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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION, ET AL., Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, ET AL., Defendants.	**PLAINTIFFS' RESPONSE TO DEFENDANT CENTRAL UTAH WATER CONSERVANCY'S MOTION TO DISMISS** Civil Case No. 2:21-CV-00573-JNP-DAO Judge Jill N. Parrish Magistrate Judge Daphne A. Oberg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Plaintiffs Ute Indian Tribe of the Uintah and Ouray Reservation and its individual Class Action Plaintiffs (collectively referred to as the "Tribe"), through undersigned counsel, submits this Response to Defendant Central Utah Water Conservancy District's ("CUWCD") Motion to Dismiss ("MTD," ECF Document 199) the Tribe's Third Amended Complaint ("TAC," ECF Document 186).

REFERENCES TO THE RECORD

Evidentiary materials for the Tribe's opposition are contained in the three-volume exhibit appendix attached to the Tribe's Response in Opposition to the Federal Defendants' Motion to Dismiss the Tribe's Third Amended Complaint. References to this appendix are to volume and page number(s), *i.e.*, "App. I, 1-10."

I. INTRODUCTION AND RESPONSE TO RELIEF SOUGHT[1]

Defendant Central Utah Water Conservancy District is a political subdivision of the State of Utah. It was established pursuant to Utah state law, the "Water Conservancy District Act," Utah Code §§ 17B-2a-1001–17B-2a-1009. In its Third Amended Complaint, the Tribe has included CUWCD as a defendant in three of its eleven claims for relief. These include the Tribe's First Claim for Relief (seeking estoppel, breach of trust, declaratory and enforcement relief as to the established quantification of the Tribe's Indian reserved water rights), Third Claim for Relief

[1] CUWCD also purports to join in and incorporate "the additional arguments that will be made by the Federal and State Defendants." MTD at 3. Many of the defenses raised by the other defendants in this matter are specific to their respective character as either agents of the Federal government or the State of Utah, and thus cannot simply be transferred into the present pleading. To the extent relevant, the Tribe incorporates by reference all counterarguments raised in the Tribe's Responses in objection to the Federal Defendants' and Utah State Defendants' Motions to Dismiss the Tribe's Third Amended Complaint, together with the Tribe's exhibits submitted as part of its objection memoranda.

(seeking estoppel, breach of trust, interpretation of Central Utah Project Completion Act ("CUPCA"), declaratory and enforcement relief as to the impact of the 1992 CUPCA on the Tribe's water right claims), and Eleventh Claim for Relief (Breach of Trust and Denial of Due Process and Equal Protection under the Fifth and Fourteenth Amendments to the U. S. Constitution, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(d**).**

The CUWCD's description of the relief it seeks does not match the argument section of its motion to dismiss. In its argument section, CUWCD raises arguments in two main sections: 1) that the Tribe's claims against CUWCD are barred by the law of the case; and 2) that the Tribe fails to state a claim against the CUWCD upon which relief may be granted. MTD at 7 and 12. The CUWCD does so without analyzing this Court's Memorandum Decision and Order Granting Motion for Leave to File Third Amended Complaint (Doc. No. 163), ECF Document 185 ("Order"), and without even stating the standard for granting a motion to dismiss for failure to state a claim. Because law of the case does not apply to a prior court's order in this situation, and because the Tribe's TAC far exceeds the minimum required to state a claim at this pleading stage, the CUWCD's Motion to Dismiss must be summarily dismissed and the CUWCD must be required to answer the Tribe's Complaint.

At this, the pleading stage of litigation, a plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Fed. R. Civ. P. 8(a)(2). A complaint must give the defendants notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007). When ruling on a defendant's motion to dismiss, a judge must consider the complaint as a whole and must "accept as true all of the factual allegations contained

in the complaint." *Erickson,* 551 U.S. at 94 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007)) (other citations omitted). A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that ... recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal quotation marks and citation omitted). At this pleading stage, having corrected what the U.S. District Court for the District of Columbia ("D.C. Court") referred to as pleading deficiencies, and having filed a "substantially revised and reformulated" complaint, the motion to dismiss should be denied.

In the second paragraph of its section on Relief Sought, CUWCD states that "in the 337 paragraphs of the TAC," CUWCD "is alleged to have committed only two acts: the execution of the '1965 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.'" MTD at 4 (citing TAC ¶¶ 131, 325). That is grossly incorrect. The Tribe's complaint makes clear that, when Congress passed CUPCA in 1992, Congress delegated authority to this state agency, the CUWCD, to complete construction of the Central Utah Project ("CUP"). In fact, CUWCD's current position is contrary to its own web page describing the history of CUPCA and stating its role in CUP:

> The Central Utah Project Completion Act ("CUPCA") was passed in 1992 and was signed into law by President George Bush Sr. The bill was a drastic departure from the old way of building federal projects and was the first time that a project had been taken from the jurisdiction of the BOR and the responsibility of construction given to the local project sponsor, in this case Central Utah Water Conservancy District.

https://www.cuwcd.com/about.html#gsc.tab=0 (last visited February 21, 2023); *accord* Federal Defendants' budget presentation on March 11, 2020, to the U.S. Senate Subcommittee on Energy and Water Development (in which the Federal Defendants acknowledge that the CUWCD is responsible for the planning and construction of projects built as part of the CUP) (App. II, 307)

and Solicitor's Opinion dated October 13, 1995 (explaining CUWCD's role) (Appx. II, 282).

More specifically, Congress delegated authority to the CUWCD to construct the Uinta Basin Replacement Project—the water storage and infrastructure that was to include water storage for the Ute Indian Tribe.[2] TAC ¶¶ 165-67 and 323-31. The Tribe alleges in its complaint that:

> Defendant CUWCD was the Utah state agency authorized by Congress under CUPCA § 202(D) to receive federal funds and to assume responsibility for completing construction of the CUP.

TAC ¶ 324. The Tribe's complaint also alleges that:

> [T]he CUP was funded by hundreds of millions of dollars in federal tax dollars over several decades. Now, as acknowledged in the Final GRBE EA [Green River Block Exchange Environmental Assessment], construction of the CUP is "nearing completion."[3] No federal funding has been appropriated for any future construction and none of the CUP facilities were built to serve the irrigation and water storage needs of the Ute Indians. These actions and omissions violate the due process and equal protections guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

TAC ¶ 327.

In a footnote at the beginning of its Motion, the CUWCD objects to what it considers "inflammatory allegations" in the eleventh claim for relief and submits that they should be stricken

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[2] App. II, 225, 230. Title II, Sec. 202(2)(D), stating, "In lieu of construction by the Secretary [of Interior], the Central Utah Project and features specified in section 202(a)(1) shall be constructed by the District [Central Utah Water Conservancy District.]"

[3] Final EA, p. 6 states, "The 'Initial Phase' of the CUP included four units, of which 3 have been fully constructed, with the remaining unit nearing completion." (footnote in TAC)

The Tribe asks the Court to take judicial notice of the Final EA, which is a matter of public record and is posted on the website for the United States Department of Interior, Bureau of Reclamation https://www.usbr.gov/uc/envdocs/ea/20190100-GreenRiverBlockWaterExchangeContract-FinalEAandFONSI-508-PAO.pdf (last visited on February 16, 2023).

pursuant to Rule 12(f).[4] MTD at 2 n. 1. In response to the D.C. Court's rulings, the Tribe responded by "adding new allegations regarding racial animus and personal involvement by the State Defendants. (*Id.* ¶¶ 311–37.)." Order at 9. The fact that the CUWCD is offended is not relevant. "Generally, to succeed on a motion to strike under Rule 12(f), the moving party must demonstrate that the challenged allegations are entirely unrelated to the controversy and are prejudicial." *Doe by Smith v. Intermountain Healthcare, Inc.*, No. 218CV00807RJSJCB, 2022 WL 180646, at *14 (D. Utah Jan. 20, 2022) ("Motions to strike are generally 'viewed with disfavor by the federal courts and are infrequently granted.'") (citation omitted).

II. RESPONSE TO CUWCD's STATEMENT OF FACTS

The CUWCD's Statement of Facts is misleading. The Tribe responds by first demonstrating that there are many more allegations directed toward the CUWCD than it acknowledges. Then the Tribe explains how the CUWCD became a party to this case after the State of Utah moved to intervene. Finally, the Tribe responds to a factual discussion that the CUWCD included later in its Motion to Dismiss because the Tribe's response provides overall context for the issues at dispute in this case.

A. Response to Statement of Facts

In addition to claiming that, "in the 337 paragraphs of the TAC," the CUWCD "is alleged to have committed only two acts," discussed above, a footnote in the CUWCD's twenty-page memorandum in support of its Motion to Dismiss claims that "Plaintiff has not alleged any acts of

[4] Fed.R.Civ.P. 12(f) provides that a party may file a motion to strike scandalous matter from a pleading, but a footnote in a motion is not itself a motion. As the District Court rules suggest, a footnote in a Motion to Dismiss is not an appropriate way to move to strike. *See* DUCivR 3-5, DUCivR 7-1(a)(3), DUCivR 7-1(b)(1) and (2).

misconduct on the part of [CUWCD]." MTD at 15 n. 4. And in its conclusion the CUWCD reiterates that "the TAC does not identify any claim of harmful action or inaction on the part of the District or any of its representatives" or otherwise claim that it acted in a way "with regard to the Tribe that was inconsistent with the terms of the specific authorization and appropriations of Congress." MTD at 19. All of these statements are flat wrong. Apparently the CUWCD reaches that conclusion because it believes it has no authority:

> 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.

MTD at 4-5, SOF 3. The CUWCD's claim of lack of authority, its claim that the TAC only alleges two acts committed by the CUWCD, its claim that the TAC does not identify any claim of harmful action or inaction, and its claim that the TAC does not allege any misconduct on the part of the CUWCD are directly contrary to specific allegations in the TAC that the CUWCD fails to acknowledge or refute:

- TAC ¶ 1: "The Tribe also alleges that the State and Federal Defendants have conspired to racially discriminate against the Ute Indian Tribe members by deliberately and systematically excluding the Tribe and its members from the benefits derived from federally-financed public water storage facilities and infrastructure in the State of Utah."
- TAC ¶ 20: CUWCD is the "Utah state agency that was authorized by Congress to receive federal funds and complete construction of the Central Utah Project…."
- TAC ¶ 128: "The CUP was sponsored by Defendant CUWCD…."
- TAC ¶ 131: CUWCD was a party to the September 20, 1965, Deferral Agreement.

- TAC ¶ 140: "[I]n 1973 the Utah State Legislature passed a Concurrent Resolution, signed by the Governor, recognizing the CUWCD had bound Utah to the promises made in the Deferral Agreement…."

- TAC ¶ 207: "The State and CUWCD have continuously reaped the benefits of the Deferral Agreement [and] are estopped from repudiating the quantification of the Tribe's Water Rights in the Agreement…."

- TAC ¶ 209: "[T]he Defendants now refuse to recognize the quantification of the Tribe's Water Rights under the [Deferral] Agreement."

- TAC ¶ 233: Quoting the "August 11, 1993 Agreement between U.S. Department of Interior and the Central Utah Water Conservancy District."

- TAC ¶ 324: As a "political subdivision of the State of Utah," the "CUWCD was the Utah state agency authorized by Congress under CUPCA § 202(D) to receive federal funds and to assume responsibility for completing construction of the CUP."

- TAC ¶ 329: "Defendants have thus conspired, or acted in concert, to divert water, water storage reservoirs, and related infrastructure *away* from the Ute Indians of the Uintah and Ouray Reservations and *towards*, to, and in favor of the non-Indian white-majority population of Utah." (Italics in original).

- The fact that the CUWCD claims that the Agreement for the Sharing of Costs…" referenced in TAC ¶ 325 and MTD at 6, SOF 14, expired does not absolve the CUWCD of liability. Rather, it demonstrates failure to meet their obligation at the time, part of a continual and persistent pattern.

- The CUWCD also fails to recognize that it is encompassed in the global reference to "Defendants" or "State Defendants" throughout the TAC. *See, e.g.*, TAC ¶¶ 130, 132, 133, 139, 144, 147, 148, 186, 187, 188, 200, 204, 205, 209, 210, 211, 238, 316, 317, 329, 330, 331, 333, 335, and 336.

- Because of the way the State of Utah and CUWCD point the finger at each other, discovery will also help determine whether CUWCD had a role where the allegations point specifically to the State of Utah. *See, e.g.*, TAC ¶¶ 193, 194, 196, 293, 294, 318, 320, and 322.

In particular, in its racial animus allegations, the Tribe alleges that the Defendants as a group, including CUWCD, participated in "an historical pattern of persistent racial animus and invidious discrimination … that continues to this day…." TAC ¶ 316. In fact, "nothing evinces

racial animus more clearly than the intentional, purposeful and/or knowing diversion of water … away from a minority population in order to make that resource available for the primary or exclusive benefit of the majority non-minority population." TAC ¶ 317; *see also* TAC ¶ 329 (Defendants have acted intentionally, deliberately, and with knowledge, and have done so continuously and systematically). The CUWCD is clearly accused of wrongdoing. Such allegations are adequate in light of Rule 9(b) of the Federal Rules of Civil Procedure, which permits "malice, intent, knowledge, and other condition of mind of a person" to be "averred generally." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269–70 (10th Cir. 1989) (with descriptions in one newspaper article and other general allegations, plaintiff sufficiently alleged racial animus so it was an error to dismiss the equal protection claim brought under Section 1983).

In fact, the positions of the two State Defendants in this litigation demonstrate their failure to take their obligations seriously historically, and their unwillingness to acknowledge them even now. While the Federal government has trust obligations and ultimate control, as detailed in the Third Amended Complaint, the Federal government has acted with and through others, including the CUWCD. The CUWCD's conclusion from the extent of the federal trust obligation that "the District is not alleged to have any such control," MTD at 5, SOF 5, simply ignores the specific allegations of involvement, control, and responsibility of the CUWCD outlined in the TAC and summarized above. Likewise, the CUWCD's argumentative assertions that "the Tribe is bound by its allegations" in its TAC related to the Federal government's control through its trust obligations, *see* MTD at 5-6, SOF 5, 6, 9, 10, and 12, simply fail to recognize that the CUWCD can still have obligations, including when the Federal government attempts to fulfill its obligations through the State and/or through the CUWCD.

B. State of Utah's Intervention and the CUWCD

The State Defendants' divergent positions must be understood in the context of how they both became part of this litigation. The Tribe filed suit against the United States and federal agencies in early 2018. TAC ¶ 325. In 2019 the State of Utah moved to intervene, D.C.D.C. Doc 32 at 1 (see TAC ¶ 156), representing that:

> This case, however, warrants the State's participation because it directly impacts Utah's scarce water resources, makes assertions concerning the State and its citizens which the State disputes, and petitions this Court to take actions which, if granted, would materially and adversely impact the State and its citizens.

The State of Utah's Motion to Intervene, however, disclaimed that the State had any obligation arising from an agreement made with the CUWCD:

> As a step towards construction of the Central Utah Project ("CUP") the Central Utah Water Conservancy District ("CUWCD"), the United States, and the Tribe negotiated and signed a so-called "Deferral Agreement" in 1965, *see* Am. Compl. ¶ 148. The State was not a party to that Agreement, did not sign it, and is not bound by its terms.

D.C.D.C. Doc 32 at 1. In moving to intervene, the State appeared to be attempting to have its cake and eat it too! The State intervened to protect the State and its citizens, while simultaneously distancing itself from and disavowing the actions of its own state agency, the CUWCD. Therefore, the Tribe named the CUWCD as a party in its Second Amended Complaint to articulate its involvement and to ensure that any relief awarded would bind not only the State of Utah but also its agency, the CUWCD.

But in response to the Second Amended Complaint, and again now in response to the TAC, the CUWCD disavows its own obligation and even claims that it had no authority, in spite of specific allegations in the TAC demonstrating that it did and in spite of the State asserting that the CUWCD negotiated the Deferral Agreement. These litigation tactics (to conceal or deflect where

the real responsibility lies) continue a historic pattern of failing to properly respect the water rights of the Tribe. This litigation must be allowed to continue so that each Defendant is forced to respond to each allegation and so that discovery can reveal the real facts behind the State Defendants' positions.

C. Response to CUWCD's Fundamental Misstatement

Although not included in its "Statement of Facts" section, the CUWCD recites factual statements without citations or legal justification that misrepresent a fundamental issue and must be addressed at the outset. With only minor edits to what it submitted previously, the CUWCD Motion again demonstrates a fundamental misunderstanding of the basic issue of water rights involved in this litigation, stating as follows:

> It should be noted that quantity and priority are but two on [sic] 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. 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 those who also own water rights in those shared sources.

MTD at 12-13. This statement has no bearing on CUWCD's contentions that the Tribe has failed to state a claim against CUWCD. However, the potential ramifications of this statement are significant enough that the Tribe feels compelled to respond.

The Tribe is seeking declaratory relief as to rights that are essential to existence and protected under federal law. The Tribe's Indian reserved water rights are not "co-located" with other water rights in the drainage basins identified in the Decker Report, at least not in the manner

asserted by CUWCD. CUWCD seems to be suggesting that the Tribe is nothing more than another water user within the State of Utah, with a usufructuary entitlement, albeit an "early priority" one, to a quantity of water within the State of Utah's apportionment under the 1948 Upper Basin Colorado River Compact. This reflects a fundamental misunderstanding of the Tribe's Indian reserved water rights. The Tribe's Indian reserved water rights became fully vested property rights upon creation of the Tribe's reservation in 1861 (as to the Tribe's Group 1- 5 water rights) and 1882 (as to the Tribe's Group 6-7 water rights). *Arizona v. California*, 373 U.S. 546, 600 (1963).

Therefore, these Indian reserved water rights are "present perfected" rights outside the purview of the Colorado River Compacts. *Id*; 1922 Colorado River Compact, Art. VIII ("Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."); 1948 Upper Colorado River Basin Compact, Art. I(b) ("It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto."). These water rights belong to the Tribe, and the Tribe holds these water rights separate from and independent of the State of Utah's percentage-based share of Colorado River water that forms the basis for the "water rights owned by thousands of others." MTD at 12.

It is also disingenuous for the CUWCD to assert that the Decker Report fails to identify stream sources for the Indian reserved water rights claimed by the Tribe. The Decker Report, as revised in 1964, specifically establishes the stream system attributed to each category of land with Reservation boundaries with an appurtenant Indian reserved water right. The Tabulation in the 1990 Compact, which the State of Utah has not only ratified but now claims should govern who administers the Tribe's water rights, does not identify stream sources to any greater degree of detail than the Decker Report. Therefore, this assertion simply holds no water, so to speak.

To the extent this Court's resolution of the Tribe's Third Claim for Relief does not touch on all of the "legal attributes" asserted by CUWCD, it is the prerogative of the CUWCD to seek to resolve these issues, whether through subsequent litigation or other means.

III. ARGUMENT

The argument of the CUWCD is confusing and internally inconsistent. While the CUWCD claims that it seeks to dismiss the claims because they are barred by the applicable statute of limitations, MTD at 3 (Relief Sought), their ultimate argument is that prior rulings of the D.C. Court are now "law of the case" and must be respected by this Court, MTD at 7. Not only is this contrary to the Order of this Court granting the Motion to Amend, the CUWCD motion to dismiss patently misstates the doctrine of law of the case. Further, the CUWCD seeks to dismiss the Tribe's claims for failure to state a claim without even acknowledging or stating the standard for dismissal at this stage in the litigation. The CUWCD's arguments must fail, and the Tribe's claims must be allowed to proceed.

A. The Law of the Case Doctrine Does Not Bar the Tribe's Claims

The CUWCD motion to dismiss (beginning at page 7) seeks to apply the law of the case doctrine to require this Court to apply decisions made by the D.C. Court prior to transfer. Having failed to even participate in the briefing on the motion to amend the complaint in this Court, *see* Order at 1 n. 1, the CUWCD *ignores the rulings of this Court in granting the motion to amend the complaint*.

In its Order Granting the Tribe's Motion to Amend its Complaint, this Court "discussed in detail" the reasoning of the D.C. Court. Order at 3. This Court explained the rationale for the D.C. Court's rulings and explained how the TAC addressed them and "includes new factual allegations

and reformulates its claims," Order at 7, including "substantial revisions" to Claims one, three, and eleven. Order at 7, 8, 9, and 12 (those claims are "substantially revised and reformulated"). Even though the other Defendants argued in response to the Tribe's Motion to Amend that "the proposed TAC is subject to dismissal for the same reasons identified by the D.C. district court," Order at 10, this Court ruled that those arguments are better addressed in a fully-briefed dispositive motion, Order at 13. Law of the case is not a basis for dismissing the claims.

Beyond this Court's ruling in granting the Motion to Amend, the CUWCD's attempt to apply the law of the case doctrine is flawed. The only case cited by CUWCD to support its argument that prior rulings are now law of the case is *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000). The CUWCD simply quotes the policy considerations underpinning the doctrine:

> "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)

MTD at 7 (quoting *McIlravy*, 204 F.3d at 1035).

However, the CUWCD ignores the preceding statement that articulates the doctrine itself:

> "[W]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Rohrbaugh v. Celotex Corp.,* 53 F.3d 1181, 1183 (10th Cir.1995).

McIlravy v. Kerr-McGee Coal Corp., 204 F.3d at 1034–35.

Indeed, in *McIlravy*, the Tenth Circuit Court of Appeals applied the law of the case doctrine to a finding of a prior panel of the same appellate Court. *Id.* at 1037; *see also Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) ("Law of the case, then, merely requires a trial

court to follow the rulings of an appellate court.") This is not the case here, in which the issues have not been addressed by any appellate court. The law of the case simply does not apply here.

Not only did this Court state that it expected a fully-briefed motion, but it outlined the areas in which the amended complaint addressed some of the very issues that the CUWCD points to:

> The proposed TAC expressly cites the APA in claims one through eight and includes new allegations addressing exhaustion of administrative remedies and the continuing violations doctrine in support of these claims. (*Id.* ¶¶ 189–201, 212–13, 223–24, 244–45, 250–51, 259, 268–69, 276–77.)

Order at 8-9.

> Further, the Tribe's proposed pleading adds numerous new allegations which attempt to address specific deficiencies identified by the D.C. district court. For example, the D.C. district court found the continuing violation doctrine inapplicable because certain claims were not pleaded under the APA, and the Tribe now expressly references the APA in claims one through eight and includes additional allegations regarding continuing violations. (*See* Proposed TAC ¶¶ 189–201, 212–13, 223–24, 244–45, 250–51, 259, 268–69, 276–77, Doc. No. 163-2.) The Tribe has also added new allegations regarding exhaustion of administrative remedies— supporting an argument that administrative exhaustion delayed claim accrual—in response to the D.C. district court's finding that certain claims accrued decades ago. (*See id.*; Reply to Fed. Defs.' Opp'n 1–2, Doc. No. 175.) * * * * * In sum, the Tribe proposes substantial revisions and adds numerous allegations which directly address the prior grounds for dismissal.

Order at 12-13.

Despite substantial revisions to the Tribe's claims, the CUWCD simply dismisses the Tribe's new references to "continuing negotiations culminating as late as 2016 (TAC ¶¶ 195, 211)," because "the authorization for construction of the Uintah and Upalco Units had expired more than twenty years previously…." MTD at 8. The CUWCD's argument fails to recognize that the Tribe's assertions are in the context of exhaustion of remedies under the APA (TAC ¶¶ 189-201), stemming from the unfilled requirement that a Compact be ratified in order for CUPCA to be binding on the Tribe. TAC ¶ 211; *see also* TAC ¶¶ 148-55. Although the CUWCD falsely

blames the Tribe for not ratifying something to which it never agreed, *see* argument below at 21-22, the result is that the controversy did not arise until mid-2012 at the earliest," TAC ¶ 211, and is not time-barred even as to the Federal Defendants.

Because the CUWCD focuses on a limited attempt to shortcut its arguments by asking this Court to apply law of the case to D.C. District Court's ruling, the CUWCD completely fails to confront the substantive distinction that the Tribe's claims are not time-barred because the claims all seek prospective relief against the Defendants' ongoing violations of federal law and trust obligations, and the role of the State actors, not recourse to make the Tribe whole from past harms. Further, the CUWCD completely ignores Tenth Circuit law which requires that, typically, "facts must be developed to support dismissing a case based on the statute of limitations," so that doing so at the Rule 12(b) stage is only appropriate when "the dates given in the complaint make clear the right sued upon has been extinguished." *Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022) (quoting authorities) (applying an inference based on the allegations in the Complaint).

The CUWCD's arguments that the continuing violations doctrine and estoppel bar the Tribe's claims are addressed in the following sections. However, the CUWCD completely fails to state the statute of limitations it believes applies, completely fails to state when it began to run, and offers no analysis as to why and when the Tribe's claims are barred. The CUWCD appears to be trying to ride the coattails of the Federal Defendants to apply a six-year statute of limitations, but 28 U.S.C. § 2401(a) applies only to claims brought "against the United States." Moreover, "there is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 233 (1985). In *Oneida,* the Supreme Court also ruled that state statutes of limitation

have no application to lawsuits brought by Indians to vindicate Indian property interests, the Court explaining that "borrowing of a state limitations period in these cases would be inconsistent with federal policy." *Id.* at 241.

1. CUWCD 's Continuing Violations Argument

Notwithstanding the D.C. District Court's statute of limitations rulings, or the assumptions the CUWCD makes about the APA, the Tenth Circuit Court of Appeals has recently made it clear that "both the continuing violation doctrine and the repeated violation doctrine can be applied within the § 1983 context." *Herrera v. City of Espanola*, 32 F.4th at 986, 989. With respect to the continuing violation doctrine, the key to the analysis is whether there is a single, discrete act that gives rise to the claim, or whether it is "the first in a series of acts" that gives rise to the claim. *Id.* at 997-98. "[A] series of unlawful acts each of which constitutes an alleged violation" supports application of the repeated violation doctrine. *Id.* at 999. The Tribe's claims rely on both continuing and repeated violations and are not barred under either the continuing violation doctrine or the repeated violation doctrine.

The CUWCD arguments that the "continuing violations doctrine does not save the claims," MTD at 8, are conclusory and without merit at this stage of litigation.

First, the CUWCD states, without citation to the TAC and without citation to authority, that the continuing violations doctrine does not apply because the Tribe does not "rely on any statements made or acts by the District." MTD at 8. This is a familiar refrain from the CUWCD, but is contrary to the many allegations of actions and failure to act outlined in the TAC and above. Because the Tribe points to unlawful *omissions* underlying the Tribe's claims, and that those omissions are ongoing, the continuing violation doctrine precludes the Federal Defendants' statute

of limitations defense. *The Wilderness Society v. Norton*, 434 F.3d 584, 588-89 (D.C. Cir. 2006) (the D.C. Circuit has "repeatedly refused to hold" that claims based on unreasonable delay of mandated government acts are time-barred, even if the claim is filed more than six years after a specific statutory deadline for these actions); *In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) ("Because the [plaintiff] does not complain about what the agency has done but rather about what the agency has yet to do, we reject the suggestion that its petition is untimely and move to a consideration of the merit."); *Yukon Kuskokwim Health Corp. v. United States*, 444 F.Supp.3d 215, 219 (D.D.C. 2020); *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 191 (D.D.C. 2011) (the continuing claims doctrine "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period."); *Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.D.C. 2006) (a claim "will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations."); *Mitchell v. United States*, 10 Cl. Ct. 63, *modified on reh'g*, 10 Cl. Ct. 787 (1986).

Second, the CUWCD acknowledges the D.C. Court's ruling:

> The DC Court … 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."

MTD at 8 (quoting D.C. Opinion, p. 10 n. 5). Now, however, the CUWCD ignores and apparently does not seek application of law of the case! Rather, the CUWCD recognizes that "[t]he D.C. Circuit has allowed application of the continuing violation doctrine under Section § 706(1) in particular cases," but argues that "the Tenth Circuit has not yet taken a position on whether it

believes the APA allows that argument." MTD at 8.

The CUWCD analyzes numerous cases to support its weak premise that "[a]nalogous case law suggests that" the Tenth Circuit will not accept that argument under the APA. MTD at 8. However, the CUWCD fails to cite a case more recent than those they cite which "hold[s] that the continuing violation doctrine is available within the § 1983 context" and concludes that "both the continuing violation doctrine and the repeated violation doctrine can be applied within the § 1983 context." *Herrera v. City of Espanola*, 32 F.4th at 986, 989.

The older cases that the CUWCD does cite do not support the CUWCD contention and, in particular, the Tenth Circuit cases the CUWCD analogizes support the Tribe's position, not CUWCD's position. The CUWCD cites *Parkhurst v. Lampert*, 264 F. App'x 748, 749 (10th Cir. 2008) for the proposition 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.'" MTD at 9. First, *Parkhurst* applied its analysis "assuming the continuing violation doctrine applies to § 1983 claims," *id.*, making the CUWCD's assertion that the Tenth Circuit won't accept that argument suspect at best. However, unlike repeated failure to fulfill its obligations, *Parkhurst* treated the prison overcrowding as a single violation (decision) that had "continual ill effects," but was not a series of "continual unlawful acts." *Id.* *Parkhurst* quoted that standard from *Bergman v. United States*, 751 F.2d 314, 317 (10th Cir. 1984), a case that involved a single letter denying Plaintiff's claims and that ruled that each subsequent adverse determinations based on the determination in that letter were "continual ill effects from the original violation." (quoting authority). Neither *Parkhurst* nor *Bergman* involved claims like those alleged by the Tribe in which Defendants continue to make affirmative decisions and participate in conduct that violates the Tribe's access to water. Likewise, *Pike v. City of*

Mission, Kan., 731 F.2d 655, 657, 660 (10th Cir. 1984) (overruled in part on other grounds by *Canfield v. Douglas Cty.*, 619 F. App'x 774 (10th Cir. 2015)), relied on by CUWCD's MTD at 9, involved the discrete action of employment termination, an action which occurred one time.

The only other Tenth Circuit case cited by the CUWCD is *Ute Distrib. Corp. v. Sec'y of the Interior of the United States*, 584 F.3d 1275, 1282 (10th Cir. 2009). As the CUWCD even recites, the case involved a single discrete Act "that divided water rights between the 'mixed blood' and 'full blood' members of the Tribe." MTD at 10. Missing from the CUWCD's analysis is that the Act also provided for termination of federal supervision over the trust of the mixed-blood members. *Ute Distrib.,* 584 F.3d at 1276. The Court did not reject the continuing wrong doctrine, *id.* at 1283, but concluded that the case involved a single, discrete decision, "the termination of the mixed-blood group from the Tribe," *id.* at 1279.

In none of these cases did the Tenth Circuit reject the continuing wrong doctrine or rule that it is not viable in the Tenth Circuit in the context of unreasonable delay with respect to the APA. Rather, the Tenth Circuit acknowledged the doctrine, and simply did not find that cases involving a single decision with continuing ill effects justified its application. Based on the analysis of those cases, and now using the language of the CUWCD, a single act of terminating employment, or a single act of terminating a group from the Tribe, are "discrete events," MTD at 10, but are distinct from a continuing failure to provide for storage of Indian reserved waters in its completion of the CUP, *see* TAC ¶ 327. The Tribe's claims in this case are not based on a single discrete act and, because they are based on continuing obligations and continuing decisions to act affirmatively or to fail to act, the statute of limitation does not bar the claims because of the continuing wrong doctrine.

2. CUWCD's Estoppel Argument

The CUWCD motion applies a superficial gloss to the facts to point the finger at the Tribe and argues that the Tribe's claims are barred due to its "own wrong." MTD at 11. The "wrong" the CUWCD cites is what it calls the Tribe's "decades-long refusal to ratify an agreement [contemplated by CUPCA] with the State and Federal Defendants". MTD at 11. The CUWCD's misunderstanding of history does not excuse this blatantly false accusation, promoting and seeking to rely on a cruel application of "bait and switch" and now blame.

As the Third Amended Complaint explains, the Tribe and the State of Utah agreed to a "proposed 1980 Compact." *See* TAC ¶¶. 148-50. Both the State of Utah and the Tribe formally approved that 1980 Compact. Thus, the Tribe ratified the agreement it had reached. However, the United States Congress did not ratify that 1980 Compact. Instead, the CUPCA legislation included a substantial revision of the 1980 Compact, revised in ways that were not acceptable to the Tribe. *See* TAC ¶¶ 152-55. Because it had not been agreed to by the Tribe or by the State of Utah, that 1990 substantial revision included in CUPCA was subject to ratification by the State and by the Tribe. It was a revision that the Tribe had not agreed to, and it was not acceptable. The Tribe approved the 1980 Compact *that it had agreed to*; the Tribe did not ratify the 1990 revision *that it did not agree to*. Yet now, in this litigation, the CUWCD accuses the Tribe of refusing to "ratify an agreement with the State and Federal Defendants." MTD at 11 (referring to this as the Tribe's "wrong" precluding application of the estoppel doctrine in its favor). It is preposterous to blame the Tribe for not ratifying a 1990 revision that it never agreed to and that was substantially different from the 1980 Compact that the Tribe had agreed to (and that it did ratify).

In fact, the very authority that the CUWCD cites is a case that guides tolling in Utah jurisprudence *in favor of plaintiffs*. The CUWCD quotes *Fitzgerald v. Spearhead Invs., LLC*, 2021 UT 34, ¶ 17, 493 P.3d 644, for the proposition 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." (internal quotation marks omitted). In *Fitzgerald*, the Court explained that the doctrine could toll the statute of limitations where the *defendant* had lulled the *plaintiff* into a false sense of security, thereby subjecting his claim to the bar of limitations. Given the wrong by the defendant, the Court would allow plaintiff's claim to proceed even though "plaintiff was aware of the facts underlying its cause of action before the limitations period had run." *Id.* 493 P.2d at 650. In *Fitzgerald*, as here, the wrong the Court was concerned with was the wrong *of the defendant*, and the Court would not "allow parties to take advantage of their own wrong." *Id.* Likewise, *Penny v. Giuffrida,* 897 F.2d 1543, 1545 (10th Cir. 1990), cited by CUWCD, reiterated the rule that "no one will be permitted to take advantage of his own wrong" where the wrong contemplated was *committed by the government / defendant* (ultimately finding that the conduct was not egregious enough to justify estoppel).

B. CUWCD Ignores the Standard for Motions to Dismiss Which Prevents Dismissal

The CUWCD motion fails to even cite Federal Rule of Civil Procedure 12(b) or state the standard that applies to its motion to dismiss. Applying the Rule 12(b)(6) standard to the CUWCD's motion to dismiss claims for failure to state a claim demonstrates that the Tribe exceeds the standard and its claims should proceed.

"In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, matters of which it may take

judicial notice." *Stewart v. Nat'l Educ. Ass'n.,* 471 F.3d 169, 173 (D. C. Cir. 2006)). As the Tenth Circuit has held in applying *Twombly*, 550 U.S. 544, "[i]n evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits … and documents incorporated into the complaint by reference …." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citations omitted).

At this, the pleading stage of litigation, a plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Fed. R. Civ. P. 8(a)(2). A complaint must give the defendants notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007). When ruling on a defendant's motion to dismiss, a judge must consider the complaint as a whole and must "accept as true all of the factual allegations contained in the complaint." *Erickson,* 551 U.S. at 94 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. at 555–56) (other citations omitted). A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that ... recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal quotation marks and citation omitted). "Where the claim is invidious discrimination ... the plaintiff must plead ... that the defendant acted with discriminatory purpose." *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted). The Supreme Court, however, in both *Twombly* and *Iqbal*, reiterated that it was not imposing a "probability requirement" at the pleading state. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. "Rather, assuming that a plausible claim for relief is pleaded, the Federal Rules continue to rely on discovery and summary judgment practice to define the issues, identify genuine fact disputes, and dispose of unmeritorious claims." Steven S. Gensler, *Federal Rules of Civil Procedure, Rules*

and Commentary, Rules 1-49, 286 (2017) (citing *Swierkiewicz v. Sorema*, 534 U.S. 505 (2002)).

Applying these standards, the Tribe's TAC should clearly be allowed to proceed.

C. The Tribe's First Claim States a Claim

The Tribe's First Claim for relief is for estoppel, breach of trust, declaratory and enforcement relief against all Defendants. As this Court found in granting the motion to amend the complaint:

> The Tribe reasserts a claim for declaratory and injunctive relief regarding the scope of the Tribe's water rights and the Federal Defendants' obligations under the 1965 Deferral Agreement (previously SAC claim one), with substantial revisions. (Proposed TAC ¶¶ 202–14, Doc. No. 163-2.)

Order at 7. The CUWCD's argument that there are no allegations of conduct against it are dealt with above. Likewise, the bulk of the section on the First Claim for Relief involves the CUWCD's irrelevant but totally misguided attempt to describe *Winters* rights claimed by the Tribe.

The CUWCD now combines its denial of responsibility with the claim that the Tribe should be pursuing its claims through a "general adjudication action for the water in the Uintah Basin pending in the state court…." MTD at 13. It claims:

> 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.

MTD at 13. However, as the Tribe alleges in its Third Amended Complaint, the 1965 Deferral Agreement was negotiated for the sole purpose of establishing a binding instrument the parties (including CUWCD) could take to the United States Congress to secure funding for the Bonneville Unit of the Central Utah Project by demonstrating that the Tribe's use of senior-priority Indian

reserved water rights would not interfere with the state-based water rights to be utilized for the Bonneville Unit, the crown jewel of the Central Utah Project for primarily non-Indian water users along the Wasatch Front. *See* TAC ¶¶ 129-34, 204-05.

At all times, the 1965 Deferral Agreement was intended to create the necessary nexus between the CUWCD and United States Congress to ensure federal funds would be made available to complete the Bonneville Unit. As stated above, this could have been accomplished through a general stream adjudication, but the CUWCD, the State of Utah, and the federal agencies decided it was necessary to take the more expedient route and establish the prerequisites for Congressional funding through the 1965 Deferral Agreement. Because CUWCD negotiated and entered into the 1965 Deferral Agreement for this specific purpose and then reaped the benefits of the resulting Congressional appropriate of funds, CUWCD simply cannot support its assertion that due process bars this Court from exercising jurisdiction over CUWCD in the present matter.

Moreover, the Utah Legislature's Concurrent Resolution dated October 10, 1973, cited in Paragraph 140 of the Tribe's Third Amended Complaint, states that "the Central Utah Water Conservancy District has executed a valid repayment contract for the Bonneville Unit with the United States Government." App. II. 166, 167. This demonstrates that the 1965 Deferral Agreement was just one of a series of contracts between the CUWCD and the Federal government to develop a project made possible only upon the Tribe's legally recognizable forbearance of its senior priority water rights.

D. The Tribe's Third Claim States a Claim

The Tribe's Third Claim for Relief is for estoppel, breach of trust, interpretation of CUPCA, declaratory and enforcement relief. As this Court found in granting the motion to amend the complaint:

> The Tribe reasserts a claim for declaratory and injunctive relief related to interpretation and enforcement of the 1992 Central Utah Project Completion Act (previously SAC claim four), with substantial revisions. (Proposed TAC ¶¶ 226–45, Doc. No. 163-2.)

Order at 8.

The Tribe's First and Third Claims for Relief each seek declaratory and enforcement relief under 28 U.S.C. §§ 2201-02, and it clearly is stated against CUWCD, which has significant responsibility with respect to CUPCA. *See* TAC ¶ 324.

The Declaratory Judgment Act allows federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought" when there is an "actual controversy within its jurisdiction." 28 U.S.C. § 2201. The controversy underlying the request for declaratory relief need not have been caused by the "actions or inactions" of each defendant. All that is required is that the controversy "touch[es] the legal relations of parties having adverse legal interests." *MedImmune Inc. v. Genentech Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937)). If, in accord with CUWCD's position, each defendant in a request for declaratory relief must be alleged to have engaged in a remediable action or inaction, this would controvert the plain language of the Declaratory Judgment, which explicitly allows such declaratory relief "whether or not further relief is or could be sought." 28 U.S.C. § 2201; *Sherwood Medical Industries Inc. v. Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975) ("the Declaratory Judgment

Act should be liberally construed to accomplish its purpose of providing a speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies and that it is not to be interpreted in any narrow or technical sense.")

The Tribe's First and Third Claims for Relief would undoubtedly touch on the legal relations between the Ute Indian Tribe and CUWCD, and it is equally clear that the Tribe and CUWCD have adverse interests with respect to these Claims. First, each of these Claims for Relief is based, in one way or another, on the legal consequences of the 1965 Deferral Agreement, to which both the Tribe and CUWCD are signatory parties. Thus, these Claims touch the legal relations of the Tribe and CUWCD as parties to a contract. Second, as both the Tribe and CUWCD have an interest in administering a finite quantity of water based on conflicting legal claims, the Tribe and CUWCD clearly have adverse legal interests in the present controversy. Pursuant to the Utah Code, water conservancy districts are charged with implementing State policy to:

> (a) provide for the conservation and development of the water and land resources of the state;
>
> (b) provide for the greatest beneficial use of water within the state;
>
> (c) control and make use of all unappropriated waters in the state and to apply those waters to direct and supplemental beneficial uses including domestic, manufacturing, irrigation, and power;
>
> (d) obtain from water in the state the highest duty for domestic uses and irrigation of lands in the state within the terms of applicable interstate compacts and other law;
>
> (e) cooperate with the United States and its agencies under federal reclamation or other laws and to construct, finance, operate, and maintain works in the state; and
>
> (f) promote the greater prosperity and general welfare of the people of the state by encouraging the organization of water conservancy districts.

Utah Code § 17B-2a-1002(1). If the Tribe were to prevail its First and Third Claims for Relief, or any combination thereof, such a ruling would have an adverse impact on the CUWCD by establishing substantial legal restrictions on how, and over what water, CUWCD may exercise this authority.

E. The Tribe's Eleventh Claim States a Claim

The Tribe's Eleventh Claim for Relief is against all Defendants for "Breach of Trust and Denial of Due Process and Equal Protection under the Fifth and Fourteenth Amendments to the U. S. Constitution, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d." As this Court stated in granting the motion to amend the complaint:

> The Tribe reasserts a discrimination claim (previously SAC claim sixteen) with substantial revisions—removing the reference to 42 U.S.C. § 1981, adding members of the Tribe as class action plaintiffs, and adding new allegations regarding racial animus and personal involvement by the State Defendants. (*Id.* ¶¶ 311–37.)

Order at 9. Further, the Court stated:

> Finally, where the D.C. district court found the allegations of animus and personal involvement by state officials insufficient, the Tribe has added new allegations regarding these elements. (*Id.* ¶¶ 316–22, 330.) In sum, the Tribe proposes substantial revisions and adds numerous allegations which directly address the prior grounds for dismissal. But whether these amendments are sufficient to cure the deficiencies previously identified and to overcome a motion to dismiss is more appropriately determined in the context of a fully briefed dispositive motion.

Order at 13.

Here, the CUWCD tries to dodge responsibility by: 1) arguing that what CUWCD terms "hyperbolic allegations" are not adequate; 2) claiming that its role with respect to CUPCA did not create any obligation; 3) arguing that the Tribe did not allege the necessary "intentional discrimination;" 4) arguing that the CUWCD, as an arm of the state, is not a

"person" as used in Section 1983; 5) arguing that the due process claims are not pled adequately; and 6) questioning the class allegations. Each of these arguments fails.

First, CUWCD argues that what the CUWCD calls "hyperbolic allegations" are not adequate. MTD at 14-15. While the Federal Defendants argued earlier that the class of Indians is a political classification alone, Native American tribes are considered nations and discrimination against them is a form of "national origin" discrimination. *See* TAC ¶¶ 4, 312, & 328; *see Meyers By & Through Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544 (D. Utah 1995). But because the Tribe's Second Amended Complaint was attacked for not adequately alleging racial animus, the Tribe obliged and added allegations in the Third Amended Complaint. No one expects that State actors would announce their racial animus toward the Native peoples, but their failure to treat them like equals make the animus clear against this "distinct minority population." TAC ¶ 312.

Specifically, Claim Eleven of the Tribe's Third Amended Complaint sufficiently satisfies the pleading requisites set forth above. To begin with, Paragraph 311—the initial allegation of Claim Eleven— incorporates by reference the preceding 310 allegation paragraphs in the Tribe's Third Amended Complaint, including all of the provisions listed above in the Tribe's Response to Statement of Facts. Then in Paragraph 354, the Tribe alleges:

> Defendant CUWCD is a political subdivision of the State of Utah. Defendant CUWCD was the Utah state agency authorized by Congress under CUPCA § 202(D) to receive federal funds and to assume responsibility for completing construction of the CUP.

TAC ¶ 324. Paragraph 1 of the Tribe's Third Amended Complaint alleges:

> Through this action, the Tribe seeks declaratory and injunctive relief to enforce the Federal Defendants' fiduciary duties to the Tribe in relation to the management of the Tribe's Reserved Water Rights and related resources administered by Federal

> Defendants. The Tribe also alleges that the State and Federal Defendants have conspired to racially discriminate against the Ute Indian Tribe members by deliberately and systematically excluding the Tribe and its members from the benefits derived from federally-financed public water storage facilities and infrastructure in the State of Utah. The suit seeks declaratory, monetary, and injunctive relief against all Defendants for the violation of the Tribe members' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Title VI of the Civil Rights Act of 1964.

TAC ¶ 1. The Tribe's Complaint alleges that the "Ute Indians of the Uintah and Ouray Indian Reservation constitute a distinct minority population based on their race, ancestry, ethnicity, national origin and religion," and that "the creation of an Indian reservation generally involves the diminishment of a tribe's homelands in return for a guarantee of permanent and protected territory, giving Indian tribes a property interest in their reserved waters that is recognized by implication in their federal reservation treaties…. That is true of the Ute Indians who were forced to cede millions of acres of valuable land to the Federal government in the nineteenth century." TAC ¶¶ 312, 313.

The Tribe's Complaint ¶ 315 summarizes the historical background of racial segregation and racial discrimination undertaken by the State and Federal Defendants in their allocation and distribution of water in the State of Utah—including the Tribe's *Winters* reserved waters, providing background for how "events of 1905-1910 established an historical pattern of persistent racial animus and invidious discrimination on the part of the Defendants that continues to this day – animus and discrimination that is directed against the Ute Indians in order to benefit the majority white population of Utah. Collectively, the Defendants have engaged in a continuous and systematic practice of diverting scarce water resources and related infrastructure in Utah to benefit non-Indian water users at the expense of the Tribe and its members and the Class Action Plaintiffs. TAC ¶ 316.

Further, the Tribe alleges that "nothing evinces racial animus more clearly than the intentional, purposeful and/or knowing diversion of water … away from a minority population in order to make that resource available for the primary or exclusive benefit of the majority non-minority population." TAC ¶ 317; *see also* TAC ¶ 329 (Defendants have acted intentionally, deliberately, and with knowledge, and have done so continuously and systematically).

The CUWCD was "the Utah state agency authorized by Congress under CUPCA § 202(D) to receive federal funds and to assume responsibility for completing construction of the CUP." TAC ¶ 324. Over $200 million in federal dollars was available, TAC ¶ 326, and "the CUP was funded by hundreds of millions of dollars in federal tax dollars over several decades [and] is 'nearing completion,'" TAC ¶ 327, but not to benefit the Tribe:

> No federal funding has been appropriated for any future construction and none of the CUP facilities were built to serve the irrigation and water storage needs of the Ute Indians. These actions and omissions violate the due process and equal protections guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

TAC ¶ 327. "Through the CUP, water security has been provided to the non-Indian residents of Utah, but no comparable water security has been provided for the Ute Indians of the Uintah and Ouray Reservation and the Class Action Plaintiffs," TAC ¶ 328, all through the deliberate actions of the Defendants. In fact, the CUWCD proclaims its mission on its web page:

> Central Utah Water's primary responsibility is to deliver clean, useable water to our customers by managing the vast Central Utah Project (CUP) and District network of water facilities. Every day we work to maintain and improve those systems. We monitor and track precipitation levels and make decisions on how best to serve current customers and store water for future generations. We work with large water users to develop ways to use water more efficiently and host the public at activities promoting conservation. We operate three water treatment facilities, two hydroelectric plants and nine reservoirs and administer the sale of water to customers in eight counties.

> Central Utah Water is proud of its role in managing the water in its jurisdiction and using technology, intelligence and hard work to ensure the best possible balance for man and nature.

https://www.cuwcd.com/about.html#gsc.tab=0 (last visited February 21, 2023). By its own description, the CUWCD is constantly making decisions to manage the water resource, and to "ensure the best possible balance for man and nature," by which they apparently mean "only non-Indian people and nature." The Tribe claims that these decisions and this management are to the deliberate exclusion of the rights of the Tribe, and that the CUWCD is in conspiracy with federal actors to deprive the Tribe of its rights, which is all to the direct benefit of non-Tribal residents of Utah. Indeed, the CUWCD mission is consistent with the Tribe's allegation:

> Defendants have thus conspired, or acted in concert, to divert water, water storage reservoirs, and related infrastructure *away* from the Ute Indians of the Uintah and Ouray Reservation and *towards*, to, and in favor of the non-Indian white-majority population of Utah. Defendants have done so intentionally, or deliberately, or with the knowledge that their actions would result in the discriminatory deprivation of water and water-infrastructure resources to the Ute Tribe and its members and would inure exclusively or primarily to the benefit of the non-Indian white-majority population of Utah. In doing so, Defendants have acted with both a discriminatory purpose and a discriminatory effect. Defendants have done so continuously and systematically.

TAC ¶ 329 (italics in original). Taken as a whole, the Third Amended Complaint, and specifically the allegations in the Eleventh Claim, are more than sufficient to allege a claim for invidious discrimination against all Defendants.

Second, the CUWCD claims that its role with respect to CUPCA did not create any obligations. MTD at 15. The CUWCD wrongly asserts that it is "mentioned in the eleventh claim for relief only in connection with a 1995 cost-sharing agreement…." MTD at 15. *See* Tribe's Response to Statement of Facts above and specifically TAC ¶¶ 1 and 329 ("Defendants have conspired…."). However, after skirting around the issue throughout its motion, the CUWCD for

the first time acknowledges that "[t]he Tribe accurately states that the District was authorized by CUPCA in 1992 to receive federal funds and complete construction of those specific projects that had been authorized and for which funds were appropriated by Congress." MTD at 15 (citing TAC ¶ 324). The CUWCD's analysis requires factual development and is not appropriately resolved at the motion to dismiss stage. *See, e.g.*, allegations in TAC ¶¶ 324-27.[5] As discussed above, at the motion to dismiss stage, the Tribe's factual allegations must be accepted as true. *Erickson,* 551 U.S. at 94 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. at 555–56) (other citations omitted).

Rather than escape liability, as the party authorized by Congress to complete construction of the Central Utah Project, the CUWCD is perhaps the single most culpable party in the historic, presently-existing, and ongoing racial segregation and racial discrimination against the Ute Indian Tribe and its members through the State and Federal Defendants' deliberate and systematic exclusion of the Tribe and its members from the benefits derived from the construction, existence of, and operation of federally-financed public water storage facilities and infrastructure in the State of Utah.

Third, the CUWCD argues that the Tribe did not allege the necessary "intentional discrimination." MTD at 15-16. However, "intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, 'intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its

[5] The Appendix being filed with these Responses contains numerous documents that support the well-pleaded complaint and that will need to be considered as the facts are developed. *See, e.g.*, CUPCA statute, App. II, 225 (highlighted to show CUWCD responsibility). However, at this stage these simply demonstrate how inappropriate a motion to dismiss is.

questioned policies will likely result in a violation of federally protected rights.'" *Barber ex rel. Barber v. Colorado Dep't. of Revenue*, 562 F.3d 1222, 1228–29 (10th Cir. 2009) (quoting *Powers v. MJB Acquisition Corp.,* 184 F.3d 1147, 1153 (10th Cir. 1999)).

Further, once plaintiff sets forth a prima facie case of discrimination (such as alleging that African American students were suspended for the rest of the school year after a fight while Caucasian students who participated in the fight were not), the burden shifts to the defendant to articulate some nondiscriminatory reasons for the action. *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., OK*, 334 F.3d 928, 930 (10th Cir. 2003)**.** Only then must plaintiff establish that the reasons were merely a pretext. *Id.* (allowing a claim for hostile environment to proceed and noting that "choice implicates intent"). This Court applied the *Bryant* analysis in a case involving dismissal of a student from a Ph.D. program in *Seid v. Univ. of Utah*, No. 2:19-CV-00112, 2020 WL 6873833, at *5 (D. Utah Nov. 23, 2020).

The Tenth Circuit Court of Appeals also applies Rule 9(b) to assess claims of animus:

> In order to state a claim based on the Equal Protection Clause, plaintiff must sufficiently allege that defendants were motivated by racial animus. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Harris v. Harvey,* 605 F.2d 330, 338 (7th Cir.1979), *cert. denied,* 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed.2d 772 (1980). The First Amended Complaint alleges that one of the newspaper articles described plaintiff as "a black man's lawyer, 'a modern-day John Brown', and 'a savior' to blacks in Kansas" and that those statements reveal a race-based animus. (First Amended Complaint at ¶ 9.) Although we do not believe that the newspaper article by itself is sufficient to establish a discriminatory intent, the First Amended Complaint also contains general allegations of an underlying race-based animus.[4] In evaluating the sufficiency of plaintiff's allegations, we cannot ignore the plain language of Rule 9(b) of the Federal Rules of Civil Procedure, which permits "malice, intent, knowledge, and other condition of mind of a person" to be "averred generally."[5] Accordingly, we conclude that plaintiff has sufficiently alleged racial animus and that it was, therefore, error to grant the motion to dismiss his equal protection claim brought under Section 1983.

Phelps v. Wichita Eagle-Beacon, 886 F.2d at 1269–70. This analysis was applied in this District to deny a motion to dismiss in *SCO Grp., Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1153 (D. Utah 2005) ("In this Circuit, a party need not aver any specific facts in support of its general allegations of malice."):

> "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991). SCO has made general and specific allegations of malice. Even though Novell argues that it has evidence to support its alleged good faith basis for claiming ownership of the UNIX copyrights, the proper place to introduce that evidence and argue its significance is not on a motion dismiss.

Id. at 1154.

Fourth, the CUWCD argues that the CUWCD, as an arm of the state, is not a "person" as used in Section 1983. MTD at 16. In fact, The CUWCD argues that, with regard to the Section 1983 claim "a threshold question is whether the District is 'an arm of the state' as suggested by the Tribe [because] Courts have held that an 'arm of the state' is not a 'person' as that term is used in Section 1983." MTD at 16. That is a curious argument based on its internally inconsistent use of terminology. Both the Tribe in TAC ¶ 324 and the CUWCD in MTD at 4, SOF 3, assert that the CUWCD is a "political subdivision," and the Tenth Circuit Court of Appeals has held that a "political subdivision" is not an "arm of the state," does not participate in the state's Eleventh Amendment immunity, and "is a 'person' within the meaning of s 1983." *Elam Const., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1345 (10th Cir. 1997) (analyzing Colorado's RTD). Rather than use conflicting terminology to raise irrelevant arguments, the CUWCD should be required to answer the Third Amended Complaint and make its statements clearly and on the record. Further, this argument does not affect the Tribe's claims under 42 U.S.C. § 2000(d).

Fifth, the CUWCD argues that the due process claims are not pled adequately. MTD at 17-18. The CUWCD asks, what process is expected? The Due Process clauses under the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states, counties, and municipalities) prohibit the deprivation of property without due process of law. The Equal Protection provisions under the Fifth and Fourteenth Amendments prohibit the deprivation of property on impermissible grounds of race, creed/religion, ethnicity or other invidious ground. The Tribe is entitled to the kind of procedure or due process in which the Tribe's rights are respected rather than be the subject of a State that intervenes to deny responsibility and deny that its own agency, the CUWCD, had authority to act as it did, and then the CUWCD denies they have any responsibility. The way the State and the CUWCD, both historically and currently in litigation, are deflecting responsibility to completely deny the rights of the Tribe that exists within their borders demonstrates a litigation tactic to deny responsibility and surely is an indication that more is beneath the surface that demonstrates malice. That is why motions to dismiss are denied -- to allow for discovery that in this case is likely to help document the Tribe's claims.

Sixth, the CUWCD raises questions about the class allegations in a footnote that do not rise to the level of an argument and need not be addressed. MTD 18 n. 6. The CUWCD simply quotes the Federal Rule of Civil Procedure 23 dealing with class actions, quotes some of the Tribe's allegations, and makes some observations. The CUWCD cites no authority, makes no argument, and certainly does not provide a basis for dismissing the claims at the pleading stage. To the extent they relate to arguments raised by other Defendants, the Tribe's responses deal with them in response to the separate Motions.

The Tribe has alleged facts sufficient to state claims against Defendant CUWCD under 42 U.S.C. § 1983 and 42 U.S.C. § 2000(d). *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

F. The Tribe's Prayer for Relief Is Adequate

The CUWCD concludes by attacking the Tribe's Prayer for Relief which it claims makes the inadequacies of the claims obvious. MTD at 18. This argument is misguided, particularly at this stage of the case, where the focus is on the claims:

> While a plaintiff is charged with a duty of giving a short and plain statement of the asserted claims and a demand for judgment and relief, Fed.R.Civ.P. 8, the test of a complaint pursuant to a motion to dismiss lies in the claim, not in the demand. Thus, the only issue on a motion dismiss is whether the claim as stated would give the plaintiff a right to any relief, rather than to the particular relief demanded. *Asphaltic Enterprises, Inc. v. Baldwin–Lima–Hamilton Corp.,* 39 F.R.D. 574, 576 (E.D.Pa.1966); *accord Falk v. Levine,* 60 F.Supp. 660, 663 (D.C.Mass.1945) (citations omitted).

Cassidy v. Millers Cas. Ins. Co. of Texas, 1 F. Supp. 2d 1200, 1214 (D. Colo. 1998). The Tenth Circuit Court of Appeals made it clear that a Motion to Dismiss is not the proper way to address the Prayer for Relief:

> As an initial matter, the court must distinguish a prayer for relief from a claim for relief. While a *claim for relief* can be dismissed pursuant to Rule 12(b)(6) for failure to state a claim, the Tenth Circuit has held that a Rule 12(b)(6) motion to dismiss is not the proper vehicle for addressing a *prayer for relief*, which is not part of the cause of action. Accordingly, the court will not dismiss part of the Prayer for Relief under Rule 12(b)(6).

Doe by Smith v. Intermountain Healthcare, Inc., No. 218CV00807RJSJCB, 2022 WL 180646, at *14 (D. Utah Jan. 20, 2022) (denying motion to dismiss third amended complaint).

Further, the Tribe's Prayer for Relief must be read in conjunction with the entire Complaint, and specifically it must be read together with the very first paragraph, which provided:

> Through this action, the Tribe seeks declaratory and injunctive relief to enforce the Federal Defendants' fiduciary duties to the Tribe in relation to the management of

> the Tribe's Reserved Water Rights and related resources administered by Federal Defendants. The Tribe also alleges that the State and Federal Defendants have conspired to racially discriminate against the Ute Indian Tribe members by deliberately and systematically excluding the Tribe and its members from the benefits derived from federally-financed public water storage facilities and infrastructure in the State of Utah. The suit seeks declaratory, monetary, and injunctive relief against all Defendants for the violation of the Tribe members' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the U.S. Constitution and Title VI of the Civil Rights Act of 1964.

TAC ¶ 1.

Finally, the CUWCD includes in its section on Prayer for Relief the suggestion that the CUWCD enjoys immunity from suit. However, only one of two positions can be true. Either the CUWCD is part of the State and immunity was waived by intervention of the State in the D.C. action. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 35 U.S. 613 (2002) (holding the State of Georgia's removal of a § 1983 suit for damages to federal court waived the state's Eleventh Amendment immunity); *see also Akiachak Native Cmty. v. Dep't of Interior*, 584 F. Supp. 2d 1, 9 (D.D.C. 2008) (State of Alaska's intervention in suit against the U.S. effectively waived Eleventh Amendment immunity). Or the CUWCD is not part of the state and does not enjoy immunity. The CUWCD cannot have it both ways. Further, immunity expressly does not apply with respect to the property interests at issue in this case, *see* Utah Code Ann. § 63G-7-301(2)(a), or with respect to actions arising out of contractual rights or obligations, *see* Utah Code Ann. § 63G-7-301(1)(b).

IV. CONCLUSION

In spite of CUWCD's current effort to distance itself from the controversies giving rise to the Tribe's First, Third, and Eleventh Claims for Relief, CUWCD has been entrenched in these controversies every step of the way. Consistent with its delegated responsibility to protect and

develop the State of Utah's apportionment of water, CUWCD executed the 1965 Deferral Agreement alongside Defendants Bureau of Indian Affairs and Bureau of Reclamation, for the specific purpose of approaching with the United States Congress with evidence that the Tribe had forborne its senior-priority water rights so that the largest unit of the Central Utah Project could proceed. The legal consequences of this 1965 Deferral Agreement are at the very heart of the present controversy. After the non-tribal parties to the Deferral Agreement failed to uphold their end of the bargain, Congress delegated authority to the CUWCD to complete construction of the Central Utah Project to Defendant, a responsibility that CUWCD has carried out in a discriminatory manner. Based on the foregoing, CUWCD's Motion to Dismiss the Tribe's Third Amended Complaint should be denied.

Respectfully submitted,

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