THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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| **Ute Indian Tribe of the Uintah and Ouray Reservation,**<br><br>Plaintiff,<br><br>v.<br><br>**United States Department of the Interior, *et al.*,**<br><br>Defendants. | Case No. 1:18-cv-00547-CJN<br><br>Judge Carl J. Nichols |

**PLAINTIFF'S OPPOSITION TO THE CENTRAL UTAH WATER CONSERVANCY DISTRICT'SMOTION TO DISMISS THE TRIBE'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES**

**EXHIBIT LIST**

| Exhibit No. | Name |
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| A | 2021 Bureau of Reclamation Budget - Highlighted |
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Plaintiff, the Ute Indian Tribe of the Uintah and Ouray Indian Reservation (Ute Indian Tribe or Tribe), respectfully submits its Opposition to the Central Utah Water Conservancy District's Motion to Dismiss the Tribe's Second Amended Complaint, ECF No 70.

## REFERENCES TO THE RECORD

Evidentiary materials for the Tribe's opposition are contained in the three volume exhibit appendix attached to the Tribe's Response in Opposition to the Federal Defendants' Motion to Dismiss the Tribe's Second Amended Complaint, as well as one exhibit that is separately attached to this memorandum as an exhibit specific to this memorandum. References to this appendix are to volume and page number(s), i.e., "App. I, 1-10."

## INTRODUCTION

Defendant the Central Utah Water Conservancy District (CUWCD) is a political subdivision of the State of Utah. It was established pursuant to Utah state law, the "Water Conservancy District Act," UTAH CODE §§ 17B-2a-1001–17B-2a-1009. In its Second Amended Complaint, the Tribe has included CUWCD as a defendant in four of its sixteen claims for relief. These include the Tribe's First Claim for Relief (seeking declaratory and enforcement relief as to the established quantification of the Tribe's Indian reserved water rights), Second Claim for Relief (seeking declaratory and enforcement relief as to the Tribe's jurisdiction over its Indian reserved water rights), Fourth Claim for Relief (seeking declaratory and enforcement relief as to the impact of the 1992 CUPCA on the Tribe's water right claims and the 1965 Deferral Agreement), and Sixteenth Claim for Relief (violation of the Tribe and its Members' Rights to Equal Protection and Due Process brought under the Fifth and Fourteenth Amendments to the U. S. Constitution, 42 U.S.C. §§ 1981, 1983, and Title VI of the Civil Rights Act of 1964**).**

CUWCD has raised two legal arguments in its motion to dismiss: (1) that this Court lacks personal jurisdiction over CUWCD, and (2) failure to state a claim upon which relief can be granted, due to the Tribe's alleged failure to assert any "action or inaction" on the part of CUWCD identified in the Tribe's Second Amended Complaint. Because the CUWCD has established the requisite minimum contacts with this forum by negotiating and executing the 1965 Deferral Agreement, and by its role as the entity authorized by Congress to complete construction of the CUP, and because the Tribe's Claims for Relief are based on controversies that touch the legal relations between the CUWCD and the Tribe, CUWCD's Motion to Dismiss must be summarily denied.

**RESPONSE TO CUWCD'S INTRODUCTION**

Despite the limited substantive basis for CUWCD's request for dismissal, CUWCD makes a sweeping and misleading assertion in its Introduction section, stating that the Tribe "asks the Court to resolve an impossible hypothetical" in seeking a declaration on the Tribe's jurisdiction over its Indian reserved water rights. Defs. Mtn. at 3. As support for this statement, CUWCD suggests that this Court is not equipped to rule on the Tribe's jurisdiction over its water rights, stating as follows:

> The voluminous Winters Rights claimed by Plaintiff, which are grouped into some seven groups by the Decker Report, are collocated with numerous water rights in multiple drainage basins that are owned by others. While Plaintiff may have an early priority claim to some of the basin waters, it does not have exclusive rights to them, and the waters claimed by Plaintiff have never been assigned to or allocated between the numerous possible hydrologic sources. In particular, the Decker Report describes "practically irrigable lands" but it does not identify specific streams or other sources, means of conveyance, allowed depletion, or other common legal attributes of the water rights that would be used to irrigate those lands. Neither does the report purport to identify or quantify the rights of those who also own water rights in the shared sources. Those decisions will require adjudication in courts where the interests of all who claim water rights in those sources, including Plaintiff, may be heard.

This statement has no bearing on CUWCD's contentions that this Court lacks personal jurisdiction over CUWCD, or that Tribe has failed to state a claim against CUWCD. Therefore, this statement should be stricken or ignored by the Court. However, the potential ramifications of this statement are significant enough that the Tribe feels compelled to respond.

The Tribe rejects, in the strongest possible terms, the allegation that the Tribe is asking the Court to "resolve an impossible hypothetical." The Tribe is seeking declaratory relief as to rights that are essential to its inherent tribal sovereignty and protected under federal law. To suggest that this creates an "impossible hypothetical" is to suggest that inherent tribal sovereignty is nothing more than an illusory concept.

The Tribe's Indian reserved water rights are not "collocated" with other water rights in the drainage basins identified in the Decker Report, at least not in the manner asserted by CUWCD. CUWCD seems to be suggesting that the Tribe is nothing more than another water user within the State of Utah, with a usufructuary entitlement, albeit an "early priority" one, to a quantity of water within the State of Utah's apportionment under the 1948 Upper Basin Colorado River Compact. This reflects a fundamental misunderstanding of the Tribe's Indian reserved water rights. The Tribe's Indian reserved water rights became fully vested property rights upon creation of the Tribe's reservation in 1861 (as to the Tribe's Group 1- 5 water rights) and 1882 (as to the Tribe's Group 6-7 water rights). *Arizona v. California*, 373 U.S. 546, 600 (1963). Therefore, these Indian reserved water rights are "present perfected" rights outside the purview of the Colorado River Compacts. *Id*; 1922 Colorado River Compact, Art. VIII ("Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."); 1948 Upper Colorado River Basin Compact, Art. I(b) ("It is recognized that the Colorado River Compact is in full force and effect and all of the provisions hereof are subject thereto."). These water rights

belong to the sovereign Ute Indian Tribe, and the Tribe holds these water rights separate from and independent of the State of Utah's percentage-based share of Colorado River water that forms the basis for the "numerous water rights in multiple drainage basins that are owned by others." Defs. Mtn. at 3.

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

To the extent this Court's resolution of the Tribe's Second Claim for Relief does not touch on all of the "legal attributes" asserted by CUWCD, it is the prerogative of the CUWCD to seek to resolve these issues, whether through subsequent litigation or other means. However, there is nothing in CUWCD's allegation that the Tribe is asking the court to resolve an "impossible hypothetical" that can or should have any bearing on CUWCD's present request for dismissal.

In addition, in the introduction to its dismissal memorandum, CUWCD states that "in some 359 paragraphs [of the Tribe's Second Amended Complaint]," the CUWCD "is alleged to have committed only a single act: the execution of the '1965 Deferral Agreement.'" Defs. Mtn. at 2. That is grossly incorrect. Perhaps CUWCD should have read the Tribe's complaint more closely. The Tribe's complaint makes clear that when Congress passed the Central Utah Project Completion Act, in 1992, Congress delegated authority to this state agency, the CUWCD, to complete construction of the Central Utah Project. More specifically, Congress delegated

authority to the CUWCD to construct the Uinta Basin Replacement Project—the water storage and infrastructure that was to include water storage for the Ute Indian Tribe.[1] Second Am. Compl. ECF 57, ¶¶ 210-218. The Tribe alleges in its complaint that:

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

Second Am. Compl. ECF 57, ¶ 354. The Tribe's complaint also alleges that:

> The CUP was constructed through the expenditure of hundreds of millions of dollars in federal taxpayer funds over several decades. Now, as acknowledged in the Final GRBE EA [Green River Block Exchange Environmental Assessment], construction of the CUP is "nearing completion."[2] No federal funding has been appropriated for any future construction. And not a single one of the CUP facilities was built to serve the irrigation water needs of the Ute Indians. These actions and omissions violate the due process and equal protections guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

Second Am. Compl. ECF 57, ¶ 353. Exhibit A, attached hereto and incorporated into the Tribe's opposition memorandum here, is the Federal Defendants' presentation on March 11, 2020, to the U.S. Senate Subcommittee on Energy and Water Development. The Court asks the Court to take judicial notice of the 3/11/2020 presentation to the Senate subcommittee. In their presentation, Federal Defendants acknowledge that the CUWCD is responsible for the planning and construction of projects built as part of the Central Utah Project.

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[1] App. II, 267, Title II, Sec. 202(2)(D), stating, "In lieu of construction by the Secretary [of Interior], the Central Utah Project and features specified in section 202(a)(1) shall be constructed by the District [Central Utah Water Conservancy District."

[2] Final EA, p. 6 states, "The 'Initial Phase' of the CUP included four units, of which 3 have been fully constructed, with the remaining unit nearing completion." The Tribe asks the Court to take judicial notice of the Final EA, which is a matter of public record and is posted on the website for the United States Department of Interior, Bureau of Reclamation https://www.usbr.gov/uc/envdocs/ea/20190100-GreenRiverBlockWaterExchangeContract-FinalEAandFONSI-508-PAO.pdf (last visited on 10/19/2020).

## LEGAL ARGUMENT

### I. This Court has Personal Jurisdiction over CUWCD in this Action

CUWCD's first legal argument is that the Court lacks personal jurisdiction over it, because the Tribe "does not allege that Central Utah has an office or does business in the District of Columbia." Defs. Mtn. at 4. Contrary to CUWCD's argument, CUWCD has consented to the personal jurisdiction of this Court by entering into the 1965 Deferral Agreement and by assuming legal responsibility under the CUPCA to complete construction of the federally-financed CUP (Central Utah Project).

Personal jurisdiction of federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure, stating in relevant part that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant…who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Under the District of Columbia's long-arm statute, courts in the District of Columbia may exercise personal jurisdiction over any out-of-state defendants for which "there is any basis consistent with the United States Constitution for the exercise of personal jurisdiction." D.C. Code § 13-424(E). Therefore, this Court may exercise personal jurisdiction over the CUWCD so long as the minimum due process requirements under the U.S. Constitution are satisfied.

Due process requires the defendants to have established "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Walden v. Fiore,* 571 U.S. 277, 283 (2014) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). !Contrary to CUWCD's suggestion that the Tribe must allege CUWCD "has an office or does business in the District of Columbia," the salient question in determining minimum contacts

is whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities" within the forum jurisdiction, such that the defendant "will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King Corp.*, *supra*, at 475 (internal quotation marks omitted). So long as the defendant's actions are "purposefully directed" at residents of the presiding jurisdiction, the Supreme Court has "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* at 476 (citing *Keeton v. Hustler Magazine, Inc., supra,* 465 U.S. 770, 774–775 (1984); *Calder v. Jones,* 465 U.S., 783 778–790 (1984); *McGee v. International Life Insurance Co.,* 355 U.S. 220, 222–223 (1957)).

Significantly, a single act or transaction can establish the requisite minimum contact, so long as it creates a "substantial connection" with the forum, irrespective of whether the defendants are involved in a pattern or maintains a place of business within the territorial jurisdiction of the subject forum. *Id.* at 475 (citing *McGee, supra*, at 223). In the 2004 case *Helmer v. Dolestkya*, the D.C. Circuit found that personal jurisdiction is established when the out-of-state defendant enters into a contract that establishes a "substantial connection" with the forum. 393 F.3d 201, 205 (D.C. Cir. 2004).

To overcome a motion to dismiss for lack of personal jurisdiction, the plaintiff need only "make a prima facie showing of pertinent jurisdictional facts." *U.S. v. Phillip Morris Inc.*, 116 F. Supp. 2d 116, 121 (D.C. Cir. 2000). A "prima facie showing" entails "alleging specific acts connecting the defendant with the forum," and "factual discrepancies appearing in the record must be resolved in favor of the plaintiff." *Id*. (quoting *Crane v. New York Zoological Soc.,* 894 F.2d 454, 456 (D.C.Cir.1990)). Pursuant to this standard, the Tribe has met all requirements to identify a basis personal jurisdiction of this Court, through its allegations surrounding (i) CUWCD's integral involvement in developing and executing the 1965 Deferral Agreement, and

(ii) CUWCD's exercise of legal authority to complete construction on the federally-financed CUP. *E.g.,* Second Am. Compl. at ¶¶ 151-158, 210-218, 239-40, 325. As alleged in the Tribe's Second Amended Complaint, the 1965 Deferral Agreement was negotiated for the sole purpose of establishing a binding instrument the parties (including CUWCD) could take to the United States Congress to secure funding for the Bonneville Unit of the Central Utah Project by demonstrating that the Tribe's use of senior-priority Indian reserved water rights would not interfere with the state-based water rights to be utilized for the Bonneville Unit, the crown jewel of the Central Utah Project for primarily non-Indian water users along the Wasatch Front. *See* Second Am. Compl. ¶¶ 153-58, 239-40.

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

Moreover, the Utah Legislature's Concurrent Resolution dated October 10, 1973, cited in Paragraph 166 of the Tribe's Second Amended Complaint, states that "the Central Utah Water Conservancy District has executed a valid repayment contract for the Bonneville Unit with the United States Government." App. III. at 578. This demonstrates that the 1965 Deferral Agreement was just one of a series of contracts between the CUWCD and the Federal Government to develop

a project made possible only upon the Tribe's legally recognizable forbearance of its senior-priority water rights, further undermining CUWCD's position that it has no connection to the District of Columbia.

Through its allegation of the jurisdictional facts reiterated above, the Tribe has gone above and beyond the minimum requirement to "make a prima facie showing of pertinent jurisdictional facts" to demonstrate this Court may exercise personal jurisdiction over CUWCD without violating due process.

## II. The Tribe has Stated Claims upon which Relief can be Granted in its First, Second, and Fourth Claims for Relief

CUWCD's second and final legal argument is that the Tribe has failed to state a claim for which relief against CUWCD because the Tribe has not identified any "action or inaction" on the part of CUWCD implicating CUWCD in the Tribe's First, Second, Fourth, and Sixteenth Claims for Relief.[3] This argument misapplies the standard for failure to state a claim in a request for declaratory relief.

The Tribe's First, Second, and Fourth, Claims for Relief each seek declaratory and enforcement relief under 28 U.S.C. §§ 2201-02. Each of the Tribe's Claims identifies a case or controversy underlying its prayers for relief. Notably, CUWCD has not challenged the existence of a case of controversy supporting the relief requested by the Tribe, only the absence of any allegation that should implicate CUWCD as a named defendant in the Tribe's Claims for Relief.

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

The Declaratory Judgment Act allows federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought" when there is an "actual controversy within its jurisdiction." 28 U.S.C. § 2201. The controversy underlying the request for declaratory relief need not have been caused by the "actions or inactions" of each defendant. All that is required is that the controversy "touch[es] the legal relations of parties having adverse legal interests." *MedImmune Inc. v. Genentech Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937)). If, in accord with CUWCD's position, each defendant in a request for declaratory relief must be alleged to have engaged in a remediable action or inaction, this would controvert the plain language of the Declaratory Judgment, which explicitly allows such declaratory relief "whether or not further relief is or could be sought." 28 U.S.C. § 2201; *Sherwood Medical Industries Inc. v. Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975) ("the Declaratory Judgment Act should be liberally construed to accomplish its purpose of providing a speedy and inexpensive method of adjudicating legal disputes without invoking coercive remedies and that it is not to be interpreted in any narrow or technical sense.")

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

Tribe and CUWCD clearly have adverse legal interests in the present controversy. Pursuant to the Utah Code, water conservancy districts are charged with implementing State policy to:

(a) provide for the conservation and development of the water and land resources of the state;

(b) provide for the greatest beneficial use of water within the state;

(c) control and make use of all unappropriated waters in the state and to apply those waters to direct and supplemental beneficial uses including domestic, manufacturing, irrigation, and power;

(d) obtain from water in the state the highest duty for domestic uses and irrigation of lands in the state within the terms of applicable interstate compacts and other law;

(e) cooperate with the United States and its agencies under federal reclamation or other laws and to construct, finance, operate, and maintain works in the state; and

(f) promote the greater prosperity and general welfare of the people of the state by encouraging the organization of water conservancy districts.

UTAH CODE § 17B-2a-1002. If the Tribe were to prevail its First, Second, and Fourth Claims for relief, or any combination thereof, such a ruling would have an adverse impact on the CUWCD by establishing substantial legal restrictions on how, and over what water, CUWCD may exercise this authority.

**III. The Tribe's Sixteenth Claim Also States a Claim on which Relief Can be Granted.**

In a footnote in its seven-page memorandum in support of its dismissal motion, the CUWCD says, "Plaintiff has not alleged any acts of misconduct on the part of Central Utah." Def. Mtn. at 6 n.3. This statement is flat wrong. And, as with the Utah State Defendants' motion to dismiss, ECF No. 67, it is perhaps necessary to review the 12(b)(6) standard for ruling on CUWCD's motion to dismiss Claim Sixteen.

"In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, matters of which it may take judicial notice," *Stewart v. Nat'l Educ. Ass'n,* 471 F.3d 169, 173 (D. C. Cir.2006)), and matters of public record. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997);

*see also 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)).

At this, the pleading stage of litigation, a plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Fed. R. Civ. P. 8(a)(2). A complaint must give the defendants notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." *Erickson v. Pardus,* 551 U.S. 89, 93 (2007). When ruling on a defendant's motion to dismiss, a judge must consider the complaint as a whole and must "accept as true all of the factual allegations contained in the complaint." *Erickson,* 551 U.S. at 94 (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555–56 (2007)) (other citations omitted). A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that ... recovery is very remote and unlikely." *Twombly,* 550 U.S. at 556 (internal quotation marks and citation omitted).

> Where the claim is invidious discrimination ... the plaintiff must plead ... that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences.

*Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009) (internal quotation marks and citations omitted). The Supreme Court, however, in both *Twombly* and *Iqbal*, reiterated that it was not imposing a "probability requirement" at the pleading state. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. "Rather, assuming that a plausible claim for relief is pleaded, the Federal Rules continue to rely on discovery and summary judgment practice to define the issues, identify genuine fact disputes, and dispose of unmeritorious claims." Steven S. Gensler, *Federal Rules of Civil Procedure, Rules*

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

Dismissal is not appropriate unless "it appears beyond doubt that plaintiff can prove no set of facts in support his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (cited in *Swierkiewicz*, 534 U.S. at 512, 514)).

Here, Claim Sixteen of the Tribe's Second Amended Complaint sufficiently satisfies the pleading requisites set forth above. To begin with, Paragraph 346—the initial allegation of Claim Sixteen— incorporates by reference the preceding 345 allegation paragraphs in the Tribe's Second Amended Complaint. Then in Paragraph 354, the Tribe alleges:

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

Second Am. Compl., ¶ 354. Paragraph 1 of the Tribe's Second Amended Complaint alleges:

> … the State and Federal Defendants have conspired and acted in concert to racially segregate and racially discriminate against the Ute Indian Tribe and its members by deliberately and systematically excluding the Tribe and its members from the benefits derived from the construction, existence of, and operation of federally-financed public water storage facilities and infrastructure in the State of Utah. The suit seeks appropriate declaratory and injunctive relief against all Defendants, and monetary relief to the extent permitted by law, for the violation of the Tribe and its members' rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. §§ 1981, 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

Second Am. Compl., ¶ 1. The Tribe's Complaint alleges that the "Ute Indians of the Uintah and Ouray Indian Reservation constitute a distinct minority population based on their race, ancestry, ethnicity, national origin and religion," and that "Tribe and its members have a property interest in the *Winters* Reserved Water Rights appurtenant to the Uintah and Ouray Reservation." Second Am. Compl., ¶¶ 347, 348.

The Tribe's Complaint summarizes the historical background of racial segregation and racial discrimination undertaken by the State and Federal Defendants in their allocation and distribution of water in the State of Utah—including the Tribe's *Winters* reserved waters, alleging:

> Congress opened the original Uintah Valley Indian Reservation to non-Indian settlement under the Indian Appropriations Act of March 3, 1905, 33 Stat. 1048, 1069-1070. The Act specifically authorized the President of the United States to "*set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the [Ute] Indians*." 33 Stat. at 1069-1070. Pursuant to that authority, President Theodore Roosevelt issued proclamations dated August 3, 1905 ("Proclamation 589"), and August 14, 1905 ("Proclamation 591"), reserving approximately 56,000 acres of tribal lands within the original Uintah Valley Indian Reservation for a "*reservoir site necessary to conserve the water supply for the Indians*." However, as described by the Honorable Bruce S. Jenkins in *Ute Tribe v. Utah*, those 56,000 acres of land were "*already under study by the U. S. Reclamation Service*" (the predecessor agency to Defendant USBR) as a reservoir site for non-Indians.[4] "The Reclamation Service offered to purchase the reserved Ute lands at $1.25 per acre. The offer was refused."[5] The Reclamation Service then went to Congress and had the Congress condemn the Indian lands for use as a non-Indian water storage reservoir. That legislation, the Act of April 4, 1910, ch. 140, 36 Stat. 269, 285, terminated all "right, title and interest of the Indians" in the tribal lands and "passed" title to the tribal lands to the non-Indian "owners of the lands" that would be irrigated by the planned non-Indian storage reservoir—a reservoir known today as "Strawberry Reservoir."[6]
>
> The events of 1905-1910 established a pattern of invidious discrimination on the part of the Defendants directed against the Ute Indians and in favor of the majority white population of Utah that continues to this day.

Second Am. Compl., ¶¶ 350-351. With respect to the Utah State Defendants, the Tribe alleges in its complaint that:

> Defendant USBR describes the Central Utah Project as the "largest water resources development program ever undertaken" in the State of Utah.[7]
>
> The CUP was constructed through the expenditure of hundreds of millions of

[4] *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 521 F. Supp. 1072, 1127 (D. Utah 1981).

[5] *Id*.

[6] *Id*.

[7] USBR website, https://www.usbr.gov/projects/index.php?id=498. Last visited on 10/18/2020.

dollars in federal taxpayer funds over several decades. Now, as acknowledged in the Final GRBE EA, construction of the CUP is "nearing completion."[8] No federal funding has been appropriated for any future construction. And not a single one of the CUP facilities was built to serve the irrigation water needs of the Ute Indians. These actions and omissions violate the due process and equal protections guarantees under the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.

[State of Utah] Defendant CUWCD was the party authorized by Congress under CUPCA, § 202(D), to receive federal funds and to assume responsibility for completing construction of the CUP.

Through the federally-financed construction of the CUP, water security has been provided to the non-Indian residents of the State of Utah, but no comparable water security has been provided for the Ute Indians of the Uintah and Ouray Reservation. Instead, Federal Defendants have adopted a systematic and continuous practice of administering their delegated authority in a manner that favors non-Indian water users in the State of Utah to the detriment of the Tribe and its members, resulting in the diminishment of the Tribe's Reserved Water Rights on the impermissible bases of race, ancestry, ethnicity, national origin, and religion.

On information and belief, and as detailed in the facts alleged herein, the State and Federal Defendants have conspired and acted in concert to divert water, water storage reservoirs, and related infrastructure and rights *away* from the Ute Indians of the Uintah and Ouray Reservation and *towards*, to, and in favor of the non-Indian white-majority population of Utah. Defendants have done so deliberately, knowing their actions will result in the discriminatory deprivation of water and water-infrastructure resources to the Ute Tribe and its members, while their actions simultaneously inure 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 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 and its members.

The Federal Defendants' actions and inactions and their discriminatory management of tribal waters alleged herein is in direct violation of the United States' (*i*) trust duty of undivided loyalty to the Tribe and its members, (*ii*) its statutory duties under the 1899 and 1906 Acts to, *inter alia*, preserve and protect

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

> the Ute Indian Tribe's "paramount rights" to waters flowing through the Tribe's reservation, (*iii*) the due process and equal protection guarantees of the Fifth Amendment to the U.S. Constitution, and (*iv*) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d.
>
> The State Defendants' actions alleged herein were undertaken under color of state law and violate the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. §§ 1981 and 1983, and 42 U.S.C. §§ 2000d.

Second Am. Compl., ¶¶ 352-359. The foregoing allegations are more than sufficient to allege a claim for invidious discrimination against all Defendants. The Tribe concedes that not all the constitutional and statutory laws invoked under Claim 16 apply to all the Defendants. However, the Tribe is entitled to relief against the CUWCD under 42 U.S.C. §§ 1981 and 1983, and 42 U.S.C. § 2000d. As the party authorized by Congress to complete construction of the Central Utah Project, the CUWCD is perhaps the single most culpable party in the historic, presently-existing, and ongoing racial segregation and racial discrimination against the Ute Indian Tribe and its members through the State and Federal Defendants' deliberate and systematic exclusion of the Tribe and its members from the benefits derived from the construction, existence of, and operation of federally-financed public water storage facilities and infrastructure in the State of Utah.

The Tribe has alleged facts sufficient to state claims against Defendant CUWCD under 42 U.S.C. § 1981; 42 U.S.C. § 1983; and 42 U.S.C. § 2000d. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003);

**CONCLUSION**

In spite of CUWCD's current effort to distance itself from the controversies giving rise to the Tribe's First, Second, Fourth, and Sixteenth Claims for Relief, CUWCD has been entrenched in these controversies every step of the way. Consistent with its delegated responsibility to protect and develop the State of Utah's apportionment of water, CUWCD executed the 1965 Deferral

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

Respectfully submitted this 19th day of October, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of October, 2020, I filed the foregoing **PLAINTIFF'S OPPOSITION TO THE CENTRAL UTAH WATER CONSERVANCY DISTRICT'SMOTION TO DISMISS THE TRIBE'S SECOND AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES** and memorandum in support electronically through the Court's CM/ECF system, which caused notice to be sent to the parties of record.

*/s/ Michael W. Holditch*
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