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

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and STATE OF UTAH Intervenor-Defendant.	Case No. 2:21-cv-00573-JNP **INTERVENOR-DEFENDANT STATE OF UTAH'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE THIRD AMENDED COMPLAINT** Judge Jill N. Parrish Magistrate Judge Daphne A. Oberg

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INTERVENOR-DEFENDANT STATE OF UTAH'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

The State of Utah, Utah Governor Spencer Cox (successor to Governor Gary Herbert), and Utah State Engineer and Director Teresa Wilhelmsen (collectively the "State") respectfully submit the following Reply in Support of the State's Motion to Dismiss Plaintiffs' Third Amended Complaint.[1] (ECF 186, "Complaint"). Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the State moves to dismiss Claims for Relief One (1965 Deferral Agreement), Three (CUPCA Waiver), and Eleven (Civil Rights Claims) in the Complaint of Plaintiffs Ute Indian Tribe of the Uintah and Ouray Indian Reservation, Shaun Chapoose, Edred Secakuku, Luke J. Duncan, Ronald Wopsock, Julius T. Murray III, and Christopher L. Tabbe, individually on their own behalf and on behalf of all persons similarly situated (collectively the "Tribe" or "Plaintiffs"). In its most recent filing, the Tribe indicates that it stipulates to the joinder of the State as a party to Claims Nine and Ten. Therefore, the State does not seek dismissal of those Claims and requests the Court join the State as a party to those two Claims. (ECF 208, pp. 17-18). The State further joins in and adopts the arguments submitted by the Federal Defendants and Defendant Central Utah Water Conservancy District (CUWCD) as they relate to Claims One, Three, and Eleven of the Complaint.

[1] Federal Defendants and Defendant CUWCD file separately from the State Defendants.

STATEMENT OF FACTS

In Plaintiffs' response to the State's Motion to Dismiss, the Tribe claims the "State's Factual Background contains several factual misrepresentations that the Tribe wishes to correct." (ECF 208, p. 5). The State addresses each alleged "misrepresentation" in turn.

Plaintiffs argue that the Tribe did not testify in favor of the 1992 Central Utah Project Completion Act (CUPCA), and attempts to support this claim by stating, "[Luke] Duncan testified a full two years before CUPCA was enacted on October 30, 1992." (ECF 208, pp. 5-6). The Tribe does not indicate why the Court should discredit Chairman Duncan's testimony based on this temporal factor alone. Two years is not an excessive amount of time for legislation to make its way through Congress, nor do Plaintiffs argue that.

Paramount to the timing of Duncan's testimony is his testimony itself. Chairman Duncan, who was the Chairman of the Ute Indian Tribal Business Committee at the time of his testimony, testified from a prepared statement on September 18, 1990:

> My name is Luke Duncan. I am Chairman of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation in northeastern Utah. I am here to testify in support of the Central Utah Project Completion Act, and in particular Title IV of that Act. Title IV of the Act provides for a long-awaited Ute Indian water rights settlement. That settlement involves both a quantification of the Ute Indian Tribe's Winter's rights, as well as a settlement of long-outstanding claims relating to the development of the Tribe's water resources and the Central Utah Project.

(ECF 211, APP 347). This testimony establishes that the Tribe, represented by its then Chairman, supported CUPCA in the hearings leading up to the passage of the legislation.

Next, Plaintiffs argue that there is "no basis for the State's contention" that the 1990 Ute Indian Compact recognized an additional 115,000 acre-feet of water depletion for the Tribe. (ECF 208, p. 5). However, the 1990 Compact recognized a depletion for the Tribe of 248,943

acre-feet with an additional 10,000 acre-feet for municipal and industrial purposes, totaling 258,943 acre-feet of depletion. (ECF 211-2, APP 363-65). Further, agencies both inside and outside the State of Utah recognize that the 1923 Decrees gave the Tribe approximately 144,000 acre-feet of depletion.[2] Subtracting the acre-feet of depletion in the 1923 Decrees from the total amount of acre-feet depletion in the 1990 Compact results in an additional amount of approximately 115,000 acre-feet of depletion provided to the Tribe in the 1990 Compact.

Also, the Court is not required to simply accept Plaintiffs' bald claim that the State does not have "legally recognized water rights at all" that the State could have utilized to complete the Green River Block Exchange Agreement (GRBE). (ECF 208, p. 6). Plaintiffs provide no facts in support of this, and the claim is nothing more than "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 557 (2007)). The water rights used by the State in the GRBE were a portion of rights assigned to the it by the U.S. Bureau of Reclamation. *See* Assignment of Water Right No. 41-3479 (A30414d) from the United States of America to Utah (March 12, 1996).

Lastly, Plaintiffs argue that the 2012 Settlement did not include a waiver of the Tribe's trust related claims. (ECF 208, p. 6). However, as indicated in Judge Nichols' prior ruling:

> In exchange for $125 million, the Tribe agreed to waive any claims that the United States (1) "failed to preserve . . . or maintain [the Tribe]'s non-monetary trust assets or resources," (2) "inappropriately transferred, sold, encumbered, allotted, managed, or used [the Tribe's] non-monetary trust assets or resources," or (3) "failed to deposit monies into [the Tribe's] trust funds" in a "timely manner."

[2] *See* Utah Dept. of Natural Resources, DNR Responds to Ute Tribe Water Claims, https://naturalresources.utah.gov/uncategorized/dnr-responds-to-ute-tribe-water-claims; *See also* Colorado River Water Users Ass., Utah, https://www.crwua.org/utah.html. Unfortunately, Plaintiffs' appendix included the same Federal Decree twice (Docket No. 4427) and said Decree did not indicate the acre-feet depletion. (ECF 211-2, APP 77-83, APP 125-133).

(ECF 114, p. 4) (*citing* 2012 Settlement Agreement, Defs.' Ex. D, ECF 68-4, ¶ 4). Plaintiffs attempt to side-step their express waiver by arguing 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." (ECF 208, p. 6) (*citing* 2012 Settlement Agreement, ¶ 6a and 6b). However, Claims One (1965 Deferral Agreement) and Three (CUPCA Waiver) of the Complaint arose prior to 2012. Claims One and Three relate back to the 1965 Deferral Agreement and CUPCA, respectively. (ECF 186, ¶¶ 202-214, 226-245). More important than the 2012 Settlement Agreement, "Even if the Tribe had pleaded an enforceable trust duty, its [] claims would still be dismissed as waived by statute." (ECF 114 at 19, fn 12). Title V of CUPCA waives the Tribe's water rights claims under the 1965 Deferral Agreement "as soon as the Tribe received the 'moneys' described in §§ 504, 505, and 506 . . . The Tribe acknowledged its receipt of those funds in a 2006 complaint filed in the Court of Federal Claims." *Id.*

ARGUMENT

I. PLAINTIFFS' FIRST AND THIRD CLAIMS SHOULD BE DISMISSED

A. Claims One and Three should be dismissed as time-barred, as the Tribe has not provided additional legal justification to disturb Judge Nichols' ruling.

Plaintiffs assert Claims One and Three should not be dismissed despite substantively identical claims being dismissed as time-barred in the D.C. District Court. The Tribe argues that the statute of limitations used by Judge Nichols does not apply to the State. Plaintiffs also argue that under U.S. Supreme Court precedent, there are no statutes of limitations that apply to tribal property rights. These arguments are without merit and this Court should again dismiss these Claims. *See Arizona v. California*, 460 U.S. 605, 618 (1983), *decision supplemented*, 466 U.S. 144 (1984) (the "law of the case" doctrine "posits that when a court decides upon a rule of law,

that decision should continue to govern the same issues in subsequent stages of the same case").

As an initial matter, Plaintiffs argue that the "D.C. District Court 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.'" (ECF 208, p. 10) (*citing* ECF 115). Plaintiffs, however, ignore the immediately-following line of the order, which provides that "Utah Water Conservancy District's Motion to Dismiss for Lack of Jurisdiction, ECF NO. 70, is GRANTED . . . All other pending motions are DISMISSED AS MOOT." (ECF 115). Twice within his opinion, Judge Nichols ruled the Court "grants the Federal Defendants' Motion to Dismiss . . . as well as the State Defendant Central Utah Water Conservancy's Motion to Dismiss." (ECF 115, pp. 1, 27). CUWCD's motion noted it "incorporate[d] the jurisdictional and other arguments made by the Federal and State Defendants as if fully set forth herein." (ECF 70, p. 5). There is no language in the opinion that limits the time-barred dismissal to only the Federal Defendants.

While arguing that the federal statute of limitations under 28 U.S.C. § 2401(a) should not apply to the State, Plaintiffs later argue that federal law must apply in this case, asserting that tribal "reserved water rights under the *Winters* doctrine are *established and qualified exclusively by the United States pursuant to federal law*." (ECF 208, p. 15) (emphasis added). The State agrees that *Winters* rights are governed by federal law even though adjudications may occur in state courts. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (*citing United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 526 (1971)).[3]

Despite acknowledging that *Winters* rights are exclusively federal law, Plaintiffs now

[3] "*Winters* rights are creatures of federal law, which defines their extent." *American Indian Law in a Nutshell*, William C. Canby, Jr. (7th ed., 2020, p. 48).

argue that the statute of limitations under 28 U.S.C § 2401(a) only applies to the Federal Defendants – that it only applies to "civil actions '*commenced against the United States*'" to the (apparent) exclusion of "civil suits *commenced against other parties*." (ECF 208, p. 10) (emphasis supplied). This litigation was commenced against the Federal Defendants. (ECF 3). There is no language in § 2401(a), and Plaintiffs cite no case law, that precludes applicability to state and private defendants. The Tenth Circuit and many other courts have held that § 2401(a) applies to claims in federal court against defendants other than the federal government.

In *Chance v. Zinke*, the plaintiff sued the federal government and a private company named Great Southwestern Exploration, Inc. (GSE). 898 F.3d 1025, 1027 (10th Cir. 2018). Plaintiff also sought damages from GSE for trespassing on the plaintiff's property. *Ibid.* The Tenth Circuit examined 28 U.S.C. § 2401(a) and initially concluded that § 2401(a) is not a jurisdictional statute. The Tenth Circuit then "agree[d] with the district court's conclusion that [the plaintiff's] claims are untimely. Accordingly, [the Appeals Court] remand[ed] to the district court with instructions to dismiss for failure to state a claim." *Id.* at 1035.

Importantly, the Tenth Circuit affirmed the district court's decision to dismiss the plaintiff's claims against defendant GSE because they were dependent on the claims against the federal government. *Id.* at 1035-36 (*citing* 28 U.S.C. § 1367(c)(3)). In *Chance*, the claims against GSE were separate from the claims against BIA and depended on state law. Nonetheless, the federal statute of limitations was applied. Here, Claims One and Three are against both the State and Federal Defendants and are necessarily governed by federal law. Therefore, it is even more appropriate than in *Chance* to dismiss Claims One and Three against the State.

In another Tenth Circuit case, claims against the federal government, and against the Ute

Tribe itself, were dismissed under § 2401(a). *Ute Distribution Corp. v. Sec'y of Interior of U.S.*, 584 F.3d 1275, 1284 (10th Cir. 2009). Although the Ute Tribe has a unique domestic-dependent relationship with the United States government,[4] it is certainly not a "federal defendant." In *Ute Distribution Corp.*, plaintiff Ute Distribution Corporation (UDC) sued the Secretary of the Interior and the Ute Tribe. The claims against the federal defendants and the Ute Tribe were dismissed because the Tenth Circuit "conclude[d] that UDC's action was untimely filed." *Ibid.* The Tenth Circuit stated that the "question we must address is whether the district court erred in denying defendants' motion to dismiss UDC's action as untimely under 28 U.S.C. § 2401(a)." *Id.* at 1282. After finding that UDC had been put on notice during the 1960s, the Tenth Circuit determined that UDC's action was untimely under § 2401(a) and dismissed the case against the federal defendants and the Ute Tribe "with prejudice." *Id.* at 1283-84.

Judicial determinations that § 2401(a) bars claims against non-federal defendants are not limited to the Tenth Circuit. *See Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 753, 757-58, 760-63 (8th Cir. 2009) (holding § 2401 time-barred two claims against federal defendants and intervenor-defendant Cook County, a political subdivision of Minnesota); *See also Sierra Club v. Penfold*, 857 F.2d 1307, 1310, 1315 (9th Cir. 1988) (holding that § 2401(a) time-barred claims against not only federal defendants, but also against intervenor-defendant Alaska Miners Association); *See also Hardin v. Jackson*, 648 F. Supp. 2d 42, 45-46, 48 (D.D.C. 2009), *aff'd*, 625 F.3d 739 (D.C. Cir. 2010) (federal defendant and intervenor-defendant BASF Corporation argued in concert that plaintiffs' claims were time-barred under 28 U.S.C. §

[4] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

2401(a), and the court agreed after rejecting plaintiff's tolling arguments, specifically acknowledging that "BASF'S motion to dismiss [was] granted" after applying § 2401(a)).

While arguing that that 28 U.S.C. 2401(a) should not apply to claims made against the State, the Tribe also argues that under *Oneida Indian Nation of N.Y. v. Cty. Of Oneida*, U.S. 661 (1974) ("*Oneida I*") and *Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y.* 470 U.S. 226 (1985) ("*Oneida II*"), no statute of limitations, state or federal, should apply to bar Plaintiffs' claims simply because the claims involve tribal property rights. (ECF 208, p. 9). In an earlier brief, the Tribe initially cited *Oneida I* and *Oneida II* to argue "tribal property rights are subject to enforcement and vindication under federal law." (ECF 82, pp. 8-19). Now Plaintiffs apparently argue that their claims are aboriginal common law claims as defined in the *Oneida* cases, and therefore, statutes of limitations should never apply. (ECF 208, p. 9). This argument is without merit. *Oneida I* and *Oneida II* are clearly distinguishable from the facts of this case.

The *Oneida* cases presented a unique set of facts. In those cases, the State of New York entered an illegal land agreement with the Oneida Tribe despite the federal government warning against the agreement. This agreement, which was in violation of the Non-Intercourse Act, was the "transaction that [was] the basis of the Oneidas' complaint." *Oneida II*, 470 U.S. at 232. Since the land agreement was not governed by treaty or federal statute, the Supreme Court decided the case based on a "federal common law right to sue to enforce [the Oneida Tribe's] aboriginal land rights." *Id.* at 235. In applying federal common law, the Court decided there was no federal or state statute of limitations "in the context of Indian land claims."[5] *Id.* at 241.

[5] The Court made this conclusion after determining that there was no direct federal statute or treaty regarding the land at issue. *Oneida II*, 470 U.S. at 236-40. This differs from the case at bar, where the Tribe acknowledges that there were treaties related to the land (and, therefore, the

Here, the Plaintiffs acknowledge that their reservation was a product of federal government creation and that their *Winters* rights are appurtenant to the reservation. (ECF 186, ¶¶ 31-34). Despite this, Plaintiffs now argue that this Court should apply federal common law based on a specific factual situation addressing disputed land claims arising from an illegal agreement between a tribe and the State of New York. This argument disregards the history in the instant case in which the claims arise from treaties, executive orders, and federal legislation. The *Oneida* holdings are, therefore, not applicable to this case.

The Ninth Circuit's analysis in *Skokomish Indian Tribe v. United States* is instructive. 410 F.3d 506 (9th Cir. 2005). After finding that a tribe's claim against a municipality regarding treaty fishing rights was time-barred based on a state statute of limitations, the *Skokomish* Court summarized why the *Oneida* holdings were not applicable:

> Finally, [*Oneida II*] is inapposite. In that case, the Supreme Court found that the plaintiff tribes could assert a federal common law damages claim for unlawful possession of land. The Court's decision was not based on any treaty. Rather, it was based on well-established federal common law principles regarding aboriginal possessory rights in land. By contrast, the Tribe in our case is seeking to collect damages for violation of fishing rights reserved to it by treaty. Thus, we hold that there is no basis for implying the right of action for damages that the Tribe seeks to assert.

Id. at 514 (internal citations omitted). Similar to *Skokomish*, the current issues before the Court are based on treaties, federal executive actions, and numerous pieces of federal legislation. (ECF 114, pp. 2-4).

Since the *Oneida* holdings, several courts have found tribal property rights claims, land

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water) at issue, and subsequent legislation (such as the 1899 Indian Appropriations Act, the Uintah Indian Irrigation Project, the Colorado River Storage Project, and CUPCA) addressed the Tribe's water rights directly.

or otherwise, to be barred by statutes of limitations or equitable considerations like laches. *See City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) (U.S. Supreme Court found the plaintiff tribe's claims against the State of New York and its local units barred by laches because "the question of damages for the Tribe's ancient dispossession [was] not at issue"); *See also Christensen v. United States*, 755 F.2d 705, 706-08 (9th Cir. 1985) (Indian plaintiffs' claims for access to Indian land allotments time-barred under § 2401(a) and rejected the claim that "laches and statutes of limitations are not generally invoked against Indians"); *See also Wolfchild v. Redwood Cnty.*, 91 F. Supp. 3d 1093, 1102 (D. Minn. 2015),*aff'd*,824 F.3d 761 (8th Cir. 2016) (rejecting tribe members' land claims as equitably barred because they were "not suing to enforce aboriginal land rights in the property at issue").

Other courts have found that the statute of limitations under 28 U.S.C. § 2401(a) applies to bar Indian property rights claims, including both land and water rights claims, that are not brought within six years. In *Loring v. United States*, 610 F.2d 649, 649 (9th Cir. 1979), plaintiff tribe members alleged that federal defendants and the City of Scottsdale, Arizona, acted in concert to fraudulently take "a right-of-way over [the Salt River Pima-Maricopa Indian Community's] lands for the building of a public roadway." The lower court dismissed the claims against federal defendants as time-barred pursuant to 28 U.S.C. 2401(a), and the Ninth Circuit, under the same reasoning, held that "[d]ismissal of the claim against the United States was proper." *Id.* at 650. *See also Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1200–01 (D.N.M. 2010) (28 U.S.C. § 2401(a) barred Indian tribe members' claims against the federal government and private companies regarding rights of way on allotment lands); *See also Mishewal Wappo Tribe of Alexander Valley v. Jewell*, 84 F. Supp. 3d 930, 932 (N.D. Cal.

2015),*aff'd sub nom.Mishewal Wappo Tribe of Alexander Valley v. Zinke*, 688 F. App'x 480 (9th Cir. 2017) (holding 28 U.S.C. 2401(a) barred plaintiff tribe's claims regarding the termination of a rancheria property). Similarly, courts have found that statutes of limitations can indeed bar tribal plaintiffs' *Winters* rights claims. *See San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350–51 (Fed. Cir. 2011) (holding that plaintiff tribe's water rights claims in the Gila River were time-barred by the six-year statute of limitation under 28 U.S.C. § 2501). *See also, Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 212–13 (2020) (holding that plaintiff tribe's challenges to water rights accounting, among other trust mismanagement allegations, were time-barred by the six-year statute of limitations under 28 U.S.C. § 2401(a)).[6]

As evidenced by the relevant case law, the statute of limitations under 28 U.S.C. 2401(a) has time-barred claims brought against defendants other than the federal government. Further, statutes of limitations can be applied to tribal property rights outside of the unique facts of the *Oneida* decisions. As such, Judge Nichols properly dismissed claims substantively identical to Claims One and Three of the Plaintiff's Third Amended Complaint. This Court should do the same because the Tribe has not provided any legal justification to disturb the prior ruling.

B. In the alternative, Claims One and Three should be dismissed as barred by laches.

Plaintiffs argue that their first and third claims cannot be barred by the defense of laches because the Tribe has not admitted the elements of laches in the Complaint, and because they have not ratified the 1990 Compact. This argument is without merit, and if the Court does not

[6] The plaintiffs in this case have appealed and the appeal is currently pending before the U.S. Court of Appeals for the Federal Circuit. *Chemehuevi Indian Tribe v. U.S.*, 21-1366.

dismiss Claims One and Three pursuant to the status of limitations in 28 U.S.C. § 2401(a), it should dismiss the claims as barred by laches. Claims are barred by laches when there is "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002). Plaintiffs argue that their Complaint and accompanying Appendix do not justify this remedy, however the record indicates that the Tribe filed claims in 2018 for issues that they were or should have been aware of in 1992, at the latest. (ECF 114, p. 9).

As discussed previously, tribal property rights claims can be dismissed as being barred by laches. *See City of Sherrill*, 554 U.S. at 2179-19. *See also Christensen*, 755 F.2d at 707-08. Here, the Tribe waited twenty-five years after the passing of CUPCA before filing this lawsuit. Plaintiffs counter this argument by asserting that because they did not ratify CUPCA and because the State did not ratify CUPCA until 2018, their claims cannot be barred by laches. CUPCA, however, was passed by Congress in 1992 and became the "supreme law of the land." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992, PL 102–575, October 30, 1992, 106 Stat 4600. Along with CUPCA being the supreme law of the land, Plaintiffs do not deny that they have accepted and have been enriched by the settlement payments under the statute. *See* 2006 CFC Compl. ¶¶ 15-18, 36, Defs.' Ex. H, (ECF 68-8). Plaintiffs cannot claim that CUPCA has no effect, while also accepting monetary payments under and otherwise benefitting from the statute. The Tribe's actions in delaying filing by twenty-five years while accepting payments under CUPCA have

prejudiced the State,[7] and Claims One and Three should be barred by laches.

C. Plaintiffs are asking the Court to adjudicate and quantify Winters rights despite their assertion to the contrary, and the State is not a party to the 1965 Deferral Agreement.

Plaintiffs continue to argue that they are not asking the Court to adjudicate or quantify their *Winters* rights, despite their Complaint stating the opposite. In particular, Claim One is a clear call for the Court to adjudicate and quantify the Tribe's *Winters* rights:

> The Tribe seeks a declaration from this court that (i) the 1965 Deferral Agreement would be void ab initio as a sham and a fraud *but for its effect as a binding quantification of the Tribe's Water Rights*; (ii) Defendants are *estopped from repudiating the quantification of the Tribe's Water Rights under the Deferral Agreement*; (iii) the United States has a trust obligation to defend the *full quantity of the Tribe's Reserved Water Rights agreed to in the Deferral Agreement*; and requests appropriate judicial enforcement under 28 U.S.C. § 2202.

(ECF 186, ¶ 214) (emphasis added). The Tribe asks the Court to adjudicate its water rights and makes three requests for the Court to confirm the quantification of same.

Adjudication and quantification under 1965 Deferral Agreement is necessarily part of Claim Three as well, challenging CUPCA and referencing the 1965 Deferral Agreement expressly. (ECF 186, ¶ 232). While claiming the contrary, the Tribe is asking the Court to adjudicate and quantify its water rights. Essentially, the Tribe is asking the Court to violate U.S. Supreme Court precedent.[8] *Colo. River Water Conservation Dist.*, 424 U.S. at 811 (all water users on a stream "are interested and necessary parties to any court proceedings").

Lastly, Plaintiffs again assert that the State is a party to the 1965 Deferral Agreement

[7] As indicated in the motion to dismiss, the State has relied on the CUPCA settlement to plan future use of its Colorado River water rights and educate the public. *See* (ECF 201, p. 20).
[8] The State again finds it necessary to point out that the Tribe previously repudiated the 1965 Deferral Agreement that they now seek to have this Court hold as binding. Uintah and Ouray Tribal Bus. Comm. Res. 89-176 (approved and signed unanimously). *See* (ECF 67, Ex. A).

based solely on the Tribe's own statements in the Complaint and a "whereas" clause in the 1973 Concurrent Resolution from the Utah legislature. However, the Tribe fails to address the case law cited by the State holding that political subdivisions like CUWCD cannot bind the State, and that legislative resolutions are not legally binding. (ECF 201, pp. 13-16).

II. THE ELEVENTH CLAIM FOR RELIEF SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM AGAINST THE STATE DEFENDANTS.

A. The § 1983 claims within the Eleventh Claim should be dismissed because the Eleventh Amendment is not relevant, and Plaintiffs concede there is no damages remedy under § 1983. Plaintiffs also fail to state a § 1983 claim based on constitutional and/or other federal rights.

In the Complaint, Plaintiffs allege that the State violated the Equal Protection Clause and the Due Process Clause, actionable under 42 U.S.C. § 1983. In response to the State's Motion to Dismiss, Plaintiffs move the goalposts. They additionally allege that the State has waived Eleventh Amendment Immunity, which is not relevant to these claims. They concede there is no damages remedy. Then, they allege that they have remedies for injunctive and declaratory relief under "all" treaties, statues, agreements, the common law, and even court decisions they have cited in their Complaint. The Court should not allow this amendment-by-brief, and should the Court even consider the merits of their arguments, it should reject them.

Plaintiffs begin their discussion of the Eleventh Claim for Relief by arguing that the State has waived Eleventh Amendment immunity by intervening in the case. (ECF 208, pp. 19–20). As discussed in the State's Motion to Dismiss, the Eleventh Amendment has no bearing on the § 1983 claim because the State and its agents in their official capacity are textually excluded from the definition of "persons" to whom § 1983 extends liability. (ECF 201, p. 25); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The State's motion mentions the Eleventh

Amendment only once—citing *P.R. Aqueduct & Sewer Authority. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), and discussing the scope of injunctive and declaratory relief available under § 1983. (ECF 201, p. 31). The Eleventh Amendment is not relevant, as declaratory and injunctive relief are only forward looking, not backward looking, and there are no appropriate forward-looking declarations or injunctions to issue against Governor Cox or State Engineer Wilhelmsen. The Court should ignore Plaintiffs' Eleventh Amendment straw man. Just because the State intervened on some claims pending in this case does not mean it is subject to damages, declaratory, or injunctive relief under the claims brought in the Eleventh Claim.

Plaintiffs seek "monetary damages as permitted by law" for alleged violations in the Eleventh Claim in the Complaint. (ECF 186, ¶ 337). As previously argued by the State in its Motion, neither the State nor its officials in their official capacity are "persons" subject to suit for damages under § 1983. *Will*, 491 U.S. at 71. Likewise, a plaintiff must plead facts showing a plausible claim that individual state actors in their *individual* capacity violated the federal constitution or laws—asserting *respondeat superior* liability is not enough. *Ashcroft*, 556 U.S. at 676; *Robbins v. Oklahoma*, 519 F.3d 1242, 1249–50 (10th Cir. 2008).

In response, Plaintiffs have "acknowledge[d]" that states and state officials sued in their official capacity are not persons subject damages claims under § 1983. (ECF 208, p. 20). They likewise make no argument that Governor Cox or State Engineer Wilhelmsen should be liable for damages in their individual-capacities. *Id.* at 21 (arguing only liability for official-capacity liability for injunctive relief). Accordingly, to the extent that Plaintiff seeks "monetary damages" under § 1983 in the Complaint, such claim must be dismissed.

Plaintiffs claim a "Denial of Due Process and Equal Protection under the Fifth and

Fourteenth Amendments to the U.S. Constitution," support a § 1983 claim against "all Defendants." (ECF 186, p. 75). As conceded by Plaintiffs, the only "Defendants" to which this claim may properly be alleged are Governor Cox and State Engineer Wilhelmsen in their official capacities. However, Plaintiffs have made no allegations that Governor Cox or State Engineer Wilhelmsen personally engaged in any violations of equal protection or due process rights. And in their opposition, Plaintiffs do not attempt to point out any pleadings subjecting them to liability for due process or equal protection violations. (ECF 208, pp 22–27). They do not cite to any equal protection or due process cases describing pleading elements or defining the underlying cause of action, either for direct or supervisor liability. They do not even mention equal protection or due process, except in blockquotes from their Complaint. *Id.* at 29-30. Plaintiffs' filings fall short of the pleading requirements to hold government officials liable for constitutional violations under the Fourteenth Amendment. *Ashcroft*, 556 U.S. at 679, 683.

Rather than addressing the proper pleading standards for § 1983 claims based on violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, Plaintiffs instead shift their claim, seeking "redress against 'the deprivation of any rights, privileged or immunities secured by the [federal] Constitutional and laws.'" (ECF 208, p. 23). They then allege that "Claim Eleven is based on the ongoing violation *of all the federal laws* the Tribe has cited in its complaint. *Id.* at 24 (emphasis added). The Court should reject this amendment-by-brief, as well as reject the claim on the merits. First, the Court should disregard this argument because Plaintiffs are improperly attempting to "amend [their] complaint through an argument in a brief opposing [dismissal]." *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). Further, "Section 1983 … does not create any substantive rights;

substantive rights must come from the Constitution or federal statute." *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1062 (D.N.M. 2010). Therefore, to state a viable claim, a plaintiff cannot simply cite to § 1983; they must assert "a violation of rights protected by the federal Constitution or created by federal statute or regulation." *Summum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002) (citations and quotations omitted).

Plaintiffs' Eleventh Claim lists "breach of trust," federal due process, and equal protection as the basis for their § 1983 suit. (ECF 186, p. 75). "Breach of trust" is not a federal constitutional right and Plaintiffs have not articulated a specific law creating an individual right of "trust" actionable under § 1983. *See Suter v. Artist M.,* 503 U.S. 347, 357 (1992) (requiring a court to analyze a "statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983'"). Breach of trust cannot be a basis of Plaintiffs' § 1983 claim.

Plaintiffs spend the rest of the Eleventh Claim alleging violations "based on race, ancestry, ethnicity, national origin and religion." (ECF 186, ¶ 312). They generally allege a "historical pattern of persistent racial animus." (*Id.* at ¶ 316; *accord id.* ¶¶ 317, 318, 319, 322, 327, 328, 329). Plaintiffs mention contracts and other actions, but these were discussed generally as an attempt "to divert water … away from the Ute Indians … and towards … non-Indian white majority of population of Utah … with a discriminatory purpose and discriminatory effect." *Id.* at ¶ 329. The claim is based on a general allegation, rather than the required specific allegation of a constitutional rights violation. *See* (ECF 201, pp. 24-35).

Plaintiffs now do not mention equal protection or due process standards. Instead, they argue that laws ranging from the Supremacy Clause to federal common law to federal judicial

decisions support their § 1983 claim. (ECF 208, pp. 24–26). These were not alleged as the source of the § 1983 violation in the Complaint and again is an attempt to amend-by-brief. Plaintiffs have had ample opportunity before two separate district courts to define the metes and bounds of its § 1983 claim. Because Plaintiffs have failed to state a § 1983 claim based on due process or equal protection, the claims should be dismissed. Even if the Court considers these claims as well pled, they should be rejected. First, Plaintiffs' assertion that "every" law mentioned in their complaint is the basis of their § 1983 claim does not put defendants on notice of the basis of their claim. Fed. R. Civ. P. 8. Plaintiffs just provide a bullet list of some of the "extensive web of legal rights that are guaranteed to the Tribe and its members …" including common law rights and rights extending from court decisions, treaties, statutes, and the Supremacy Clause. (ECF 208, p. 25). This seriatim list cannot be the basis of a § 1983 claim.

Plaintiffs have not asserted, and counsel for the State has not found, any case holding that § 1983 can be used to assert rights under a non-statutory or regulatory contract, or a "right" declared in case law. Binding Tenth Circuit law requires a court to look at the constitution, or federal statutory or regulatory law. *E.g., Summum*, 297 F.3d at 1000. Common law or case law cannot create an independent right actionable under § 1983. *Oneida II,* 470 U.S. at 235–36 (concluding that tribes could maintain a common-law action for violation of possessory property rights under federal common law, but not that such a right was enforceable under § 1983).

The remainder of asserted sources of rights are also unavailing. The Supremacy Clause is not an independent source for § 1983 rights. *Golden State Transit Corp., v. City of Los Angeles*, 493 U.S. 103, 107 (1989). The Ute Treaties of 1863 and 1868 do not provide individual rights enforceable against a state official giving rise to a § 1983 claim. *Jones v. Norton*, 809 F.3d 564,

578 (10th Cir. 2015). The Indian Civil Rights Act is not a source of § 1983 rights—it is a separate statute providing limited redress for civil rights violations by tribes. *See Sulcer v. Davis*, 986 F.2d 1429, 1993 WL 5613, at *2 (10th Cir. Feb. 18, 1993) (unpublished table op.). The remaining statutes—the Utah Enabling Act and sections of the federal criminal code defining Indian Country and setting jurisdiction for crime in Indian Country—have not "unambiguously" created individual rights enforceable against state agents. *Suter*, 503 U.S. at 357.

B. Plaintiff's Title VI claim within the Eleventh Claim should be dismissed.

To the extent that Plaintiff's Eleventh Claim includes a claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, it should be dismissed. There is no right of action against individuals under Title VI. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1169-70 (11th Cir. 2003); *accord Webb v. Swensen*, 663 F. App'x 609, 613 (10th Cir. 2016) (unpublished). And naming the "State" in a Title VI case is inappropriate. *Assoc. of Mexican–American Educators v. State of Cal.*, 195 F.3d 465 (9th Cir.1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc); *Comfort ex rel. Neumyer v. Lynn Sch.*, 131 F. Supp. 2d 253, 255 (D. Mass. 2001). Plaintiffs apparently do not dispute these precepts. Instead, Plaintiffs contend that there could still be injunctive relief against Governor Cox and State Engineer Wilhelmsen in their official capacities, citing to the subsection of the statute in which Congress attempted to abrogate States' sovereign immunity. 42 U.S.C. § 2000d-7(a). But that attempted abrogation of sovereign immunity is not effective.

Congress may only abrogate a state's sovereign immunity when there is an expressed intent to do so, and it validly acts pursuant to its power under the Fourteenth Amendment. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 55–56, 72 (1996); *Coll. Sav. Bank v. Fla. Prepaid*

Postsecondary Edu. Expense Bd., 527 U.S. 666, 673 (1999). Instead, Title VI was enacted pursuant to Congress's Spending Clause Powers. 42 U.S.C. § 2000d (noting the prohibition of discrimination in any program "receiving Federal financial assistance"). Accordingly, sovereign immunity is waived as a condition of accepting federal funds, and the liabilities created and remedies available are the ones which a state agency "would have been aware" would have existed when the state agency "engaged in the process of deciding whether to accept federal dollars …." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570–71. (2022) (cleaned up). The remedies must be "generally available for contract actions." *Id.* (cleaned up).

Injunctive relief against a governor for alleged violations of a state's program would not be "generally available for contract actions." *Id.* Because §2000d-7 does not mention injunctive relief against state officials, those officials were not put on notice of such a remedy at the time any state subdivision took federal funds. Therefore, injunctive relief against Governor Cox and State Engineer Wilhelmsen in their official capacities is unavailable under Title VI. Also, when a federal statute has a remedial scheme for enforcement against state officials, injunctive relief under *Ex parte Young* is unavailable. *Seminole Tribe*, 517 U.S. at 75–76. Title VI has a remedial scheme allowing enforcement against a State by the "Federal department and agency" providing federal funds. 42 U.S.C. § 2000d-1. This acts as another bar to injunctive relief.

Finally, even if some form of Title VI claim survives against some of the named defendants, Plaintiffs have failed to state a valid Title VI claim because they have failed to plead a plausible claim of intentional discrimination against Plaintiffs by Defendants. *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). Plaintiffs plead that some state actions (many beyond the four-year statute of limitations) may have had the effect of diverting water from Tribal members

to non-tribal members, but there is no disparate impact claim under title VI, *Alexander*, 532 U.S. at 284–85, and Plaintiffs have pleaded no non-conclusory facts that anyone in the State of Utah (much less the Governor or State Engineer) engaged in intentional discrimination. *Delbert v. Duncan*, 923 F. Supp. 2d 256, 261 (D.D.C. 2013).

Plaintiffs' blockquote on page 27 of their Response referencing three paragraphs in the Complaint provides no facts showing intentional discrimination, and the Court need not infer. Plaintiffs make unsupported, conclusory allegations about generic "Defendants." It makes vague allegations about a "conspiracy," but such allegations must be pleaded with particularity, and not generally." *See Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) (recognizing that conclusory allegations of conspiracy to deprive constitutional rights under § 1983 cannot be conclusory but must be supported by "specific facts showing an agreement and concerted action amongst the defendants"). In short, Plaintiffs have not pleaded any facts against any state actor within the four-year statute of limitations that leads to the plausible inference of racial discrimination prohibited by Title VI. Accordingly, the claim should be dismissed on its merits.

CONCLUSION

Based on the foregoing, the State requests this Court to dismiss Claims One, Three, and Eleven of Plaintiffs' Complaint.

DATED this 3rd day of April 2023.

/s/ Stephen K. Kaiser
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CERTIFICATE OF SERVICE

I certify that on April 3, 2023, the undersigned electronically filed the foregoing **INTERVENOR-DEFENDANT STATE OF UTAH'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE THIRD AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of this filing to all counsel of record:

/s/ Stephen K. Kaiser
Stephen K. Kaiser
Assistant Attorney General
Attorney for Intervenor-Defendant