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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, a federally recognized Indian Tribe, Plaintiff(s), v. DAVID URE, MICHELLE MCCONKIE, MICHAEL STYLER, SPENCER COX, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, Defendant.	**MOTION TO DISMISS COMPLAINT** Case No. 2:23-cv-00295 Judge David B. Barlow Magistrate Judge Honorable Daphne A. Oberg

Defendant David Ure, former director of the Utah School and Institutional Trust Lands Administration (SITLA), by and through counsel, Philip S. Lott, Assistant Utah Attorney

General, moves to dismiss the Complaint filed by the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("the Tribe").

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SPECIFIC RELIEF SOUGHT AND GROUNDS

Former Director Ure asks this Court to dismiss all five Counts of the Tribe's Complaint, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the following grounds:

1. The Tribe fails to state a claim under federal civil rights laws. The Tribe is not a person or citizen as required by the federal statutes the Tribe cites;
2. Likewise, former Director Ure is not a person for purposes of federal civil rights laws when sued in his official capacity;
3. The Tribe fails to satisfy Rule 8's pleading standard;
4. The Tribe fails to allege facts sufficient to support a claim for civil conspiracy;
5. Former Director Ure, as the director at the time of the events, had the authority to cancel, delay, or suspend any sale at any time prior to the execution of the certificate of sale; and
6. This Court lacks subject matter jurisdiction under the UGIA because the Tribe failed to file a notice of claim.

Additionally, Plaintiff's state law claims fail for the reasons identified in Defendants Utah School and Institutional Trust Lands Administration and Michelle McConkie ("the SITLA Defendants") and Governor Spencer Cox/former Director Michael Styler's Motion to Dismiss as incorporated below.

RELEVANT BACKGROUND[1]

1. SITLA is the Utah state entity established to manage lands that Congress granted to Utah for the support of common schools and other beneficiaries. Utah Code §53C-1-103(1)(a).

2. When Utah was admitted as a state, Congress passed the Utah Enabling Act. Act of July 16, 1894, ch. 138, 28 Statutes at Large 107. Utah's common schools were the largest beneficiaries under the Enabling Act, but there are eleven other beneficiaries as well. *Id.*

3. The Utah Legislature created SITLA in 1994 as an independent agency of state government. Utah Code §53C-1-102(1)(a).

4. SITLA administers the land it holds in trust for the exclusive benefit of the trust beneficiaries. It is charged with managing the lands in the most prudent and profitable manner possible. In doing so, SITLA must consider the interests of both income for current beneficiaries and the preservation of assets for future beneficiaries. §53C-1-102(2).

5. "The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state." §53C-1-102(2)(d).

6. In 2019, the Legislature created the Land Trusts Protection and Advocacy Office. §53D-2-201. That office is tasked with representing the beneficiary interests of the school and institutional trust. *Id.*

7. Former Director Ure was the director of SITLA during the events leading to this claim. (Compl. ¶ 11.)

[1] Some of the factual statements in this section are taken from the Tribe's Complaint. Defendant Ure does not admit these facts but includes them because well-pleaded factual allegations are accepted as true at the pleading stage. Conclusory allegations are not. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

8. The Tribe brought this action on its own behalf and on behalf of its members, asserting *parens patriae* status. (*Id*. ¶¶ 8-9.)

9. This suit involves land north of Highway 40, south of Tabiona, and north of Fruitland, Utah. (*Id*. ¶ 31.) It is referred to throughout the Complaint and this memorandum as "Tabby Mountain."

10. SITLA holds title to the surface rights (not mineral rights) of Tabby Mountain. (*Id*. ¶ 42.)

11. In December 2018 SITLA issued a public notice that it planned to sell Tabby Mountain. (*Id*. ¶ 60.)

12. On December 19, 2018, the Tribe expressed to SITLA its interest in bidding. (*Id*. ¶ 61.)

13. SITLA provided information regarding the bidding process, including notice that "All sales will be finalized on SITLA's standard certificate of sale." (*Id*. ¶¶ 67-71.)

14. SITLA drafted an "Offer to Purchase" specific to the Tabby Mountain sale and required each potential bidder to use this form. (*Id.* ¶ 68)

15. The "Offer to Purchase" incorporated by reference the terms of the same, including language that "All sales will be finalized on SITLA's standard certificate of sale." (*Id.* ¶¶ 69-71)

16. The sale of trust land is governed by SITLA's regulation R850-80. The regulation in effect at the time of these events provided:

i. "The agency may sell trust land if the agency determines that the sale of the land would be in the best interest of the trust beneficiaries and provided that

the land is sold for no less than fair market value.: R850-80-200

ii. "The sales process shall be initiated by an agency determination to evaluate the appropriateness of the sale of a particular parcel of trust land. The evaluation shall be undertaken in accordance with RS850-80-500…."RS850-80-300

iii. The agency has the ability to sell lands by public auction or by negotiated sale. RS850-80-550

iv. Requirements for both types of sales are set out in RS850-80-600 through 620

v. Both types of sales are finalized by the issuance of a certificate of sale, signed by the purchaser and the director. RS850-80-700. The final signature on the certificate of sale is made by the director. The sale is not final and no rights vest in the purchaser until the certificate is executed by the director. "The agency reserves the right to cancel the sale of trust land for any reason prior to the execution of the certificate by the director." RS850-80-700(3)

17. On February 22, 2019, SITLA issued a press release, providing public notice that it had voted to suspend the Tabby Mountain sale. (*Id*. ¶ 93).

ARGUMENT

1. The Tribe is not a person for the purposes of 42 USC § 1983, and therefore lacks standing to bring an action under 42 USC § 1983. (Counts I, II, & III)

In the Complaint, the Plaintiff is clearly acting in its sovereign capacity. In Paragraph 7 of the Complaint, Plaintiff states that it is a "federally recognized sovereign Indian tribe." In

Paragraph 8, Plaintiff states that the tribe is bringing suit on its own behalf—in an exercise of its sovereignty—and as *parens patriae* on behalf of its members—another exercise of its sovereignty. The "doctrine of *parens patriae*," by its nature, requires the Tribe to have a "quasi-sovereign interest" that is "apart from the interest of particular private parties." *Sierra Club v. Two Elk Generation Partners*, 646 F.3d 1258, 1268 (10th Cir. 2011). That quasi-sovereign "*parens patriae*" status "is inconsistent with a § 1983 action: quasi-sovereign interests are not individual rights." *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076, 1082 (9th Cir. 2019). The Tribe accordingly is not a "person" or "citizen" entitled to sue under the federal civil rights laws.

In *Inyo County Cal v. Paiute-Shoshone Indians Of The Bishop Community Of The Bishop Colony, et al*, 538 US 701 (2003), the Paiute-Shoshone tribes had asserted a claim against Inyo County for violation of its citizens' Fourth Amendment rights, challenging the County's authority to seize casino employment records as part of a welfare fraud investigation. When the tribe refused to turn over the records, the county prosecuting attorney sought and obtained a search warrant for the records. The tribe then sued the county under § 1983, asserting its sovereignty and that the search warrants were not valid on tribal land. The District Court disagreed, and dismissed for failure to state a claim, but the Ninth Circuit affirmed in party and reversed in part, and the parties sought certiorari to the United States Supreme Court, which was granted. The Supreme Court held that an Indian tribe, when acting as the sovereign, is not a "person," whether they are the claimant or the respondent. Justice Ginsberg noted, quoting from the United States' brief, that, since the court had decided that "person" excludes sovereigns as defendants under § 1983, it would be anomalous for the Court

to give the same word a different meaning when it appears in another position in the same sentence. The Court went on to say that the qualification of a sovereign as a person depends not "upon a bare analysis of the word 'person' but on the "legislative environment" in which the word appears. (*Id.*, at 1893, internal cites omitted.)

More recently, in the Tenth Circuit Court of Appeals, in *Becker v. Ute Indian Tribe of the Uintah and Ouray,* 868 F3d 1199 (10th Circ. 2017), the Court noted that a tribe may or may not qualify as a person, "depend[ing] on whether the tribe's asserted right [is] of a sovereign nature." Citing *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F3d 1222, 1234 (10th Circ. 2010). The Court determined that, when the right being asserted is tribal sovereignty, the tribe is not a person within the meaning of § 1983.

In the case at hand, Plaintiff has affirmatively pled that it is acting in its sovereign status (Comp. ¶¶ 7-9. 18-22, and 121) although there is a conclusory claim that it is "a person" later, in ¶ 129. This conclusion is not supported by any of the facts pled in the Complaint, therefore Plaintiff does not have standing to sue under § 1983 and those claims must be dismissed.

2. Former Director David Ure is not a person for purposes of litigation under § 1983, as he is being sued in his official capacity.

Plaintiffs' first, second, and third causes of action assert § 1983 claims against David Ure, the former Director of SITLA.[2] Section 1983 provides a remedy against "persons" who violate federal rights while "acting under color of state law." 42 U.S.C. § 1983; *Jojola v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995). Only a "person" as that term has been interpreted by federal

[2] Complaint and Jury Demand, court filing 5/5/23 at ¶ 11 (hereinafter "Compl.")

case law may be a proper defendant. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). "Neither the state, nor a governmental entity that is an arm of the state, nor a state official who acts in his or her official capacity, is a 'person' within the meaning of § 1983." *Harris v. Champion*, 51 F.3d 901, 905–906 (10th Cir. 1995). Because David Ure has been sued in his official capacity, he is not a person for purposes of § 1983, Plaintiffs' First, Second, and Third Causes of actions should be dismissed with prejudice.

3. The Tribe fails to satisfy Rule 8's pleading standard.

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It must also "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Legal conclusions can provide a framework for a complaint, but they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Common to all § 1983 claims "is the requirement that liability be predicated on a violation traceable to a defendant-official's 'own individual actions.'" *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937). Because § 1983 is "vehicle[ ] for imposing personal liability on government officials, we have stressed the need for careful attention to particulars, especially in lawsuits involving multiple defendants" *Pahls*, 718 F.3d at 1226. This requires enough allegations to give the [defendant] notice of the theory under which [his or her] claim is made." *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008). "[I]t is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each

individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state [or county in this case]." *Id*. at 1250. The collective use of the term Defendants, with no distinction as to what acts are attributable to whom makes it impossible for individuals to ascertain "what particular unconstitutional acts they are alleged to have committed." *Id*. As to Ure, the Complaint alleges no facts suggesting he is personally liable under §§ 1981–85. To state a claim under those statutes, a plaintiff must offer more than "mere conclusory statements" that a defendant "personally participated in a violation of [the plaintiff's] constitutional rights." *Whitehead v. Marcantel*, 766 F. App'x 691, 702 (10th Cir. 2019) (§ 1983).[3]

Plaintiff does not clear that low hurdle. Plaintiff's allegations are that "SITLA and DNR conspired to make sure that SITLA would not sell the land to the Tribe" [4], "SITLA and DNR's first plan for thwarting sale to the Tribe was for DNR to seek additional funds from the State"[5], and similar vague allegations against SITLA and DNR or the generic "defendants." That is far from explaining how former Director Ure personally discriminated against or violated the Tribe's constitutional rights.

Further, the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. am XIV. To succeed with the

[3] 1 So too under §§ 1981, 1982, and 1985. See, e.g., *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 983 (10th Cir. 1991) (§ 1981); *Moniz v. Cox*, 512 F. App'x 495, 501 (6th Cir. 2013) (§ 1982); *Tilghman v. Kirby*, No. 13-cv-CIV-73, 2013 WL 6092529, at *2 (W.D. Okla. Nov. 19, 2013) (§ 1985).

[4] Comp. ¶ 76

[5] Comp. ¶ 79

equal protection claim, Plaintiff must offer evidence that shows that the defendant was aware of, and acquiesced to, racial harassment or that they themselves engaged in racial classifications.

4. Assuming that Former Director Ure is being sued as an individual, the Tribe has not alleged sufficient facts to assert a claim upon which it could receive relief.

The Tribe is seeking relief that could not be ordered against former Director Ure in his individual capacity (specific performance, sale of Tabby Mountain at a reduced price, etc.), so the Complaint does not appear to be against former Director Ure in his individual capacity, allegations of willful misconduct notwithstanding.

The Tribe's allegations that he engaged in a civil conspiracy with another individual, however, could be construed as an attempt to hold former Director Ure individually liable, so, in an abundance of caution, he notes that the Tribe has failed to allege sufficient facts to successfully plead a cause of action for conspiracy.

The Tribe alleges the Defendants participated in the conspiracy to have SITLA violate federal and state law, and to discriminate based on race, ethnicity, national origin and religion, Comp. ¶¶ 4,102, 136-138. To succeed on a civil conspiracy claim, a plaintiff must allege "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv., 2017 UT 75, ¶ 70, 416 P.3d 401, 425. Further, "[t]he claim of civil conspiracy require[s], as one of [its] essential elements, an underlying tort." *Puttuck v. Gendron*, 2008 UT App 362, ¶ 21, 199 P.3d 971. The Tribe has failed to allege the elements, and even if it had, it fails on its merits.

The Tribe cannot show an unlawful act. The governing regulations allow SITLA to suspend a sale prior to the finalization of the certificate of same. Here, SITLA drafted an "Offer to Purchase" and required bidders to execute that Offer as a condition to submit a valid bid. That Offer stated the sale would be completed on SITLA's standard certificate of sale.[6] The version of Utah Admin. Code R850-80-700(3) in effect at the time was clear that SITLA "may terminate a sale for any reason prior to the finalization of the certificate of sale." SITLA, through former Director Ure, exercised that discretion to address the trust beneficiaries concern regarding the appraisal and the length of time the property was advertised.[7] The Tribe cannot overcome that by making conclusory allegations the sale was suspended based on its perception of a history of general government discrimination.

5. **At the time of the sale, the rules and regulations governing SITLA permitted the Director to cancel a sale at any point, up until a Certificate of Sale was executed. R850-80-700(3)**

The version of R850-80-700 (Certificates of Sale) in effect at the time the property was advertised for bid controlled the sale of trust lands. "A certificate of sale shall be signed by the director after it has been signed by the purchaser and returned to the agency. The certificate shall not be final and no rights shall vest in the purchaser until the certificate is executed by the director. The agency reserves the right to cancel a sale of trust land for any reason prior to the execution of the certificate of sale by the director."

[6] Compl. ¶¶ 68-70
[7] Compl., ¶ 93

Former Director Ure complied with the rules and regulations in effect at the time of the bidding process for Tabby Mountain, and the suspension of the sale was permissible under those rules and regulations.

6. This Court lacks subject matter jurisdiction under the Utah GIA because the Tribe failed to file a notice of claim

This court lacks jurisdiction over Plaintiff's state law claims, as they have been untimely filed, and are thus barred. Before filing suit against a governmental entity, an injured party must first file a notice of claim with that entity within one year after the claim arises, and the suit itself must be filed within a year after the claim is denied. Utah Code §63G-7-402; *David v. Midway City*, No. 20-cv-66, 2021 WL 6927739 at *9, (D. Utah Dec. 14, 2021). Failure to comply with the notice of claim provision deprives the trial court of subject matter jurisdiction. *David*, 2021 WL 6927739, at *9 (citing *Patterson v. Am. Fork City*, 2003 UT 7, ¶10, 76 P.3d 466); *see also, Thomas v. Lewis*, 2001 UT 49, ¶13, 26 P.3d 217 ("The notice of claim provisions of the Governmental Immunity Act are jurisdictional."). The GIA bars federal courts from granting relief on state-law claims unless a plaintiff satisfies its requirements. *Jones v. City/Municipality of Cottonwood Heights, Utah*, No. 22-cv-003022022, 2002 WL 10052834, at *3, N (D. Utah Oct. 17, 2022).

The Complaint does not allege compliance with the notice provisions of the GIA. The GIA protects both Utah's governmental entities and "each employee of a governmental entity." Utah Code §63G-7-201(1). This protection applies to the notice of claim provision. Utah Code §63G-7-401(2). The Tribe's state law claims should be dismissed with prejudice on these grounds, alone.

RESPECTFULLY SUBMITTED THIS 28th day of August, 2023.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/*Philip S. Lott*
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