IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as Secretary of the Department of the Interior, the BUREAU OF RECLAMATION, and the BUREAU OF INDIAN AFFAIRS, Federal Defendants and THE STATE OF UTAH, CENTRAL UTAH WATER CONSERVANCY DISTRICT, a political subdivision of the State of Utah, GARY HERBERT, 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.	Civil No. 1:18-cv-00547-CJN

DEFENDANT CENTRAL UTAH WATER CONSERVANCY DISTRICT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Central Utah Water Conservancy District ("Central Utah"), having specially appeared before this Court for the sole purpose of filing a Motion to Dismiss to Dismiss the Second Amended Complaint, submits the following arguments in reply to the Opposition ("Opp. Mem.") that was filed by Indian Tribe of the Uintah and Ouray Reservation ("Tribe") in response to Central Utah's motion.

I. INTRODUCTION

Central Utah has moved this Court to dismiss the four claims for relief (the first, second, fourth, and sixteenth causes of action) that the Tribe purports to state against Central Utah in the Tribe's Second Amended Complaint ("Complaint"). As previously noted, in the Complaint's 359 paragraphs, Central Utah is alleged to have committed only a single affirmative act: the execution of the "1965 Deferral Agreement," an agreement that was also approved and signed by the Tribe. *See* Complaint 155. The Tribe challenges the jurisdictional arguments by claiming that Central Utah consented to the jurisdiction and venue of the United States District Court for the District of Columbia when it signed that agreement, though the agreement contains no language indicating consent or reference to jurisdiction or venue in the District of Columbia.[1] The Tribe further argues that Central Utah was brought within the jurisdiction of this Court when it was designated by Congress to receive funding and to complete those elements of the Central Utah Project that would later be authorized and funded by the federal government. *See* Complaint 151, 155. The Tribe errs. Neither the Deferral Agreement nor the receipt in Utah of appropriated funds for the construction of reclamation facilities in Utah subjects Central Utah to the jurisdiction of this Court with respect to the Tribe's claims.

Notably, Central Utah is not alleged by the Tribe to have ever adjudicated or administered any water right, Indian or otherwise, and there is no claim that Central Utah built any facility or spent any federal funds (or refused to build any facility or spend federal funds) in a manner contrary to the terms of the congressional authorizations and appropriations.

[1] Curiously, though the Tribe acknowledges that Central Utah's Motion to Dismiss is directed solely to the allegations contained in the Complaint and, by citing the standards that govern Rule 12(b)(6) motions, seemingly urges this Court to consider the motion under that rule, the Tribe then attempts to support its argument with numerous exhibits and a lengthy three-part appendix of documents that the Tribe itself terms "Evidentiary materials" (Opp. Mem. 1), many of which are not referenced in the pleadings and are thus proffered inappropriately at this stage of the proceedings. Central Utah objects to any consideration of those materials.

Before it presents the personal jurisdiction arguments in its memorandum, the Tribe begins with an emphatic denial of Central Utah's observation that the Tribe is asking this Court to "resolve an impossible hypothetical." However, as noted below, the Tribe then proceeds to confirm the validity of that characterization by acknowledging that the water rights issues it raises cannot be fully resolved in this Court.

II. THE TRIBE'S JURISDICTIONAL ARGUMENTS MISINTERPRET THE DISTRICT OF COLUMBIA'S LONG-ARM STATUTE AND THE DECLARATORY JUDGMENT ACT.

The Tribe objects to Central Utah's Motion to Dismiss on jurisdictional grounds by chastising Central Utah for not reading the Complaint more closely, arguing that Congress's delegation of authority to Central Utah to receive federal funds and construct the facilities for which those funds were appropriated subjects Central Utah to personal jurisdiction of this Court. Opp. Mem 4 - 5.[2] The Tribe errs. The Tribe devotes a significant portion of its Opposition Memorandum to a statement of the standards for invoking long-arm jurisdiction in the District of Columbia, including reference to the familiar requirement that "specific acts" must be alleged to connect the defendant with the forum and show that a defendant has "purposely directed" its actions "at the residents of the presiding jurisdiction" (Opp. Mem. 6, 7), yet the Complaint is completely devoid of such allegations.

Notably, neither the Tribe nor Central Utah is a resident of the District of Columbia. Central Utah does not have an office or other business presence in Washington, DC. While Congress did authorize Central Utah to receive funding and use it for the construction of certain

[2] The Tribe here again mischaracterizes Central Utah as a "state agency." Central Utah is not an agency of the State of Utah; it is instead a political subdivision, a separate legal entity that does not have authority to act for or bind the state. *See* Utah Code Ann. §§ 17B-1-103(35), 17B-103(l), and 17B-2-1002-1003; *see also Metro. Water Dist. of Salt Lake and Sandy v. DHCH Alaska Trust*, 2019 UT 62, ¶ 12, 452 P.3d 1158, 1163 ("Under article XI, section 8 of the Utah Constitution, local districts may exercise only those powers provided by statute.")

reclamation projects, that money is received by Central Utah in Utah, all of Central Utah's authorized construction activities have occurred in Utah, and the benefits from the Central Utah Project are realized in Utah. The Tribe is not a resident of the District of Columbia, and not one of Central Utah's activities is alleged to have been "purposely directed" at District residents. The Tribe's argument, taken to its logical conclusion, would mean that any organization, public or private, that received any congressionally appropriated funds, would be subject to the personal jurisdiction of this Court. That is incorrect. The Tribe's optimistically broad interpretation would render the District of Columbia's log-arm statute virtually meaningless.

The other basis alleged for this Court's assertion of personal jurisdiction over Central Utah is the fact that Central Utah signed the 1965 Deferral Agreement. Opp. Mem., at 8. Here, again, the Tribe fails to demonstrate that the agreement signed by both parties is a factual basis for assertion of personal jurisdiction in this forum. The 1965 Deferral Agreement contains no language consenting to jurisdiction and venue in this Court.[3]

The Tribe then looks to the Declaratory Judgment Act, 28 U.S.C. §2201 as a surrogate for personal jurisdiction, suggesting it allows a Court to order affirmative relief over parties if the controversy "touches" the legal relations between the parties. *See* Opp. Mem., at 10. The federal courts certainly have authority to provide relief under Declaratory Judgment Act, but only as to those parties over which the courts have acquired personal jurisdiction, as the Declaratory Judgment Act contains no independent grant of jurisdiction. "[T]he Declaratory Judgment Act does not constitute an independent grant of jurisdiction." *Swan v. Clinton*, 100 F.3d 973, 976 n.1

[3] The Tribe's Complaint and subsequent argument avoid any mention of where the 1965 Deferral Agreement was executed, likely because the Tribe cannot truthfully allege that it has any factual nexus with the District of Columbia. The Deferral Agreement was signed many years ago. It does not, on its face, state where it was signed, but the Tribe's and Central Utah's authorizing resolutions recite that they passed in Utah, and Central Utah is informed and believes and therefore represents that the agreement itself was executed in the State of Utah.

(D.C. Cir. 1996) (citing to *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950)); *see O'Brien v. Sutter*, 1997 WL 244268, at *1 (D.C. Cir. May 6, 1997) (unpublished) ("Because the district court lacked subject matter jurisdiction, and the Declaratory Judgment Act, 28 U.S.C. § 2201, does not constitute an independent grant of jurisdiction, the district court was without power to issue a declaratory judgment."); *see also Lovitky v. Trump*, 308 F. Supp. 3d 250, 260 (D.D.C. 2018) ("[T]he declaratory judgment statute does not constitute an independent grant of jurisdiction.") Rather, the Tribe still must still allege "specific acts connecting the defendant with the forum." *citing U.S. v. Phillip Morris Inc.,* 116 F. Supp. 2d 116, 121 (DC Cir. 2002). Though the Tribe acknowledges its burden, it has failed to meet it – the Tribe has alleged no specific acts on the part of the Central Utah that would connect it with this forum.

It is the Tribe's obligation to plead facts sufficient to establish personal jurisdiction, and its failure to do so here requires dismissal of the Complaint under Rule 12(b)(2) of the Federal Rules of Civil Procedure, at least as those claims relate to Central Utah.

III. THE TRIBE HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

As it did in its opening memorandum, Central Utah joins in and incorporates the jurisdictional and other arguments made by the Federal and State Defendants in their separate reply memoranda as if fully set forth herein.

In particular, no specific action or inaction on the part of Central Utah is mentioned in the Complaint's first, second or fourth claims for relief, and the sole mention of Central Utah in the sixteenth claim for relief is that it was the party authorized by Congress to receive federal funds and assume responsibility for completing construction of the Central Utah Project. Central Utah is affirmatively alleged only to have "sponsored" the Central Utah Project and to have signed the Deferral Agreement that allowed federal funding of the Bonneville Unit of that project. *See*

Complaint ¶¶ 151, 155. Significantly, the Tribe makes no allegation that Central Utah used those federal funds for any purposes other than those for which the funds were authorized and appropriated. Nor has the Tribe alleged any act by Central Utah that could support a conclusion that Central Utah intentionally discriminated against it.

It is true that the Tribe's opening causes of action are claims brought under the federal Declaratory Judgment Act, but the Tribe's failure to plead facts sufficient to establish personal jurisdiction over Central Utah betray its failure to state a claim upon which relief can be granted, necessitating dismissal under Rule 12(b)(6).

The most striking of the Tribe's arguments is its assertion with respect to its 16th Claim for Relief that Central Utah "is perhaps the single most culpable party in the historic, presently-existing, and ongoing racial segregation and racial discrimination against the Ute Indian Tribe" (Opp. Mem., at 16), thus impossibly characterizing Central Utah as the prime actor in a pattern of discrimination that began in 1905 (*Id.* at 14), some 59 years before Central Utah was formed.

Hyperbole in argument is not a cure for pleading failures. It bears repeating that Central Utah has constructed all of the reclamation facilities that Congress has authorized and funded. Stated conversely, Central Utah has not failed or refused to complete any authorized facility, and it has not purported to adjudicate any water right. The Tribe's failure to allege any specific, affirmative acts or failings on the part of Central Utah in furtherance of the Tribe's discrimination claim is fatal to that claim, at least as it relates to Central Utah.

Finally, this Court should be aware of the inconsistency between the Tribe's objection "on the strongest possible terms [to Central Utah's] allegation that the Tribe is asking the Court to 'resolve an impossible hypothetical'" (Opp. Mem., at 3), and the Tribe's later, more candid, admissions about the limits of the remedy this Court could provide.

Central Utah acknowledged in its opening memorandum the existence of the Tribe's so-called Winters Rights (Central Utah's Motion to Dismiss, at 3),[4] but challenges the Tribe's assertion that it has exclusive "administrative, regulatory, legislative, and adjudicatory jurisdiction" over those water rights (*See* Complaint ¶¶ 248, 249). As noted, the Winters Rights claimed by the Tribe consist of seven groups according to the Decker Report, located in multiple hydrological basins that are drained by numerous streams. While the Tribe may have early-priority claims to a large amount of water, its rights do not embrace the total water flows in the streams in those basins, and its claims have never been assigned to or allocated between these numerous hydrologic sources. The Tribe's claimed rights are, in fact, collocated in the sources for many hundreds of water rights that are owned by others who are not subject to the Tribe's jurisdiction.

This, then, is the "impossible hypothetical" posed by Central Utah. Though the Tribe dislikes that appellation, the Tribe's own arguments validate it. The Tribe acknowledges, for example, that "both the Tribe and [Central Utah] have an interest in administering a finite quantity of water based on conflicting legal claims" (Opp. Mem., at 10), and admits that while a determination of the "legal attributes" of these water rights may be beyond the province of this Court, that relief could be obtained elsewhere "through subsequent litigation or other means" (*Id.* at 4).

The issues raised here do not concern only Central Utah and the Tribe, they touch and affect the rights of many hundreds of individuals, companies and municipalities in Utah that share

[4] Though the point is not determinative of the pending motion, Central Utah notes its disagreement with the Tribe's unsupported claim that it holds its claimed water rights "separate from and independent of the State of Utah's percentage-based share of the Colorado River water." (Opp. Mem., at 3-4.) It is instead Central Utah's understanding and belief that the United States holds the rights to the reserved waters in trust for various tribes, and that the tribes' rights to use Colorado River waters are charged against the allocations made to the states in which the reservations are located.

rights to those water sources. That determination will require adjudication in courts where the interests of all who claim water rights in those sources, including the Tribe, may be heard.

Fortunately for all, the Tribe is not without a remedy: a general adjudication case for those basins is already pending in the Utah courts. Central Utah, the multitude of other water right holders, and the United States through the McCarran Amendment, are proper parties to that proceeding, and the Tribe is free to intervene in that or a similar federal proceeding to assert and confirm the priority of rights in specific streams, the allocation of shared flows, the nature and place of use, and the other legal attributes of its specific water rights.[5] That is the proper process and venue for the determination and declaration of the Tribe's important water claims. The Complaint should be dismissed to allow that process to proceed.

IV. CONCLUSION

The Tribe has not alleged a basis for personal jurisdiction over Central Utah in this Court, nor has Central Utah committed any act that would evidence its consent to such jurisdiction. Neither has the Tribe described any specific act or failure to act when required to do so that would support an actionable claim against Central Utah. In particular, the Tribe does not allege that Central Utah built any facility or took any other action that was inconsistent with the specific authorization and appropriations of Congress.

For these reasons and based on the further arguments and authorities advanced by the Federal and State Defendants, Central Utah respectfully moves this Court to dismiss all claims made against it by the Tribe.

[5] The Tribe tacitly acknowledges through its citation to two 1923 court decrees as the basis for some of its claimed water rights that water right disputes between "the Ute Indians and their non-Indian neighbors" can be resolved in courts of common jurisdiction. *See* Complaint ¶¶ 48 – 50.

Respectfully submitted,

Dated: December 9, 2020

/s/ Edwin C. Barnes
Edwin C. Barnes (admitted pro hac vice)
Timothy R. Pack (admitted pro hac vice)
CLYDE SNOW & SESSIONS
201 South Main Street, Suite 1300
Salt Lake City, UT 84111
(801) 322-2516
ecb@clydesnow.com
trp@ckdesnow.com

Dated: December 9, 2020

/s/ Daniel S. Ward
Daniel Sage Ward, DC Bar #474339
WARD & BERRY, PLLC
2000 Pennsylvania Avenue, NW
Suite 4500
Washington, DC 20006
(202) 331-8160
dan@wardberry.com

Specially Appearing Counsel for Defendant Central Utah Water Conservancy District

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of December, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

Dated: December 9, 2020

/s/ Daniel S. Ward
Daniel Sage Ward, DC Bar #474339