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

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

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Defendant Central Utah Water Conservancy District (the "District") filed a Motion to Dismiss ("Motion," ECF 199) on November 18, 2022, asking the Court to dismiss all claims stated against it by Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation and the putative class (collectively, the "Tribe") in the Third Amended and Supplemental Complaint ("TAC," ECF 186). The Tribe responded to the Motion on February 27, 2023 ("Response," ECF Doc. 207, refiled as ECF 209). The District files this Reply in support of its Motion.

INTRODUCTION

The District was first named as a party to this action in the Second Amended Complaint ("SAC," ECF 57), which was filed in the United States District Court for the District of Columbia ("DC Court"). The District appeared there specially and moved the DC Court to dismiss the four claims that had been stated against it for lack of jurisdiction and because the SAC had failed to state a claim against the District on which relief could be granted (ECF 70). The DC Court granted the District's motion. ECF 114, 115. Some of the claims brought against other parties were also dismissed, and the remaining claims were transferred to the District of Utah. With the matter now pending in this Court, the Tribe requested leave to file the TAC in an effort to address the pleading deficiencies recognized by the DC Court. This Court conducted the required "futility" screening analysis of the proposed TAC and overruled the Federal and State Defendants' objections,[1] noting "whether [the Tribe's] amendments are sufficient to cure the deficiencies previously identified and to overcome a motion to dismiss is more appropriately determined in the context of a fully briefed dispositive motion." ECF 185 at 13.

[1] As this Court observed in Footnote 1 of its Order, the District did not participate in the briefing on the Motion to Amend, a choice the District made because all of the claims previously stated against it had been dismissed by the DC Court for lack of personal jurisdiction. The District recognizes that it is susceptible to personal jurisdiction in this Court and has elected to address the claims advanced in the TAC without requiring additional service of process.

The TAC purports to bring three claims for relief against the District: the First Claim is based on "Estoppel, Breach of Trust, Declaratory and Enforcement Relief"; the Third Claim on "Estoppel, Breach of Trust, Interpretation of CUPCA, Declaratory and Enforcement Relief"; and the Eleventh Claim, which alleges "Breach of Trust and Denial of Due Process and Equal Protection," citing the Fifth and Fourteenth Amendments, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act. *See* TAC at 50–52, 54-59, 75–83. The District seeks dismissal of each of these claims because the Tribe has not cured the deficiencies recognized by the DC Court: while lack of personal jurisdiction over the District may no longer be an issue, the restated causes of action still do not state claims against the District upon which relief may be granted.[2]

ARGUMENT

I. THE TRIBE'S RENEWED CLAIMS AGAINST THE DISTRICT ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

The DC Court dismissed Claims 1, 2, 4, 5 and 16 of the SAC because they were time-barred by the applicable statutes of limitations. *See* ECF 114 at 8–11, 22. As noted by this Court, those claims were refiled "with substantial revisions" as Claims 1, 3, and 11 of the TAC *See* ECF 185 at 7–8. The District has moved this Court to dismiss the refiled claims on the same grounds cited by the DC Court, because the revisions do not alter that result.

First, the Tribe makes the blanket argument that the law of the case doctrine as invoked by the District "does not apply here," and claims that the District misunderstands Tenth Circuit

[2] The Tribe complains that the District, in an effort to be economical in its submission, "fail[ed] to even cite Federal Rule of Civil Procedure 12(b) or state the standard that applies to its motion to dismiss." Response at 21. The District is unsure how its decision not to devote an additional page of text to rehearse this most familiar of procedural standards in any way disadvantaged the Tribe. That standard was authoritatively described by the DC Court at page 6 of its Memorandum Opinion and, if that recital was not sufficient, the omission was certainly cured by the Tribe through its recognition of the standard in its Response. *See id.* at 22.

law on the concept. Response at 13–14. It is instead the Tribe that evidences a misunderstanding of this doctrine. "Under the law-of-the-case doctrine, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Poche v. Joubran*, 389 F. App'x 768, 774 (10th Cir. 2010) (quoting *Dobbs v. Anthem*, 600 F.3d 1275, 1279 (10th Cir. 2010)). Further, the Tenth Circuit has directly addressed the effect of orders from a transferor court after the venue is transferred to a different federal district: "When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done. Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court . . . ." *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) (citations and quotations omitted).

The District readily acknowledges that the law of the case "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). Thus, the doctrine does not necessarily bind this court to the DC Court's rulings, but the fact remains that the it applies here because this is the "same case," and because the reconstituted First and Third claims present essentially the same analysis as to the statute of limitations issue—despite the amendments made between the SAC and TAC. Therefore, the Court may rely on the law of the case to conclude that the First and Third claims are barred by the applicable statute of limitations because the defects noted by the DC Court were not adequately rectified by the changes in the TAC.

The Tribe further evidences its misunderstanding of law of the case doctrine through its argument that the District "*ignores the rulings of this Court in granting the motion to amend the complaint.*" Response at 12 (emphasis by the Tribe). The Tribe here apparently suggests that

this Court's "futility" screening analysis somehow validated the adequacy of the Claims themselves, rather than merely allowing them to be filed and then tested by dispositive motions. The Court clearly stated the limited nature of its futility decision, noting that "whether the[] amendments are sufficient to cure the deficiencies previously identified and to overcome a motion to dismiss is more appropriately determined in the context of a fully briefed dispositive motion." ECF 185 at 2, 14.

Rather than reproduce in detail here the legal analyses of the applicable statutes of limitations from its Motion and the filings of the other Defendants, including the thorough analysis advanced by the State of Utah in its Reply, the District incorporates them herein by reference and will focus instead on the import of the allegations made by the Tribe.

The DC Court found from the language of the SAC and sources cited therein that the Tribe has "known since 1980 that Defendants 'abandoned' the Ute Indian Unit," that it has known "since 1986 that the Upalco Unit was 'indefinitely postponed,'" and "has also known, since at least 1992, that Defendants would not honor the Tribe's understanding of the scope of its water rights." ECF 114 at 9. Thus, the court concluded, "as of the 1980's, and certainly by 1992, the Tribe knew that Defendants would not meet the specific obligations described in the Deferral Agreement, as well as other alleged sources." *Id.* Because the Tribe was aware of these facts decades before it filed the present action, the DC Court ruled that the Tribe's First, Second, Fourth, and Fifth Claims were barred by the six-year limitations period in 28 U.S.C. § 2401(a), and that the Sixteenth Claim was barred by Utah's four-year statute of limitations. ECF 114 at 11, 22.

The inadequacy of the allegations that led to the DC Court's conclusions has not been mitigated by the TAC. The Tribe acknowledges in the opening paragraph of the TAC that the

Central Utah Project ("CUP") is comprised of "federally-financed public water storage facilities and infrastructure in the State of Utah." TAC ¶ 1. While the District was "authorized by Congress to receive federal funds" and complete the facilities for which the federal funds had been appropriated, *see id.* ¶ 20, the CUP remained under federal control, as set forth in greater detail below. There is no allegation in the TAC that Congress granted the District discretion to decide which federal facilities were to be built, or that Congress made construction funds available for use at the District's discretion. The authority granted to the District by Congress was precisely and only to receive federal funds for the construction and operation of the specific federal facilities for which those funds were appropriated. By no later than 1992, the Tribe was clearly aware that Congress would no longer authorize completion of storage projects for the Tribe and that, as the DC Court noted, Congress had, instead, authorized payment of millions of dollars to the Tribe "to settle once and for all any claims the Tribe might have under the 1965 Deferral Agreement." ECF 114 at 4. It strains belief—even under the liberal pleading standard at the motion to dismiss stage—for the Tribe to now argue that it was not then aware that Congress had no longer authorized and would not appropriate funds to build federal storage facilities for the Tribe.

In an effort to save its claims from another dismissal, the Tribe has amplified its contention that the "continuing violations doctrine" tolled the running of the applicable statutes of limitation. Response at 18. The District initially argued in its Motion that the Tenth Circuit had yet to recognize the theory in the context of a § 1983 action. Motion at 8–10. However, as the Tribe points out, the Tenth Circuit recently joined other circuits in recognizing the theory in the § 1983 context, holding that litigants "may seek to rely on the continuing violation doctrine

in an effort to overcome the statute of limitations on their § 1983 claims." *Herrera v. City of Espanola*, 32 F.4th 980, 994 (10th Cir. 2022).

Nonetheless, *Herrera*'s mere recognition of the doctrine's applicability does not save the Tribe's claims. This is because *Herrera* also recognized and adopted several caveats that must be present before the doctrine becomes available: namely, the "important caveat . . . that it is triggered by continual unlawful acts, not by continual ill effects from the original violation"; and that at least one of the acts must occur within the applicable statute of limitations. *Id.* at 993 (citations and quotations omitted). The claims in the TAC that are asserted against the District satisfy neither of these requirements.

The Tribe argues that the District's complaint about the inadequate nature of the Tribe's allegations of continuing violations is conclusory, and then counters with its own conclusory references to the unspecified "unlawful *omissions*" that supposed support its claims. Response at 16. This being a federal project dependent on specific funding and authorization by Congress, the complained-of omissions would necessarily have to have been made by that legislative body. Though the Tribe cites cases on page 17 of the Response describing situations where claims were found not to have been time-barred because of unreasonable federal delays, it was abundantly clear by 1992 that Congress would not appropriate funds for the construction of the Ute Indian and UPALCO Units, and the Tribe points to no later congressional action or deadline that could have lulled it into believing that claims based on the failure to authorize and fund construction of those storage units were not ripe. Thus, even assuming there was a "continuing violation" at some point, it did not extend past 1992, meaning there is no event pleaded as occurring within the applicable statute of limitations, which is a prerequisite to application of the continuing violations doctrine.

In an effort to avoid the consequences of its delay, the Tribe alleges there were "continuing negotiations culminating as late as 2016." Response at 14 (citing TAC ¶¶ 195, 211). These allegations are unavailing, particularly as to the District. TAC paragraph 195 claims only that the Federal Defendants "strung the Tribe along," and paragraph 211 makes claims about "the Tribe's negotiations with the State and Federal Defendants over the terms of a water compact that is a statutory requisite under CUPCA."[3] Even assuming that the Tribe meant to include the District, a separate political subdivision, in its loose reference to "State Defendants," those allegations identify no conduct *on the part of the District* that could have tolled the statutes of limitations that would otherwise apply to claims against the District.

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that *the defendant* is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. (citing *Twombly*, 550 U.S. at 556) (emphasis added). Thus, "[a] complaint that fails to differentiate wrongful acts among multiple defendants . . . does not provide the fair notice that the law requires." *Matthews v. Bergdorf*, 889 F.3d 1136, 1148 (10th Cir. 2018) And although courts generally must assume the factual allegations in the pleading are true, they may not accept as true "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *See Iqbal*, 556 U.S. at 678.

[3] The focus on the other parties' conduct in water compact negotiations is not helpful to the Tribe, as the Tribe ultimately acted to repudiate the Deferral Agreement which was a principal focus of the water compact. *See* ECF 67-1, Ex. A to State Defendants' Motion to Dismiss SAC: Uintah and Ouray Tribal Bus. Comm. Res. 89-176, Sept. 20, 1989 (approved and signed unanimously).

The District does not believe that conduct or omission by any defendant is pleaded in sufficient detail to trigger the continuing violations doctrine and allow the Tribe to circumvent the statute of limitations for claims that were clearly ripe no later than 1992. But moreover, the Tribe has alleged no post-1992 action or breach of duty whatsoever that would support a continuing violation claim against the District, specifically. Thus, the revisions to the reformulated claims in the TAC do not remedy the deficiencies that led the DC Court to dismiss the counterpart claims in the SAC based on the applicable statutes of limitation.

II. THE FIRST AND THIRD CLAIMS FOR RELIEF DO NOT STATE CLAIMS AGAINST THE DISTRICT UPON WHICH RELIEF MAY BE GRANTED.

The Tribe's First and Third Claims, which are captioned as claiming "breach of trust" and "estoppel" against the Defendants, fail to identify any actionable conduct on the part of the District.

In the first place, the TAC does not allege that the District has any trust or fiduciary responsibility to the Tribe or its members. After the District noted that omission, the Tribe responded by invoking a sort of "transitive" trust theory: the Tribe first notes the federal government's "trust obligations and ultimate control" and then seems to argue that since the federal government acts "with and through others"—such as the State of Utah and the District—those federal trust obligations flow through to and are affirmatively assumed by the contracting parties. *See* Response at 8. But that is not what the TAC itself alleges and, moreover, it is not the law. The District has certain obligations that are defined by statute and contract, but it has never assumed trust obligations on behalf of the Tribe or its members. The Tribe offers no authority at all in support of the novel theory that the District has somehow assumed the federal government's trust obligations, and after search the District has been unable to locate any.

In the second place, the Tribe misapprehends the principal of estoppel. In Utah, "[t]he elements essential to invoke the doctrine of equitable estoppel are: (1) an admission, statement,

or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act." *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979). The TAC identifies no specific admission, statement or act on the part of the District,[4] alleges no Tribal action made in reasonable reliance on any action by the District (as opposed to other parties), and describes no injury that resulted from the Tribe's reasonable, detrimental reliance on something *the District* is alleged to have said or done.

The Tribe claims that the Defendants collectively have disputed its *Winters* water rights, but the TAC is deficient in that it alleges no act, statement, document, or representation *by the District* which could be construed to that effect. Indeed, the District has never disputed the Tribe's water rights.[5] Similarly, the District, a signatory to the Deferral Agreement, has never

[4] Other than, perhaps, signing the 1965 signing of the Deferral Agreement, which the District has never disavowed, whereas the Tribe has expressly repudiated it. *See supra* note 3. Thus, even if the Court were to construe the District's signing of the Deferral Agreement as a statement or act, the second and third elements would not be supported by the allegations in the TAC (and indeed, are thwarted by the Tribe's own admitted action in repudiating the Agreement).

[5] The District has always acknowledged the Tribe's *Winters* reserved water rights as "present perfected rights" for purposes of priority as describe in *Arizona v. California*, 373 U.S. 546, 600 (1963), and has never challenged the early priority date of those rights. While the Tribe's water rights are perfected for purposes of priority and cannot be forfeited for non-use, the other attributes necessary for the use of those rights have never been fully adjudicated. Regardless of the Tribe's objection to the District's characterization, those water rights *are* co-located with those of thousands of other water right holders in the seven drainage areas. The coexistence of the Tribe's water rights with other, non-Indian rights is evidenced by the reference to lands "either owned by Indians or non-Indians" on the first page of the Deferral Agreement which the Tribe filed as an Exhibit within the large Appendix it submitted in support of its Responses to the three motions to dismiss. *See* ECF 211-1, Appendix to Plaintiffs' Responses, Vol. II, at 158–164. The District has suggested that it would be in the Tribe's interest to participate in the ongoing adjudication of the water rights in those drainages so it could better define its rights and protect them from interference by others, consistent with the prior adjudication of some of the Tribe's *Winters* Rights and certification of other Tribe water rights by the Utah State Engineer. *See id.* at

disputed or disavowed that agreement, and the TAC alleges no act, statement, document, or representation where the District is purported to have done so. A general allegation about the acts of unspecified "Defendants" is not clear enough to alert the District (or the court) about the factual or legal basis of the claims asserted against it. *See Richeson v. United States*, 849 F. App'x 726, 728 (10th Cir. 2021). Such "shotgun"-style complaints are inadequate. *See, e.g.*, *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) ("The law recognizes a significant difference between notice pleading and 'shotgun' pleading."); *Schwab v. Kan. Dep't of Child. & Fams.*, 851 F. App'x 110, 116 (10th Cir. 2021) ("[C]ollective allegations are insufficient to put [Defendants] on notice of the wrongful acts they allegedly committed."); *Matthews v. Bergdorf*, 889 F.3d 1136, 1148 (10th Cir. 2018) ("A complaint that fails to differentiate wrongful acts among multiple defendants . . . does not provide the fair notice that the law requires.").

In response to the District's complaint about the Tribe's failure to identify specific, actionable conduct on the part of the District, the Tribe offers thirteen conclusory bullet points which point instead to alleged actions of the State and the Federal Defendants. *See* Response at 6–7.[6] The Tribe's continuing failure to identify any harmful discretionary conduct *on the part of the District* is not cured by general references to the conduct of others.

The District in its Motion observed that "in the 337 paragraphs of the TAC," the District itself "is alleged to have committed only two acts: the execution of the '1965 Deferral

159. But that decision is ultimately one for the Tribe, and for the federal government acting as its trustee.

[6] One bullet point cites the allegation in ¶ 128 of the TAC that the District somehow "sponsored" the CUP, but this statement is undercut by the Tribe's own acknowledgment in ¶ 127 that the CUP was authorized in 1956, whereas the District was not created until 1964. Therefore, it is temporally impossible for the District to have sponsored the project.

Agreement' . . . and the 'Agreement for the Sharing of Costs associated with Replacement Features for the Uintah and Upalco Units of the Central Utah Project'" (an agreement to which the Tribe was not a party). Motion at 4 (quoting TAC ¶¶ 131, 325). In response, the Tribe argues that the 1992 Central Utah Project Completion Act (CUPCA) delegated to the District responsibility for "the planning and construction of projects to be built as part of the CUP." Response at 3. Yet, the CUP remained a federal reclamation project following this delegation. For instance, one section of CUPCA notes that the District's "authorization to construct any of the features [identified in the Act] *shall expire* if no federally appropriated funds for such features have been obligated or expended by the District in accordance with this Act within five years from the date of completion of feasibility studies." Central Utah Project Completion Act, Pub. L. No. 102-575, tit. II, § 203(b)(1), 106 Stat. 4600, 4612 (1992) (emphasis added). Another section provided that the CUP features "shall be constructed by the District under the program guidelines" as set forth in a prior statute. *Id.* § 202(a)(1)(D), (a)(3)(F), (a)(6)(B), (d). The Tribe's own allegations also make it clear that the District lacked the discretion, obligation, or funding mechanism to build facilities that were not specifically authorized and funded by Congress. Indeed, the Tribe acknowledges in Eleventh Claim for Relief that the reason additional CUP facilities have not been built was (and is) because "No federal funding has been appropriated for any future construction . . . ." TAC ¶ 327.

The Tribe also persists in what appears to be a deliberate attempt to blur the District's legal status under state law. It first correctly describes the District as "a political subdivision of the State of Utah," TAC ¶ 20, but then ignores the import of that status by repeatedly referring to the District as a "state agency" or "arm of the state." *See, e.g.*, TAC ¶¶ 9, 15, 27, 28, 34, 35. It also loosely characterizes the District as one of the State Defendants, arguing that the District's

actions somehow bound the State, and that the State's actions bound the District, in matters relating to the Deferral Agreement and the allegations of discrimination. Candidly, the Tribe knows better.

The District is a water conservancy district organized in 1964 under the laws of the State of Utah. Utah water conservancy districts are political subdivisions distinct from the State and they can only exercise the specific powers that have been granted to them by the Utah Legislature. *See* Utah Code Ann. §§ 17B-1-102(35), 17B-1-103(l), 17B-2a-1002, 17B-2a-1003; *see also Metro. Water Dist. of Salt Lake and Sandy v. DHCH Alaska Trust*, 2019 UT 62, ¶ 12, 452 P.3d 1158, 1163. The District is a legal entity separate and distinct from the State of Utah; it is not authorized to act for or bind the State, nor has it purported to do so, and the Tribe has offered no authority that holds to the contrary.

III. THE TRIBE'S OWN ALLEGATIONS RENDER ITS THIRTEENTH CLAIM LEGALLY DEFICIENT

The Tribe's Eleventh Claim for Relief is barred by the applicable statute of limitation on the grounds noted above and in the incorporated arguments of the other Defendants. Additionally, that claim as it is advanced against the District is amply negated by specific allegations made by the Tribe in the TAC.

Ignoring for purposes of argument the incontrovertible fact that the District is a political subdivision separate from the State, the Tribe's characterization of the District as a "state agency," *see, e.g.*, Response at 6–7 (quoting portions of the TAC), would render the discrimination claim facially deficient. If the District were considered a state entity, then it is black letter law that the federal courts would not have jurisdiction to hear a § 1983 action brought against it. *See Elam Constr. v. Regional Transp. Dist.*, 129 F.3d 1343, 1345 (10th Cir. 1997) ("The Eleventh Amendment immunizes states from suits in law or equity, including

injunctive actions. Under the arm-of-the-state doctrine, this immunity extends to entities created by state governments which operate as their alter egos or instrumentalities." (citations omitted)). Curiously, the TAC alleges—in the same paragraph, no less—that the District is both "a political subdivision of the State of Utah," and that it is a "state agency." TAC ¶ 324. Thus, in the face of the Tribe's argument that the District "cannot have it both ways," *see* Response at 37, it is the Tribe that tries to have it both ways: either the District is a political subdivision and thus theoretically subject to § 1983, or it is a state agency, in which case it clearly is not. *See Elam Constr.*, 129 F.3d at 1345 (noting state sovereign immunity "does not, however, extend to political subdivisions of the state, such as counties or municipalities").[7]

Even assuming that a § 1983 claim can be advanced against the District as a political subdivision of the state, "under § 1983, a municipality [or political subdivision] is liable for the unconstitutional acts of its employees *only* where the action was authorized by official municipal policy." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1221 (10th Cir. 2011) (emphasis added). Further, to assert an actionable discrimination claim under § 1983, the plaintiff "must also demonstrate the discrimination [itself] was caused by a custom or policy within the meaning of *Monell* [*v. N.Y.C. Dept. of Social Servs.*, 436 U.S. 658 (1978)]." *Mitchell v. City & County of*

[7] In its Response, the Tribe also conflates the District's argument about the Tribe's failure to follow the Utah Governmental Immunity Act with the issue of sovereign immunity as it relates to § 1983. *See* Response at 37; Motion at 18–19. The two issues are entirely distinct—the former relates to a necessary procedural prerequisite to obtain monetary relief from a government entity organized under Utah law, whereas the latter is a crucial jurisdictional issue that relates to the ability to bring suit in federal court against state entities under the U.S. Constitution. The District does not assert that it enjoys wholesale "immunity from suit." *See* Response at 37. Further, because they are separate legal entities, the State could not have waived any immunity enjoyed by the District when it asked leave of the DC Court for the State to intervene in this matter. The reasons why the Tribe will be unable to pursue a claim for monetary relief against the District because of its failure to allege compliance with important statutory prerequisites are sufficiently addressed in the Motion, and the District will not duplicate that argument here.

Denver, 112 Fed. App'x 662, 671–72 (10th Cir. 2004). "Official policy may take the form of 'formal rules or understandings' or, alternatively, a decision by a municipal officer who is 'responsible for establishing final policy with respect to the subject matter in question.'" *Kan. Penn*, 656 F.3d at 1221–22 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 483, (1986)). Nowhere in the TAC does the Tribe identify any District policy or decision by any District officer that could support a § 1983 claim; thus, the Tribe has not described a prima facie case of discrimination.

The failure to identify specific policies of the District or allegedly prejudicial acts by District officials is amply illustrated by an examination of the preposterous claim in the Tribe's Response that the District is:

> perhaps the single most culpable party in the historic, presently-existing, and ongoing racial segregation and racial discrimination against the Ute Indian Tribe and its members through the State and Federal Defendants' deliberate and systematic exclusion of the Tribe and its members from the benefits derived from the construction, existence of, and operation of the federally-financed public water storage facilities and infrastructure in the State of Utah.

Response at 32. That argument is not only inconsistent with, but is specifically contradicted by, numerous affirmative allegations made by the Tribe in the TAC.

The District was empowered by Congress to receive federal funding and complete construction of the CUP facilities that were authorized and funded by Congress, but nowhere has the Tribe identified any requirement—nor does one exist—that the District was obligated, or even allowed, to construct federal reclamation facilities that Congress did not first approve or for which Congress declined to appropriate funds. Congress clearly declared in 1992 in CUPCA that the facilities the Tribe now complains of were no longer authorized and would not receive federal funds.

The Tribe repeatedly recognizes in the TAC that the CUP was and remains a federal project where the District was granted no discretion in deciding what facilities would be constructed using appropriated federal funds. The Tribe claims:[8]

- These are "federally-financed public water storage facilities and infrastructure." TAC ¶ 1.
- This case "arises under the Federal Defendants' fiduciary duties relating to the management and protection of the Tribe's water rights and water resources imposed . . . by Congress." TAC ¶ 23.
- The Tribe's water rights "are held by the United States, as trustee, for the benefit of the Tribe." TAC ¶ 37.
- As Trustee, "The U.S. Exercises Comprehensive, Pervasive, Elaborate, and Exclusive Control over Tribal Waters, Tribal Water Rights, and the UHP." TAC, heading B.
- "For over a century, the Federal Defendants have assumed and exercised comprehensive, pervasive, elaborate, and exclusive control over" the Tribe's water rights. TAC ¶ 51.
- "[T]he Federal Defendants' control of the waters themselves, as well as . . . exclusive control over the infrastructure necessary to put the water rights to productive use. TAC ¶ 52.
- "The Federal Defendants' comprehensive, pervasive, elaborate and exclusive control over the Tribe's waters has . . . prevented the Tribe from assuming control over the use and development of its *Winters* Reserved Water Rights" TAC ¶ 53.
- The BIA had "pervasive and comprehensive control of" the Uintah Indian Irrigation Project ("UIIP"). TAC ¶ 64; *see also* TAC ¶¶ 67, 68, 71.
- "The CUP was authorized by Congress in the Colorado River Storage Project Act of 1956." TAC ¶ 127.
- "Defendant USBR was responsible for building the CUP and dividing it into six units." TAC ¶ 128.
- "[T]he Federal Defendants' promise to the Tribe of supplemental water and storage." TAC ¶ 135.
- The "Federal Defendants' promise in the Agreement that the Ultimate Phase of the CUP would provide water to the Tribe's lands." TAC ¶ 136.

[8] The District cites these references only to demonstrate *the Tribe's own characterization* of the history of the Tribal water rights and the CUP facilities, and not to suggest that any of the Defendants acted in a discriminatory or otherwise improper manner.

- "Although Congress appropriated construction funds for the Upalco Unit in 1981, by 1986 the USBR had indefinitely postponed its construction citing 'increased costs and lack of demand.'" TAC ¶ 142.
- The "USBR continued 'planning' for the Uintah Unit into the 1980s, but by 1986 decided to 'postpone' the Uintah Unit indefinitely." TAC ¶ 142.
- In 1980, "[t]he Federal Defendants also abandoned the Ute Indian Unit . . . without any economic justification." TAC ¶ 143.
- "Under CUPCA, Title V, Congress . . . acknowledged the Federal Defendants' failure to fulfill their obligations to the Tribe." TAC ¶ 157.
- "The Federal Defendants never fulfilled [the Bottle Hollow Reservoir] obligation." TAC ¶ 164.
- "[T]he Federal Defendants' abdication of their fiduciary duties to the Tribe." TAC ¶ 166.
- "For years the Federal Defendants strung the Tribe along." TAC ¶ 195.
- "[T]he Federal Defendants' failure to complete the CUP." TAC ¶ 201.

These allegations leave no room for the Tribe's argument that the District was the primary actor in a claimed historic pattern of discrimination that began nearly sixty years before the District was even formed then continued thereafter, notwithstanding the federal government's "comprehensive" and "exclusive" control of tribal water rights and facilities. Again, the Tribe's own allegations counter its contention that the District discriminated against it by exercising discretion with regard to the construction and operation of these federal reclamation facilities. Further, as previously noted, the Tribe in the TAC does not allege that the District failed to construct any facility that was actually approved and funded by Congress.

IV. THE TRIBE MISAPPREHENDS THE DISTRICT'S ARGUMENT ABOUT THE TRIBE'S PRAYER FOR RELIEF

The Tribe argues that it was inappropriate for the District to comment on the TAC's Prayer for Relief. Response at 36–37. The District does not argue that the Prayer for Relief is inappropriate in general, but rather that its detail underscores the District's arguments about the

inadequacy of the three Claims for Relief, at least to the extent they are asserted against the District.

The first prayer, for example, asks that the Court confirm the Federal Defendants' trust obligations, including those related to the *Winters* rights and the UIIP. TAC at 83–84. The District has no trust obligations and has never disputed the Tribe's *Winters* rights. The second prayer asks for relief only against the Federal Defendants. *Id.* at 84. The third prayer references the Midview Exchange Agreement, a document and a claim to which the District is not a party. *Id.* at 84–85. The fourth prayer asks relief on behalf of the putative Class Action Plaintiffs for alleged civil rights violations, *id.* at 85, but the class action claims fail for the same reasons and lack of specificity as those stated by the Tribe. The sixth prayer fails for that same reason. Finally, as addressed more fully in the District's Motion, the fifth prayer seeks monetary damages, *see id.*, which are not available from the District as a matter of law. While the Prayer for Relief is not a separate *claim* for relief, the absence of a request for any relief specific to the District in the prayer is further confirmation that the TAC fails to state a claim against the District upon which relief may be granted.

CONCLUSION

For these reasons, and based on the further arguments and authorities advanced by the Federal and State Defendants as they relate to the First, Third, and Eleventh Claims for Relief, the District respectfully moves this Court to dismiss with prejudice all claims made against it by the Tribe.

Dated this 3RD day of April, 2023.

CLYDE SNOW & SESSIONS

/s/ Edwin C. Barnes

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April, 2023, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

Dated this 3rd day of April, 2023.

/s/ Ellen DePola