

PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

September 7, 2021

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

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.

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

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 Our August 3, 2021 opinion is withdrawn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,

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

CHRISTOPHER M. WOLPERT, Clerk

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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.

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.

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.

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.