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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 STATE OF UTAH DEFENDANTS' MOTION TO DISMISS** Civil Case No. 2:21-CV-00573-JNP-DAO Judge Jill N. Parrish Magistrate Judge Daphne A. Oberg

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Plaintiffs, the Ute Indian Tribe of the Uintah and Ouray Reservation and its individual Class Action Plaintiffs (collectively referred to as the "Tribe" or "Tribal Plaintiffs"), through undersigned counsel, submit this Response to Defendant State of Utah's ("State") Motion to Dismiss the Tribe's Third Amended Complaint ("TAC"), ECF No. 201.

REFERENCES TO THE RECORD

Evidentiary materials for the Tribe's opposition are contained in the three-volume exhibit appendix included as part of 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."

INTRODUCTION AND RESPONSE TO RELIEF REQUESTED

The State of Utah has moved to dismiss the first, third, ninth, tenth and eleventh claims in the Tribe's TAC. The Tribe's First Claim for Relief seeks declaratory and enforcement relief related to the contractual quantification of the Tribe's Indian reserved water rights under the 1965 Deferral Agreement. The Tribe's Third Claim for Relief seeks declaratory and enforcement relief related to the 1992 Central Utah Project Completion Act, or CUPCA. The Tribe's Ninth Claim alleges a breach of trust claim against the Federal Defendants based on the United States Bureau of Reclamation's ("USBR") execution and implementation of the Green River Block Exchange Contract ("GRBE Contract"). The Tribe's Tenth Claim alleges the Federal Defendants violated NEPA, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370, by failing, *inter alia*, to prepare an Environmental Impact Statement ("EIS") to address major federal actions taken pursuant to the GRBE Contract. The Tribe's Eleventh Claim for Relief seeks relief based on breach of trust and the 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**).**

Although the State of Utah has been a party to this case for more than three years,[1] and although the Tribe's GRBE claims have been included in the Tribe's complaint for nearly all of those three years, the State only now—at this belated date—contends for the first time that the State is a "necessary" party to the Tribe's GRBE claims, Claims Nine and Ten. The State further contends that Claims Nine and Ten must be dismissed for no reason other than because the State is not a named party to Claims Nine and Ten. It is not necessary for the Court to dismiss Claims Nine and Ten. Instead, Plaintiffs willingly stipulate to the State's joinder as a party-defendant under Claims Nine and Ten. The State's remaining grounds for dismissal are without merit.

RESPONSE TO STATE'S FACTUAL BACKGROUND

The State's Factual Background contains several factual misrepresentations that the Tribe wishes to correct. State Mtn., ECF No. 201 at PageID.1102-04. There is no basis for the State's contention that the proposed 1990 compact "recognized an additional 115,000-acre feet of water depletion for the Tribe." *Id.* at PageID.1103. The State bases this statement on paragraphs 127-155 of the Tribe's TAC. *Id.* However, nowhere in the TAC, or paragraphs 127-155 specifically, does the Tribe allege that the proposed 1990 compact "recognized an additional 115,000-acre feet of water depletion for the Tribe." It is also incorrect to say that the "Tribe testified in favor of CUPCA." State Mtn., ECF No. 201 at PageID.1103. Rather, as attested by Luke Duncan, the former Chairman of the Ute Indian Tribal Business Committee (whose sworn declaration is

[1] *See* State of Utah Motion to Intervene filed on April 17, 2019, ECF No. 32, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547, and the D.C. District Court order granting intervention, ECF No. 52, filed on Feb. 5, 2020.

incorporated into the Tribe's TAC), Mr. Duncan testified in September 1990 before the United States Senate's Subcommittee on Energy and Natural Resources of the Committee on Energy and Natural Resources. Mr. Duncan testified a full two years before CUPCA was enacted on October 30, 1992. App. II, 225. *See* Luke Duncan Declaration, App. II, 314-42. It is also incorrect for the State to assert that the 2012 Settlement included a "complete waiver of the Tribe's trust related claims." State Mtn., ECF No. 201 at PageID.1104. Contrary to the State's representation, the 2012 Settlement Agreement expressly preserved the Tribe's right to assert claims relating to its "water rights," the Tribe's "authority to use and protect such water rights," and the Tribe's right to assert claims related to the "loss of water resources" caused by the Federal government's "failure to establish, acquire, enforce, or protect such water rights." The Settlement Agreement also expressly preserves, and exempts from the waiver and release, any "claims for harms or damages" arising "after" the date of the 2012 Settlement. *See* 2012 Settlement Agreement, Sections 6(a) and 6(b), ECF No. 200-4, PageID.1031-32. Finally, the Tribe's disputes the State's contention that the Green River Block Exchange ("GRBE") Contract enables the State of Utah to "utilize its water rights under the 1922 Colorado River Compact." State Mtn., ECF No. 201 at PageID.1104. This statement is directly contrary to the allegations of the Tribe's complaint which must be accepted as true at this procedural juncture. The Tribe's TAC alleges that the water that is the subject of the GRBE Contract does not constitute "legally recognized water rights at all." *See* TAC ¶¶ 281-282, ECF No. 186 at PageID.828.

STANDARD OF REVIEW

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." Fed. R. Civ. P.

8(a)(2). A complaint must give the defendants notice of the claims and the grounds on 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).

The court must consider the complaint in its entirety, together with other materials that courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *See* 5B Wright & Miller §1357 (3d ed. 2004 and Supp. 2007); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999), *aff'd*, 38 Fed. Appx. 4 (D.C. Cir. 2002) ("[W]here a document is referred to in the complaint and is central to plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.") (citing *Greenberg v. The Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999)).

Granting a motion to dismiss is "a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (citing *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001) (quotation omitted); *see also Cottrell, Ltd. v. Biotrol*

Int'l, Inc., 191 F.3d 1248, 1251 (10th Cir. 1999) (quoting *Cayman Exploration Corp. v. United Gas Pipe Line Co.,* 873 F.2d 1357, 1359 (10th Cir.1989)).

ARGUMENT

I. PLAINTIFFS' FIRST AND THIRD CLAIMS SHOULD NOT BE DISMISSED

The Tribe's First and Third Claims seek declaratory and enforcement relief related to the 1965 Deferral Agreement and the 1992 Central Utah Project Completion Act, or CUPCA. The State makes a scattershot argument that the First and Third Claims should be dismissed on several grounds, either because the claims are time-barred or barred by laches, or because there is no jurisdiction over the claims, or because the Tribe's complaint fails to allege justiciable claims. State Mtn., ECF No. 201 at Page.Id1107-20. All of these arguments are without merit.

A. Plaintiffs' First and Third Claims are not Time-Barred

Like Defendant CUWCD, the State cannot identify a statute of limitations that applies to the Tribe's First and Third Claims *against the State* (as distinguished from the Tribe's claims against the Federal Defendants). The only statute of limitations the State cites is 28 U.S.C. § 2401(a). State Mtn., ECF No. 201 at PageID.1107. However, § 2401(a) is a federal statute, enacted by Congress, and by its terms § 2401(a) is a statute of limitations that is limited to civil actions "*commenced against the United States*." (emphasis added). Because the Tribe's claims against the State and CUWCD are not claims "*against the United States*," the limitation period under 28 U.S.C. § 2401(a) does not apply to the Tribe's First and Third Claims against the State and CUWCD.

At the heart of the Tribe's First and Third Claims for Relief are the Tribe's vested—and thus enforceable—property rights to water, *Arizona v. California*, 373 U.S. 546, 600 (1963)

(holding that Indian reserved water rights become vested property rights upon the creation of the reservation), together with the Tribe's inherent sovereign authority to regulate and administer its tribal water rights. The Supreme Court has ruled that tribal property rights are subject to enforcement and vindication under federal law. *Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-36 (1985) ("*Oneida II*") ("[W]e hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law.").

> Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished.

Oneida Indian Nation of N.Y. v. Cty. of Oneida, 414 U.S. 661, 676-77 (1974) ("*Oneida I*") (holding Indian tribes have a federal common law right to sue for infringements on their possessory rights in tribal property).

"[T]here is no federal statute of limitations governing federal common law actions by Indians to enforce property rights." *Oneida II*, 470 U.S. at 241. Moreover, state statutes of limitation also have no application to lawsuits brought by Indians to vindicate Indian property interests. As explained in *Oneida II*, the "borrowing of a state limitations period in these cases would be inconsistent with federal policy." *Id.* at 233.

Thus, under the holdings in *Oneida I* and *Oneida II*, there is no federal statute of limitations and no state statute of limitations that applies to bar the Tribe's First and Third Claims against the State and CUWCD. The First and Third Claims clearly qualify as common law claims against the State and CUWCD because these claims seek to vindicate the Tribe's property rights in its Indian reserved water rights and the Tribe's possessory interest in the full amount of its water rights as those rights were contractually quantified under the 1965 Deferral Agreement.

The State's argument for dismissal relies heavily on the fact that the D.C. District Court dismissed the first and fourth claims of the Tribe's Second Amended Complaint on the ground that those claims were time-barred. State Mtn., ECF No. 201 at PageID.1109-09. Significantly, however, the State fails to mention two distinguishing facts which make all the difference here. First, the State neglects to mention that the State of Utah never moved to dismiss the First and Fourth Claims of the Tribe's Second Amended Complaint on the ground that those claims were time barred under 28 U.S.C. § 2401(a) (or any other statute of limitations for that matter).[2] This means the D.C. District Court was never asked to decide the issue presented here, that is, that by its terms, 28 U.S.C. § 2401(a) applies only to civil actions "*commenced against the United States*," or stated differently, that 28 U.S.C. § 2401(a) has no application to civil suits *commenced against other parties*. (emphasis added). Secondly, the State fails to inform this Court that the D.C. District Court's dismissal ruling is limited by its terms to a ruling on "the Federal Defendants' Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim." *See* D.C. District Court Order of September 15, 2021, ECF No. 115, D.C.D. case number 1:18-cv-00547. The D.C. District Court never addressed the question of whether the Tribe's claims against the State and against CUWCD were time-barred.

Under controlling Supreme Court precedent—the holdings in *Oneida I* and *Oneida II*—there is no federal statute of limitations and no state statute of limitations that applies to bar the Tribe's First and Third Claims against the State and CUWCD.

[2] *See* State of Utah Motion to Dismiss filed on July 16, 2020, ECF No. 67, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547.

B. Plaintiffs' First and Third Claims Are Not Barred by Laches

Laches is an equitable defense that prevents "dilatory claims" and applies where there is "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." State Mtn., ECF No. 201 at PageID.1119 (citing, *inter alia*, *National Railway Passenger Corp. v. Morgan,* 536 U.S. 101, 121-22 (2002)). Laches—like the statute of limitations—is an affirmative defense. Fed. R. Civ. P. 8(c)(1). As a general rule, the burden falls on a defendant to assert affirmative defenses, and an affirmative defense does not necessitate a response from the plaintiff. *Fernandez v. Clean House LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018). ! A district court may dismiss a complaint as time-barred under Rule 12(b)(6), but only "if the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Id.* Here, the Tribe's complaint contains no factual allegations that "admit[] all the elements of the affirmative defense" under the State's theory. *Fernandez*, 883 F.3d at 1299.

Even assuming, *arguendo*, that the Court could dismiss the First and Third Claims on the basis of laches, the allegations under the TAC provide no factual predicate for a finding of laches. The State argues that the State of Utah has "relied on the finality of the [1990] Compact" and "has assumed that, as part of the negotiated settlement reached in CUPCA, which incorporated by reference the 1990 Compact, Plaintiffs would receive the amount of water the Compact indicates." State Mtn., ECF No. 201 at PageID.1120. But the State's assertion is absurd. And to fully appreciate the absurdity of the State's assertion, the Court need look no further than the State of Utah's own actions and inactions in relation to the proposed 1990 compact. CUPCA was enacted on October 30, 1992. App. II, 225. Following its enactment, time passed by—year after year and decade after decade passed by—with *neither* the State nor the Tribe ratifying the compact, even

though CUPCA expressly made the "proposed" 1990 compact "subject to re-ratification by the State and the Tribe." P. L. 105-575, Sec. 503(a) (Oct. 30, 1992). *See* App. II, 254. In fact, the Utah State Legislature did not ratify the 1990 Compact until 2018—*26 years after CUPCA was enacted in 1992*—and then the Utah Legislature only did so because the Tribe had filed this lawsuit on March 8, 2018. *See* App. II, 402-09; TAC ¶¶ 155-156, ECF No. 186 at PageID.799.

C. The State's Straw-Man Jurisdictional Argument is Specious

Next, the State distorts the Tribe's complaint beyond all recognition. Relying on the McCarran Amendment, 43 U.S.C. § 666(a), the State raises a red-herring, or straw man argument, contending that this Court "lacks jurisdiction to adjudicate Plaintiff's water claims." State Mtn., ECF No. 201 at PageID.1115-18. The Tribe calls this a red-herring, or straw man argument, because, of course, the Tribe's complaint does not ask the Court to *adjudicate* the Tribe's water rights. What the First and Third Claims in the TAC seek is (*i*) declaratory and enforcement relief with respect to the Tribe's rights under a federal contract, the 1965 Deferral Agreement, and (*ii*) declaratory and enforcement relief with respect to the Tribe's rights under a federal statute, the 1992 CUPCA.

The McCarran Amendment has nothing to do with the relief the Tribe actually seeks in this case. As described by one court, the McCarran Amendment serves a very limited purpose, which is to waive the Federal government's sovereign immunity in the limited circumstance of a general stream adjudication. As recognized by at least two federal courts, the McCarran Amendment otherwise has no effect whatsoever on federal jurisdiction over lawsuits involving water rights:

> [T[he language of the McCarran Amendment does not limit this court's jurisdiction to hear plaintiffs' water rights taking claim. The McCarran Amendment serves a limited purpose which defendant now seeks to expand. Senator McCarran, who introduced the legislation, stated in the Senate report that the legislation was "not

> intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream"….The court thus cannot abstain from its obligation to exercise its jurisdiction based upon a statute enacted merely as a waiver of the federal government's sovereign immunity in state stream adjudications. Defendant's position, in some ways, would be to turn the McCarran Amendment on its head.

Hage v. United States, 35 Fed. Cl. 147, 160 (1996). The D.C. District Court came to the same conclusion in an entirely different lawsuit involving Indian water rights, where the plaintiffs—like the State here—argued that the McCarran Amendment prohibited the Klamath Tribe from enforcing its water rights:

> Plaintiffs rely first on the McCarran Amendment, 43 U.S.C. § 666, a federal statute enacted in 1952 that waives federal sovereign immunity to allow for "the joinder of the federal government in state suits for the general adjudication of all water rights in river systems and for the administration of the adjudicated rights." Cohen's Handbook at 1242; *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 802–03, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)…The fact that the Klamath Tribes' reserved rights were quantified in state proceedings, and are physically enforced by the state's water department, does nothing to alter the substantive rights themselves. That is to say, the McCarran Amendment does not—as plaintiffs seem to suggest, *see* Pl.'s Opp'n at 11–13—compromise, revise, or otherwise diminish the Klamath Tribes' water rights.

Hawkins v. Bernhardt, 436 F. Supp. 3d 241, 254 (D.C. Dist. 2020). Because the Tribe's TAC seeks neither an adjudication nor a quantification of its Indian reserved water rights, the McCarran Amendment simply has no application to the Tribe's suit here.

D. Plaintiffs' First and Third Claims Do Allege Colorable Claims for Relief

The State next contends that the Tribe's First and Third Claims should be dismissed because the State of Utah is not a party to the 1965 Deferral Agreement and is not bound by it. This argument falls short for at least two reasons. First, the State Defendants are improperly challenging the factual allegations set forth in the Tribe's Third Amended Complaint, allegations

that must be accepted as true under a 12(b)(6) motion. *Twombly,* 550 U.S. 544, 555–56. The Tribe's TAC specifically alleges that the State of Utah is a party to and/or is bound by the 1965 Deferral Agreement:

> The Bonneville Unit construction thus proceeded only because the Defendants agreed the Tribe's *Winters* Reserved Water Rights in the Colorado River system would be (*i*) established in the Decker Report, (*ii*) have priority dates consistent with the advent of the Winters Doctrine, and (*iii*) be enforceable without further adjudication of the Tribe's rights.
>
> ***
>
> Upon execution of the 1965 Deferral Agreement, the United States and State of Utah were in a position to seek Congressional funding for the Bonneville Unit by certifying to Congress that the State of Utah had an uncontested right to water in the Uinta Basin.
>
> ***
>
> Further, in 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, and sought Congressional funding for the CUP based on the Tribe's agreement to defer some of its water rights and refrain from challenging construction of the Bonneville Unit.

TAC ¶¶ 133, 138, 141, ECF No. 186 at PageID.794-96.

The Tribe Exhibit Appendix includes a copy of the 1973 Concurrent Resolution, passed by the Utah State Legislature and signed by the Utah Governor. App. II, 166-70. That Resolution acknowledges the State of Utah's direct involvement in securing the Tribe's agreement to the 1965 Deferral Agreement, stating:

> WHEREAS, the State of Utah and the Central Utah Water Conservancy District have negotiated and executed a contractual agreement recognized in the Colorado River Basin Project Act of 1968 with Indian Tribes for a deferral of water use, and the federal government has expended over eighty million dollars in construction, and the [Central Utah Water Conservancy] district has constructed a water treatment plant with tax money of Utah citizens at a cost of over eight million dollars . . . .

* * * *

> NOW, THEREFORE, BE IT RESOLVED, that the 40th Legislature of the State of Utah . . . does hereby request the President of the United States, the Department of Interior, the Office of Management and Budget, and the Department of Agriculture to recognize and honor the interests and official position of elected officials of the State of Utah which request that contracts be let immediately to continue construction on the Bonneville Unit as planned and to proceed with the planning and construction of all other authorized units (Upalco, Uintah, Jensen) of the Central Utah Project in order to avoid water rationing, economic limitations and other hardships by the Citizens of Utah.

App. II, 166-70. Accordingly, because justice and fair play require it, the Utah State Defendants are prohibited under the doctrines of estoppel by legislative record, and/or equitable estoppel, from now insisting the State of Utah is not bound by the terms of the 1965 Deferral Agreement:

> The doctrine of equitable estoppel is not, in itself, either a claim or a defense. Rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct. *See generally* 3 J. POMEROY, EQUITY JURISPRUDENCE § 804, at 189 (5th ed. 1941); Note, *Equitable Estoppel of the Government,* 79 COLUM.L.REV. 551, 552 (1979).

ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988).

Secondly, the State does not have to be a signatory to the Deferral Agreement in order for the State to be bound by the quantification of the Tribe's water rights confirmed under the Agreement. Indian reserved water rights under the *Winters* doctrine are established and qualified exclusively by the United States pursuant to federal law. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983); *Cappaert v. United States*., 426 U.S. 128, 138 (1976); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) ("questions arising from the collision of private rights and reserved rights of the United States including the volume and scope of particular reserved rights, are federal questions…" [internal

punctuation omitted]); *U.S. v. District Court in and for Eagle County, CO*, 401 U.S. 520, 526 (1971); *Arizona v. California*, 373 U.S. 546, 598-601 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

In its 1963 opinion in *Arizona v. California*, the Supreme Court ruled that Indian reserved water rights are "present perfected" water rights as that term is used in Article VIII of the 1922 Colorado River Compact. The Court also ruled that Indian water rights retain their "present perfected" character from the date of inception. *Arizona*, 373 U.S. at 600. The Court adopted Special Master Simon K. Rifkind's findings on the distinctive legal character of Indian reserved water rights:

> The fundamental nature of a reserved water right is that it is *fully vested at the time of its creation*; nothing further need be done to perfect it. It differs radically from appropriative rights under state law, which may be initiated by a filing but which must be perfected by actual diversion and beneficial use of water within a reasonable time after the filing.

Report of the Special Master at 310, Dec. 5, 1960, *Arizona v. California*. The following year, the Supreme Court issued a decree in *Arizona v. California*, finding that, consistent with the 1922 Colorado River Compact, the Secretary must satisfy "present perfected rights in the order of their priority dates *without regard to state lines*." *Arizona v. California*, 376 U.S. 340, 342 (1964) (emphases added). This means that Indian reserved water rights are vested property rights, irrespective of whether the water rights have been quantified by contract or by adjudication, and irrespective of whether or not the water rights are being diverted and put to beneficial use.

For this reason it is immaterial whether the State of Utah is contractually bound by the 1965 Deferral Agreement. Nor is it essential for the State of Utah to agree to the quantification of the Tribe's water rights under the 1965 Deferral Agreement in order for the Tribe's water rights to be

judicially recognized and enforced. *Baley v. United States*, 942 F.3d 1312, 1340 (Fed. Cir. 2019) ("[T]here is no need for a state adjudication to occur before federal reserved rights are recognized."); *Colville Confederated Tribes v Walton,* 647 F.2d 42, 52-53 (9th Cir. 1981) (water use on a federal reservation is not subject to state regulation). This point is reinforced by the fact that the U. S. Congress recognized the terms of the 1965 Deferral Agreement as valid and binding through its enactment of the Colorado River Basin Act of 1968. The Tribe's TAC alleges:

> With passage of the Colorado River Basin Project Act of 1968, Congress recognized the Deferral Agreement as a binding agreement. The Act amended the Colorado River Storage Project Act of 1956 (*i.e.*, the Act authorizing the construction of the CUP) to account for Defendants' obligations under the Deferral Agreement, stating:
>
> > That the planning report for the Ute Indian unit of the Central Utah Participating Project shall be completed on or before December 31, 1974, to enable the United States of America to meet the commitments heretofore made to the Ute Indian Tribe of the Uintah and Ouray Indian Reservation under the Agreement dated September 20, 1965 (Contract No. 14-06-W-194).

TAC ¶¶ 139, ECF No. 186 at PageID.795. Thus, even if the Court were to determine that the State of Utah was not party to, and is not contractually bound by, the 1965 Deferral Agreement, the Tribe's First and Third Claims nonetheless allege a claim upon which relief can be granted.

II. PLAINTIFFS STIPULATE TO THE JOINDER OF THE STATE AS A PARTY TO CLAIMS NINE AND TEN

Although the State of Utah has been a party to this case for more than three years,[3] and although the Tribe's GRBE claims have been included in the Tribe's complaint for nearly all of

[3] *See* State of Utah Motion to Intervene filed on April 17, 2019, ECF No. 32, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547, and the D.C. District Court order granting intervention, ECF No. 52, filed on Feb. 5, 2020.

those three years, the State only now—at this belated date—contends for the first that the State is a "necessary" party to the Tribe's GRBE claims, Claims Nine and Ten. The State further contends that Claims Nine and Ten must be dismissed for no reason other than that the State is not a named party to Claims Nine and Ten. State Mtn., ECF No. 201 at PageID.1120-24. The Tribe emphasizes that the State did not raise this issue in its prior motion to dismiss the Tribe's Second Amended Complaint (which contained claims substantively similar to Claims Nine and Ten in the TAC).[4] Nor did the State mention this issue in the State's objection to the Tribe's motion for leave to file its Third Amended Complaint, which included a copy of the proposed complaint, including Claims Nine and Ten, as an exhibit to the Tribe's motion to amend.[5] Had the State raised this issue at an earlier stage, the Tribe certainly would have included the State as a named party to Claims Nine and Ten. It is not necessary for the Court to dismiss Claims Nine and Ten because the Plaintiffs stipulate and agree to the State's joinder as a party-defendant under Claims Nine and Ten.

II. PLAINTIFFS HAVE ALLEGED COLORABLE CLAIMS AGAINST UTAH GOVERNOR COX AND UTAH STATE ENGINEER WILHELMSEN UNDER 42 U.S.C. § 1983

Section 1983 of Title 42 of the United States Code permits "citizen[s]" and other persons "within the jurisdiction" of the United States to seek legal and equitable relief from "person[s]" who, acting under color of "any statute, ordinance, regulation, custom, or usage, of any State" deprives the claimant of federally protected rights:

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[4] *See* State of Utah Motion to Dismiss Second Amended Complaint filed on July 16, 2020, ECF No. 67, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547.

[5] *See* Motion for Leave to File Third Amended Complaint and proposed Third Amended Complaint filed on Jan. 19, 2022, ECF No. 163 and ECF No. 163-2.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

A. The State Has Waived Eleventh Amendment Immunity

At the outset it must be emphasized that the State of Utah waived Eleventh Amendment immunity for itself and its state officers when the State sought and was granted intervention in this case. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 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). As the Supreme Court explained in *Lapides*:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results.

Id. at 619. The holding in *Lapides* extends to the circumstance here, where the State of Utah affirmatively moved for, and was granted, intervention in this case.[6]

> In *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, the Supreme Court held that when a state's attorney general, validly authorized to bring suit in federal court, does so voluntarily, the attorney waives the state's Eleventh Amendment immunity for that case. The Court further explained that a state has reason to know that voluntary invocation of federal court jurisdiction waives Eleventh Amendment immunity and as a result, a state's grant of authority to its attorney general to invoke

[6] *See* State of Utah Motion to Intervene filed on April 17, 2019, ECF No. 32, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547, and the D.C. District Court order granting intervention, ECF No. 52, filed on Feb. 5, 2020.

> a federal court's jurisdiction is consent to waive the state's Eleventh Amendment immunity by the attorney general.
>
> * * * * *
>
> In this case, the Attorney General, in filing the State of Alaska's motion to intervene, has acted within his broad statutory authority to represent the Alaska's interest. Such authority includes waiving Alaska's Eleventh Amendment immunity to the extent necessary for the present litigation.

Akiachak Native Cmty. v. Dep't of Interior, 584 F. Supp. 2d 1, 9 (D.D.C. 2008); *see also Pettigrew v. Okla. ex rel. Okla. Dep't of Pub. Safety*, 722 F.3d 1209, 1212 (10th Cir. 2013) (recognizing that a state's intervention in a federal lawsuit waives Eleventh Amendment immunity); *Sutton v. Utah State Sch. For Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (holding it would be "grossly inequitable" to permit the State of Utah to assert the Eleventh Amendment in a case that the State removed to federal court).

Consequently, the State of Utah's waiver of Eleventh Amendment immunity in this case renders the holding in *P.R. Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)—on which the State relies—inapplicable. State Mtn., ECF No. 201 at PageID.1131. The Eleventh Amendment does not immunize the State Defendants from the Tribe's claims for relief under Claim Eleven.

B. Plaintiffs Concede the State Itself is Not a Person Under 42 U.S.C. § 1983, But the Claims Against Governor Cox and State Engineer Wilhelmsen are Proper Under *Ex Parte Young*

The Tribe acknowledges that states are not persons for purposes of § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Tribe also acknowledges that state officials are not persons for purposes of § 1983 when the officers are sued in their official capacities for damages. *Id. See* State Mtn., ECF No. 201 at PageID.1125-26.

However, that holding does not apply when a state official is sued in his official capacity for injunctive relief. "[O]fficial-capacity actions for prospective relief are not treated as actions against the State." *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14 (1985); *Will*, 495 U.S. at 71, n.10. Therefore, a state officer is a person under § 1983 who can be sued in his or her official capacity when the officer is sued for declaratory and injunctive relief. *Ex parte Young,* 209 U.S. 123, 159–160 (1908). The distinction is "commonplace in sovereign immunity doctrine," L. Tribe, American Constitutional Law § 3–27, p. 190, n. 3 (2d ed. 1988). Moreover, the only immunity available to a state official sued in his or her official capacity for prospective injunctive relief is the sovereign immunity that the governmental entity itself possesses. *See Graham*, 473 U.S. at 167. However, as discussed above, the State of Utah waived Eleventh Amendment immunity for itself and for its state officers when the State sought and was granted intervention in this case. *Lapides*, 535 U.S. at 624; *see also Clark v. Barnard,* 108 U.S. 436, 447 (1883) (a State's "voluntary appearance" in federal court as an intervenor negates Eleventh Amendment immunity). No other immunity is available to Governor Cox and State Engineer Wilhelmsen. As the Supreme Court explained in *Ex Parte Young*:

> If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Young, 209 U.S. at 159-60. According to Wright and Miller's treatise on Federal Practice and Procedure:

> The best example of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws.

13D Federal Practice & Procedure, § 3566 (3d ed.) (April 2016 Update). As further explained by the Tenth Circuit, "federal courts generally have jurisdiction to enjoin the exercise of state regulatory authority (which includes judicial action) contrary to federal law. *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017) (citing *Shaw v. Delta Air Lines, Inc.*, 462 U.S. 85, 96 n.14 (1983)).

C. Plaintiffs Have Pled a Proper Claim for Declaratory and Injunctive Relief

The Plaintiffs have pled the elements of a claim for declaratory and prospective relief under § 1983, alleging (*i*) that Governor Cox and State Engineer Wilhelmsen, (*ii*) acting in their official capacities and under color of state "statute, ordinance, regulation, custom, or usage," (*iii*) are engaged in ongoing violations of the Plaintiffs' rights protected by federal law. TAC ¶¶ 315-322, 329-330, 333, ECF No. 186, Page ID. 838-844.

In total, the allegation section of Plaintiffs' Third Amended Complaint runs to 83 pages in length and contains three-hundred thirty-seven (337) separate factual allegation paragraphs. In addition, each section of the complaint expressly "incorporate[s] and re-allege[s] all [the preceding] paragraphs and allegations in the "complaint as if fully set forth herein."[7]

In arguing that the Tribe's TAC fails to state a claim under § 1983, the State both misstates the applicable substantive law and misapplies the 12(b)(6) standard. For instance, the State

[7] One could reasonably ask, in what kind of mad Kafkaesque legal system are 83 pages of factual allegations insufficient to allege violations of a litigant's rights under federal law? Must a party draft a thousand-page thesis simply to allege a § 1983 claim that passes muster under Rule 12(b)(6)? If that is the case, then the Ute Tribal Plaintiffs respectfully submit that such an onerous pleading burden would deprive the Tribe and its members of meaningful access to the courts for a redress of their grievances as protected by the First Amendment. *See,* e.g., *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). (holding that the First Amendment right to petition extends to all branches of the government including the courts).

contends that the Tribal Plaintiffs have not pleaded any "facts showing that the Individual Defendants—Spencer Cox, the Current Governor of Utah, and Teresa Wilhelmsen, the current Utah State Engineer—have undertaken any actions whatsoever *violative of the U.S. Constitution or the Tribe's constitutional rights*." (emphasis added). State Mtn., ECF No. 201 at PageID.1124.[8] However, the State's contentions to this effect grossly misstate the scope of the relief under 42 U.S.C. § 1983. Section 1983 is not limited to relief against "*constitutional violations*;" instead, § 1983 provides for redress against "the deprivation of *any rights, privileges, or immunities secured by the [federal] Constitution and laws*." (emphasis added). 42 U.S.C. § 1983. Because the State's entire legal premise is flawed, the argument flowing from it is also fatally flawed.

Plaintiffs' Claim Eleven is based on the ongoing violation of all the federal laws the Tribe has cited in its complaint, including the Tribe's treaties with the United States (particularly insofar as the Constitution itself designates Indian treaties as a part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2). Federal law includes judicial precedent and federal common law. *See, e.g., Oneida II*, 470 U.S. at 233-36. Federal law also includes the federal court decisions that adjudicated the boundaries of the Tribe's Uintah and Ouray Reservation and delineated the scope of federal, state and tribal jurisdictional authority inside the Uintah and Ouray Reservation.[9]

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[8] The State repeats the misstatement throughout its motion, for instance, arguing that "Plaintiff fails to state a current ongoing *constitutional* violation to allow them to proceed under *Ex parte Young*." (emphasis added). State Mtn., ECF No. 201 at PageID.1125.

[9] *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1157 (D. Utah 1981) (*Ute I*); *aff'd in part, rev'd in part, Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc) (*Ute III*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*); and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*) (referred to collectively as "the *Ute Tribe v. Utah* line of cases").

The State of Utah contends that the Tribe's complaint alleges only a single "past wrong," not any ongoing violation of federal laws. State Mtn., ECF No. 201 at PageID.1124. But that statement, too, is grossly incorrect. For example, the Tribal Plaintiffs allege that the State of Utah entered into the Green River Block Exchange Contract with the United States on March 19, 2019—significantly, a full twelve months *after* the Tribe's original complaint was filed in this case.[10] TAC ¶ 172, ECF No. 186 at PageID.803. The Tribe further alleges that under the GRBE Contract, the State of Utah exercises administrative authority over releases of water from Flaming Gorge Reservoir and does so to the detriment of the Tribal Plaintiffs and in violation of the Federal government's federal law trust obligations to the Ute Tribe. TAC ¶¶ 173, 176 ECF No. 186 at PageID.803-04. The Tribal Plaintiffs allege specifically:

> [T]he Defendants' decision to enter into the GRBE Contract cannot be "necessary and in the interests of the United States," as required under 43 U.S.C. § 389, because the GRBE violates the Defendant's responsibilities as trustee to the Ute Indian Tribe by prioritizing the stored water needs of the State of Utah over the severe, longstanding, and well-documented [watr] storage needs of the Ute Indian Tribe.

TAC ¶ 291, ECF No. 186 at PageID.831.

> Instead of utilizing federally-administered storage infrastructure to help meet the needs of its Tribal beneficiary, the Federal Defendants have conspired with the State of Utah to limit the water storage that is available to the Tribe in order for the Tribe to derive economic benefit from the Tribe's senior-priority, present perfected water rights.
>
> In entering into the GRBE Contract Defendants have granted the State of Utah not just a right to stored water in Flaming Gorge [Reservoir], but also the right to administer water releases from Flaming Gorge, thus removing administrative control from the Tribe's trustee and giving control over Flaming Gorge water releases to a party whose interests are adverse to those of the Tribe.

TAC ¶¶ 293-294, ECF No. 186 at PageID.831-32.

[10] *See* Complaint filed on March 8, 2018, ECF No. 1, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547.

Another example of ongoing violation of federal law is the State of Utah's contention in this very lawsuit that the State has the authority to exercise "*primary [regulatory] administration of water within*" the Tribe's Uintah and Ouray Reservation. *See* Utah Mot. Intervene, ECF No. 32 at 4, *Ute Tribe of the Uintah and Ouray Reservation v. United States*, D.C.D. case number 1:18-cv-00547. The Ute Tribe was taken aback by this assertion, and responded that the State's contention was "frankly preposterous." explaining:

> The issue of the State of Utah's jurisdictional authority over tribal lands within the Uintah and Ouray Reservation was fully, fairly, and conclusively adjudicated between the parties and the question was resolved resoundingly against the State and in favor of the Tribe by the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc) (*Ute III*); modified and reaffirmed, *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (*Ute V*); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (*Ute VI*) (reaffirmed); and *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255 (10th Cir. 2016) (*Ute VII*) (reaffirmed).

Tribe's Resp., ECF No. 37 at 7. The Tenth Circuit rulings in *Ute Tribe v. Utah* are based on the extensive web of legal rights that are guaranteed to the Tribe and its members under the U. S. Constitution, under federal treaties, statutes, and federal decisional law, including, without limitation:

* the Supremacy Clause of the U. S. Constitution, art. VI, cl. 2, which provides that "the Laws of the United States … and all Treaties made … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby";

* the Ute Treaties of 1863 and 1868, 13 Stat. 673 and 15 Stats. 619;

* the Utah Enabling Act of 1894, 28 Stats. 107 (pursuant to which the State of Utah "forever" disclaimed all right and title to "all lands … owned or held by any Indian or Indian tribes");
* 18 U.S.C. §§ 1151 and 1152 which statutorily define Indian country and preclude state jurisdiction and the application of state law within Indian country;
* the Indian Civil Rights Act of 1978, Title IV, codified at 25 U.S.C. §§ 1321-1326, which prescribes the exclusive means by which the State of Utah may exercise criminal and/or civil adjudicatory or regulatory jurisdiction over Indians within Indian country in Utah.

In light of these rights secured to the Tribe and its members by federal law, the State of Utah's open assertion of regulatory authority over tribal waters inside the boundaries of the Uintah and Ouray Reservation in the current litigation is itself a form of ongoing violation of the Tribe and its members' rights under federal law.

In short, contrary to the State's argument, the Tribe's complaint sufficiently alleges that the State of Utah, Governor Cox and State Engineer Wilhelmsen are engaged in ongoing violations of federal law. More to the point, the State and its officers have been a party to this lawsuit since February 5, 2020. At any time during the last three years, Governor Cox and State Engineer Wilhelmsen could have disavowed the State's ongoing violations of federal law alleged in the Tribe's complaint, but they have not done so. The State of Utah's position, and Governor Cox and State Engineer Wilhelmsen's position is that the State has the legal right to do everything it is currently doing, which includes, *inter alia*, (*i*) diverting water and water infrastructure away from the Tribe's reservation for the benefit of non-Indians, (*ii*) controlling water releases from Flaming

Gorge Reservoir to the detriment of the Tribe and its members, and (*iii*) presuming to exercise "*primary [regulatory] administration of water within*" the Tribe's Uintah and Ouray Reservation.

D. Plaintiffs Have Pled a Proper Claim Under Title VI, 42 U.S.C. 2000d

The State contends that neither the State of Utah, nor Governor Cox or State Engineer Wilhelmsen are proper party defendants to Plaintiffs' claim under Title VI, 42 U.S.C. §2000d. State Mtn., ECF No. 201 at PageID.1134. However, Section 2000d-7(a) states in pertinent part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. §2000d-7(a) (underscore added). Thus, the statute itself does not impose the restriction that the State urges. Indeed, the statute specifically contemplates suits brought "*against a State*," and expressly provides for "*remedies both at law and in equity*." This language is sufficiently broad to include prospective injunctive relief against state officers such as Governor Cox and State Engineer Wilhelmsen. Therefore, the Tribe rejects the State's contention that neither the State of Utah, nor Governor Cox or State Engineer Wilhelmsen are proper party defendants to Plaintiffs' claims under §2000d.

The State also contends that the TAC does not sufficiently allege intentional discrimination on the basis of race, color, or national origin. 42 U.S.C. §2000d. However, this argument is similarly unavailing. In addition to the allegations cited above, the Tribal Plaintiffs allege:

> Utah Governor Spencer Cox is the State of Utah's chief executive officer. As such, Governor Cox is responsible for implementing state laws and overseeing the

> operation of the State's executive branch. It is Governor Cox's responsibility to insure that the State of Utah complies with federal laws, including the Ute Tribe's treaties with the United States.
>
> Teresa Wilhelmsen, P.E., is the Utah State Engineer and Director of the Utah State Division of Water Rights. State Engineer Wilhelmsen is "responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters." UTAH CODE ANN. § 73-2-1(3)(a).
>
> On information and belief, within the last four years and continuing through today, Governor Cox and State Engineer Wilhelmsen have participated in, adopted, and/or ratified one or more acts or omissions, taken under color of Utah state law, custom or practice, which acts or omissions are depriving the Ute Tribe and the Class Action Plaintiffs of the beneficial use of the Tribe's Reserved Water Rights in violation of the Plaintiffs' members' constitutional guarantees of due process and equal protection. These acts and/or omissions are an ongoing violation of constitutional and federal law. As an example, these acts include, without limitation, (1) the State of Utah's repudiation of the quantification of the Tribe's Reserved Water Rights under the 1965 Deferral Agreement; (2) the State's solicitation and approval of the Green River Block Exchange Contract, granting the State of Utah administrative authority over water releases from Flaming Gorge Dam and Reservoir; (3) the State of Utah's continued assertion of administrative jurisdiction over tribal waters inside the Tribe's Reservation in violation of Federal statutory and decisional law, including, without limitation, the Tribe's Treaties of 1849, 1863 and 1865, and federal court rulings in the *Ute Tribe v. Utah* line of cases;[11] and (4) one or more actions taken in concert or collusion with one or more Federal Defendants and/or their officers to insure that no tribal waters are stored in CUP facilities or the CUPCA Section 201(1) and Section 203 replacement facilities. As an example, during the years 2011-2017, Federal Defendants and their agents and employees urged the Ute Tribe to develop proposals for storing tribal waters in CUP facilities; however, once the Tribe had developed such proposals, identifying what the Tribe believed to be open storage capacity in CUP facilities, the Federal Defendants would then, on information and belief, allocate that open storage capacity to the State of Utah and/or the state's political subdivisions or irrigation/conservancy districts.

TAC ¶¶ 320-322, ECF No. 186 at PageID.841. The TAC further alleges:

> Defendants have … conspired, or acted in concert, to divert water, water storage reservoirs, and related infrastructure *away* from the Ute Indians of the Uintah and

[11] *E.g., Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc).

> 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.
>
> The GRBE Contract between Defendant USBR and the State of Utah is but the latest act of conspiracy, racial animus, and invidious discrimination on the part of the State and Federal Defendants.
>
> The Defendants' actions have resulted in substantial and ongoing economic harm and losses to the Ute Tribe, its members, and the Class Plaintiffs.

TAC ¶¶ 329-331, ECF No. 186 at PageID.843-44. The TAC further alleges:

> The State Defendants' actions alleged herein were undertaken under color of state law, custom or practice and violate the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and 42 U.S.C. §§ 2000d.

TAC ¶ 333, ECF No. 186 at PageID.844.

"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). The court must ask whether *all* of the facts alleged, taken collectively, give rise to a cause of action, not whether any individual allegation, scrutinized in isolation, meets that standard. *Tellabs*, 551 U.S. at 322. Under Rule 9(b) of the Federal Rules of Civil Procedure, "malice, intent, knowledge, and other conditions of a person's mind *may be alleged generally*." Fed.R.Civ.P. 9(b) (emphasis added). In turn, the Tenth Circuit has adopted the pleading standard under Rule 9(b) as the appropriate measure for claims based on racial bias and discrimination. *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269-70 (10th Cir. 1989). Consequently, the

factual allegations of under the TAC are more than sufficient. TAC ¶¶ 291, 293-294, 311-227, ECF No. 186 at PageID.831-32, and PageID.837-45.

CONCLUSION

The State Defendants' motion to dismiss the First, Third and Eleventh Claims are devoid of merit and should be denied. With respect to the TAC's Ninth and Tenths Claims, involving the 2019 GRBE Contract, there is no need for the Court to dismiss Claims Nine and Ten because the Plaintiffs stipulate to the State's joinder as a party-defendant under Claims Nine and Ten.

Respectfully submitted this 27th day of February, 2023.

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