Edwin C. Barnes (#0217)
Timothy R. Pack (#12193)
CLYDE SNOW & SESSIONS
201 South Main Street, Suite 2200
Salt Lake City, UT 84111
Telephone and Fax: (801) 322-2516
Email: ecb@clydesnow.com
trp@clydesnow.com

Attorneys for the Central Utah Water Conservancy District

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

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe, SHAUN CHAPOOSE, EDRED SECAKUKU, LUKE J. DUNCAN, RONALD WOPSOCK, JULIUS T. MURRAY III, and CHRISTOPHER L. TABBEE, individually on their own behalf and on behalf of all persons similarly situated, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR; DEB HAALAND, Secretary of the Interior, United States Department of the Interior; BUREAU OF RECLAMATION; BUREAU OF INDIAN AFFAIRS; THE STATE OF UTAH; CENTRAL UTAH WATER CONSERVANCY DISTRICT, a political subdivision of the State of Utah; SPENCER COX, in his capacity as Governor of Utah, and TERESA WILHELMSEN, P.E., in her capacity as Utah State Engineer and Director, Utah Division of Water Rights, Salt Lake City, Utah, Defendants.	**DEFENDANT CENTRAL UTAH WATER CONSERVANCY DISTRICT'S MOTION TO DISMISS** Civil Case No. 2:21-CV-00573-JNO-DAO Judge Jill N. Parrish Magistrate Judge Daphne A. Oberg

Central Utah Water Conservancy District ("District") moves the Court to dismiss all claims stated against it in the Third Amended and Supplemented Complaint ("TAC") (Doc. 186) filed by the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("Tribe") on its own behalf and on behalf of its members (collectively "Plaintiffs"). The TAC was filed here, with leave of court following dismissal by Judge Carl J. Nichols of the United States District Court for District of Columbia ("DC Court"), of certain claims that were made in the Tribe's Second Amended and Supplemented Complaint ("SAC") and the transfer of the remaining SAC claims to the District of Utah. The claims that were dismissed by the DC Court included all four SAC claims that sought relief from the District.

The principal focus of the TAC is the Tribe's claim that the federal government has breached its duty of trust to the Tribe through a series of actions and inactions dating back more than a hundred years.[1] There is no allegation in those claims that the District failed to build any Central Utah Project ("CUP") storage facility that was authorized and funded by Congress, or that it built any facility that was not so authorized. The secondary focus of the TAC is on the quantification and priority of the Tribe's water rights, which the District has never challenged.

As the TAC is now reformulated, the Tribe sets forth eleven claims for relief, eight of which seek relief only from the Federal Defendants (the second, fourth, fifth, sixth, seventh, eighths, ninth, and tenth claims). Two claims of the TAC (the first and eleventh claims) are advanced against "all Defendants", including the District, the first of which is a restatement of the first claim in the SAC. Curiously, the Tribe does not identify the party or parties from whom relief

[1] The District objects to the Tribe's inflammatory allegations of "racial cleansing and genocidal campaigns" in its eleventh claim for relief. Central Utah submits that these hyperbolic allegations are impertinent and scandalous and should therefore be stricken from the TAC pursuant to Rule 12 (f) of the Federal Rules of Civil Procedure.

is sought in its third claim, either in the Table of Contents (TAC, p. ii) or in the heading for that claim (*Id.*, p. 54). Since the third claim alleges estoppel and breach of trust and seeks declaratory relief under the Central Utah Project Completion Act ("CUPCA"), as did the fourth claim in the SAC, the District assumes that claim is asserted against all Defendants, as well. In the eleventh claim for relief, the Tribe and a purported class of plaintiffs allege a pattern of "persistent racial animus and invidious discrimination" beginning as early as 1905, some 60 years before the District was organized.

I. RELIEF SOUGHT AND GROUNDS FOR RELIEF

The District asks the Court to dismiss all claims asserted against it by the Tribe and the putative class, with prejudice, because those claims are barred by the applicable statute of limitations. The Tribe argues that the Defendants should be estopped from asserting the statute of limitations, but its argument is based on the Tribe's own actions and inactions and is thus unavailing. The Tribe's claims should also be dismissed because they fail to state claims against the District upon which relief may be granted and, to the extent they purport to seek monetary damages from the District, because the Tribe failed to comply with (or even allege compliance with) the requirements of the Utah Governmental Immunity Act. The District will address herein those grounds that apply specifically to it, and hereby expressly joins in and incorporates the additional arguments that will be made by the State and Federal Defendants[2] to the extent they apply to the TAC's first, third, and eleventh claims for relief.

[2] The terms "Federal Defendants" and "State Defendants" are used frequently throughout the TAC but are nowhere defined. The District assumes that the term Federal Defendants includes the United States Department of the Interior and its Secretary along with the Bureau of Reclamation and the Bureau of Indian Affairs, and that the term State Defendants refers to the State of Utah, its Governor, and the State Engineer. The District is a legal entity separate and apart from the State of Utah, with no authority to act for or bind the State, but will nevertheless assume that the Tribe intended to include the District whenever it uses the term State Defendants in the TAC.

The Tribe makes no claim that the District constructed any facility or spent any federal funds in a manner contrary to the express terms of congressional authorizations and appropriations. Indeed, in the 337 paragraphs of the TAC, the District is alleged to have committed only two acts: the execution of the "1965 Deferral Agreement" (the "Deferral Agreement") and the "Agreement for the Sharing of Costs Associated with Replacement Features for the Uintah and Upalco Units of the Central Utah Project." *See* TAC ¶¶ 131, 325. However, no act or statement is alleged in which the District is alleged to have denied or repudiated the Deferral Agreement or the quantification of the Tribe's water rights or failed to complete any replacement features that were authorized and funded by Congress. Neither is the District alleged to have adjudicated any water right, Indian or otherwise; indeed, it has no authority to do so. Moreover, the District and its representatives are not alleged to have adopted any discriminatory policy or custom, or to have committed any discretionary act adverse to the Tribe.

II. STATEMENT OF FACTS

1. The Tribe is a federally recognized sovereign Indian Tribe, organized as a tribal government and chartered as a federal corporation. It acts as *parens patriae* on behalf of its members. TAC ¶¶ 6, 7.
2. The Tribe consists of 2,070 members who are represented by a Business Committee that holds the power and responsibility to negotiate with Federal, State, and local governments on behalf of the Tribe, to approve or veto and disposition and any interest in tribal lands and other tribal assets, and "to regulate all economic affairs and enterprises of the Tribe." TAC ¶¶ 185, 186.
3. The District is a water conservancy district organized in 1964 under the laws of the State of Utah. Utah water conservancy districts are political subdivisions distinct from the

state and they can only exercise the specific powers that have been granted to them by the Utah Legislature. *See* Utah Code Sections 17B-1-103, 17B-2a-1002 – 1003; *see also Metro. Water Dist. of Salt Lake and Sandy v. DHCH Alaska Trust*, 2019 UT 62, ¶ 12, 452 P.3d 1158. The District has no authority to act for or bind the State of Utah.

4. The Tribe has not alleged that the District has any Trust obligations to the Tribe and, in fact, it does not.

5. For purposes of this motion, the Tribe is bound by its allegations that the Federal Defendants have "comprehensive, pervasive, elaborate, and exclusive control over the Tribe's waters" and "exclusive control over the infrastructure necessary to… put the water rights to productive use." TAC ¶¶ 52, 53. The District is not alleged to have any such control.

6. For purposes of this motion, the Tribe is bound by its allegations that the Federal Defendants have "exclusive responsibilities" and "exclusive authority" for the Uintah Indian Irrigation Project. TAC ¶¶ 68, 71.

7. The District is not a party to the Midview Exchange Agreement. TAC ¶ 110.

8. The District is not a party to the Green River Block Exchange Contract. TAC ¶ 172.

9. For purposes of this motion, the Tribe is bound by its allegations that the Federal Defendant were responsible for the Bottle Hollow obligations. TAC ¶ 164. The District is not alleged to have had any such responsibilities. *Id.*

10. For purposes of this motion, the Tribe is bound by its allegations that it was the Federal Defendants who "indefinitely postponed" construction of the Upalco Unit of the Central Utah Project in 1986 and "abandoned" the Ute Indian Unit in 1980. TAC ¶¶ 142, 143.

11. The 1992 CUPCA declared the Upalco and Uintah Units would not be constructed and included provisions for payment of compensation to the Tribe in exchange for a waiver of obligations under the Deferral Agreement. TAC ¶¶ 157, 158. The Tribe separately acknowledged receiving the moneys allocated for the waiver, as allowed by Title V of the Reclamation Projects Authorization and Adjustments Act of 1992, entitled Ute Indian Rights Settlement, PL 102-575. *See* DC Court's Memorandum Opinion ("DC Opinion") (Doc. 114), p. 19 n.12.
12. For purposes of this motion, the Tribe is bound by its allegation that it was the Federal Defendants who failed to complete the CUP. TAC ¶ 201.
13. It was clear and a matter of public record no later than 1992 that the Upalco and Uintah Units of the CUP were no longer authorized and would not be constructed. The Tribe acknowledges that no federal funds have since been appropriated for their construction. TAC ¶ 327.
14. Authorization for the "Agreement for the Sharing of Costs Associated with Replacement Features for the Uintah and Upalco Units of the Central Utah Project" referenced in TAC ¶ 325 expired and is no longer in effect. *See* Reclamation Projects Authorization and Adjustments Act of 1992, § 203(b), PL 102-575.
15. The Tribe does not allege that it filed (and, in fact, did not file) a notice of claim with the District as required by the Governmental Immunity Act of Utah as a prerequisite for maintaining a suit for damages.

III. ARGUMENT

A. The Tribe's Claims against The District are Barred by the Law of the Case.

The DC Court's ruling that the first and fourth claims for relief stated in the SAC (now repleaded as the first and third claims in the TAC) are barred by the statute of limitations, and that the sixteenth claim in the SAC (now modified and repleaded as the eleventh claim in the TAC) did not state a claim upon which relief could be granted. The District commends the DC Court's ruling and urges this Court to carefully consider it, including the DC Court's findings that:

- "The Tribe has known since 1980 that Defendants 'abandoned' the Ute Indian Unit … and since 1986 that the Upalco Unit was 'indefinitely postponed[.]' The Tribe has also known, since at least 1992, that Defendants would not honor the Tribe's understanding of the scope of its water rights." DC Opinion, p. 9 (internal citations omitted);

- "Thus, as of the 1980's, and certainly by 1992, the Tribe knew that Defendants would not meet the specific obligations described in the 1965 Deferral Agreement.[]" *Id.*; and

- "§507 of the 1992 Act expressly waived 'any and all claims relating to [the Tribe's] water rights covered under the [1965 Deferral] [A]greement,' as soon as the Tribe received the 'moneys' described in §§ 504, 505, and 506. *See* 106 Stat. at 4655. The Tribe acknowledged its receipt of those funds in a 2006 complaint filed in the Court of Federal Claims." *Id.*, p. 19 n.12.

The TAC does not undermine or change those findings, and they remain the law of the case. *See McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) ("The [law of the case] doctrine is based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided . . . [and] requires that litigants be encouraged to present all available claims and defenses at the earliest opportunity." (internal citations and quotation marks omitted)). The DC Court similarly rejected the Tribe's argument that the continuing violations

doctrine protected its claims from the statute of limitations, noting that "the Tribe could have sought 'advice, launch[ed] an inquiry, and discover[ed] through [its] agents the facts underlying [its] current claim[s]' back in 1992." DC Opinion, p. 10 (citation omitted). The Tribe attempts to bolster its argument with references to continuing negotiations culminating as late as 2016 (TAC ¶¶ 195, 211), but that argument ignores the point that the authorization for construction of the Uintah and Upalco Units had expired more than twenty years previously and that the negotiations were not about reviving or reauthorizing those projects.

1. The Continuing Violations Doctrine Does Not Save the Claims.

Notably, none of the allegations the Tribe makes in support of the continuing violations doctrine rely on any statements made or acts by the District, and thus could not support a tolling of claims against it. Neither does the law applicable here require its application to other parties.

The DC Court dismissed the Tribe's first, second, fourth, and fifth claims for relief based on the statute of limitations, but noted that "the continuing violation doctrine tolls claims alleging an unreasonable delay of agency action" and that 5 U.S.C. § 706(1) "imposes upon federal agencies an ongoing obligation to avoid unreasonable delay." *See* DC Opinion, p. 10 n.5. The Tribe apparently inserted additional Section § 706(1) allegations into the TAC because the DC Court appeared to have opened that door. The D.C. Circuit has allowed application of the continuing violation doctrine under Section § 706(1) in particular cases, but the Tenth Circuit has not yet taken a position on whether it believes the APA allows that argument. Analogous case law suggests that it will not.

The Eleventh Circuit, for example, held that the Department of the Interior's failure to designate a critical habitat for a threatened species (i.e., a failure by an agency to act) was not a continuing violation, "but, rather, a single violation that accrues on the day following the

deadline" to act. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006). That court further held that it "distinguishes between the present consequence of a one time violation, which does not extend the limitations period, and the continuation of that violation into the present, which does," and held that the failure to designate the habitat amounted to "a one-time violation under the Act" and the alleged continuing violations were merely "the continuing effects" of the one-time violation. *Id.* Thus, the Eleventh Circuit refused to permit the untimely claims under the continuing violations doctrine. *Id.; see Parkhurst v. Lampert*, 264 F. App'x 748, 749 (10th Cir. 2008) (holding that, in the context of a § 1983 case, the continuing violation doctrine "is triggered by continual unlawful acts, not by continual ill effects from the original violation"); *Pike v. City of Mission, Kan.*, 731 F.2d 655, 660 (10th Cir. 1984) (overruled in part on other grounds by *Canfield v. Douglas Cty.*, 619 F. App'x 774 (10th Cir. 2015) ("A plaintiff may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continue to be felt.").

The Eastern District of Washington opined that the argument that a failure to act is a continuing violation, "taken to its logical end, suggests a *de facto* elimination of any statute of limitation, for the limitation period would never begin to accrue so long as" the failure to act continued. *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1236 (E.D. Wash. 2010).

While the Tenth Circuit has not issued an opinion on the subject, the United States District Court for the District of New Mexico conducted an extensive analysis based on Tenth Circuit precedent in similar matters. *See Wild Horse Observers Assoc. v. Salazar*, 2012 WL 13076299 (D.N.M. Sep. 28, 2012) (unpublished). In *Salazar*, the plaintiffs argued the Department of Interior had not maintained a current inventory of wild horses and burros on

public lands, which was required by the Wild Horses Act. *Id.* at *3. Plaintiffs argued their arguments were not time-barred under Section 706(1) because the failure to act amounted to continuing violations. The *Salazar* court analyzed *Hamilton* (11th Circuit) and *Wild Fish* (E.D. Wash.) to note the split among the courts, but also analyzed the Tenth Circuit's *Ute Distrib. Corp. v. Sec'y of the Interior of the United States*, which centered on the DOI's implementation of the 1954 Ute Partition and Termination Act that divided water rights between the "mixed blood" and "full blood" members of the Tribe. 584 F.3d 1275, 1282 (10th Cir. 2009). In *Ute*, the Tribe argued that the DOI had a continuing duty to manage the undistributed assets, including undistributed water rights, but the Tenth Circuit rejected this argument, stating "the continuing wrong doctrine cannot be employed where the plaintiffs' injury is definite and discoverable and nothing prevented the plaintiff from coming forward to seek redress." *Id.* at 1283 (internal quotation marks omitted). The Tenth Circuit held that the DOI's act was "a single discrete event . . . that gave rise to a cause of action and triggered the limitations period." *Salazar*, 2012 WL 13076299, at *7.

Based on this analysis, the *Salazar* court held that the plaintiff's claim regarding the DOI's failure to inventory the wild horses was time-barred because the plaintiffs "should have realized that the Placitas area had not been inventoried for wild horses and was not being managed in accordance with the dictates of the Wild Horses Act" and that their "injury was discrete and discoverable and nothing prevented Plaintiffs from coming forward to seek redress." *Id.* at *9.

In the present case, the failure to complete the CUP project, as well as the expiration of the congressional authorization for the Uintah and Upalco Units and the fact that funds were not appropriated for their completion, were known, discrete events. The Tribe may still protest the

impact of those events, but under *Ute* and *Salazar* as well as cases in other circuits, those impacts do not constitute continuing violations that would toll the statute of limitations. As noted by the DC Court, "the Tribe could have sought advice, launched an inquiry, and discovered through its agents the facts underlying its current claims back in 1992." DC Opinion, p. 10 (cleaned up).

2. The Doctrine of Estoppel Does Not Save the Claims.

The Tribe claims that the State Defendants and the District should be estopped from asserting the statute of limitations as a defense to the first and third claims for relief because they "have continuously reaped the benefits of the Deferral Agreement" and that the Federal Defendants cannot assert that doctrine because the Tribe never ratified the agreement that was contemplated by CUPCA. See TAC ¶¶ 154-55, 207, 240.[3] These arguments fail.

The Tribe cannot assert its own decades-long refusal to ratify an agreement with the State and Federal Defendants as a basis to estop them from raising the statute of limitations. The U.S. Supreme Court has held that "the party claiming estoppel must have relied on its ***adversary's conduct*** in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know nor should have known that its adversary's conduct was misleading." *Heckler v. Cmty. Health Servs. of Crawford Cnty,, Inc.*, 467 U.S. 51, 59 (1984) (emphasis added). Similarly, the Utah Supreme Court held that "[t]he equitable estoppel doctrine comes from the maxim that no man may take advantage of his own wrong. This maxim is deeply rooted in American jurisprudence." *Fitzgerald v. Spearhead Invs., LLC*, 2021 UT 34, ¶ 17, 493 P.3d 644 (internal quotation marks omitted); *see Penny v. Giuffrida*,

[3] As noted by the DC Court, the Tribe ultimately agreed to accept compensation for the foregone CUP components and waived its claims under CUPCA. DC Opinion, p. 19 n.12.

897 F.2d 1543, 1545 (10th Cir. 1990) ("The purpose of the doctrine of equitable estoppel is to ensure that no one will be permitted to take advantage of his own wrong.").

Thus, the Tribe's failure or refusal to ratify any compact cannot estop the Defendants from asserting of the statute of limitations against the Tribe's claims. As the DC Court noted, the Tribe was on notice of its claims decades before this action was initiated and it failed to further investigate or assert its claims at that time.

B. The Tribe Fails to State a Claim Against the District Upon Which Relief May Be Granted.

a. The First Claim for Relief

The Tribe's first claim for relief alleges that the District and others have repudiated the quantification of the Tribe's so-called "*Winters* Rights," yet the Tribe cites no statement, document, or action where the District purportedly did so. The District has never challenged the quantification or priority of those rights, so that is not a claim upon which relief may be granted against the District.

It should be noted that quantity and priority are but two on the numerous attributes of a water right. The voluminous *Winters* Rights claimed by the Tribe, which are grouped into some seven drainages in the Decker Report, are co-located with water rights owned by thousands of others in the hundreds of tributaries found in the seven relevant drainage basins. While the Tribe has an early priority claim to some of these basin waters, it does not have exclusive rights to any drainage or tributary, and the waters claimed by the Tribe have never been specifically assigned to or allocated among the numerous possible hydrologic sources. In particular, the Decker Report describes "practically irrigable lands," but it does not identify specific streams or other sources, means of conveyance, allowed depletion, or other common legal attributes of the water rights that

would be used to irrigate those lands. Neither does the Decker Report purport to identify or quantify the rights of others who also own water rights in those shared sources.

In addition to the quantity or rate of flow of water allowed under a water right, other essential attributes of such rights include identification of steam or other source where the water is to be taken, the point where the water will be diverted, the place where the water will be used, the method by which the water will be conveyed from the point of diversion to the place of use, the allowed nature and time of use, whether the water can be stored and, if so, where and how long and where it will be released. *See* UTAH CODE ANN. §§ 73-3-1, *et seq*.

The early priority of the Tribe's water rights may put it close to the head of the proverbial ditch, but that ditch is shared with thousands of others who have rights to some of those flows and whose use of water may potentially interfere with the Tribe's rights. The District cannot and is nowhere purported to have adjudicated the Tribe's water rights. Neither does the Utah State Engineer have authority to adjudicate title to those rights. Rather, that authority is vested exclusively in the courts. *See Jensen v. Jones*, 2011 UT 67, ¶¶ 10-11, 270 P.3d 425. The Tribe has an available remedy and protection against interference with its rights by others. There is a general adjudication action for the waters in the Uintah Basin pending in the state court, and the United States, through the McCarran Amendment, has waived jurisdictional defenses to participation in that process, though the Tribe has not yet filed claims in that proceeding. The Tribe could and should document its claims of priority and quantification there to protect them against the claims of or interference by others. The Tribe could also confirm there the other essential attributes of its rights. Without the clarity and detail that come only from the adjudication of water rights in the context of all others who may claim interests in them, the Tribe will not be able to demonstrate interference with its senior rights by individual water users who hold rights with specific

authorized points of diversion and authorized places of use. This Court is not a forum where the full relief sought by the Tribe can be obtained.

b. The Third Claim for Relief

The Complaint does not identify which parties the Tribe's third claim for relief is asserted against but, as noted above, the District assumes it was intended to apply to all Defendants. That said, the only "failure" the Tribe alleges in its third claim is that of "the United States, acting through the Federal Defendants." TAC, ¶ 237. No act or omission has been alleged on the part of the District or the State Defendants, and the District is not alleged to have a trust relationship with the Tribe.

The issues of waiver and estoppel are addressed above and are for brevity are referenced and incorporated here. For those reasons, along with the fact that no conduct on the part of the District is implicated in the third claim for relief, it should be dismissed.

c. The Eleventh Claim for Relief

The eleventh claim for relief alleges breach of trust and civil rights and a long pattern of alleged constitutional rights violations beginning as early as 1905. These allegations, made in hyperbolic terms, are an apparent reaction to the DC Court's statement that the Tribe did not "adequately allege animus" when it attempted in the SAC to infer that an invidious discriminatory purpose motivated the decisions of which it complains. DC Opinion, p. 21.

The failure of the Tribe to adequately plead its discrimination claims noted by the DC Court is not cured by the new broad, general historical arguments set forth in the TAC. For purposes of this motion, however, the District notes that the "continuous and systematic practice" supporting the claims of "persistent racial animus and invidious discrimination" argued by the Tribe is founded in pattern of conduct that allegedly began nearly sixty years before the

District was formed.[4] TAC, ¶ 316. It cannot be honestly argued that the District was an instigator of, or party to, the century-long pattern of practices characterized by the Tribe.

The District is mentioned in the eleventh claim for relief only in connection with a 1995 cost-sharing agreement with the Interior Department (but not the Tribe) relating to possible replacement features for the Uintah and Upalco Units. TAC ¶¶ 324, 325. The Tribe accurately states that the District was authorized by CUPCA in 1992 to receive federal fund and complete construction of those specific projects that had been authorized and for which funds were appropriated by Congress. *Id.* ¶ 324. The 1995 agreement was not self-acting, however: any replacement facilities would have required additional congressional authorization and authorization. That authorization, to the extent it might have been evidenced by the 1995 agreement, expired years ago. *See* Reclamation Projects Authorization and Adjustments Act of 1992, Sec. 203(b), PL 102-575. Further, the funds for construction of replacement facilities were never appropriated.

CUPCA gave the District no discretion with regard to the amount of funding it would receive or which facilities were to be built, and the Tribe does not allege that the District or any of its officers exercised discretion in that or any other regard. The eleventh claim simply fails to identify a specific and cognizable cause of action against the District.

While Title VI (42 U.S.C. § 2000d) may allow a private right of action for claims of discrimination in federally funded programs, it "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Black Educ. Network, Inc. v. AT & T Broadband, LLC*, 154 F. App'x 33, 44 (10th Cir. 2005) (stating the same). "A motion to

[4] The District does not agree with the pejorative characterizations of the Federal Defendants' conduct, but provides cites to those allegations only to illustrate the fact that Plaintiff has not alleged any acts of misconduct on the part of the District.

dismiss a Title VI claim is appropriate where a plaintiff fails to allege any evidence to indicate racial bias motivated a defendant's action and the allegations made support a finding that alleged bias was not racial in nature." *Joseph v. Boise State Univ*., 998 F. Supp. 2d 928, 944 (D. Idaho 2014), aff'd, 667 F. App'x 241 (9th Cir. 2016).

Here, where no statement or act is alleged to support an argument that the District *intentionally* discriminated against the Tribe or any of its members, the claim fails as a matter of law. "Under Title VI, an actionable 'discriminatory purpose ... implies more than intent as volition or intent as awareness of consequences ... [it] implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Bray v. Worcester Polytechnic Inst*., ___ F. Supp. 3d ____, No. CV 21-40049-TSH, 2022 WL 952131, at *10 (D. Mass. Mar. 30, 2022) (citation omitted).

With regard to the Tribe's Section 1983 claim, a threshold question is whether the District is an "arm of the state" as suggested by the Tribe's apparent characterization of the District as a State Defendant. Courts have held that an "arm of the state" is not a "person" as that term is used in Section 1983 and is, therefore, not subject to claims under Section 1983. *See McLaughlin v. Bd. of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1172 (10th Cir. 2000); *Gaby v. Bd. of Trustees of Cmty. Tech. Colleges*, 348 F.3d 62, 63 (2d Cir. 2003) (per curiam) (collecting cases).[5]

[5] A different analysis may apply if the District had instead been argued to be a "municipality" rather than an "arm of the state." In that case, to assert a Section 1983 claim, a party must show "1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged." *Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015). None of those allegations are made in support of the Tribe's eleventh claim.

The Tribe's due process claims fail for similar reasons. "To establish a procedural-due-process claim, a plaintiff needs to demonstrate not only the possession of a protected property interest but also a denial of an appropriate level of process." *Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011). The TAC is devoid of allegations of any process at all that was due to the Tribe on the part of the District. As stated by the Eleventh Circuit Court of Appeals,

> The question is: what process was due? To state a claim for the denial of property without due process of law, the plaintiff must allege (1) deprivation of a constitutionally protected property interest; (2) governmental action; (3) and constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir.2003). Count II contains no allegation of the process the Tribe claims was due, much less that it was inadequate. The District Court's dismissal of Count II is accordingly affirmed. *See Tinney v. Shores*, 77 F.3d 378, 382 (11th Cir.1996) (holding that, by failing to allege inadequate process, appellant did not state a procedural due process claim).

Miccosukee Tribe of Indians of Fla. v. United States, 716 F.3d 535, 559 (11th Cir. 2013). In this case, the fact that the Tribe identifies no process that was required of the District is fatal to the Tribe's due process claim.

Due process protection has "[h]istorically ... been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006) (emphasis in original). The eleventh claim fails for the additional reasons that it implicates no District officials and describes no deliberate or discretionary decisions by that entity.

A substantive due process claim under the Fourteenth Amendment may arise when a plaintiff alleges the government deprived him of a fundamental right. *Williams v. Berney*, 519 F.3d 1216, 1220 (10th Cir.2008). Substantive due process protects fundamental liberty interests and protects against the exercise of government authority that "shocks the conscience." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir.2008). "To show the Defendants' conduct is conscience shocking, [a plaintiff] must prove a government actor abused his or her

authority or 'employ[ed] it as an instrument of oppression' in a manner that shocks the conscience.**"** *Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 750 (10th Cir. 2013) (internal citation omitted). Here, again, no District actor is identified and there is no claim that any District actor abused his or her authority.

For each and all of these reasons, the eleventh claim fails to state a claim against the District upon which relief may be granted.[6]

d. The Tribe's Prayer for Relief.

The inadequacies of the Tribe's claims against the District are made obvious by the Tribe's Prayer for Relief. It asks the Court to order the Federal Defendants to "fulfill their trust obligations," to provide an accounting, and to "declare that the Midview Exchange Agreement is illegal." TAC, pp. 84-85. Those requests by their own terms do not apply to the District.

The Tribe then asks the Court to order unspecified "declaratory and injunctive relief," apparently against all Defendants, to remedy the "Class Action Plaintiffs' deprivation of due

[6] While the class action allegations need not be reached because the eleventh claim fails to state a claim, the District questions the adequacy of those allegations. Rule 23 of the Federal Rules of Civil Procedure allow a class action claim where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The Tribe's own allegations call into question whether the TAC qualifies for class action treatment.

The Tribe asserts, for example, that it acts as *parens patriae* for its members and asserts that its business committee has the power and responsibility to negotiate with the federal and state governments on behalf Tribe and to regulate "*all* economic affairs and enterprises of the Tribe." TAC ¶¶ 7, 186 (emphasis added). There is no allegation that any of the individual members of the Tribe owns a separate interest in water rights claimed by the Tribe or has been prevented from using them. Neither is there any suggestion that the Tribe members did not benefit from the payments made to the Tribe for the waiver of claims. The Tribe has 2,070 members. TAC ¶ 185. Though numerous, its members are known and counted, and there is no group of unknowns who need to be identified or given a chance to assert separate claims.

process and equal protection." *Id.*, p. 85. As noted above, the TAC implicates no District actor or action in its discrimination claim, so there is no District conduct that could or should be enjoined. Further, the very generality of that request and the inability of the Tribe to identify any specific conduct it wants enjoined confirms the inadequacy of the eleventh claim for relief.

The Tribe concludes the specific requests of its prayer for relief by asking for an award of "[m]onetary damages as permitted by law based on Defendants' unlawful acts and omissions identified herein." *Id.* That request fails because the TAC identifies no basis for, or method for calculation of, monetary relief. Further, to the extent it is directed to the District, it is barred by the Governmental Immunity Act of Utah. *See* UTAH CODE ANN. §§ 63G-7-101, *et seq*. That act provides governmental entities with immunity from suit except in areas where immunity is specifically waived. The Tribe did not invoke a specific waiver from immunity for the claims it has made against the District and, fatal to its monetary claim, failed to demonstrate that it timely filed the notice of claim required by UTAH CODE ANN. § 63G-7-401(2) as a prerequisite to the filing of an action. In fact, the Tribe filed no such notice with the District before it commenced this action.

IV. CONCLUSION

The TAC does not identify any claim of harmful action or inaction on the part of the District or any of its representatives. In particular, the Tribe does not allege that the District built any facility or took any other action with regard to the Tribe that was inconsistent with the terms of the specific authorization and appropriations of Congress.

The DC Court found that the Tribe's claims were barred by the statute of limitations. That finding is the law of the case, and the Tribe's renewed attempts to assert a pattern of continuing violations and estoppel do not change that result. It was obvious no later than 1992 that the Uintah

and Upalco Units of the CUP were no longer authorized and would not be funded. The Tribe simply cannot assert its own refusal to ratify agreements as detrimental reliance on its part sufficient to estop others from invoking the statute of limitations.

The District has not repudiated or disavowed the quantity or priority of Tribe's water rights, though the Tribe has not elected to participate in the adjudication necessary for it to protect its rights from interference by other appropriators. Further, the Tribe alleges no violation of CUPCA on the part of the District. Neither does the TAC describe any discretionary act or other conduct on the part of the District that would support the civil rights claims the Tribe attempts to assert in its own regard and on behalf of the putative class of tribal members.

For these reasons and based on the further arguments and authorities advanced by the Federal and State Defendants, the District respectfully moves this Court to dismiss all claims made against it by the Tribe with prejudice.

Dated this 18th day of November, 2022

CLYDE SNOW & SESSIONS

/s/ Edwin C. Barnes

Edwin C. Barnes (#0217)
Timothy R. Pack (#12193)
CLYDE SNOW & SESSIONS
201 South Main Street, Site 1300
Salt Lake City, UT 84111
(801) 322-2516
ecb@clydesnow.com
trp@ckdesnow.com

Counsel for Defendant Central Utah Water Conservancy District

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of November, 2022, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

Dated this 18th day of November, 2022

/s/ Barbara Reissen
Barbara Reissen