenth Circuit has further clarified that 18 U.S.C. § 1151 defines Indian country as to both criminal and civil jurisdiction. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 (10th Cir. 1995). The tribal parties’ argument that these cases mean that Utah state courts have no civil subject matter jurisdiction over suits involving tribal parties inside reservation boundaries fails to acknowledge that the federal government can—and here has via 25 U.S.C. § 1322(a)—consented to the state’s acceptance of the federal court’s civil jurisdiction over Indian country up to the extent of the state’s general civil jurisdiction, which Utah accepted in Utah Code Ann. § 9-9-201.¹² Thus, Utah state courts have underlying

¹² Utah’s broad acceptance of the congressional invitation to accept the federal government’s concurrent jurisdiction over

subject matter jurisdiction over this matter, but only, as discussed below, if the Tribe has consented and if the matter does not involve trust property pursuant to 25 U.S.C. § 1322(b).

1. The Tribe Is Not Required to Hold a Special Election to Selectively Consent.

At oral argument, the tribal parties asserted that the congressional authorization of state court jurisdiction over civil matters in 25 U.S.C. § 1322(a) is effective only if the Tribe consents pursuant to 25 U.S.C. § 1326, which requires a special election as follows:

State jurisdiction acquired pursuant to this title [25 USCS §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, *shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a*

tribal lands makes it different than other states within the jurisdiction of the Tenth Circuit, such as Oklahoma, which has a completely different jurisdictional structure. Thus, in Utah the analysis necessarily focuses not on whether Utah has underlying jurisdiction, but on the degree to which a tribe as a whole or through its designated elected officials has ceded its jurisdiction to the state—either wholly by special election or, as to selected geographic or subject matter areas, by individual resolution waiving sovereign immunity and submitting to state jurisdiction.

special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Id. (emphasis added). The court disagrees that a tribe's consent by majority vote is required for a state to accept the *federal government's* grant of civil jurisdiction over tribal matters. Instead, § 1326 relates to a *tribe's* ability to independently relinquish to a state the *tribe's* jurisdiction over tribal matters, whether or not the state has accepted the federal government's jurisdiction. In other words, the court interprets §§ 1321–1326 *et seq.* as (1) requiring a formal election under § 1326 if a tribe intends to surrender all of its own jurisdiction over tribal matters to a state that either has or has not yet accepted the federal government's civil or criminal jurisdiction or (2) allowing a tribe's waiver of its sovereign immunity over selected matters if a state has previously accepted the federal government's jurisdiction by complying with § 1324.

The Act of August 15, 1953, is the relevant statute in which five states (California, Minnesota, Nebraska, Oregon, and Washington) were given mandatory jurisdiction to the extent of each state's jurisdiction elsewhere in the state and in which Congress authorized all remaining states to “assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept

such responsibility.” *Williams v. Lee*, 358 U.S. 217, 222 (1959). See Act. of Aug. 15, 1953, c. 505, §§ 2, 4, 6–7; 67 Stat. 590 (hereinafter Public Law 280, or PL-280). The policy surrounding Public Law 280 in The Act of 1953 and its amendments in The Indian Civil Rights Act of 1968 reflect congressional intent to balance—without itself compelling the states—the federal government’s relinquishment of jurisdiction over tribal matters to states on the one hand with the ability for Indians, on the other hand, to exercise independent judgment over when and how much of their own sovereign immunity to surrender to the states in whose geographic boundaries they otherwise reside. See *Kennerly v. Dist. Court of Ninth Judicial Dist.*, 400 U.S. 423, 426–29 (1971). The purpose of this policy was to facilitate Indians’ greater participation in American society on similar terms as other citizens of the United States and its component states. See *Williams* 358 U.S. at 220–21. Additionally, Supreme Court precedent cited by the tribal parties supports this interpretation.

To begin with, in *Williams*, a non-Indian attempted to sue Indians in Arizona state court for actions that took place on a reservation. 358 U.S. 217. In 1959, PL-280 provided the only clear federal authorization for states to exercise civil or criminal jurisdiction over Indians. Consent by the Indians themselves was not required. In *Williams*, the Supreme Court reversed the Arizona state court judgment against the Indian parties because Arizona had failed to accept the federal government’s jurisdiction over Indians by 1959, and moreover, its Enabling Act still expressly disclaimed

jurisdiction over Indian lands. 358 U.S. at 222 n.10, 233.

The discussion of the procedural election requirements of 25 U.S.C. § 1326 in *Kennerly* is especially instructive as to this court's interpretation. 400 U.S. 423 (1971). By 1971, Congress had amended the Act of August 15, 1953, with Title IV of the Civil Rights Act of 1968, 82 Stat. 78, 25 U.S.C. §§ 1321–1326 (1964 ed., Supp. V). Section 403(b) of the 1968 Act repealed § 7 of the Act of 1953, which had authorized states to unilaterally accept the federal government's grant of its jurisdiction over civil and criminal offenses in Indian country. Section 402(a) of the 1968 Act reaffirmed congressional willingness to offer that states assume its civil jurisdiction as before, but this time stated a requirement that such assumption was subject to "the consent of the tribe . . . which would be affected by such assumption." *Id.* *Kennerly* went on to explore the balancing that these provisions require.

In *Kennerly*, Montana had taken no affirmative action to accept civil or criminal jurisdiction over the Blackfeet Reservation pursuant to the Act of 1953. 400 U.S. at 425. Similarly, after the 1968 Act, Montana failed to legislatively accept civil or criminal jurisdiction over the Blackfeet tribe by amending its Enabling Act or other statutes as § 1324 required. *See id.* at 427. Nevertheless, the Montana state court exercised jurisdiction over a civil action involving Indians within the exterior boundaries of the Blackfeet Reservation. *Id.* at 424. The basis for Montana's assertion of civil jurisdiction

was that the Blackfeet Tribal Council had adopted Chapter 2, Civil Action, § 1 as part of the Blackfeet Tribal Law and Order Code on November 20, 1967, which stated:

The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts

Id. at 425. By 1971, the Court could have considered evidence of this unilateral tribal action amending the tribe's Law and Order Code as consent to globally waive the tribe's sovereign immunity had Montana previously accepted either Congress' 1953 or 1968 offer of jurisdiction. See *id.* at 428 (examining first whether Montana had assumed "such measure of jurisdiction over any or all such civil causes of action arising within Indian country"). But according to *Kennerly*, after the 1968 Act, even if Montana had accepted jurisdiction under the Act, tribal council legislation is an insufficient prerequisite to manifest the tribe's consent to permanently authorize the state to assume global jurisdiction over a tribe. *Id.* at 426–30. For that, strict compliance with the election provisions of 25 U.S.C. § 1326 was required.¹³ *Id.* at 429.

¹³ Of course, the Blackfeet Tribal Council could not have known about the procedural requirements of the Act of 1968 when they amended their Law and Order code in 1967. Had they known, they still may not have held an election to grant permanent concurrent jurisdiction to the state courts of

Dueling footnotes in *Kennerly* between the majority and dissenting justices support this interpretation. The dissenting justices challenged the majority view because they believed that the Court's requirement for a special election in *Kennerly* required the tribe to "choose between exclusive tribal court jurisdiction on the one hand and permanent, irrevocable state jurisdiction on the other." *Id.* at 431 n* (Stewart, J., dissenting). The majority expressly stated that this view "is incorrect." *Id.* at 430. Instead, the majority stated that 25 U.S.C. § 1322(a) "obviously" does not compel the inference that Congress intended to foreclose "selective tribal consent to state exercise of jurisdiction." *Id.* at n.6. Rather, the majority holding is more specific. It states that before a court can conclude that a tribe has irrevocably and permanently ceded its tribal sovereignty and/or consented to share it with a state, the tribe must comply with the procedural election procedures of § 1326. *Id.* *Kennerly* says nothing, therefore, about whether the procedural election requirements of § 1326 are required before the state can accept the *federal government's* grant of jurisdiction. In fact, *the state's* requirements are set forth in § 1324.

Montana because the impetus for the Law and Order amendment was apparently a temporary inability to maintain a tribal court. *See Kennerly*, 400 U.S. at 430. This practical explanation for the tribe's code amendment supports the majority's view that the formal procedures of § 1326 must be met before a court finds such a global and irrevocable ceding of *the tribe's* jurisdiction to the state.

Kennerly's holding is squarely focused on the actions *a tribe* must take to permanently and globally cede *tribal* jurisdiction to the state. It expressly leaves open the option for a tribe to selectively consent, via selective waivers of tribal sovereign immunity, to a state's exercise of the jurisdiction ceded to the state by the federal government. 400 U.S. at 428 (quoting § 402(a) of the Act, 25 U.S.C. § 1322(a) (1964 ed., Supp. V), which grants the United States' consent for states to assume "such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof *as may be determined by such State*" (emphasis added)).

The tribal parties' contrary interpretation of the consent requirement in § 1322(a) relies heavily on "the idea of inherent Indian sovereignty as a bar to state jurisdiction." *McLanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 172 (1973). The trend, according to the Supreme Court in 1973, had been away from that idea and toward the treaties and statutes that define the limits of state power. *Id.*¹⁴ Thus, in *McClanahan*,

¹⁴ See also *White Mountain Apache*, 448 U.S. at 144–45:

Where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.

In *White Mountain Apache*, the Court found that a "comprehensive federal regulatory scheme" over logging and hauling Arizona tribal timber on reservation and Bureau of

where Arizona had never accepted civil jurisdiction over Indians pursuant to § 1324 and the tribe had not consented to the imposition of state tax on Indians on the Navajo Reservation, Arizona's state tax could not be imposed on reservation Indians nor collected or enforced in Arizona state courts. *Id.* at 177–78.¹⁵

The Supreme Court further clarified the relationship between subject matter jurisdiction and tribal sovereign immunity in *Kiowa Tribe v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998). *Kiowa* essentially expanded tribal sovereignty to include the commercial activities of a tribe conducted off a reservation. In the process, the Court continued its trend against analyzing the existence of state jurisdiction based on inherent Indian sovereignty and instead “toward reliance on federal pre-emption.” *McLanahan*, 411 U.S. at 172.

Indian Affairs roads precluded state motor vehicle license and fuel use taxes on a non-Indian corporation under contract with a tribe. *Id.* at 148–49.

¹⁵ At the April 13 hearing on the tentative ruling, the tribal parties further suggested that *Fisher v. District Court of Montana*, 424 U.S. 382 (1976), decided five years after *Kennerly*, elevated tribal sovereign immunity over federal preemption as the premier federal barrier to state court jurisdiction. (Apr. 13 Hrg. Tr. 17, ECF No. 132.) *Fisher* arose in Montana, however, which had not acted to accept the federal court's grant of jurisdiction under § 1322(a). *Fisher*, 424 U.S. at 388. Thus, its reasoning does not speak to *Kennerly's* holding about selective tribal consent to state court jurisdiction versus permanent irrevocable state jurisdiction only by special election.

In doing so, the *Kiowa* Court stated that “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” 523 U.S. at 754. This distinction suggests that “clear federal authorization,” (Pl.’s Emergency Mot. 18, ECF No. 54, citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 7.03(1)(a)(ii), p. 608 (2012 ed.)), is one side of a coin by which subject matter jurisdiction is transferred from the federal government to a state that accepts it. And tribal waiver of sovereign immunity—either globally pursuant to special election via 25 U.S.C. § 1326 or selectively as suggested by *Kennerly*—is the other side of the same coin. Both are necessary. This view is consistent with the Tenth Circuit’s statement in *Lawrence* that the two concepts are “different animals.” 875 F.3d at 545. In *Kiowa*, the state of Oklahoma, which is not a PL-280 mandatory jurisdiction state, did not have subject matter jurisdiction over a contract case both because it has not acted to accept civil or criminal jurisdiction under § 1324, *see, e.g., Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (U.S. App. D.C. 1988); *Indian Country, U.S.A. v. Okla.*, 829 F.2d 967 (10th Cir. 1987), and because the tribe had not waived its immunity. *Kiowa*, 523 U.S. at 760.

The Supreme Court confirmed the interpretation that a special election is not required for a tribe to selectively consent to waive sovereign immunity in *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). The case arose in Oklahoma, which has never accepted general civil jurisdiction over Indians pursuant to

§ 1324. The Supreme Court held that a sufficiently clear contractual waiver of tribal immunity, combined with a state statute accepting jurisdiction over contracts involving arbitration, was sufficient for a state court to exercise civil jurisdiction over an Indian tribe for off-reservation commercial activity.¹⁶ *Id.* at 418–19. *C & L* thus means that not only can tribes selectively consent to state jurisdiction as *Kennerly* suggested, but also that states can selectively assent to accept the federal government’s subject matter jurisdiction over tribal matters under § 1324 by enacting statutes that do not disclaim jurisdiction over tribes or tribal parties on that subject. *Id.* at 419–20 (finding that Okla. Stat., Tit. 15, § 802.B (1993) regarding arbitration agreements vests jurisdiction over such agreements—regardless of the parties—in “any

¹⁶ The tribal parties cite *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973), in an unsuccessful attempt to factually distinguish *C & L*. They argue that of course Indians are generally subject to state jurisdiction for off-reservation Indian activity, whereas the activity here was on the reservation and subject to different rules. Not only is the situs of the activity here in dispute, but *Mescalero* is a 1973 case issued prior to *Kiowa*, when tribal sovereign immunity was extended to a tribe’s off-reservation activity. *Kiowa*, 523 U.S. 751. That the *C & L* Court specifically analyzed the necessity of both state court jurisdiction in a state that has otherwise not globally accepted federal jurisdiction over Indian matters under § 1324 and waiver of tribal immunity for a tribe’s off-reservation activity per *Kiowa* demonstrates that the tribal parties’ distinction is not compelling.

court of competent jurisdiction of this state,” including the Oklahoma state court).¹⁷

Based on this analysis, the court concludes that a special election under 25 U.S.C. § 1326 is not required for the Tribe to selectively consent to suit in a state court where—as in Utah—the state has undisputedly accepted the federal court’s jurisdictional authority pursuant to § 1324.¹⁸

¹⁷ In fact, this is exactly what § 1322(a) envisions by authorizing a state to assume “such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof *as may be determined by the State....*” 25 U.S.C. § 1322(a) (emphasis added); *see Kennerly*, 400 U.S. at 428, 431 n.*. Because Oklahoma’s arbitration statute did not disclaim jurisdiction over arbitration agreements that tribes or tribal parties entered, the requirements of 25 U.S.C. § 1324 were met and qualified as state statutory authority to overcome the Oklahoma Enabling Act’s impediment to civil jurisdiction over Indian matters. *See C & L*, 532 U.S. at 419.

¹⁸ Dicta in two Tenth Circuit criminal decisions suggest that the Act of 1968 requires tribal consent by special election for a state to accept the congressional grant of jurisdiction over tribal matters. *United States v. Tony*, 637 F.3d 1153, 1158 (10th Cir. 2011) (stating that the 1968 amendment served to “eliminate the requirement of affirmative legislative action and to require the consent of the Indian tribe by special election before a state could assume jurisdiction”); *United States v. Burch*, 169 F.3d 666 (10th Cir. 1999) (The Act of 1953 “was amended in 1968 to omit the requirement of affirmative legislative action and to require the consent of the Indian tribe by special election before a state could assume jurisdiction.”). These statements did not support the analytical foundations of either case, because neither New Mexico (*Tony*) nor Colorado (*Burch*) was one of the five mandatory jurisdiction states under

PL-280 in The Act of 1953, nor had either state assumed criminal jurisdiction in Indian country per § 1324. *See United States v. Barela*, 797 F.3d 1186, 1191 (10th Cir. 2015) (defining dicta). And although Utah has consented to accept criminal jurisdiction over Indians, the *Ute Indian Tribe v. Utah* cases do nothing if not make clear that the Tribe has neither globally nor selectively waived *the Tribe's* sovereign immunity over criminal matters involving Ute Indians in Indian country. *See* 114 F.3d at 1530.

Dicta in Tenth Circuit civil cases also make clear that Utah tribes have not globally consented to state civil jurisdiction by special election pursuant to § 1326. *See United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985) (“Although Utah since has indicated its willingness to assume this jurisdiction, no Indian tribe has accepted its offer.”); *see also Superior Oil Co. v. Merritt*, 619 F. Supp. 526 (D. Utah 1985) (stating that federal diversity statute 28 U.S.C. § 1322 cannot be construed as a general federal waiver of tribal sovereign immunity that abrogates the special election requirement under 25 U.S.C. § 1326 to demonstrate a tribe’s consent to globally waive its sovereign immunity). The Tenth Circuit’s mandate in this case, *Lawrence*, similarly notes that the Tribe has never granted global consent to state court jurisdiction—a point with which this court does not disagree. 875 F.3d at 546 n.4. In fact, the Ute Indian Tribe amended § 1-2-1 of its Law and Order Code to clarify that it has never globally consented to state civil or criminal jurisdiction by way of the special election process required by § 1326. (*See* VIII, ECF No. 52.) The Tenth Circuit’s mandate left it to this court in the first instance, however, to decide whether there is state court jurisdiction in this action, and this court finds a distinction between global consent to state court civil jurisdiction by the Tribe pursuant to the special election requirements of § 1326 and selective consent by tribal waiver of sovereign immunity in selected civil actions as contemplated by *Kennerly* and *C & L*.

Rather, the court concludes that because Utah has unequivocally accepted federal authorization to exercise civil jurisdiction, the tribal parties' likelihood of success on the merits of the state court's jurisdiction under § 1322(a) does not rest on the Tribe never having requested or held a § 1326 special election, but depends solely on whether there is a valid selective waiver of the Tribe's sovereign immunity in the Becker Independent Contractor Agreement, which will be comprehensively analyzed *infra*.

This conclusion is also supported by a comparison with jurisdictional and immunity issues in *Blatchford v. Native Village of Noahtak*, 501 U.S. 775 (1991), which held that the congressional grant of original jurisdiction over civil actions brought by Indian tribes arising under the United States Constitution, laws, or treaties pursuant to 28 U.S.C. § 1362 is not a waiver of a state's Eleventh Amendment immunity defense, *id.* at 786 n.4. In other words, the congressional grant of jurisdiction in 28 U.S.C. § 1362 is "wholly distinct" from immunity defenses. *Id.* By analogy to *Blatchford*, the congressional grant of civil jurisdiction under 25 U.S.C. § 1322(a)—that can be accepted by a state pursuant to 25 U.S.C. § 1324—is a "wholly distinct" issue from whether a tribe has (1) globally waived its sovereign immunity by special election consent under 25 U.S.C. § 1326 or (2) selectively waived its sovereign immunity as in *Kennerly* and *C & L*. Existence of subject matter jurisdictional authority is not negated by the existence of immunity;

immunity simply limits the exercise of any authorized jurisdiction. *Id.* at 779.

Also supporting this reasoning is the Tenth Circuit’s discussion of the United States’ waiver of sovereign immunity in The Indian Reorganization Act in *Wopsock v. Natchees*, 279 Fed. Appx. 679 (10th Cir. 2008).¹⁹ In *Wopsock*, former Ute Business Committee members attempted to sue federal Bureau of Indian Affairs officials for allegedly failing to call a special election to approve two ordinances that amended the Tribe’s Constitution. *Id.* at 686. By enacting The Indian Reorganization Act, Congress established the federal court’s subject matter jurisdiction; in addition, the Act contains a congressionally approved waiver of the United States’ sovereign immunity for violations of the Act. *Id.* When discussing whether the court had jurisdiction over the Bureau of Indian Affairs defendants, the Tenth Circuit referred interchangeably to the United States’ “consent” to suit and the United States’ “waiver of sovereign immunity” and specifically stated that “[i]t is the terms of the United States’ consent that define this court’s jurisdiction to entertain any suit.” *Id.* at 685–86. Notably, there was no question that Congress’ enactment of The Indian Reorganization Act conferred subject matter jurisdiction on the court. The only question was whether the officials had

¹⁹ This and any other unpublished decisions are not precedential, but are cited for their persuasive value. *See* Fed. R. App. 32.1; 10th Cir. App. R. 32.1.

violated the terms of the Act sufficiently for the Act to trigger the United States' consent, or waiver of its sovereign immunity, and subjected it to suit for redress of those alleged violations. *Id.* at 685–87; *see also Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) (“To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction.”); *Quality Tooling v. United States*, 47 F.3d 1569, 1575 (Fed. Cir. 1995) (“The inquiry, then, is not whether there is the one, jurisdiction, or the other, a waiver of immunity, but whether there is both.”). Likewise, here there is no question that Congress authorized states to accept civil jurisdiction over Indian matters in § 1322(a), which Utah accepted pursuant to § 1324 by enacting Utah Code Ann. § 9-9-201. The only way, then, that the Tribe's consent impacts the state's jurisdictional authority to entertain a suit is if the Tribe has also waived its sovereign immunity. It is undisputed that the Tribe has not requested a special election pursuant to 25 U.S.C. § 1326 to cede all of its sovereign immunity to Utah, but whether the terms of the Becker Independent Contractor Agreement—if the agreement is valid—triggered the Tribe's selective waiver of its sovereign immunity to consent to suit on the agreement is a substantial question.²⁰

²⁰ Because of this court's conclusion about the state's subject matter jurisdiction, the tribal parties' arguments about the state lacking minimum contacts are unavailing. (Pl.'s Reply 15, ECF No. 101.) The court also finds that nothing about its

2. Becker's Independent Contractor Agreement Did Not Involve Trust Property.

The court has concluded that the Utah state court has subject matter jurisdiction because Congress authorized Utah to exercise civil jurisdiction over Indian matters in 25 U.S.C. § 1322(a) and because Utah accepted that jurisdiction in Utah Code Ann. § 9-9-201. The next question before the court is whether this action seeks to adjudicate “the ownership or right to possession . . . or any interest therein” of “any real or personal property . . . belonging to any Indian or any Indian tribe . . . that is held in trust by the United States.” 25 U.S.C. § 1322(b);²¹ 28 U.S.C.

conclusion on Utah’s subject matter jurisdiction is at odds with any of the Tenth Circuit’s reasoning in *Lawrence*, 875 F.3d 539. In other words, it does not conflate subject matter jurisdiction with sovereign immunity, but rather considers them separately and independently.

²¹ 25 U.S.C. § 1322(b) states:

Alienation, encumbrance, taxation, use, and probate of property. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community *that is held in trust by the United States* or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or*

§ 1360(b).²² Both statutes provide that Congress has not conferred on states its subject matter jurisdiction over trust property. Therefore, if the action involves trust property, Utah would be precluded from having subject matter jurisdiction over this action, regardless of its acceptance of § 1322(a) via § 1324 and Utah Code Ann. § 9-9-201.

At this point, because answers to the questions regarding trust property and selective waiver of the tribe's sovereign immunity dictate the tribal parties' likelihood of success on the merits of their argument that the state court has no jurisdiction over this action, the court must consider in full the validity and terms of the Becker Independent Contractor Agreement at issue. Before doing so, however, the

otherwise, the ownership or right to possession of such property or any interest therein.

Id. (emphasis added.)

²² 28 U.S.C. § 1360(b) similarly states:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

court addresses the tribal parties' motion that the Tribal Court's February 28 Opinion should be given preclusive effect. (ECF No. 110.) This is because the Tribal Court's ruling directly addresses the validity of the contract under federal and tribal law, and if preclusive would dictate the court's evaluation of the tribal parties' likelihood of success on the merits.

B. February 28, 2018 Tribal Court Decision

1. Background

On August 18, 2016, the Ute Indian Tribe, the Uintah and Ouray Tribal Business Committee, and Ute Energy Holdings, LLC, filed a declaratory judgment action against Becker in The Ute Indian Tribal Court of the Uintah and Ouray Reservation. The tribal parties first filed their complaint in Tribal Court three and a half years after Becker initiated federal court action on this contract, (*Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation et al*, Case No. 2:13-cv-123 (dismissed for lack of federal question jurisdiction)), twenty months after Becker sued in state court, and two days after this court, Judge Robert J. Shelby presiding, dismissed the instant action for lack of federal court jurisdiction, (ECF No. 40). Becker's companion case seeking to enjoin the tribal parties from pursuing the 2016 Tribal Court action is Case No. 2:16- cv-958 in this court. (Compl. for Decl. J., ECF No. 2-3, Case No. 2:16-cv-958.) The Tribal Court issued its February 28 Opinion as a result of the following circumstances.

On September 14, 2016, this court initially granted Becker's motion for a temporary restraining order enjoining the parties from pursuing the Tribal Court action, and followed that order with a preliminary injunction on September 28, 2016. (ECF No. 50, Case No. 2:16-cv- 958.) The tribal parties had previously filed a motion for summary judgment in Tribal Court on September 12, 2016, two days before this court's temporary restraining order, seeking a ruling that Becker's contract was void as an ultra vires act under tribal law. (App'x 178, ECF No. 122-1, Case No. 2:16-cv-958.) Becker had filed a motion to dismiss the Tribal Court action on September 14, 2016, on the grounds that the contract validly waived the Tribe's sovereign immunity and exhaustion remedies and that the Tribe had submitted to jurisdiction elsewhere. (App'x 206, ECF No. 122-1, Case No. 2:16-cv-958.) The tribal parties immediately appealed this court's preliminary injunction, and on December 30, 2016, the Tenth Circuit stayed the preliminary injunction to allow the parties to pursue the Tribal Court action during the appeal.

After the injunction was stayed, the parties continued litigating in Tribal Court, completing their briefing on the above two motions. On March 9, 2017, the Tribal Court, Judge Pro Tem Thomas Weathers presiding, denied Becker's first motion to dismiss and denied without prejudice the tribal

parties' motion for summary judgment.²⁴ (App'x 4, ECF No. 122-3, Case No. 2:16-cv-958.) Judge Weathers also ordered the parties to show cause why the Tribal Court "should not dismiss or at least stay this lawsuit pending resolution of the state and federal lawsuits as a matter of comity, preservation of limited judicial resources, and avoidance of conflicting judgments." (*Id.* at 7.) Following briefing on the order to show cause, the Tribal Court issued an Order on June 9, 2017, declining to stay or dismiss the case primarily so that it could rule on the tribal law questions. (*Id.* at 257–58.) Judge Weathers bifurcated the tribal parties' complaint and scheduled discovery to proceed only on issues related to the validity of the contract and its terms under tribal and federal law, including the waiver of sovereign immunity and the need for federal approval of the contract. (ECF No. 70-12, Case No. 2:16-cv- 958.)

²⁴ In its Order, the Tribal Court relied on this court's preliminary conclusion that a consensual relationship between an employee and a tribe gives rise to tribal court jurisdiction. (App'x 8, ECF No. 122-3, Case No. 2:16-cv-958.) And, "[a]t this early stage of this litigation," the Tribal Court was unwilling to assume the validity of the Becker Independent Contract Agreement's waiver of sovereign immunity because of the Tenth Circuit's uncertainty about the validity of the contract itself under tribal law, as well as the Tenth Circuit's suggestion that even if the contract was void, the Tribal Court may still be a "court of competent jurisdiction." (*Id.* at 9.) At that time the Tribal Court did not independently analyze its own jurisdiction under tribal or federal law.

On August 25, 2017, during the discovery period on these issues, the Tenth Circuit reversed this court's preliminary injunction, holding that because Becker had not shown a likelihood of success on the validity of the contract waiving tribal exhaustion, the Tribal Court should address in the first instance whether it had jurisdiction. (ECF No. 69, Case No. 2:16-cv- 958.)

In the meantime, discovery disputes had ensued in the Tribal Court action. On September 19, 2017, shortly after the Tenth Circuit's August reversal and well in advance of the Tribal Court's dispositive motion deadline—but in compliance with Tribal Court rules—the tribal parties filed three motions for partial summary judgment in Tribal Court: one arguing the Becker Independent Contractor Agreement is void ab initio under federal law, one arguing the contract's waiver of sovereign immunity is invalid under tribal law, and one arguing the contract is invalid under both federal and tribal law because it concerns trust property and failed to receive the required federal approval. (App'x 678–737, ECF No. 122-4, Case No. 2:16-cv-958.) Becker, after locating a Tribal Ordinance and Tribal Court decision that he believed directly related to the tribal parties' second motion for partial summary judgment as to tribal law, filed a second motion to dismiss on November 2, 2017. (App'x 236, ECF No. 122-5, Case No. 2:16-cv- 958.)

On December 18, 2017, Judge Weathers decided both of these motions because they raised the same

legal issue.²⁵ (ECF No. 70-15, Case No. 2:16-cv-958.) Judge Weathers again issued an order to show cause why the Tribal Court action “should not be dismissed or stayed as a matter of comity and preservation of limited tribal judicial resources given the identical suits pending (for some time) in state and/or federal court.” (Id. at 5.) The next day, Judge Weathers denied all pending discovery and other motions without prejudice, except for the tribal parties’ motion for partial summary judgment on whether the Becker Independent Contractor

²⁵ Both motions addressed aspects of the Tribal Court’s jurisdiction. On the one hand, Judge Weathers rejected the tribal parties’ position that Ute Law and Order Code § 1-8-5 precludes successful selective waiver of the Tribe’s sovereign immunity when the Business Committee adopts a resolution that incorporates by reference a contract that contains a waiver of sovereign immunity. *Dec. 18 Order*, Ute Indian Tribal Court, Case No. CV-16-253 (rejecting the reasoning in *Toole v. Ute Water Settlement Accounting Servs., LLC*, Ute Indian Tribal Court, Case No. CV-09-061 (August 10, 2010), and adopting the subsequent reasoning in *Yazzie v. Ute Indian Tribe*, Ute Indian Tribal Court, Case No. CV-09-118 (Feb. 14, 2011). Both *Toole and Yazzie* are lower court, not appellate court, decisions of the Ute Tribal Court and thus neither is binding authority on the Tribal Court.) On the other hand, Judge Weathers rejected Becker’s argument that § 1-2-3(5) of the Ute Law and Order Code precludes jurisdiction over him if he were found to be an “employee” of the Tribe because the tribal parties alleged that fact in its complaint and thus the Tribal Court was required to accept it on the standard for a motion to dismiss. See *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (stating that a court must accept as true all the factual allegations in the complaint when considering a motion to dismiss).

Agreement is void ab initio under federal law, upon which a new discovery and briefing schedule was set. (ECF No. 70-16, Case No. 2:16-cv-958.)

On December 21, 2017, the Tenth Circuit issued its mandate reversing the Preliminary Injunction against the Tribal Court action in Becker's federal companion case. (ECF No. 69, Case No. 2:16-cv-958.) Following the mandate, Becker immediately filed a second motion for preliminary injunction in that case, (ECF No. 70, Case No. 2:16-cv-958), which this court heard on February 14, 2018. (ECF No. 106, Case No. 2:16-cv-958.) This court denied Becker's second motion for preliminary injunction because validity of the contract and tribal court exhaustion were still at issue, according to the Tenth Circuit's mandate, even though Judge Weathers' December 18, 2017 Order had held that the Tribe had validly waived its sovereign immunity by Tribal Resolution 05-147 incorporating the Becker Independent Contractor Agreement by reference. (*Id.*; *see also* ECF No. 107, Case No. 2:16-cv-958). In addition, by December 28, 2017, the tribal parties had filed a motion in Tribal Court to reconsider Judge Weathers' December 18, 2017 Order holding that the contract had validly waived the Tribe's sovereign immunity under tribal law. (App'x 144, ECF No. 122-7, Case No. 2:16-cv-958.) The motion also requested that the Tribal Court vacate its December 19 discovery and briefing schedule on the motion arguing that federal law rendered the contract void ab initio. It also asked the Tribal Court to reconsider the denial without prejudice of the tribe's other motions. (*Id.* at 147.) They specifically asserted,

however, that the Tribal Court should not reconsider Becker's discovery motions. (*Id.*)

Shortly thereafter, on January 4, 2018, Judge Weathers notified the parties that he would no longer be the judge on the case. (ECF No. 70-18, Case No. 2:16-cv-958.) On January 9, Chief Judge Stiffarm stayed the December 19 order setting the discovery and briefing schedule on the tribal parties' motion for partial summary judgment on whether the Becker Independent Contractor Agreement is void ab initio under federal law. (App'x 302, ECF No. 122-7, Case No. 2:16-cv-958.) The stay order was silent as to whether it granted the tribal parties' request to vacate the portion of Judge Weathers' Order that denied the then-pending motions without prejudice. (*Id.*) On January 10, Chief Judge Stiffarm reassigned the Tribal Court action to Judge Terry Pechota. (App'x 303, ECF No. 122-7, Case No. 2:16-cv-958.)

Following the change in Tribal Court judges, there was a flurry of litigation activity in federal, state, and tribal courts. In the Tribal Court action, the tribal parties moved for expedited rulings on all of their pending motions, including those Judge Weathers previously dismissed without prejudice. Judge Pechota heard these motions in Tribal Court on February 16, 2018.²⁶ (App'x 26, ECF No. 122-8,

²⁶ The hearing was held notwithstanding that briefing was incomplete because Judge Weathers' December 19 discovery and briefing schedule and order dismissing the remaining

Case No. 2:16-cv-958.) Becker actively pursued preparations for the state court trial, set to begin on February 26, 2018, while trying to fend off the tribal parties' efforts to stay the state court trial and precipitously pursue rulings in Tribal Court. The tribal parties filed an interlocutory appeal to the Tenth Circuit regarding this court's January 17, 2018 ruling declining to exercise supplemental jurisdiction over the tribal parties' preliminary injunction motion. Becker filed a third motion to dismiss in Tribal Court asking it to fully consider its jurisdiction on the merits. (App'x 337, ECF No. 122-8, Case No. 2:16-cv-958.)

Among other issues, Becker's third motion to dismiss in the Tribal Court action addressed the merits of the tribal parties' motion to reconsider Judge Weathers' December 18 decision, which found waiver of the Tribe's sovereign immunity under Ute Law and Order Code § 1-8-5 and *Yazzie*,²⁷ as well as whether the Tribal Court was a "court of competent jurisdiction" under § 1-2-3(5) of the Ute Law and Order Code. (*Id.*) On February 17, 2018, this court issued a temporary restraining order enjoining the state court action. (ECF No. 85.) On February 20 in the Tribal Court action, the tribal parties objected to Judge Pechota's consideration of Becker's third motion to dismiss on jurisdictional grounds, encouraging the Tribal Court "to focus like a laser on

motions without prejudice had been stayed by Judge Stiffarm on January 9.

²⁷ See Section I.C.2.a., *infra*.

the action in Tribal Court” and assuring the Tribal Court they are “fully prepared to defend the Tribal Court’s rulings in subsequent federal court review of this Tribal Court proceeding.” (App’x 208, ECF No. 122-8, Case No. 2:16-cv-958.) On February 26, 2018, the date the state court action had previously been set to begin, the tribal parties responded to Becker’s jurisdictional motion to dismiss in Tribal Court, again urging Judge Pechota to rule on motions Judge Weathers had previously dismissed regarding contract validity and to reject Judge Weathers’ decision finding that the Tribe had acceptably waived its sovereign immunity under tribal law. (App’x 395, ECF No. 122-8, Case No. 2:16-cv-958.)

Ultimately, the Tenth Circuit’s direction to this court clarified its November 29, 2017 mandate in this action. (ECF No. 81.) On February 28, 2018, this court conducted an evidentiary hearing on the tribal parties’ preliminary injunction motion to enjoin the state court action and took the matter under submission. (ECF No. 106.) The Tribal Court, Judge Pechota presiding, issued its February 28, 2018 Opinion on the same day. (ECF No. 108.)

**2. The Tribal Court’s February 28
Opinion Does Not Have Preclusive
Effect**

The tribal parties quote from 2 Commercial Arbitration § 40:41 (2017) to support their argument that this court should give the Tribal Court’s February 28 Opinion preclusive effect: “If the federal court concurs with the tribal court’s acceptance of

jurisdiction and determination of the facts, then the matter is res judicata and cannot be relitigated in federal court.” (Mot. re Preclusion 4, ECF No. 110) (emphasis added).) The requirement that the federal court concur supports that the federal court has authority to independently evaluate the Tribal Court’s conclusions to give the February 28 Opinion preclusive effect. The tribal parties simultaneously argue that “[t]he Tenth Circuit has rejected the argument that federal courts sit as a referee of tribal courts.” (*Id.* (“[W]e firmly reject the [] position that the district court had a duty to monitor the proceedings before the tribal court.”) (quoting *Burrell v. Armijo*, 456 F.3d 1159, 1173 (10th Cir. 2006).) They also argue that “[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.” (*Id.* (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987)).)

To address the tribal parties’ conflicting positions, this court reviewed relevant precedent that confirms that this court “may evaluate the existence of a tribal court’s jurisdiction” after a tribal court’s “ruling that it had jurisdiction” has been exhausted. *Burrell*, 456 F.3d at 1168. The tribal parties assert that “the Ute Indian Rules of Civil Procedure do not permit interlocutory appeals,” (Mot. for Clarification 3, ECF No. 88); therefore, the Tribal Court’s February 28 Opinion is not fully exhausted because it cannot yet be appealed and

thus is not final.²⁸ See *Murdock v. Ute Indian Tribe*, 975 F.2d 683, 687 (10th Cir. 1992) (requiring a final adjudication on the merits as an element of preclusion). Nevertheless, the tribal parties argue that the Tribal Court’s February 28 Opinion granting their partial motions for summary judgment should be given preclusive effect here because “[s]ummary judgment orders are afforded preclusive effect,” (Mot. re Preclusion 3, ECF No. 110 (citing the court to Charles Alan Wright, et al., 18A Federal Practice & Procedure Juris § 4444 (2d ed. 2002) and *In re Griego*, 64 F.3d 580, 584 (10th Cir. 1995)).) *In re Griego* points out, however, that “[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.” 64 F.3d at 584–85. Similarly, Wright explains that “claim preclusion and issue preclusion result from summary judgments that rest on the lack of any genuine dispute of material fact going to the merits of a claim or defense.” Charles Alan Wright, et al., 18A Federal Practice & Procedure Juris § 4444 (2d ed. 2002).

Upon review of the February 28 Opinion, this court has ample doubts about the quality, extensiveness, or fairness of the procedures followed by the Tribal Court. This court also doubts that the Tribal Court acknowledged genuine disputes of fact

²⁸ As the court explains further *infra*, the Becker Independent Contractor Agreement was valid and enforceable and included an express waiver of any requirement of tribal law that tribal remedies be exhausted.

material to the merits of the jurisdictional claims and that it considered those disputed facts in the light most favorable to the non-moving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (stating that “[i]n articulating the factual context of the case, the [court] failed to adhere to the axiom that in ruling on a motion for summary judgment, ‘[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor’”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

For example, the February 28 Opinion holds that the Tribal Court has jurisdiction over Becker under Title I, Chapter 2, §§ 1-2-1 to 1-2-4, Ute Indian Law and Order Code, Amended and Restated, Ordinance 13-010. (Opinion 3, ECF No. 108-1.) None of those sections, however, grants the Tribal Court subject matter jurisdiction over civil matters, which § 1-2-5 apparently does, and then in § 1-2-6 only concurrently with state and federal courts that have valid jurisdiction. (App’x 53, ECF No. 55-1.) In addition, the February 28 Opinion is silent on the fact that Ordinance 13-010 was not executed until March 27, 2013, about six weeks after Becker filed his first federal action against the tribal parties. (Compl., ECF No. 2, Case No. 2:13-cr-123.) While Ordinance 13-010 could be relevant if the issue was whether the Tribal Court has jurisdiction over a contract with a non-Indian that arose after March 27, 2013, the Opinion does not mention that Ordinance 87-04 governed between November 16, 1987 and March 27, 2013— which includes the time period when Becker worked for the Tribe and the

Independent Contractor Agreement was executed. (ECF No. 70-2, Case No. 2:16-cv-00958.)

Thus, the Tribal Court failed to analyze that Ordinance 87-04 and the Ute Law and Order Code at the relevant time did not provide broad civil jurisdiction over non-Indians, and, in fact, expressly precluded the Tribal Court from exercising jurisdiction over claims “against the Ute Indian Tribe [and] the Tribal Business Committee,” both of which are parties to the Tribal Court action. (App’x 52, ECF No. 55-1.) Had the Tribal Court’s February 28 Opinion acknowledged that Ordinance 87-04 was the relevant Ordinance in effect at the time the Independent Contractor Agreement was negotiated, the Tribal Court would have been required to analyze whether Becker was an employee or an independent contractor in deciding whether it had jurisdiction over him.²⁹ The February 28 Opinion

²⁹ The February 28 Opinion merely states that Becker “was a tribal employee or independent contractor,” without deciding which he was. (*Id.* at 4, ECF No. 108-1.) This is critical because under Ordinance 87-04, the Tribal Court only had subject matter jurisdiction over employees, not independent contractors. Title I, Chapter 2, § 1-2-3(4), Ute Indian Law and Order Code, Amended and Restated, Ordinance 87-04 states:

The Courts of the Ute Indian Tribe *shall not have jurisdiction to hear claims against the Ute Indian Tribe of the Uintah and Ouray Reservation, the Ute Tribal Business Committee of the Uintah and Ouray Reservation, or any Tribal officers or employees in their official capacities, except that the Ute Indian Tribal Court shall have jurisdiction to hear actions brought by the Ute Indian Tribe against the bonds of officers or*

also fails to address that Ordinance 13-010—even if it were the relevant Ordinance—retains Ordinance 87-04’s § 1-2-3(4) of the Ute Indian Law and Order Code, thus resulting in the oddity that under Ordinance 13-010 the Tribal Court can have jurisdiction over claims against non-Indians but prohibits non-Indians from raising their claims against the Tribe or the Business Committee.³⁰ (*Id.*)

employees *and actions against officers or employees for* restitution of Tribal money, property, or services wrongfully converted to their personal benefit.

(ECF No. 70-2, 2:16-cv-00958) (emphases added.) Equally important to an analysis of the parties’ intent when contracting about jurisdiction over Becker is an analysis of the parties’ intent when contracting about jurisdiction over the Tribe. As shown in the section just quoted, Ordinance 87-04 precluded jurisdiction over claims against the Tribe itself, including the Business Committee. Previous language that had authorized civil actions against the Tribe itself was stricken by § 1-2-3(5) of Ordinance 87-04, which as amended stated:

[T]he Courts of the Ute Indian Tribe *shall not assume jurisdiction over any civil or criminal matter which does not involve a member of the Tribe, or a member of a federally recognized Tribe*, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of Tribal members may be directly or indirectly affected.

(ECF No. 70-2, 2:16-cv-00958) (emphasis added.)

³⁰ The jurisdictional restriction on the Tribal Court in Ordinance 87-04 and its successor, Ordinance 13-010, against resolving claims against the Tribe or its Business Committee raises an additional question. Can any Ute Tribal Court exhaust the question of whether the Tribe has validly waived its sovereign immunity and decide that against the Tribe’s

See Kremer v. Chem. Const. Corp., 456 U.S. 461, 480 (1982) (holding that a party who does not have a full and fair opportunity to litigate a claim or issue is not subject to claim preclusion on such issues). By its unreasoned and incorrect one sentence conclusion that the Tribal Court “clearly has jurisdiction” over Becker under Title I, Chapter 2, §§ 1-2-1 to 1-2-4 of the Ute Indian Law and Order Code, the February 28 Opinion entirely ignores disputed facts about the parties’ expectations about jurisdiction over the Independent Contractor Agreement at the time it was executed and fails to consider those facts in the light most favorable to Becker.

Additionally, the exhaustion doctrine that provides a tribal court the first opportunity to examine its own jurisdiction does not apply “where

interest? It appears not, because the Tribal Court has no jurisdiction to do so. The tribal parties suggest that in this circumstance provisions in the Tribe’s Constitution or By-Laws allow the Tribal Business Committee to decide—or delegate the decision to an entity other than the Business Committee—which, even if true would not provide an adequate solution to this problem. These due process concerns support this court’s conclusion that it should not give preclusive effect to the February 28 Opinion. In light of this conclusion, it would be futile in the companion case for this court to defer to the Tribal Court to exhaust the issue of its own jurisdiction. Additionally, because Becker’s claims against the tribal parties are expressly precluded by § 1-2-3(4) of Ordinance 87- 04 and § 1-2-3(5) of Ordinance 13-010, the Tribal Court also had no jurisdiction to determine that Becker is not entitled to the 2% of net revenue distributed to Ute Energy Holding from Ute Energy that he is seeking in the state, federal, and Tribal Court actions. (February 28 Opinion 11, ECF No. 108-1.)

exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction" or "where the action is patently violative of express jurisdictional prohibitions." *Burrell*, 456 F.3d at 1168 (quoting *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. at 857 n.21). Additional exceptions to exhaustion apply "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in *Montana v. United States*]," *id.* (quoting *Strate v. A-1 Contrs.*, 520 U.S. 438, 459 n. 14 (1997)), or when "it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement 'would serve no purpose other than delay.'" *Id.* (quoting *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)). As will be described, *infra*, the court finds that these exceptions apply to the Tribal Court's February 28 Opinion. Significantly, this court found in its Preliminary Injunction order in Becker's companion case that "express jurisdictional prohibitions" against the exhaustion rule applied. (ECF No. 50, Case No. 2:16-cv-958.) Yet the Tribal Court's February 28 Opinion purports to have relied on this court for the proposition that the exceptions in *Montana v. U.S.*, 450 U.S. 544, 565–66 (1981), grant the Tribal Court jurisdiction over non-Indians who enter consensual relationships with the Tribe. (February 28 Opinion 3–4, ECF No. 108-1.) This is erroneous for two reasons.

First, *Montana* does not create tribal court jurisdiction over nonmembers. It establishes "a presumption against tribal court civil jurisdiction

over non-Indians” that can only be overcome if a tribe can meet the burden to show that an exception applies. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1150 (10th Cir. 2011) (emphasis added). Second, this court’s Preliminary Injunction did not hold that Tribal Court jurisdiction over Becker was established because of the existence of a consensual agreement. Rather, it held that because the tribal parties’ contractual waiver of sovereign immunity in the Becker Independent Contractor Agreement overlaps with the question of “express jurisdictional prohibitions,” exhaustion in Tribal Court was not required. (ECF No. 50, Case No. 2:16-cv-958.) What the February 28 Opinion fails to analyze is that if a consensual relationship is rooted in a contract, and the terms of that contract expressly waive sovereign immunity for legal proceedings on the contract; explicitly waive any requirement that legal proceedings be brought in Tribal Court or that tribal remedies be exhausted; expressly provide that Utah law governs the contract and any disputes; and state that all contract disputes “shall” be resolved in the United States District Court for the District of Utah or any court of competent jurisdiction, that contract cannot represent a “consensual relationship” that equates to consent to Tribal Court jurisdiction. The tribal parties argue that a contractual agreement is not a prerequisite to a consensual relationship and that Becker’s consensual relationship began through an employment relationship before the parties entered into the contract. (App’x 403–04, ECF No. 122-8, Case No. 2:16-cv-958.) While true, this fails to address the complexity created by the terms of the

contract that renounced Becker's status as an employee and made the agreement retroactively effective on March 1, 2004, when his relationship with the Tribe began. (Preamble and Art. 6-E, App'x 91-95, ECF No. 55-1.)³¹

Accordingly, the court DENIES the tribal parties' motion to give preclusive effect to the Tribal Court's February 28 Opinion and to advance this court's consideration of the questions of both preliminary and permanent injunctive relief enjoining the state court from proceeding in the tribal parties' summary judgment motions before this court. (ECF No. 110.) The court will, however, consider the Tribal Court's February 28 Opinion in its analysis below. *See MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1066 (10th Cir. 2007) ("The decision whether to enforce

³¹ The court also notes that the February 28 Opinion held, without analysis, that the second *Montana* exception gave the Tribal Court jurisdiction. (February 28 Opinion 3, ECF No. 108-1.) That narrow exception rebuts the presumption against jurisdiction over a non-Indian if such non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 511. *See also Crowe & Dunlevy*, 640 F.3d at 1153. "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community," *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Montana*, 450 U.S. 544), such that assertion of Tribal Court jurisdiction under this exception is necessary to "avert catastrophic consequences." *Id.* at 341. Not only did the Tribe not argue this exception applies, (*see* App'x 403, ECF No. 122-8), the Tribal Court identified no facts that would support this conclusion.

non-final orders of a tribal court is left primarily to [the court's] discretion under the doctrine of comity.”). Additionally, to make the record clear, the tribal parties’ motion to clarify this court’s ruling on the Tribal Court’s consideration of its own jurisdiction, (see ECF No. 88), does not relate to this action in the same way it relates to Becker’s federal companion case seeking to enjoin tribal court proceedings. (Case No. 2:16-cv-958). This court clarifies that its February 16, 2018 Order in that case, (ECF No. 107, Case No. 2:16-cv-958), does not separately apply to this case, and the motion in this action is DENIED as MOOT. (ECF No. 88.)

C. Becker’s Independent Contractor Agreement Is Valid.

The court now considers the tribal parties’ likelihood of success on the invalidity of Becker’s Independent Contractor Agreement under tribal and federal law, including the Tribal Court’s conclusions. The court begins with whether Becker’s Independent Contractor Agreement involves trust property because that issue drives the contract’s validity under both federal and tribal law.

The tribal parties’ preliminary injunction motion did not cite the court to any specific facts that demonstrate that Becker’s agreement alienates Indian assets held in trust by the United States. (ECF No. 54.) They cite the court to numerous cases for the principle that failure to secure federal approval for alienation of Indian trust property renders that alienation invalid, (*id.*), but that puts the cart before the horse. The motion does, however,

incorporate by reference the factual assertions in the tribal parties' partial motions for summary judgment, which the court also reviewed.³² (*See* ECF Nos. 52, 53.) The tribal parties assert the following potentially relevant facts about the nature of the property alleged to be alienated by the contract:

1. "The Ute Tribe . . . oversees approximately 1.3 million acres of trust lands, some of which contain significant oil and gas deposits." (Pl.'s Expedited Mot. 11, ECF No. 52.)

2. "Becker's job duties were to manage and develop the Tribe's energy and mineral resources, and the Tribe's Energy and Minerals Department, both of which are located inside the exterior boundaries of the Tribe's U&O Reservation. The IC Agreement states that Becker's services to the Tribe were to include the 'restructuring and development of the Tribal Energy and Minerals Department as set forth in Tribal Ordinance 03.003,' which was attached to the Becker IC Agreement as Exhibit C." (*Id.* at 15.)

³² There, of course, the tribal parties characterized the facts as "undisputed," but the court does not consider them as such on a motion for preliminary injunction, particularly when the unusual urgency and concurrent litigation in two federal cases, a state case, and a tribal court case—and their related appeals—make it appropriate for the court to first decide this preliminary injunction motion and then, after appeal, set a status conference to consider a briefing schedule for the remaining pending motions to give Mr. Becker an opportunity to respond.

3. “The Becker IC Agreement was never authorized or approved by the Secretary of the Interior, or the Secretary’s duly-authorized designee. Indeed, in the parallel state-court litigation between the parties, Mr. Becker has admitted that his IC Agreement ‘was never approved by the U.S. Congress or the Secretary or Department of Interior.’” (*Id.* at 16.)

4. “The Independent Contractor Agreement (“IC Agreement”) that was later signed by Becker and the Tribe contains a provision captioned ‘Participation Plan,’ that states in relevant part:

Contractor [Becker] shall receive a beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC . . . (‘Contractor’s Interest’).

* * * *

In the future, a) if the Tribe participates in any projects involving the development, exploration and/or exploitation of minerals in which the Tribe has any participating interest and/or earning rights ... and Contractor [Becker] is providing services under this agreement, and b) the Tribe elects not to place such interests in Ute Energy Holding, LLC, then Contractor [Becker] shall receive a two percent (2%) beneficial net revenue interest in such assets

* * * *

If, at any time, Contractor [Becker] wishes to sell the Contractor Rights, Contractor [Becker] agrees to notify the Tribe of his intention. The Tribe shall have 60 days to exercise this preferential right to purchase with a bona fide, market value offer to purchase on the same terms and conditions that any legitimate offer would entail.”

(Pl.’s Second Exped. Mot. 13, ECF No. 53.)

5. “Since October 1, 2008, Ute Energy Holdings LLC has been wholly owned by the Ute Tribe.” (*Id.* at 14.)

6. “The Ute Tribe was a member of Ute Energy LLC through its membership in Ute Energy Holdings LLC.” (*Id.*)

7. “During the early 2000s, the Tribe was a party to several ‘Exploration and Development’ Agreements (‘EDAs’) with various oil and gas companies. The Tribe had a dual legal status under the EDAs; not only was the Tribe the lessor of its oil/gas minerals but, in addition, the Tribe had the option to participate (with the oil/gas company ‘partners’) as a working interest owner in the drilling and production of oil and gas from wells drilled on tribal lands under the EDAs.” (*Id.* at 15.)

8. “Under Assignments dated May 4, 2005 and May 10, 2007, the Tribe assigned multiple real property and mineral interests, first to Ute Energy Holdings LLC, and then to Ute Energy LLC:

- The Tribe's 33 percent (33%) membership interest in Ute/FNR, LLC (The Operating Agreement for Ute/FNR LLC recites that the LLC's purpose was, *inter alia*, to 'jointly own, explore, develop, produce . . . [and] market Mineral production' *inter alia*, an oil/gas 'Exploration and Development Agreement, as amended and superseded, between the Tribe and other parties.');
- The Lake Canyon Exploration and Development Agreement ('EDA') between the Tribe, Bill Barrett, and Berry Petroleum;
- The Wolf Flat EDA between the Tribe and Questar Exploration;
- The Monument Butte EDA between the Tribe and Newfield;
- The Little Canyon EDA between the Tribe and Bill Barrett;
- The Tribe's right to develop minerals through the land exchange with SITLA (State of Utah School & Institutional Trust Lands Administration);
- The Dominion Little Canyon EDA between the Tribe and Dominion Exploration;
- The Tribe's thirty-three percent interest in Ute/FRN, LLC's interest in the Uintah Basin Field Services, LLC (construction

and ownership in pipeline, gas gathering systems and natural gas compressor station); and

- The Tribe’s fifty percent (50%) interest in the Three Rivers Gathers Pipeline, LLC.”

(*Id.* at 15–16.)

9. “Both Ute Energy Holdings LLC and Ute Energy LLC were capitalized with the Tribe’s interests in the EDAs and with other property assets that the United States holds in trust for the Tribe.” (*Id.* at 15.)

10. “Mr. Becker’s last day of employment for the Ute Tribe was October 31, 2007.” (*Id.* at 17.)

11. “During Ute Energy LLC’s seven years of existence—from May 5, 2005 through November 29, 2012—there was only one year in which Ute Energy LLC distributed revenues to Ute Energy Holdings LLC, and that year was 2010, when Ute Energy LLC distributed \$500,000.00 to Ute Energy Holdings LLC.” (*Id.* at 18.)

12. “On November 29, 2012, Ute Energy LLC closed the sale of its two operating subsidiaries, Ute Energy Upstream³³ and Ute Energy Midstream. The

³³ Incidentally, the court notes that in a pending civil action before this court, *Newfield Prod. Co. v. Crescent Point Energy U.S. Corp.*, 2:17-cv-1064-CW, it is alleged that Newfield entered into an EDA regarding mineral leases with parties including Ute Energy, LLC in 2008, which Ute Energy subsequently assigned to Ute Energy Upstream Holdings, LLC in 2010. (Compl. ¶¶ 1, 18, ECF No. 2, Case No. 2:17-cv-1064.)

In 2012, Crescent Point acquired Ute Energy Upstream and merged it into Crescent Point at which time Crescent Point began receiving the working interest payments under the EDA. (*Id.* at ¶¶ 1, 19–20.) Newfield now alleges that Crescent Point has breached its terms and obligations under the EDA by refusing to allow its acquisition of 65% of the fee mineral leases it is entitled to under the agreement. (*Id.* at ¶ 22.) These allegations do not give the court confidence in the tribal parties’ assertions that the oil and gas ventures begun in the transactions at issue in this action were a failure. (*See generally* ECF No. 53, Case No. 2:16-cv-579.) Additionally, Crescent Point’s answer and counterclaim do not deny the allegation that the Ute Indian Tribe and the Ute Distribution Corporation do not need to be parties to the suit, even though the original parties to the EDA included them as well as Newfield and Ute Energy. (Compl. ¶ 16, ECF No. 2; Answ. ¶ 16, ECF No. 22, Case No. 2:17-cv-1064.) Based on these assertions, the court understands that the Tribe entered into the EDA (after receiving approval from the Secretary of the Interior) and then assigned it to Ute Energy. In preparation for the liquidation of Ute Energy (under the Amended and Restated Operating Agreement at issue here, though irrelevant to this case), the EDA was assigned to Ute Energy Upstream Holdings, LLC in 2010 in exchange for value. During Upstream’s merger with Crescent Point in 2012, Crescent Point became the successor-in-interest of the EDA and began receiving the working interest payments under the EDA. If this complicated set of transactions involving payments on the EDA’s working interest does not raise questions of Indian trust property requiring participation of the Ute Indian Tribe in the lawsuit, it is difficult to believe that the tribal parties in this action did not fully understand that Becker’s 2% “net revenue” interest compensation implicated anything other than similar profits from their working interest in the underlying EDAs and not trust property.

sale of the two subsidiaries was a liquidating event under the terms of the Ute Energy LLC Operating Agreement.” (*Id.* at 17–18.)

13. “Following the liquidation of Ute Energy LLC on November 29, 2012, Ute Energy LLC distributed back to the Ute Tribe (through Ute Energy Holdings LLC) the Tribe’s capital contributions to Ute Energy LLC and the appreciation of that capital.” (*Id.* at 18.)

The tribal parties also incorporate 702 pages of appendices, which include state, federal, and tribal orders; treaties; statutes; constitutions and corporate charters; resolutions and ordinances; congressional reports; discovery excerpts; declarations and affidavits; excerpts from the various Operating Agreements and EDAs; assignments; case law; expert witness resumes and reports; excerpts from treatises; and transcripts of court proceedings. A review of many of these materials reveals that some of the thirteen “facts” listed above are not entirely consistent factual representations of the materials themselves, either because they tell an incomplete story or because they assume conclusions not expressed in the materials.

At the evidentiary hearing on the motion for preliminary injunction, the parties also referred the court to supporting facts and exhibits in the companion case, *Becker v. Ute Indian Tribe*, Case No. 2:16-cv-958. Some of those materials are duplicates of the ones presented here, and others, although directly related to the facts at issue here, can only be found there. One of those exhibits is the

record of the Tribal Court action, which itself is over 3,600 pages long. Some of that material is extremely illuminating on these facts, such as the parties' oral arguments in Tribal Court on February 16, 2018.

The court makes three observations about the materials provided for consideration of the tribal parties' motion for preliminary injunction. First, the court has considered expert reports or affidavits by counsel as legal argument, not as facts. This is also true for the expert witnesses who testified for the tribal parties at this court's hearing on the preliminary injunction. Second, it has been difficult for the court to rule, on an expedited basis, on a motion supported by over 5,000 pages of generally dense materials without a frank and straightforward explanation of how the materials support the requested relief.³⁴ The court has had to scour the dockets of the three other cases for explanations that counsel for the tribal parties, in particular, did not offer here— even when expressly asked to do so at oral argument and despite it being their burden to do so on a motion for preliminary injunction. Finally, key pages in dispositive documents happen to be missing from the tribal

³⁴ Between the issuance of the court's tentative ruling and publication of this opinion, the tribal parties moved to supplement the record with 700-plus additional pages of materials from the tribal court action. The tribal parties made no effort to explain their relevance, and the court notes that most of the documents are already in the record and none of them affect this court's conclusions.

parties' appendix. Such omissions are noted where relevant.

1. ***The Proceeds to be Distributed to Becker Are Not Trust Property Under Federal Law.***

As recited in section 1.A.2, supra, Congress has not authorized states to adjudicate “the ownership or right to possession of [any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States] or any interest therein.” 28 U.S.C. §1360(b); 25 U.S.C. 1322(b). Additionally, the Indian Non-Intercourse Act of 1790 prohibits any conveyance or claim against Indian lands without the express consent of Congress. 25 U.S.C. § 177. A contract purporting to “convey any land or any interest therein held by the United States in trust for such Indian” is unlawful unless the conveyance was authorized by law. 25 U.S.C. § 202; *see also* 25 U.S.C. § 396 (hereinafter The Indian Mineral Leasing Act of 1938) (providing that leases of Indian property held in trust by the United States may be leased for mining purposes upon approval by the Secretary of the Interior).

The purpose of The Indian Mineral Leasing Act of 1938 was to “bring all mineral-leasing matters in harmony with The Indian Reorganization Act” as a means of giving “the Indians [a] ‘voice’ in the granting of leases [and] give Indians the greatest return from their property.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188–89 (1989). The

1938 Act “is both comprehensive and pervasive” and regulates “all stages of the process of oil and gas leasing and production on Indian reservations.” *Id.* at 205. The Department of the Interior supervises the auction and bidding process; secures lessee bonds to ensure compliance with lease terms; regulates the actual operations of the lessees; and sets acreage limitations, lease terms, royalty rates, methods, and times of payment, all to ensure that the leases are “in the best interest of the Indian lessor.” *Id.* Additionally, the Indian Mineral Development Act of 1982 (25 U.S.C. §§ 2101–2108) authorizes any Indian tribe to enter into “Minerals Agreements” to explore, extract, process, or develop mineral resources on lands held in trust for Indians by the United States, including selling or otherwise disposing of the “production or products of such mineral resources.” 25 U.S.C. § 2102(a). Such agreements require approval of the Secretary of the Interior and are subject to “any limitation or provision” contained in a tribe’s constitution or charter.³⁵ *Id.*

Tribes may enact their own regulations to supplement federal guidelines. *Cotton Petroleum,*

³⁵ The Act’s regulations can be found at 25 C.F.R. § 225.1 *et seq.* Section 225.1(a) states the regulations apply “to the lands or interests in lands or any Indian tribe, individual Indian or Alaska native the title to which is *held in trust by the United States or is subject to a restriction against alienation imposed by the United States.*” (Emphasis added.) A plain reading of the regulation shows the regulations only apply to trust lands or lands restricted from alienation.

490 U.S. at 205. The Ute Indian Tribe of the Uintah and Ouray Reservation has enacted such regulations, the relevant one here being Ordinance 03.003, which was enacted on October 27, 2003 and is appended as Attachment C to Becker's Independent Contractor Agreement. (App'x 104, ECF No. 55-1.) Ordinance 03.003 "restructures and reorganizes the Energy and Minerals Department" of the Tribe for the following purposes: enhancing collection of royalties, severance taxes, and other payments; improving management and tracking of tribal energy resources; improving forecasting of mineral revenues; providing ongoing monitoring of regulatory matters; and improving coordination with other government agencies. (*Id.*) To accomplish these purposes, the Department is divided into three divisions: Royalty, Severance Tax, and Land. (*Id.* at 105.) Becker was hired as the Land Division Manager of the Energy and Minerals Department. (*Id.* at 91.)

Under Ordinance 03.003, the Land Division had the responsibility to maintain and administer all agreements covering the Tribe's energy, surface, and mineral resources. (*Id.* at 106.) This includes responsibility for collection of all payments, fees, or penalties on its surface and mineral resources imposed by the Tribe or the United States on behalf of the Tribe that are not assigned to the Royalty and Severance Tax Division. (*Id.*) It also includes administering and maintaining business licenses and access permits and supervising all energy or mineral-related field operations. It also maintains the Tribe's ownership database management system

and geographic information systems. (*Id.*) As Manager, Becker was “charged with the overall management of the Land Division.” (*Id.* at 107.) His specific duties included preparing reports, projections, and planning documents; preparing and implementing budgets; personnel decisions; and all other functions assigned by the Business Committee. (*Id.*) Becker’s Independent Contractor Agreement also had a Services attachment, wherein Becker and the Tribe expected to set additional goals and timelines during his initial 24-month contract that are not specifically identified. (*Id.* at 101.)

Exhibit B—Participation Plan set forth part of the compensation in Becker’s Independent Contractor Agreement for service as the Tribe’s Land Division Manager. (*Id.* at 103.) Assuming that Becker did not resign without cause and that the Tribe did not terminate Becker for cause within 30 months from March 1, 2004, the parties agreed that the Exhibit B—Participation Plan provisions would otherwise survive the termination of the contract. (*Id.* at 93–94, 103.)

a. *Provision 1 of the Participation Plan Does Not Involve Trust Interests.*

The first paragraph of the Participation Plan provides that “[i]n recognition of Contractor’s services, Contractor shall receive a beneficial interest of two percent (2%) of net revenues distributed to Ute Energy Holding, LLC from Ute Energy, LLC (and net of any administrative costs of Ute Energy Holdings) (‘Contractor’s Interest’).”

(App'x 103, ECF No. 55-1.) The court can find no dispute that the revenues referred to here were money. To determine whether this anticipated 2% monetary distribution consisted of trust property, the court examines both the law and the facts.

The tribal parties rely heavily on *U.S. v. Noble*, 237 U.S. 74 (1915). In *Noble*, beginning in 1902 a Quapaw Indian, Charles Blackhawk, entered into a 10-year mining lease and assignment of the rents and royalties due thereunder without approval from the Secretary of the Interior, as permitted by 29 Stat. at L. 321, 331, for leases of that length. *Id.* at 75–76. Blackhawk, 67 years old, was “unable to read or write, or understand intelligently the English language, an ignorant and uneducated child of nature, old and infirm, and wholly incapacitated for the transaction of business.” *Id.* at 78 (internal quotations omitted). This first lease and assignment of royalties was valid. *Id.* at 79. Over the next four years, Mr. Blackhawk entered additional leases and assignments, based in part on the first valid assignment, which had an overlapping effect that extended its term beyond ten years. *Id.* at 82. The later assignments included royalties, but also, in the 1906 lease, a percentage of “the whole product on said lands.” *Id.* at 81. The assignees argued that the assignment was of “sums of moneys,” not interests subject to non-alienation. *Id.* at 80–81. Specifically, the agreed-upon percentage of “the whole product on said lands” was stated as a percentage of “the market value of the minerals.” *Id.* Without approval from the Secretary of the Interior, this “lease for ten years . . . subject to an existing lease for ten years, of

the same property” that extended the original lease beyond ten years authorized for mining leases by statute “was unauthorized and void.” *Id.* at 84.

The tribal parties argue that the money representing Becker’s “beneficial interest of two percent (2%) of net revenue distributed to Ute Energy Holding, LLC from Ute Energy, LLC” is trust property as was Mr. Blackhawk’s percentage of “the whole product on said lands.” (Pl.’s Second Exped. Mot. 41, ECF No. 53.) Thus, they argue, because it is undisputed that Becker’s Independent Contractor Agreement was not approved by the Secretary of the Interior, the agreement is “absolutely null and void.” *See Bunch v. Cole*, 263 U.S. 250, 253 (1923) (finding that agreements that require and do not receive approval by the Secretary of the Interior are null and void). Whether Becker’s 2% net revenue interest is trust property, as in *Noble*, depends on how Ute Energy generated revenue and then calculated net revenue for distribution to Ute Energy Holding.³⁶ These issues

³⁶ At the April 13 hearing on the tentative ruling, the tribal parties argued that the court misconstrued their argument about the monetary revenue anticipated by Becker’s Independent Contractor Agreement. (Apr. 13 Hrg. Tr. 21, ECF No. 132) (“We are not arguing that the money representing Becker’s beneficial interest of two percent is trust property.”) Instead, they argued that because Becker’s April 27, 2005 contract anticipated payment of “future” profits from Ute Energy, which was not established until several days later on May 5, 2005, *Noble*’s prohibition on money payments for future profits “issuing out of the land” applies to Becker’s contract. (Pl.’s Second Exped. Mot. 42-43, ECF No. 53.) The court finds

are governed by Ute Energy's Operating Agreement.³⁷ Whether Ute Energy's revenue generation and *distribution to Ute Energy Holdings*—and subsequently to Becker per the Independent Contractor Agreement—nullifies the Agreement, as was the case in *Bunch*, also depends on whether the Secretary of the Interior was required to but failed to approve the Operating Agreement.³⁸

Original Operating Agreement. The court has identified no dispute that the May 4, 2005 Operating Agreement of Ute Energy, LLC, was approved by the

this argument unpersuasive. *Noble's* prohibition on money payments for future profits relied on the fact that restricted property was at issue in *Noble*. Even if Ute Energy was not established until several days after the Becker contract was signed, Becker's contract limited his receipt of revenue only to the non-trust profits of Ute Energy. Thus, he was only entitled to revenue from non-trust profits generated if and when Ute Energy was established.

³⁷ Davis Graham & Stubbs, representing the Tribe, drafted each of the three Operating Agreements, Becker's Independent Contractor Agreement, and all other documents required to effectuate this complex transaction to develop the Tribe's oil and gas resources as contemplated by the Ute Tribal Business Committee. (Feb. 28 Hrg. Tr. 37, ECF No. 111.) This is an experienced law firm that specializes in Indian law and oil and gas law. (*Id.*) It is reasonable to assume the Tribe and its Business Committee were fully advised on the consequences of entering into these agreements.

³⁸ It does not depend, as the tribal parties argue, on whether Becker's Independent Contractor Agreement itself was approved by the Secretary of the Interior.

Superintendent of the Bureau of Indian Affairs. The members of Ute Energy included Ute Energy Holdings, LLC, whose initial percentage interest in Ute Energy was 81%.³⁹ (Op. Agr. 53, ECF No. 79-1, Case No. 2:16-cv- 958.) Ute Energy Holdings contributed a “90% undivided interest in the Assigned Rights described in Schedule 1 to the Master Agreement.” (Id. at 54.) The tribal parties failed to include the Master Agreement and its schedules in the record, but the Operating Agreement stated that by unanimous written consent of its managers, Ute Energy Holdings would transfer to Ute Energy “certain rights and interests relating to their ownership interests in Ute/FNR LLC and the associated development rights in the Naval Oil Shale Reserve No. 2 and Brundage Canyon, as well as their direct working interests in the Lake Canyon Exploration and Development Agreement and the anticipated Wolf Flat project (collectively, the ‘Working Interests’).” (Id. at 61.) The “Fair Market Value” of these initial contributions was stated by dollar amount. (Id. at 54.) Tribal Resolution No. 05-116, dated March 3, 2005, authorized the Tribe to transfer its “ownership interest in Ute/FNR LLC and the related development rights in the Naval Oil Shale Reserve No. 2 and Brundage Canyon” and its “working interests in the Lake Canyon Exploration and Development and the anticipated Wolf Flat project” to Ute Energy Holdings, which then transferred its

³⁹ The remaining membership interests were held by non-Indian investors.

membership interest in the agreements as a capital contribution to Ute Energy. (App'x 107, ECF No. 55-2.) Resolution 05-116 expressly stated that “the Tribe is currently the party to the *agreements being assigned* to Ute Energy Holdings and Ute Energy.” (*Id.* (emphasis added).) In other words, the agreements—not the mineral rights themselves—were transferred to capitalize Ute Energy.

Tribal Resolution No. 07-124, dated May 2, 2007, authorized the Tribe to “contribute the Tribe’s commercial interests in the SITLA LOI and AMI Agreement to Ute Energy,” specifically stating that “the interests to be contributed . . . will consist solely of commercial rights under the respective agreements, and will exclude any governmental rights to regulate the conduct of activities on Reservation lands as well as the rights of the Tribe as a landowner and lessor (collectively, the ‘Governmental Rights’).” (*Id.* at 111.) Resolution 07-124 further stated that approval for assigning the Tribe’s commercial interests “shall affect only the Tribe’s commercial interests, and shall exclude any of the Tribe’s Governmental Rights in the affected lands.” (*Id.*)

Finally, Tribal Resolution No. 07-183, dated June 26, 2007, authorized the Tribe to “assign to Ute Energy its commercial interests” in the Little Canyon EDA, the Monument Butte EDA, the Section 36 Agreement, the Black Tail Ridge EDA, the CDX Farmount Agreement, the Gas Plant Agreement, and the Three Rivers Gathering LLC. (*Id.* at 114–15.) The purpose for transferring these

“Newly Contributed Interests” was in part to raise capital to pay off and fully discharge operating funds that Ute Energy had initially borrowed from Laminar, a 10% non- Indian owner of Ute Energy, under a Credit Agreement between the members of Ute Energy, without increasing the Tribe’s “financial risk and exposure by contributing cash to Ute Energy.” (*Id.* at 114–15.) The transfer of the Tribe’s commercial interests in these agreements would result in cash investments by new non-Indian investors Quantum Energy Partners IV, LP and Quantum Resources, LP, in exchange for the investors’ opportunity to “share in potential profits of the [Ute Energy] company.” (*Id.* at 115–16.) This new arrangement to secure investment funds to enable Ute Energy to “exercise its participation rights under exploration and development agreement[s]” required an amendment to Ute Energy’s Operating Agreement. (*Id.*)

Amended and Restated Operating Agreement.

As the means to raise capital, the plan between Ute Energy and its new non-Indian investors was to issue and sell units of the company at an initial public offering (IPO). (Am. Op. Agr. 1, ECF No. 79-2, Case No. 2:16-cv-958.) The July 7, 2007 Amended and Restated Operating Agreement anticipated a limited term of operation and eventual liquidation of Ute Energy, LLC. (*Id.* at 7, 16, 46.) The investors were provided with “all resolutions of the Tribe, the Board of Managers of the Company and the Existing Members” approving the Amended and Restated Operating Agreement and the transactions contemplated by it. (*Id.* at 88.) The Tribe provided

satisfactory evidence to the non-Indian investors that it “ha[d] conveyed to the Company [Ute Energy, LLC] all right, title and interest in and to those assets set forth in Schedule 202.(m),” which is not included in the materials provided to the court, “and that such conveyances have received all requisite approvals by the [Bureau of Indian Affairs].” (*Id.* at 89.) In fact, the Amended Operating Agreement contained an entire section of significant representations and express warranties by the company. (*Id.* at 92.)

“An express warranty is a contract collateral to a contract of sale, although incident to and based thereon. Being collateral to the principal contract, it does not with that contract terminate upon delivery or acceptance of the subject-matter of the sale by the purchaser.” *M. H. Walker Realty Co. v. Am. Sur. Co.*, 211 P. 998, 1014 (Utah 1922) (internal quotations omitted). Ute Energy warrantied that it “has full power and authority (and has all rights and approvals from the Ute Tribe) that are necessary to hold and own its properties . . . to perform this Agreement . . . and to issue, sell and deliver the Units.” (Am. Op. Agr. 93, ECF No. 79-2, Case No. 2:16-cv-958.) It warrantied the same regarding the Tribe’s interests in the non-EDA assets of Ute Energy, including Uintah Basin Field Services, LLC; Ute/FNR, LLC; and Three Rivers Gathering, LLC. (*Id.*) It warrantied that no “consent, approval, notification, waiver or other similar action from any third party” was required for the issuance, sale, and delivery of the “Units” and will not violate “any law, rule, regulation . . . of any Governmental Entity.”

(*Id.* at 94.) It warranted that “no registration or filing with, or consent or approval of or other action by, any Governmental Entity or any third party, *including any approval by the U.S. Department of Interior pursuant to the IMDA or otherwise*, is or will be necessary for the Company’s valid execution, delivery and performance.” (*Id.* at 94) (emphasis added.)

Significantly, with respect to the “Oil and Gas Properties,” which were defined only for tax purposes by reference to § 614 of the Internal Revenue Code, (Op. Agr. 15, ECF No. 79-1, Case No. 2:16-cv-958), the Amended and Restated Operating Agreement warranted the following:

The quantum and nature of the Company’s interest in and to the Oil and Gas Properties as set forth in the Reserve Report includes the entire interest of the Company in such Oil and Gas Properties as of the date of the Reserve Report and are complete and accurate in all material respects as of [that] date. The ownership of the Oil and Gas Properties by the Company **entitles the Company to the share of the Hydrocarbons produced therefrom or attributable thereto set forth as the Company’s “net revenue interest”** in the Reserve Report and does not in any material respect obligate the Company to bear the costs and expenses relating to the maintenance, development or operations of any such Oil and Gas property in an amount in excess of the **“working interest” of the**

Company in each Oil and Gas Property
set forth in the Reserve Report.⁴⁰

(Am. Op. Agr. 98–99, ECF No. 79-2, Case No. 2:16-cv-958 (bold added).) This warranty continues:

The Hydrocarbon Interests and operating agreements attributable to the Oil and Gas Properties of the Company . . . are in full force and effect in all material respects in accordance with their terms. **All rents, royalties and other payments due and payable under such Hydrocarbon Interests and operating agreements have been properly and timely paid.**

(*Id.* at 99 (bold added).) These terms of the Amended and Restated Operating Agreement show that Ute Energy was required to pay the Tribe separately and appropriately for its role as a lessor and landowner of the trust property and/or the Tribe’s mineral interests held in trust by the United States, as provided by each EDA and LLC agreement constituting Ute Energy Holding’s membership interest in Ute Energy. According to these provisions, “net revenue interest” distributed from Ute Energy to Ute Energy Holdings necessarily excluded those costs, and thus represented solely the

⁴⁰ The Reserve Report, which Section 4.13 of the Amended and Restated Operating Agreement discusses, represents estimated proved mineral reserves, except for changes as a result of production in the ordinary course of business or change in price. (Am. Op. Agr. 100, ECF No. 79-2, Case No. 2:16-cv-958.)

Tribe's profit from its "working interests," which are not trust property.⁴¹

⁴¹ The tribal parties admitted at oral argument in Tribal Court on February 16, 2018, that Ute Energy "distinguished between the governmental revenues and then maybe the business rev. So in other words, the tribe, as the landowner, got its royalties and severance packs. *And those were not put into Ute Energy, LLC.*" (App'x 47, ECF No. 122-8, Case No. 2:16-cv-958 (emphasis added).) The tribal parties also admitted that Mr. Becker's agreement specifically excluded payments attributable to restricted trust property:

THE COURT: And Mr. Becker's agreement specifically excluded those kinds of payments?

MS. BASSETT: Yes.

(*Id.*) These admissions made in oral argument to the Tribal Court, while perhaps made in an attempt by counsel to simplify, expose that the oral argument and briefs in this court did not accurately represent the complexity of the transactions and the character of the proceeds at issue. When faced with this issue at the April 13, 2018 hearing on the tentative ruling, the tribal parties argued that they had previously disclosed to this court that Ute Energy was capitalized with only the working interest portion of the Energy and Development Agreements, (*See* Feb. 28 Hrg. Tr. 33-34, 54; ECF No. 111). They then argued that even if Ute Energy was not capitalized by trust assets, the net revenue distributed from Ute Energy to Ute Energy Holdings, of which Becker was to receive 2%, should be defined under standard oil and gas principles. In their view, net revenue must then necessarily be derived from production of the Tribe's mineral resources, which requires the Independent Contractor Agreement to receive separate approval from the Secretary of the Interior under the Indian Mineral Development Act at 25 U.S.C. § 2102 or the Indian Non-Intercourse Act at 25 U.S.C. § 177. (Apr. 13 Hrg. Tr. 36-

On July 2, 2007, the Acting Superintendent of the BIA notified the Chairman of the Ute Indian Tribe Business Committee that the Amended and Restated Operating Agreement “is not utilizing the Tribe’s surface or mineral assets for collateral, or granting any interest in the Tribe’s trust assets” and therefore “is not the type of agreement that is subject to the BIA review process, and that it is therefore unnecessary for the Tribe to seek the BIA’s approval of the Restated Agreement.” (ECF No. 70-5, Case No. 2:16-cv-958.)

The BIA noted that it is its responsibility to “review[] and approve[] those agreements that grant an interest in *tribal trust lands* or provide for the development of the Tribe’s *trust mineral estate*” under The Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108, the Non- Intercourse Act, 25 U.S.C. § 177, 25 U.S.C. § 81, and other authorities. (*Id.* (emphasis added).) The BIA determined that “[t]he Restated Agreement creates no interest in trust lands subject to approval by the BIA. Likewise, the Restated Agreement does not provide for the exploration or development of minerals in which the Tribe holds a beneficial or restricted interest.” (*Id.*) The BIA also noted that it had previously approved the Original Operating Agreement of Ute Energy “out of an abundance of caution” but that it no longer believed such approval was necessary, nor was approval of the Amended and Restated Operating

43, ECF No. 132.) The court addresses this argument in the immediately following paragraphs.

Agreement necessary. The BIA expressed its encouragement for the Business Committee's efforts and stated that "[t]he Tribe may, at its discretion, proceed with implementation of the Restated Agreement without any further review by the BIA." (*Id.*) The BIA conclusion is consistent with and supported by the court's own review of the transactions as documented in the record. If the various operating agreements did not implicate restricted interests, it is nonsensical that revenue generated from those operating agreements, of which Becker was to receive 2%, somehow converted into restricted interests requiring secretarial approval.

Exploration and Development Agreements.

Because the EDAs were not expressly warranted in Ute Energy's Operating Agreement, as the LLC interests were, the court also reviewed (to the extent provided) the Tribe's Exploration and Development Agreements that the Tribe assigned to Ute Energy Holdings and with which Ute Energy Holdings capitalized its membership interest in Ute Energy. (App'x 229–49, ECF No. 55-1, App'x 8–106, ECF No. 55- 2.) These agreements support the tribal parties' assertion that "[t]he Tribe had a dual legal status under the EDAs; not only was the Tribe the lessor of its oil/gas minerals but, in addition, the Tribe had the option to participate (with the oil/gas company 'partners') as a working interest owner in the drilling and production of oil and gas from wells drilled on tribal lands under the EDAs." *See* section 1.C at ¶ 7, *supra*. Those portions of the EDAs that the tribal parties produced in the appendix reveal

that products from the contractual production of oil and gas on restricted Indian land are owned by the Tribe or by the United States in trust for the Tribe. Sale or other disposition of such trust property requires the payment of specified bonus, royalty, throughput, and similar payments under the terms of the EDAs and thus requires approval by the Secretary of the Interior in satisfaction of all federal laws and regulations. (*See, e.g.* App’x 11–15, 22–27, 35–39, 55–62, 74–85.) There is no dispute that the Secretary approved all the EDAs.

The “working interest” references in the EDAs—which were the actual interests assigned to Ute Energy Holdings and then to Ute Energy—are a result of The Indian Mineral Development Act of 1982, which gave Indian tribes the opportunity to sell, lease, or dispose of their mineral interests not just as lessors of the trust land and mineral interests, but as participants in the development of their mineral resources through joint venture agreements with mineral developers.⁴² 25 U.S.C. §§ 2101–2108. This type of participation offers an

⁴² For example, Congress anticipated that this law would allow an Indian tribe to “pledge or hypothecate its interest in tribal mineral resources [for] prospective production, products or proceeds of such minerals . . . as security for the repayment of loans or other advances to permit the tribe to develop its mineral resources.” (“United States House of Representatives Report No. 97-746” 183, ECF No. 55-2.) Tribal mineral interests to be severed from the land or pledged as security for future production, of course, require approval from the Secretary of the Interior. *Id.*

opportunity for greater return on resources. But it also comes with risks, costs, and losses that the United States has declined liability for, so long as the Secretary of the Interior ensured that “the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Mineral Agreement by any other party.” *Id.* § 2103. Revenue from participation in “working interests” is separate and distinct from the revenues earned solely by lease arrangements that federal law requires the Secretary of the Interior to approve as fair and appropriate. Significantly, when trust property is not pledged as security for the costs of future production, revenue from “working interests” is thus not revenue from trust property or otherwise a restricted interest that requires secretarial approval. *See id.* § 2105.

Liquidation and the Second Amended and Restated Operating Agreement. As the 2007 Amended and Restated Operating Agreement anticipated, a Second Amended and Restated Operating Agreement was executed in 2010 to facilitate liquidation of Ute Energy. (Second Am. Op. Agr. 2, ECF 79-3, Case No. 2:16-cv-958.) Both of the amended Operating Agreements provided for distribution in kind of the capital contributions of member Ute Energy Holdings, which means that the increased value attributable to the Tribe’s restricted trust interests in its EDAs and LLC agreements could be assigned from Ute Energy back to Ute Energy Holdings without triggering distribution of net revenue. (*See* Am. Op. Agr. 50, ECF No. 79-2 & Second Am. Op. Agr. 47 & 50, ECF 79-3, Case No.

2:16-cv-958.) Specific provisions of the Second Amended and Restated Operating Agreement anticipated re-assignment of Ute Energy Holding's capital contributions—the actual EDA and LLC working interests—from Ute Energy to Ute Energy Holdings upon liquidation, describing how the Fair Market Value of the in-kind distributions would be valued in Ute Energy Holdings' member Capital Account. (*Id.* at 47, ECF No. 79-3, Case No. 2:16-cv-958.) After the Net Agreed Value (a defined term) for the in-kind capital contributions was determined and the Permitted Transfer (another defined term) via assignment of the actual agreements back to Ute Energy Holdings, the remaining value in the Capital Accounts was to be distributed to members. (See Second Am. Op. Agr., ECF No. 79-3, Case No. 2:16-cv-958.) That value represents unencumbered and unrestricted non-trust net revenue interest Ute Energy distributed to Ute Energy Holdings and to which Becker makes a 2% claim. According to the affidavit of Ute Energy's accountant, that value distributed to Ute Energy Holdings was \$378,709,233.74 as of April 15, 2016. (Aff. of Laurie Bales, ECF No. 79- 4, Case No. 2:16-cv-958.) Of that value, \$171,807,157.20 was distributed in cash payments to the Ute Tribe. (June 29, 2016 Aff. of Laurie Bales, ECF No. 55-1 at 207.)⁴³

⁴³ These provisions of the operating agreements undermine the tribal parties' argument that "the Tribe's interest in the value of Ute Energy was based exclusively on the . . . net mineral acres that were assigned to Ute Energy" and then "distributed back to the Tribe after the liquidation of Ute

b. Provisions 2, 3, & 4 of the Participation Plan Do Not Involve Trust Interests.

Paragraphs two through four of the Participation Plan, quoted here in full, provide as follows:

2. In the future, a) if the Tribe participates in any projects involving the development, exploration and/or exploitation of minerals in which the Tribe has any participating interest and/or earning rights, or similar commercial interests and Contractor is providing services under this agreement, and b) the Tribe elects not to place such interests in Ute Energy Holding, LLC,

Energy.” (Apr. 13 Hrg. Tr. 38, ECF No. 132.) Here, the tribal parties seem to revert to the argument that Becker cannot be entitled to a 2% distribution of the appreciated value of Ute Energy distributed to Ute Energy Holdings because “it’s a return of the assets themselves which are trust assets.” (*Id.*) The tribal parties are incorrect. The operating agreements are carefully structured such that the return of the assets themselves does not trigger a distribution of net revenue from Ute Energy to Ute Energy Holdings, so the appreciation and other profits constituting net revenue under the agreements are neither trust assets nor restricted property. Furthermore, even if they were, the tribal parties stated that, when “the money enters into general commerce,” a Tribe can use proceeds from trust assets without getting secretarial approval. (*Id.* at 36.) The appreciation and/or profit distributed from Ute Energy to Ute Energy Holdings were not direct proceeds of trust property, mineral production, or other restricted property, but rather money that entered the Tribe’s general commerce.

then Contractor shall receive a two percent (2%) beneficial **net revenue interest** in such assets, provided however, that in the event the Tribe should enter into an agreement under which the Tribe would be required to pay any project costs or expenses without the benefit of financing or a form of carried interest, then Contractor agrees that in the event Contractor elects to participate in such projects, Contractor shall in the same manner as the Tribe pay two percent (2%) of any project costs and expenses and receive the net revenue attributable to such participation interest.

3. **Contractor shall receive no interests in or incentive payments or payments of any kind based on any fees or revenues paid to the Tribe that are regulatory in nature including, but not limited to, the following: royalties, severance tax, through-put fees, surface or rights-of-way payments, and lease bonuses.**
4. If, at any time, Contractor wishes to sell the Contractor Rights, Contractor agrees to notify the Tribe of his intention. The Tribe shall have 60 days to exercise this preferential right to purchase with a bona fide, market value offer to purchase on the same terms and conditions that any legitimate offer would entail.

(App'x 103, ECF No. 55-1 (bold added).)

In light of the definitions in and provisions of all three versions of the Ute Energy Operating Agreements from inception through liquidation, as discussed above, the court finds that no provision of Becker's Exhibit B—Participation Plan required the Tribe to distribute any portion, proceeds, or revenue from restricted Indian mineral interests or mineral interests that the United States held in trust for the Tribe. This conclusion is required because under either provision 1 or 2, Becker was to receive 2% of net revenues distributed as defined by the Amended and Restated Operating Agreement, whether from participation rights the Tribe exercised through or independently from Ute Energy.

First, if the Tribe participated in its working interests through Ute Energy, net revenue interests the Tribe received by virtue of its protected role as a lessor were already excluded by the Operating Agreement. In other words, the nature of the capital contributions made by the Tribe—consisting only of the “working,” “participation,” and “development” interests in its various EDAs and LLC interests—do not, the Secretary of the Interior pointed out, “utilize[] the Tribe's surface or mineral assets for collateral, or grant[] any interest in the Tribe's trust assets.”⁴⁴ (ECF No. 70-5, Case No. 2:16-cv-958.)

⁴⁴ To the extent the tribal parties' experts opined otherwise, the court did not find those opinions persuasive. The court appreciates, however, that at oral argument the tribal parties' expert, Mr. Wozniak, acknowledged that his opinion

Second, if the Tribe elected to participate in its working interests independently of Ute Energy, paragraph 3 of Exhibit B—Participation Plan specifically excluded interests in or payments related to trust property, while paragraph 2 was carefully drafted to require Becker to pay his proportional share of expenses so that the Tribe’s trust assets would never be diminished or alienated by Becker’s 2% share of the resulting net revenue.⁴⁵ Finally, because paragraph 4 only authorized Becker to sell his rights under the Participation Plan, and those rights did not involve trust property, paragraph 4 also does not represent an alienation of trust property requiring approval from the Secretary of the Interior. In short, Becker’s Independent Contractor Agreement is not invalid under federal law.⁴⁶

Tribal Court Decision. Judge Pechota’s February 28 Opinion granted the tribal parties’ motion for summary judgment on the invalidity of

about the meaning of “net revenue interest” was given in the context of his familiarity with oil and gas leases and that he had not been given or reviewed the Operating Agreements at issue here, which he acknowledged could influence his definition of the term. (Feb. 28, 2018 Hrg. Tr. 124–30, ECF No. 111.)

⁴⁵ This provision never took effect in any event, but even if it had, it did not implicate trust property.

⁴⁶ The elegance and sophistication of the Participation Plan and related contracts demonstrate the Ute Indian Tribe’s acumen in managing its resources. *Contra U.S. v. Noble*, 237 U.S. at 78.

Becker's Independent Contractor Agreement under federal law without first granting a motion to vacate Judge Weathers' December 19 Order allowing Becker to complete discovery and complete briefing on the motion. (See ECF 108-1 and ECF No. 70-16, Case No. 2:16-cv-958.) In addition to this procedural irregularity that calls the ruling into question, the Tribal Court did not examine the Ute Energy Operating Agreements that were directly implicated by the terms of the Independent Contractor Agreement. The Independent Contractor Agreement's provisions distributing revenue from Ute Energy to Ute Energy Holdings can only be interpreted in conjunction with Ute Energy's Operating Agreements. When viewed together, the provisions are not ambiguous. Thus the Tribal Court improperly relied for its interpretation of the term "net revenue interest" on parol evidence of early contract negotiation discussions and the reports of expert witnesses, most of whom also did not review the Operating Agreements. (ECF No. 108-1.) See Restatement (Second) of Contracts § 209(3) (1981) ("Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement"); Restatement (Second) of Contracts § 213 (1981) ("A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.").

The Tribal Court also incorrectly asserts that "[i]t is undisputed that the revenue upon which Becker's 2% interest was to be calculated came from

oil and gas production on land held in trust.” (February 28 Opinion 11, ECF No. 108-1.) First, Becker expected to conduct discovery and complete briefing based on the December 19 Order; thus the facts were not undisputed, but were unaddressed. Second, at oral argument in Tribal Court Becker hotly disputed this allegedly undisputed fact. (App’x 26, ECF No. 122-8, Case No. 2:16-cv-958.) This court is not persuaded that the February 28 Opinion can stand on appeal through the Tribal appellate courts, and thus does not find that it should give comity to the decision or weigh it in favor of the tribal parties’ likelihood of success on the invalidity of the Independent Contractor Agreement under federal law.

c. *State Court Jurisdiction Is Not Preempted Because Contract Revenue Is Not Trust Property Under Federal Law.*

Because this court concludes that Becker’s 2% “net revenue” interest in distributions under the Independent Contractor Agreement is not restricted trust property, it finds that the tribal parties are unlikely to succeed on the merits of their argument that the state court does not have jurisdiction over this action under federal statutes 25 U.S.C. §§ 1322(b) and 1360(b).

In the next section, the court considers whether the Independent Contractor Agreement is invalid under tribal law.

2. The Independent Contractor Agreement Is Valid Under Tribal Law

Because of the court's conclusion that Becker's 2% "net revenue" interest in distributions under the Independent Contractor Agreement is not restricted trust property, the tribal parties' arguments about the invalidity of the contract related to tribal law restrictions on the power of the Ute Indian Tribal Business Committee to approve transactions involving trust property are already resolved against the tribal parties. With respect to trust property, the Business Committee did not act ultra vires when it approved the agreement. (*See* Feb. 28 Hrg. Tr. 89–93, ECF No. 111) (referring to limitations on the Business Committee's authority to alienate trust property under the Tribe's Constitution and Charter).

The tribal parties assert two additional reasons why the state court cannot exercise jurisdiction over this action under tribal law. The court first examines whether the tribal parties are likely to succeed on their argument that the Business Committee acted ultra vires to waive the Tribe's sovereign immunity and whether such waiver was valid under tribal law. The court then examines whether the tribal parties are likely to succeed on their argument that Becker's Independent Contractor Agreement is otherwise invalid under the Tribe's Corporate Charter.

a. *The Tribe Validly Waived Sovereign Immunity Under Tribal Law.*

Beyond cursory statements claiming it is so, the tribal parties' pending motions for preliminary injunctions and summary judgment in this action do not argue specific tribal law grounds for the invalidity of the Tribe's waiver of sovereign immunity in the Independent Contractor Agreement. (Pl.'s Mot. 32, ECF No. 54; Pl.'s First Summ. J. Mot. 29, ECF No. 52; Pl.'s Second Summ. J. Mot. 43, ECF No. 53.) The tribal parties' specific assertions of tribal law are in their appendix and were raised at oral argument.

The tribal parties state that the Tribe is governed by a six-member body known as the Uintah and Ouray Tribal Business Committee. *See* art. III, § 1 Constitution and By-Laws of the Ute Indian Tribe of the Uintah and Ouray Reservation. (App'x 61, ECF No. 55-1.) The Tribal By-Laws provide that “[n]o tribal business shall be transacted” except through a majority vote of a quorum of the Business Committee.” (*See* By-Laws, art. VI, §§ 3, 5; ECF No. 55-1 at 71.) Only the Chairman of the Tribal Business Committee (and the Vice-Chairman in the Chairman's absence and when called upon to preside) can individually exercise authority to transact tribal business as delegated by the Business Committee.” (*See* By-Laws, art. I, §§ 1-2; ECF No. 55-1 at 69.)

The tribal parties argue that Business Committee Resolution 05-147, which references

Becker's Independent Contractor Agreement and was adopted on April 27, 2005, does not contain an express waiver of the Tribe's sovereign immunity. (App'x. 89, ECF No. 55-1; Feb. 28 Hrg. Tr. 86-89, ECF No. 111.) Resolution 05-147 states that the Business Committee in Tribal Ordinance 01-007 enacted a long-term Financial Plan for the Tribe and that a referendum vote of the membership of the Tribe on December 20, 2001 ratified and approved the Financial Plan. (App'x 89, ECF No. 55-1.) As part of the Financial Plan, the Business Committee designated a nine-member Venture Fund Board. (*Id.*) The Business Committee passed Tribal Ordinance 03.003 to restructure the Energy and Minerals Department. (*Id.*) Thereafter, the Venture Fund Board recommended that Mr. Becker be engaged as an Independent Consultant to implement Tribal Ordinance 03.003 under the terms and conditions of the Independent Contractor Agreement attached as Exhibit A to Resolution 05-147. (*Id.*)

The resolution goes on to state that the Business Committee determined that it should accept the Venture Fund Board's recommendation, that it specifically agreed to enter into the attached Independent Contractor Agreement, and that it authorized the Business Committee Chairman to execute any document necessary to carry out the resolution consistent with the By- Laws. (*Id.*) The certified version of Resolution 05-147, provided by the tribal parties in their appendix, is stamped as Resolution 05-147 and includes Becker's 13-page Independent Contractor Agreement, including its

Services and Participation Plan attachments A and B, each page of which is also stamped with the same resolution number, and included the separately-stamped and numbered Ordinance 03.003 as attachment C.⁴⁷ (*Id.* at 89–112.)

Article 23 of Resolution 05-147 bears the title Limited Waiver of Sovereign Immunity; Submission to Jurisdiction. (*Id.* at 98.) In it, the Tribe agrees to a limited waiver of its sovereign immunity defense relating to the interpretation, breach, or enforcement of the agreement.⁴⁸ (*Id.*) The Tribe also waived tribal law requirements for exhaustion of tribal remedies. (*Id.* at 99.) Article 23 concluded as follows:

⁴⁷ The tribal parties' complaint in this matter alleged that there was no Business Committee resolution that "specifically" waived the Tribe's sovereign immunity for suit on Becker's contract. They attached as an exhibit to the complaint a version of Becker's contract that (1) did not include the first page of Resolution 05-147 agreeing to the contract and (2) sanitized the pages of the contract itself to remove the stamp on each page indicating it was a part of Resolution 05-147. (*Compl.* ¶ 48 & Ex. A, ECF No. 2 & 2-1.) It took the tribal parties a year and a half to ameliorate these omissions in their appendix. (*See* ECF No. 55-1.)

⁴⁸ Additional support for the court's conclusion that the contract did not include trust property is that Article 23 provided that the interpretation, breach, or enforcement of the agreement in a "Legal Proceeding shall not include proceedings related to royalty or similar interests in lands held by the Tribe that are not expressly subject to the terms of this Agreement." (*Id.*) In other words, those interests were not a part of the contract for which Becker could be compensated.

The Tribe's limited waiver of sovereign immunity shall be further evidenced by a Tribal Resolution delivered at the time of execution of this Agreement in accordance with Tribal laws, that expressly authorizes the foregoing submission to jurisdiction of the courts so designated and the execution of this Agreement.

(*Id.*) As stated above, the contract itself was stamped as a part of Resolution 05-147.

The tribal parties' argument is simple. They claim that § 1-8-5 of the Ute Law and Order Code requires that any resolution or ordinance of the Business Committee that waives the Tribe's sovereign immunity

be clear, unequivocal and express. All waivers must be contained within a resolution or ordinance *and cannot be made by reference to a contract, agreement, memorandum of agreement, memorandum of understanding or other writing . . .* Sovereign immunity cannot be waived by any official, director, employee, or agent of the Ute Indian Tribe. The provisions of this Section 1-8-5 replace and supersede any other conflicting provisions of the Ute Law and Order Code, specifically . . . Ordinance No. 98-002.

(App'x 44-45, ECF 55-1 (emphasis added).) The tribal parties argue that, because Becker's Independent Contractor Agreement was identified as an exhibit in Resolution 05-147, the resolution

itself did not make or authorize a valid waiver of sovereign immunity under tribal law. Thus, they argue it was an ultra vires act of the Business Committee and Chairman Natchees, who signed the contract. (Feb. 28 Hrg. Tr. 86–89, ECF No. 111.)

Interestingly enough, the version of § 1-8-5 that the tribal parties rely upon was amended by Tribal Ordinance 14-001 adopted on January 7, 2014. (App’x 44–45, ECF 55-1.) In effect at the time Resolution 05-147 was adopted was the version of § 1-8-5 attached to the tribal parties’ complaint. It does not refer to the “no incorporation by reference” argument and simply states:

Except as required by federal law, or the Constitution and Bylaws of the Ute Indian Tribe, or as specifically waived by a resolution or ordinance of the Business Committee specifically referring to such, the Ute Indian Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

(*Compl.*; ECF No. 2-6 at 5.) Thus, the tribal parties argue either that a 2014 Ordinance should govern interpretation of a 2005 Resolution or that a 2014 Ordinance should govern interpretation of the 2005 version of Law and Order Code § 1-8-5.

The parties have identified two prior Tribal Court opinions that interpret waivers of sovereign immunity under the version of § 1-8-5 in effect at the

time Resolution 05-147 was adopted and the contract was executed. The first case is *Toole v. Ute Water Settlement Accounting Services, LLC*, Case No. CV-09-081, Ute Indian Tribal Court, Ruling and Order dated August 10, 2010. (App'x 653, ECF No. 122-4, Case No. 2:16-cv-958.)

Toole came before the Tribal Court on defendant's motion to dismiss the action for lack of jurisdiction. Defendant was a limited liability company wholly owned by Ute Enterprises, LLC, and established under Ordinance 01-007 as amended by Ordinance 06-005. Defendant's Executive Director, Roseline Taveapont, had entered into an employment contract with Mr. Toole. (*Id.* at 653–54.) The contract was not signed by the Chairman of the Business Committee and was apparently authorized only by a letter that stated, “the Business Committee has authorised [sic] by motion the use of a Service Contract to be funded out of the CEO's contract.” (*Id.* at 654.) The contract specifically stated that “[a]ny dispute under this Agreement shall be first heard in the Tribal Court for the Ute Indian Tribe.” (*Id.*)

After Toole's employment was terminated, he brought an action in Tribal Court to enforce the contract. Defendant's motion to dismiss argued that under Ordinance 87-04, (the same Ordinance in effect at the time Becker's Independent Contractor Agreement was executed), the Tribal Court lacked jurisdiction to hear Toole's claims against the Tribe, its Business Committee, or Tribal officers or employees in their official capacities. (*See id.* at 655.)

Defendant also argued that the Tribal Court lacked jurisdiction because the Tribe had not waived its sovereign immunity in Toole's contract. (*Id.* at 655.)

After first concluding that the Tribe's sovereign immunity extends to sub-entities and enterprises of the Tribe,⁴⁹ the Tribal Court reviewed federal law to determine that a valid waiver of the Tribe's sovereign immunity must be express, clear, and unequivocal and that it cannot be waived by company "officials." (*Id.* at 658–59.) It also concluded that under § 1-8-5 of the Ute Law and Order Code (the same version in effect at the time Becker's Independent Contractor Agreement was executed), "only the Ute Tribal Business Committee may waive immunity by passing a resolution or ordinance which specifically refers to the express waiver." (*Id.* at 660.) Nothing in the employment contract itself mentioned a waiver of sovereign immunity; instead, Toole relied on contract language stating the availability of fees in actions and choice-of-law provisions to imply a waiver, (*id.* at 661), along with his own honestly held belief that Defendant's

⁴⁹ The *Toole* court reached this conclusion based on language in *Kiowa v. Manufacturing Technologies, Inc.* that a tribe's sovereign immunity extends to commercial activities undertaken by the tribe, combined with an analysis that Defendant's commercial activities were tribal in nature. (App'x at 657, ECF No. 122-4, Case No. 2:16-cv-958.) This analysis was necessary because Defendant LLC was established under the Ute Indian Tribe Limited Liability Act of 1998, which expressly stated that "[t]he sovereign immunity of the Ute Indian Tribe shall not extend to limited liability companies formed under this Title." (*Id.* at 660.)

Executive Director waived sovereign immunity on behalf of the Tribe, (*id.* at 662).

The Tribal Court noted that while the Business Committee had authorized hiring Toole as part of its usual hiring practices as the chief executive body, those practices did not consist of a specific resolution waiving the Tribe's immunity. (*Id.* at 661.) It then went on to say:

[T]he Law and Order Code sets forth a very specific standard when executive actions are accompanied by a waiver of the Tribe's immunity. No resolution was passed specifically authorizing the waiver. Nothing in the transaction resembled what Defendant asserts is the normal process for waiving immunity.

The actions of the Business Committee were not similar to those it undertakes when the Tribe waives immunity in matters involving Ute Oil, LLC. There, the Business Committee waives immunity by passing a resolution or ordinance which specifically refers to the express waiver as is required by U.L.O.C. § 1-8-5. Defendant has failed provided [sic] any evidence that the Business Committee even reviewed the Agreement or knew of its specific content. How can the Court find a waiver when the record is bereft of evidence that the Business Committee considered immunity and elected to waive the same?

(*Id.* at 661–62 (emphasis added).) As a result of this reasoning, the Tribal Court found that it lacked jurisdiction and dismissed the action. (*Id.* at 662.)

The second case is *Yazzie v. Ute Indian Tribe*, Case No. CV-09-188, Ute Indian Tribal Court, Ruling dated February 14, 2011. (App’x 243, ECF No. 122-5, Case No. 2:16-cv-958.) *Yazzie* was before the Tribal Court on the Tribe and Business Committee Defendants’ motion to alter or amend its previous ruling that the Tribe waived its sovereign immunity in a contract with a Chief Judge. (*Id.*) In *Yazzie*, Defendants argued that the 2010 *Toole* decision established precedent that the Tribal Court lacked jurisdiction because Resolution 07-329 did not contain an express, unequivocal waiver of the Tribe’s sovereign immunity and that the contract’s enforcement clause did not establish a waiver. (*Id.*)

The Tribal Court found that “Resolution 07-329 was clear beyond doubt that the contract being incorporated by reference was the Chief Judge Contract.” (*Id.* at 244.) Further, it found that “[t]he resolution authorized the Chairman of the Business Committee to execute all documents necessary to carry out the intent and purpose of the resolution.” (*Id.*) The contract was signed by the Business Committee Chairman and certified by the Business Committee Secretary as adopted “under the authority of the Constitution and By-Laws of the Ute Indian Tribe.” (*Id.*) After analyzing the law on incorporation by reference, the Tribal Court concluded that the Chief Judge Contract was a valid

contract incorporated into and made a part of Resolution 07-329. (*Id.*)

The Tribal Court ultimately granted the motion to alter the previous ruling but on alternative grounds, not on *Toole*. The Chief Judge contract contained an “Enforcement of Contract clause that irrevocably granted to the Ute Tribal Court jurisdiction to hear and decide any and all breach of contract or other claims.” (*Id.* at 245) (internal quotations omitted). Tribal Ordinance 87-04, still in place at the time, thus became an issue, because it “divests the Tribal Court of jurisdiction over claims against the Ute Indian Tribe and Tribal Business Committee.” (*Id.*) While the Tribal Court acknowledged that “[t]he Business Committee has authority to waive sovereign immunity by a resolution,” which incorporates the contract by reference into the resolution, *Yazzie* held that under the Tribe’s Constitution and By-Laws it takes a Tribal Ordinance, not a resolution or contract, “to amend the Law and Order Code to restore the Ute Tribal Court’s jurisdiction over claims brought against the Tribe and its officers.”⁵⁰ (*Id.*)

⁵⁰ It is worth noting that *Yazzie* was dismissed with prejudice because Tribal Ordinance 87-04 precluded the Tribal Court’s jurisdiction over the Tribe and its Business Committee, while at the same time the valid contract limited jurisdiction exclusively to the Tribal Court. (*Id.* at 245–46.) This is inconsistent with the usual dismissal *without* prejudice, when a court lacks jurisdiction, to allow the claimant to raise his or her claims in a court of competent jurisdiction. Plaintiff was

First Tribal Court Order. On December 18, 2017, Judge Weathers in the parties' Tribal Court action concluded that under *Yazzie's* reasoning, the requirements of § 1-8-5 of the Law and Order Code were met. (Order 2, ECF No. 91-5, Case No. 2:16-cv-958.) First, while acknowledging the language in *Toole* that a resolution itself must specifically refer to the waiver of sovereign immunity, Judge Weathers stated that the "incorporation by reference" reasoning in *Yazzie* supports the meaning of "specifically referring to such" in § 1-8-5 of the Law and Order Code. (*Id.* at 4.) Second, Judge Weathers reviewed the meeting minutes of the Business Committee immediately before adoption of Resolution 05-147 and noted that there was a discussion "about Article 23, the applicability of Utah law to the contract, and whether any dispute could go to tribal court first before state or federal court." (*Id.* at 4–5.) Because this discussion "satisfied the purpose behind the 'specifically referring to such' language in Section 1-8-5," which he concluded was to ensure the Business Committee knows it is waiving the Tribe's sovereign immunity when it adopts a given resolution, Judge Weathers concluded that the language adopting Becker's Independent Contractor Agreement on the first page of Resolution 05-147 itself was sufficient to satisfy § 1-8-5 of the Ute Law and Order Code.⁵¹ (*Id.*)

effectively denied a forum. Becker alleges this is the outcome sought by the tribal parties here. (ECF No. 105.)

⁵¹ During oral argument on the motion to reconsider this decision in Tribal Court, the tribal parties claimed that "no one

As previously related, the tribal parties moved to reconsider this decision on December 28, 2017, and Judge Weathers notified the parties on January 4, 2018, that he was no longer the judge assigned to the case. (ECF No. 70-18, Case No. 2:16-cv-958.)

Second Tribal Court Decision. At oral argument in Tribal Court on February 16, 2018, the tribal parties argued that the court should find the waiver of sovereign immunity invalid because “the facts here are identical to the facts in *Toole*.” (Hrg. Tr. 94, ECF No. 122-8, Case No. 2:16-cv-958.) This is incorrect. First, here the Business Committee passed a resolution to accept Becker’s attached Independent Contractor Agreement. There was no resolution at all in *Toole*. Second, the agreement here, each page of which was stamped with the same 05-147 resolution number as the first page of the resolution, contained an explicit waiver of sovereign immunity in Article 23. In *Toole*, the contract

informed the tribal business committee that the Becker agreement contained a waiver of the Tribe’s sovereign immunity. There’s only one line that says ‘Article 23,’ and it doesn’t explain what Article 23 does.” (Feb. 16 Hrg. Tr. 93, ECF No. 122-8, Case No. 2:16-cv-958.) The February 28 Opinion states that “nothing in the April 27, 2015 [sic] minutes” shows that the Business Committee read the Independent Contractor Agreement, and that they “are absent of any mention about sovereign immunity.” (ECF No. 108-1 at 10.) This is far from undisputed, and the record reflects that Becker has yet to receive discovery of additional minutes from meetings that discussed the negotiations and understanding of contract terms. (See App’x 348 & 354, ECF No. 122-9, Case No. 2:16-cv-958.)

specifically provided for jurisdiction first in Tribal Court and did not, as here, explicitly waive tribal exhaustion.

The tribal parties also argued that *Yazzie*, as a tribal court level case, has no precedential value, unlike an appellate level case. (*Id.* at 95.) *Toole*, however, was also a tribal court level case, a point the tribal parties omit. In the February 28 oral argument in this action, the tribal parties further argued that because the court in *Yazzie* found that it lacked subject matter jurisdiction, its substantive ruling on how § 1-8-5 is satisfied by a resolution incorporating a contract by reference is not binding authority. (Feb. 28 Hrg. Tr. 110, ECF No. 111.) The court cannot overlook that under that reasoning, neither is *Toole* binding authority for the tribal parties' argument here, because the *Toole* court similarly found it lacked subject matter jurisdiction over the action. *Toole* held that the Tribe's sovereign immunity extends to tribal LLCs. It was incidental to that holding that the *Toole* court noted the Business Committee waives sovereign immunity for tribal LLCs "by passing a resolution or ordinance which specifically refers to the express waiver as is required by U.L.O.C. § 1-8-5," and that in *Toole* "[n]o resolution was passed specifically authorizing the waiver." (App'x 661–662, ECF No. 122-4, Case No. 2:16-cv-958.) See *Barela*, 797 F.3d at 1191 (defining dicta as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand" (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995))).

Furthermore, the tribal parties are simply incorrect. A court “always [has] jurisdiction to determine [its own] jurisdiction,” and that includes making conclusions of law based on “jurisdictional facts.” *Gonzalez-Alarcon v. Macias*, No. 16-2263, 2018 U.S. App. LEXIS 6753, *12–*13 (10th Cir. Mar. 21, 2018).

Neither the facts nor the law in Toole stand for the tribal parties’ position that the waiver of sovereign immunity must be contained within the four corners of the resolution in which the Business Committee authorizes the action, as in the 2014 version of § 1-8-5 of the Law and Order Code, rather than “be specifically waived by a resolution or ordinance of the Business Committee specifically referring to such,” as in the version of § 1-8-5 in effect at the time Resolution 05-147 was adopted by the Business Committee.

The Tribal Court’s February 28 Opinion nevertheless adopted the tribal parties’ position without identifying which version of § 1-8-5 it was applying. It could only have been applying the 2014 version of § 1-8-5, however, because it stated that “it was insufficient under Section 1-8-5 for a contract containing a waiver of immunity to be simply appended to a resolution or ordinance if the resolution or ordinance does not itself expressly authorize a waiver of sovereign immunity *within the text of the resolution or ordinance.*” (*Id.* at 7 (emphasis added).) Because Becker’s Independent Contractor Agreement actually contained an explicit waiver of sovereign immunity and was stamped as Resolution 05-147 as was the first page of the

resolution that gave authority for and accepted the agreement, this decision appears to be clear error under the version of § 1-8-5 in effect at the time. The court is not persuaded that this portion of the February 28 Opinion can stand on appeal through the Tribal appellate courts. Thus, the court declines to give comity to the decision or weigh it in favor of the tribal parties' likelihood of success on the invalidity of the waiver of sovereign immunity under tribal law.

b. *The Ute Business Committee's Pattern and Practice Affirmed the Validity of the Waiver.*

In further support of this conclusion, to the extent such materials are provided in the record, the court has examined the tribal parties' pattern and practice during the time period prior to the Tribe's adoption of the 2014 version of § 1-8-5. For example, on March 31, 2005, the Ute Business Committee adopted Resolution 05-116 authorizing the execution of the Operating Agreement of Ute Energy. (App'x 109, ECF No. 55-2.) The Operating Agreement contained the following waiver:

19.9 Waiver of Sovereign Immunity. The Company hereby waives any sovereign immunity it may have by reason of the character of its Members or otherwise.

(Op. Agr. 46, ECF No. 79-1, Case No. 2:16-cv-958.) The Business Committee did not expressly state this waiver within the four corners of Resolution 05-116, yet the tribal parties have not challenged its validity

under tribal law nor the authority of the Chairman of the Business Committee to enter into the agreement.

Again on June 26, 2007, the Ute Business Committee adopted Resolution 07-183, approving and authorizing the execution of the Amended and Restated Operating Agreement of Ute Energy. (App'x 117, ECF No. 55-2.) That Operating Agreement contained a very broad waiver of sovereign immunity that the Business Committee did not expressly state within the four corners of Resolution 07-183:

11.1 Waiver of Sovereign Immunity. Each of the Company and Ute Holdings hereby irrevocably and unconditionally waives any sovereign immunity it may have by reason of the character or identify of its members or otherwise.

(Am. Op. Agr. 54, ECF No. 79-2, Case No. 2:16-cv-958.) The tribal parties have not challenged the validity of this waiver under tribal law, nor have they challenged the authority of the Chairman of the Business Committee to enter into the agreement. Notably, it does not appear that either Resolution 05-116 or 07-183 included as attachments the documents containing the waivers of sovereign immunity to the resolutions themselves, as was the case in Resolution 05- 147 approving and authorizing the execution of the Becker Independent Contractor Agreement.

As another example found within the record, Resolution 06-216 approved and authorized the execution of the Little Canyon EDA with Dominion Exploration & Production, Inc. “in substantially the same form as that attached to this Resolution as Exhibit A.” (App’x 75, ECF No. 55-2, Case No. 2:16-cv-579.) While the record refers to an operating agreement associated with the Dominion EDA, said agreement is not attached to the EDA itself, nor is the EDA stamped with the number of Resolution 06-216. (*Id.* at 78.) Whether or not the operating agreement contained a similar limited waiver of sovereign immunity, at a minimum this demonstrates the Business Committee’s pattern of approving and executing all manner of agreements based on resolutions that attach the intended documents as exhibits to the resolution.

Similarly, Resolution 05-283, dated August 30, 2005, approved the FIML Natural Resources LLC, Quester Gas Management Company, and Uintah Basin Field Services, LLC Pipeline Agreements, which are not attached as an exhibit to the resolution nor stamped with the resolution number. (*Id.* at 89–106.) This agreement does not contain a section that expressly waives sovereign immunity, but it does include a section giving original, exclusive jurisdiction to the United States District Court for the District of Utah, or if that court lacks jurisdiction, agreeing instead to arbitration. (*Id.* at 103.) Nothing about this effective waiver of tribal sovereignty is mentioned in the four corners of Resolution 05-283, yet the waiver has not been

challenged as invalid or lacking Business Committee authority.

Resolution 07-124, dated May 2, 2007, approves assignment of the forthcoming SITLA agreements to Ute Energy, even though the final transfer of assignment documents had yet to be created. (*Id.* at 111.) That agreement contained a waiver of sovereign immunity by the State of Utah and the Ute Tribe “to the extent necessary to allow the enforcement of this Agreement.” (*Id.* at 72.) Of course, this waiver was not mentioned in Resolution 07-124, nor has it been challenged as invalid or lacking Business Committee authorization.

The tribal parties’ appendix contains several other EDA agreements whose indexes reference the Tribe’s waiver of sovereign immunity, but the appendix itself did not include the resolutions authorizing those agreements or the pages of the EDA agreements themselves where the waiver of sovereign immunity is set forth. (*Id.* at 20, 33, 53; App’x 239, ECF No. 55-1.) It is reasonable to assume that the indexes to these documents accurately reflect that they contained a waiver of the Tribe’s sovereign immunity that was not contained within the four corners of the resolutions accepting the agreements.

These documents demonstrate that the Tribe had a consistent pattern during the relevant time of authorizing the Ute Business Committee to selectively waive the Tribe’s sovereign immunity to enter into commercial agreements by resolutions that did not contain an express waiver of sovereign

immunity within the four corners of the document; sometimes failed to mention the words “sovereign immunity” but instead agreed to original and exclusive jurisdiction in a non-tribal court or arbitration; did not stamp the attached document waiving sovereign immunity to the resolution with the same number as the resolution; or did not even include the document that waived sovereign immunity as an attachment to the resolution at all. Given this pattern and practice, the court concludes that, of those that the court reviewed, Resolution 05-147 was the most thorough waiver of sovereign immunity the Ute Business Committee issued between 2005 and 2007. It referred to the Independent Contractor Agreement specifically in the resolution, the Agreement was actually attached to the resolution, the Agreement was stamped with the same resolution number, and the Agreement itself had a three- paragraph Article 23 setting forth clear terms of the tribal parties’ waiver of sovereign immunity and submission to jurisdiction elsewhere for disputes over the Agreement.

It is true that the tribal parties have submitted 2010 and 2011 resolutions in which the Ute Tribal Business Committee waived the Tribe’s sovereign immunity within the four corners of the resolutions themselves. (*See* Ex. L, ECF No. 14-12.) The first, Resolution 10-085, specifically waives sovereign immunity for the benefit of JP Morgan Chase in relation to entering into a \$65 million loan transaction involving Ute Energy that was attached and incorporated to the resolution. The second, Resolution 11-328, specifically waives sovereign

immunity for the benefit of RBC Capital Markets for margin trading and leveraging of the same account. (*Id.*)

Notwithstanding the 2010 and 2011 resolutions that waive sovereign immunity consistent with the Tribe's current version of Law and Order Code § 1-8-5, the court has found no evidence that between 2005 and 2007, the relevant time period, the tribal parties have a likelihood of success on the merits of their claim that at the time Resolution 05-147 was adopted in 2005, § 1-8-5 of the Ute Law and Order code required the resolution to identify the waiver within the four corners of the resolution itself. Therefore, the court concludes that the Becker Independent Contractor Agreement validly waived the tribal parties' sovereign immunity and was not an ultra vires act of the Ute Business Committee in 2005.

c. *Contract Is Valid Under Other Tribal Law.*

Finally, the court considers the tribal parties' arguments that the Tribe's Section 17 Corporate Charter invalidates the Becker Independent Contractor Agreement. First, however, the court reiterates that in section I.2.C., *supra*, it concluded that the Ute Business Committee did not act ultra vires in approving Becker's Independent Contractor Agreement under either the Tribe's Constitution or

Charter because the contract does not involve restricted trust property.⁵²

Second, the tribal parties' final argument is that one provision of the Tribe's Corporate Charter prohibited the Ute Business Committee from entering the Becker Independent Contractor Agreement. (See Pl.'s Second Exp. Mot. 32–33, ECF No. 53; Pl. Reply 8–9 & 20, ECF No. 101; Feb. 28 Hrg. Tr. 141–43, App'x 81–90, ECF No. 122-8, Case No. 2:16-cv-958.) The tribal parties' argument relies on art. VI, §§ 1 and 1(f) of the Tribe's Constitution. Section 1 limits the exercise of the Business Committee's powers as required by the United States Constitution and/or statutes as well as by the "express restrictions upon such powers contained in [the Tribe's] Constitution and By-Laws." (App'x 62, ECF No. 55-1.) Section 1(f) authorizes the Business Committee "[t]o regulate all economic affairs and enterprises *in accordance with the terms of a Charter* that may be issued to the Ute Indian Tribe of the Uintah and Ouray Reservation by the Secretary of the Interior." (*Id.* at 63 (emphasis added).)

⁵² Specifically, the court's conclusion that the Becker Independent Contractor Agreement does not implicate trust property resolves the tribal parties' arguments under Sections 5(b)(1) and 5(b)(3) of the Charter, as well as under Section 1(f) of the Constitution that requires the Business Committee to act in accordance with the Charter. The Tribal Court ruled otherwise in its February 28 Opinion based on its conclusion that the contract created a claim against trust property. (ECF No. 108-1.)

The Charter referred to was authorized by section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, and approved by the Secretary of the Interior on January 19, 1937, under section 16 of the Act, 25 U.S.C. § 476. (*See* App'x 74, ECF No. 55-1.) Section 5 of the Charter identifies the powers and limitations of the corporation, section 5(f) of which states that the Business Committee is authorized

[t]o make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this Charter, with any person . . . Provided, That all contracts entered into . . . requiring payment of money by the corporation . . . shall not exceed \$10,000 in total amount except with the approval of the Secretary of the Interior.

(*Id.*)⁵³ The tribal parties argue that because Becker's contract was for value greater than \$10,000, it required approval from the Secretary of the Interior. (Pl. Second Exp. Mot. 32, ECF No. 53.) Interestingly, in the state court action, the tribal parties vigorously objected to Becker's characterization of his suit as also being against the Tribe's Section 17 Corporation.⁵⁴ (ECF No. 12 at 55–58.) More recently,

⁵³ The Tribal Court did not opine on this provision of the charter. (*See* ECF No. 108-1.) For the reasons previously stated, *supra*, the court does not find it necessary for the Tribal Court to exhaust this issue.

⁵⁴ The tribal parties' objection was based on the Charter's waiver of sovereign immunity in § 5(i). To avoid the waiver, the tribal parties argued that the waiver "is limited to the federally

the tribal parties state that “[i]n the initial stages of the state court litigation, the Tribe’s attorneys mistakenly believed that the Tribe’s federally-chartered corporation was defunct.” (Pl.’s Reply 9, ECF No. 101.) The court notes, however, that even the tribal parties’ expert, Pilar Thomas, opines that Sec. 5(b)(1) relates to the Business Committee “mak[ing] or perform[ing] agreements greater than \$10,000 *that will be paid by the corporation* without Secretarial approval.” (App’x 216, ECF No. 55-2 (emphasis added).)

This court finds no evidence in Resolution 05-147, including Becker’s Independent Contractor Agreement or the associated Operating Agreements, that demonstrates the Tribe’s Section 17 Corporation was a party to these contracts. (App’x 89–112, ECF No. 55-1 and ECF Nos. 79-1, 79-2 & 79-

chartered corporation and does not extend to the Tribe itself.” (ECF No. 12 at 56.) They also argued that

the Ute Tribe as a constitutional organization would be the proper defendant because it entered into the contract with Lynn Becker that is the subject of this suit. The federally chartered corporation was not a party to the Agreement. Therefore the Ute Indian Tribe’s federally-chartered corporation could not be a party to this action because not only was it not a party to this contract, it is an essentially defunct arm of the Tribe.

(*Id.*) They further stated that “[t]here is no action of the Section 17 Corporation at issue in this case. Neither the disputed contract nor the resolution mentions the Section 17 Corporation.” (*Id.*)

3, Case No. 2:16-cv-958.) As a result, the court finds that the tribal parties are unlikely to succeed on the merits of the contract's invalidity under the Charter or the Constitution that requires compliance with the Charter because there is no evidence of involvement by the Section 17 Corporation. This reasoning is consistent with prior precedent. *See Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998) (remanding to district court to determine whether the tribal corporate entity or the Ute Tribe itself was the proper defendant); *Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521 (D. Utah 1981) (finding that lack of clarity on whether the section 17 corporation or the Ute Tribe entered seven leases prevented conclusion on sovereign immunity based on tribal charter). Again, there is no evidence here that the Tribe's corporate entity was involved in any way with these agreements.

d. *The Tribe Has Waived the Exhaustion Requirement.*

The Tenth Circuit directed this court to “exercise its original jurisdiction in accord with the mandate in [its] decision *Ute Indian Tribe v. Lawrence*, 875 F.3d 539 (10th Cir. 2017), and decide the Tribe's request for injunctive relief against the state court proceedings.” (Order, *Ute Indian Tribe v. Lawrence*, No. 18-4013 (D.C. No. 2:16-CV-00579-CW) (D. Utah Feb. 16, 2018).) *Lawrence* held that this court has original jurisdiction to determine whether “federal law precludes state-court jurisdiction over a claim against Indians arising on the reservation.” 875 F.3d at 540. Pursuant to the Tenth Circuit's mandate,

this court has been required to analyze whether the tribal parties are likely to succeed on the merits of their claims. This court concludes that federal law does not preclude state-court jurisdiction because Congress granted subject matter jurisdiction to Utah in these circumstances under 25 U.S.C. §§ 1321–1326, because the Becker Independent Contractor Agreement is valid under federal and tribal law, and because the tribal parties’ selective waiver of sovereign immunity in the valid contract consented to the state’s exercise of that jurisdiction. As a result, the court concludes the tribal parties are also bound by the Agreement’s Article 23 provision that waives any requirement for tribal exhaustion. That provision states:

and the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe *and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.*

(App’x 99, ECF No. 55-1) (emphasis added).)

This exhaustion waiver, in conjunction with the other provisions of Article 23 that designate “original and exclusive jurisdiction,” (App’x 98–99, ECF No. 55-1), to other courts of competent jurisdiction—of which the Utah state court is one—removes this case from the tribal exhaustion policy pronouncements in *National Farmers Union Insurance Companies. v. Crow Tribe*, 471 U.S. 845

(1985) (requiring a tribal court to first determine whether it has exceeded the lawful limits of its jurisdiction before such a claim may be entertained by a federal court). Similarly, the contract's exhaustion waiver eliminates any requirement for Tribal appellate court review of the February 28 Opinion that may otherwise be required for exhaustion by *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 17 (1987) (stating that “[u]ntil appellate review is complete, [the tribal courts] have not had a full opportunity to evaluate the claim and federal courts should not intervene”). In other words, because Article 23 is valid, the Tribal Court “has exceeded the lawful limits of its jurisdiction.” *Nat’l Farmers*, 471 U.S. at 857; *see also Becker v. Ute Indian Tribe*, 868 F.3d 1199, 1203 (10th Cir. 2017) (stating that exhaustion is not a jurisdictional prerequisite, but “required as a matter of comity”); *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (stating that if the district court finds the tribal court lacks jurisdiction, comity principles do not require litigants to first exhaust tribal court remedies). Therefore, jurisdiction over these contract claims resides in Utah state court. The Utah state court is not required to stay its proceedings for the Tribal Court action to be resolved and the Tribal appellate court to review its jurisdictional conclusions.⁵⁵ In fact, in its decision in

⁵⁵ *See Harvey v. Ute Indian Tribe*, 2017 UT 75 (Utah) (holding that Utah district courts must decide whether to stay state court proceedings pending tribal exhaustion of claims against tribes or tribal officials).

the companion case today, this court enjoins the parties from proceeding in the Tribal Court action.

II. CONCLUSION

The tribal parties have not shown a likelihood of success on the merits of their position to warrant this court's grant of a preliminary injunction enjoining Mr. Lynn Becker and Judge Barry G. Lawrence from proceeding in the state court matter of *Becker v. Ute Indian Tribe*, Case No. 140908394, Third Judicial District Court, Salt Lake County. This court has concluded that the state court has subject matter jurisdiction over the parties' claims because Utah accepted the federal government's offer of jurisdiction in 25 U.S.C. § 1322(a), because the Tribe selectively waived its sovereign immunity in Resolution 05-147 properly under tribal law, and because the contract does not involve restricted property held in trust for the Tribe by the United States. Additionally, the court has concluded that the Tribal Court's February 28 Opinion should not be given preclusive effect and that tribal exhaustion is futile. Because the tribal parties cannot succeed on the merits, the court need not analyze the other elements necessary to grant a preliminary injunction motion, and the motion is DENIED. (ECF No. 54.) The court summarizes its rulings herein as follows:

1. The court DENIES the tribal parties' motions for a preliminary injunction to enjoin the state court action. (ECF No. 54 and the injunction portions of ECF Nos. 52 & 53.)

2. The court DENIES as MOOT in this case the tribal parties' motion for clarification and reconsideration of the Court's Order Amending February 14, 2018 Ruling in the companion case 2:16-cv-958. (ECF No. 88.)

3. The court DENIES as MOOT the tribal parties' motions in limine seeking to limit evidence to be considered in the motion for preliminary injunction. (ECF Nos. 97, 98, & 99.)

4. The court DENIES the tribal parties' motion to give preclusive effect to the Tribal Court's February 28 Opinion and to consolidate and advance consideration of its other motions. (ECF No. 110.)

5. The court DENIES as MOOT the tribal parties' motion to strike the Declaration of Lynn Becker and its exhibits B–B-5 in Becker's opposition to the tribal parties' preclusion motion because the court did not consider those materials. (ECF No. 124.)

6. The court GRANTS the tribal parties' motion for leave to supplement legal authority. (ECF No. 133.)

7. The court GRANTS the tribal parties' motion to supplement the record. (ECF No. 135.)

The court stays this action pending resolution of the state court action, including the tribal parties' partial summary judgment portions of the motions at ECF Nos. 52 & 53, Becker's motion to consolidate this case with the companion case at ECF No. 114,

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and the tribal parties' Motion for Sanctions at ECF
No. 134.

DATED this 30th day of April, 2018.

BY THE COURT:



Clark Waddoups
United States District Judge

App-203

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

No. 18-4030 & 18-4072
(D.C. No. 2:16-CV-00958-CW)
(D. Utah)

LYNN D. BECKER,

Plaintiff Counterclaim Defendant – Appellee,

v.

UTE INDIAN TRIBE OF THE UINTAH AND
OURAY RESERVATION, a federally chartered
corporation and a federally recognized Indian tribe,
et al.,

Defendants Counterclaimants Third-Party
Plaintiffs – Appellants,

v.

JUDGE BARRY G. LAWRENCE, District Judge,
Utah Third Judicial District, in his individual and
official capacities,

Third-Party Defendant – Appellee.

Filed: January 12, 2022

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ORDER

Before MORITZ, BRISCOE, and EID, Circuit
Judges.

Appellee Lynn D. Becker's petition for panel
rehearing is denied.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT,
Clerk