PHILIP S. LOTT (5750)
Assistant Utah Attorney General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
PO Box 140856
Salt Lake City, UT 84114-0856
Telephone: (801) 366-0100
Facsimile: (801) 366-0101
E-mail: phillott@agutah.gov
Attorney for Defendant David Ure

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.	**FORMER DIRECTOR URE'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS** Case No. 2:23-cv-00295 Judge David B. Barlow Magistrate Judge Honorable Daphne A. Oberg

David Ure, former director of School and Institutional Trust Lands Administration (SITLA), for his reply to the Response in Opposition filed by the Ute Indian Tribe of the Uintah and Ouray Indian Reservation ("the Tribe"), states that the Tribe's Complaint should be

dismissed for several reasons, as set forth in his opening brief. Nothing in the Tribe's Memorandum in Opposition (or in opposition to the other motions to dismiss filed in this case) changes that conclusion. For the reasons stated by SITLA and Defendant McConkie in their reply (including the accompanying chart), which are incorporated herein, DUCivR 7-1(a)(7), the Tribe's claims are not pled with particularity, and its claims are barred by the Statutes of Limitation. For the reasons stated by Defendants Cox and Styler in their reply, which are incorporated herein, DUCivR 7-1(a)(7), the Tribe's claims under Title VI may not be brought against individuals.

This memorandum argues that the Tribe is not a person allowed to bring to suit under 42 U.S.C. §§ 1983, the Tribe has not alleged claims against Defendant David Ure in his official capacity, nor does the Tribe state a claim against Defendant Ure in his individual capacity, and this Court lacks subject matter jurisdiction under the Utah Governmental Immunity Act because the Tribe failed to file a notice of claim.

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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)

While there are potential scenarios where the Tribe might be able to articulate a set of facts where it would have standing to represent the interests of tribal members, this is not one of them. The Tribe's reliance on *Church of Scientology of California v. Cazares,* an out of circuit case from over 40 years ago, to support its argument is puzzling. That case is about whether a corporation can bring a civil rights action to (1) protect the rights of its members or (2) to protect its own rights. *Id*. at 1276. It has no relevance to this case. Membership in the Church of Scientology is presumably voluntary, and not based on any sort of protected status, nor is there any argument that the Church of Scientology is a sovereign in its own right, unlike the Tribe.

The Tribe argues it is asserting a violation of the rights of its members that do not arise from sovereignty. That proposition is not supported because here the Tribe is using § 1983 for "denial of due process and equal protection based on allegations it was discriminated against based on race, national origin, ethnicity and religion" because it was not awarded a contract to buy Tabby Mountain. That interest is "apart from the interest of particular private parties". It is the Tribe's interest as a sovereign. It is separate from the interests of any particular member. The Tribe argues that Defendant Ure's "expansive interpretation" of Chemehuevi *is "likely" wrong, but the Tribe offers nothing other than a conclusion that the Tenth Circuit held differently in* Inyo. *This is incorrect, as the Ninth Circuit was applying* Inyo *when deciding* Chemehuevi.

The Tribe, here, does not have a § 1983 claim. An Indian tribe "may not sue under § 1983 to vindicate" a "sovereign right," such as its right to be free of state regulation and control. *Inyo Cty.*, 538 U.S. at 712, 123 S.Ct. 1887. Nor can the Tribe

assert its members' individual rights as *parens patriae* in a § 1983 action automatically. To assert *parens patriae* standing, the Tribe would have to "articulate an interest apart from the interests of particular private parties," i.e., "be more than a nominal party," and "express a quasi-sovereign interest." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 651 (9th Cir. 2017); *Confederated Tribes of Colville Reservation v. Anderson,* 903 F.Supp 1187, 1185 (2011) ("The Tribe is precluded from pursuing its *parens patriae* claim because the Ninth Circuit in *Skokomish* ruled that individual tribal members do not hold an interest in communal tribal usufructuary rights.")That requirement is inconsistent with a § 1983 action: quasi-sovereign interests are not individual rights. Chemehuevi, 934 F.3d at 1082.

The Tribe's reliance on Native Village of Curyung *is misplaced. While the Court found that the villages could bring suit as* parens patriae *under § 1983 to enforce r*ights created by the Adoption Assistance Act and the Indian Child Welfare Act, the Court also found that the Tribe could not sue on behalf of its own sovereign interests, nor did § 1983 create a cause of action against the State. The Court analyzed *Inyo*, and, after applying it to the facts, found that *Inyo* meant that the villages could not use § 1983 as a vehicle to enforce sovereign rights. *Curyung*, 151 P.3d at 402. In the case at hand, the Tribe is clearly acting in its sovereign capacity and asserting its rights as a sovereign, not asserting its members' rights.

The Tribe argues that Defendant Ure's analysis of *Becker v. Ute Indian Tribe of the Uintah and Ouray*, 868 F3d 1199 (10th Circ. 2017) is incorrect, but the Tribe has misread the case. In *Becker,* the Court noted that "[t]he Tribe's complaint and appellate briefs could be

clearer in stating the basis of its § 1983 claims." *Becker,* at 1205. The Court was able to parse through the § 1983 claims in that case, much like it must in the case at hand, where the Tribe has affirmatively pled it is acting in its sovereign status. The Plaintiffs do not have standing to sue under § 1983 and those claims must be dismissed.

2. The Tribe has not alleged that its claims are against Defendant David Ure in his official capacity, nor does it state a claim against him in his individual capacity.

The Tribe makes a one-line argument that Ure is a "person" subject to § 1983, however makes no distinction as to what role it is suing him in. He cannot be sued in his official capacity and, to any extent the Tribe is suing him in his individual capacity, it has failed to allege any personal participation. Rather, the Tribe repeatedly conflates the actions of one with the actions of all.

2.1 Ure cannot be sued in his official capacity.

"It is well settled that a state and its agencies, as well as employees of that state and its agencies acting in their official capacities, do not fit within the meaning of a 'person.'" *Cline v. State, Div. of Child and Family* Services, 142 P3d 127 (UT App. 2005). 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 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.

2.2 The Tribe fails to meet Rule 8's pleading standard against Ure in his individual capacity.

The Tribe has made allegations that Defendant Ure orchestrated some grand conspiracy to deprive the Tribe of the opportunity to purchase Tabby Mountain out of some hypothetical racial animus on his part, but it offers nothing but its conclusions and generalized historical grievances. In its Complaint the Tribe makes no specific allegations as to what actions Defendant Ure may have taken to violate the Tribe's due process rights or what he did to personally participate in an alleged conspiracy. Nor does it address the lack of specificity in its opposition. Instead, the Tribe reiterates that Defendant Ure was the Executive Director of SITLA and was acting as such during the time surrounding the sale, as well as communicating about the process with the Tribe. The Tribe completely ignores that Defendant Ure was acting within the scope of his employment and within his discretion.

To succeed in its § 1983 claims, the Tribe must allege that Ure personally participated in a denial of the Tribe's due process rights and conspired to violate those rights. *Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013). To succeed on a conspiracy to violate civil rights claim the Tribe must allege (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom. *Tilton v. Richardson,* 6 F.3d 683, 686 (10th Cir. 1993). The Tribe did not properly allege a conspiracy. It has made conclusory statements that Defendant Ure was "likely the principal architect" of a discriminatory scheme to keep Tabby Mountain out of the hands of the Tribe, but there are no supporting facts alleged. Simply serving as Director during the relevant time frame is not enough. Nor is a beneficiary's concern about whether Ure

is maximizing the income to the trust sufficient. All of the allegations against Ure are the actions he was required to perform in his official capacity.

3. This Court lacks subject matter jurisdiction under the Utah Governmental Immunity Act because the Tribe failed to file a notice of claim.

The Tribe suggests the Notice of Claim requirement is not applicable and is only an "alleged requirement." The Tribe argues that it "does not agree that any of significant claim [sic] had to be submitted" but provides no factual or legal basis for its disagreement. *Utah Code Ann. § 63G-7-401(2) is explicit:* Any person having a claim against a governmental entity, or against the governmental entity's employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental. *(emphasis added).*

All defendants fit the criteria. The Immunity Act mandates that any person having a claim against a governmental entity . . . shall file a written notice of claim with the entity before maintaining an action. Winegar*,* 2018 UT App. at ¶ 18 *citing Utah Code Ann. § 63G-7-401(2). The notice of claims must be filed within one year after the claim arises,* Id. *citing Utah Code Ann. § 63G-7-402, and must contain (i) a brief statement of the facts; (ii) the nature of the claim asserted; (iii) the damages incurred by the claimant so far as they are known; and (iv) if the claim is being pursued against a governmental employee individually . . . , the name of the employee.* Id.*, citing Utah Code Ann. § 63G-7-401(3)(a). Here, taken in the light most favorable to the Tribe (and not one the Defendants believe is accurate), the Tribe was on notice in August 2022 when a whistle blower is alleged to have come forward. Its deadline to file was August*

2023, which has already passed, so it has missed that deadline. That defect cannot be corrected. The Immunity Act's notice-of-claim requirements are explicit in state law, Utah Code §§ 63G-7-401, -402, and "are to be strictly construed[, and] full compliance … is required as a condition precedent to the right to maintain a suit." *David v. Midway City*, No. 2:20-CV-00066-DBP, 2021 WL 6927739, at *10 (D. Utah Dec. 14, 2021), appeal dismissed, No. 22-4009, 2022 WL 3350513 (10th Cir. Aug. 3, 2022) (unpublished) (quoting *Great West Cas. Co. v. Utah Dep't of Transp.*, 2001 UT App 54, ¶ 9, 21 P.3d 240); *accord McGraw v. Univ. of Utah*, 2019 UT App 144, ¶ 18, 449 P.3d 943, 947. See also Winegar v. Springville City, 2018 UT App. 42, ¶18*, P.3d (citing* Wheeler v. McPherson, 2002 UT 16, ¶ 11, 40 P.3d 632*) (state law claims may not be brought against the state or its subdivisions unless the requirements of the Immunity Act are strictly followed.)*

Finally, in its opposition to Ure's motion, the Tribe asserts that it "will submit" a notice of claim, and requests that the Court "hold in abeyance any decision on those claims …." That won't work for two reasons. First, a failure to file a notice of claim deprives the court of subject-matter jurisdiction over the claim, which cannot be cured by a later-filed notice of claim. *David*, 2021 WL 6927739, at * 9 (quoting *Wheeler v. McPherson,* 2002 UT 16, ¶ 9, 40 P.3d 632; *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 10, 67 P.3d 466)). The Tribe's promise to comply with the statute in the future cannot serve as a basis to create subject-matter jurisdiction for the court to "hold" the case. *See Pead v. Ephraim City*, 2020 UT App 113, ¶ 32, 473 P.3d 175, 183 (reversing district court's denial of motion to dismiss when plaintiff filed notice of claim one day too early); *McNeil v. United States*, 508 U.S. 106, 113 (1993) (concluding that a pro se prisoner's claim under the Federal Tort Claims Act was barred because he filed the lawsuit before the statutorily

required administrative remedies were exhausted). And unlike other provisions of the Immunity Act, which allows a plaintiff to cure a defect while the case is ongoing, *cf.* Utah Code § 63G-7-601(3) (allowing a plaintiff an opportunity to provide an undertaking after the 20-day limitations period), no such exception exists for the notice-of-claim requirement. The Immunity Act specifies that notice must be filed "before maintaining an action." Utah Code § 63G-7-402(2). A suit against the State or its employees is "allowed" "[o]nly after the state has had the opportunity to consider the claim …." *Hall v. Utah State Dep't of Corrs.*, 2001 UT 34, ¶ 22, 24 P.3d 958, 958. Because that has not happened, the Court lacks subject-matter jurisdiction and must dismiss, and not "hold in abeyance" or otherwise stay, the state-law claims.

Second, for the reasons stated in Governor Cox and Former Director Styler's Motion to Dismiss, in other Defendants' Motions, and in their Replies, which are incorporated herein, DUCivR 7-1(a)(7) if the Tribe does file a notice of claim, it will be outside of the limitations period allowed in the Immunity Act, and the claims will be barred nonetheless. Utah Code § 63G-7-403; *Craig v. Provo City*, 2016 UT 40, ¶ 16, 389 P.3d 423, 426. The Tribe does not address the timing of the notice of claim, or the Immunity Act's two-year[1] statute of limitations for filing tort claims against the State, in any of its memoranda. Instead, the Tribe argues that the discovery rule or equitable tolling applies to toll the running of the general three-year or four-year statutes of limitations.[7] But the limitations periods in the Immunity Act "replaces the limitations period for claims against private actors ….". *Peak Alarm Co. v. Werner*, 2013 UT 8, ¶ 26, 297 P.3d

[1] The version of the Immunity Act in effect in February 2019 used a slightly different mechanism to calculate the statute of limitations—one year after the filing of a notice of claim (which still had to be filed within one year of the incident). *See* 2019 Utah Laws Ch. 229 (H.B. 311), § 4.

592. Therefore, the Tribe's claims are barred under the two-year limitations period. And even if its arguments made for tolling the causes of action under the general statutes of limitations applies to the limitations period in the Immunity Act, *see* Utah Code § 63G-7-401(1)(a), (b), -403-(2)(b), they should be rejected for the reasons herein.

The Tribe's failure to comply with the Utah Governmental Immunity Act's notice-of-claim requirements deprives this Court of subject-matter jurisdiction over the state-law causes of action. And because it is too late for the Tribe to file a notice of claim and then bring an action, the state law claims must be dismissed with prejudice.

RESPECTFULLY SUBMITTED THIS 6th day of November, 2023.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/*Philip S. Lott*

PHILIP S. LOTT
Assistant Utah Attorney General
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on this 6th day of November, 2023, I electronically filed the foregoing, **FORMER DIRECTOR URE'S REPLY MEMORANDUM IN SUPORT OF HIS MOTION TO DISMISS**, using the Court's electronic filing system. I also certify that a true and correct copy of the foregoing was placed in outgoing, United States mail, postage prepaid, to the following:

J. Preston Stieff
Attorney for Plaintiff
Patterson Earnhart Real Bird & Wilson LLP
110 S Regent Street, Suite 200
Salt Lake City, UT 84111
jps@stiefflaw.com

Kyle J. Kaiser
Assistant Utah Attorney General
Attorney for Defendants Cox and Styler
kkaiser@agutah.gov

Vanessa J. Walsh
Assistant Utah Attorney General
Attorney for Defendants McConkie and SILA
vwaslh@agutah.gov

/s/*Dustie Ross*