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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, v. DAVID URE, MICHELLE MCCONKIE, MICHAEL STYLER, SPENCER COX, UTAH SCHOOL and INSTITUTIONAL TRUST LANDS ADMINISTRATION Defendants.	**RESPONSE IN OPPOSITION TO DEFENDANTS SITLA AND MCCONKIE'S MOTION TO DISMISS** Civil Case No. 2:23-CV-00295 Jude David B. Barlow Magistrate Judge Daphne A. Oberg

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INTRODUCTION

As this Court recognized during the November 18, 2024, hearing in this case, the foundation of Plaintiff Ute Indian Tribe of the Uintah and Ouray Reservation's ("Tribe") claims against Defendants "involves a wide-ranging conspiracy of [Utah] state employees to deprive the [Ute Indian Tribe] of the right to purchase Tabby Mountain . . ." Transcript at 6 (attached hereto as Exhibit 1). Indeed, since early 2019 – and continuing to this day with Defendant McConkie at the helm of the Utah School and Institutional Trust Lands Administration (SITLA) – Defendants SITLA, Utah Department of Natural Resources (DNR), and the officers of each remain engaged in an ongoing conspiracy to discriminatorily prevent the Tribe from purchasing a parcel of land within the Tribe's own Reservation, known as Tabby Mountain. This suit seeks to remedy these ongoing violations of state and federal statutory and constitutional laws.

Early in 2018, SITLA's Board of Directors unanimously determined that it was in the best interest of SITLA and its trust beneficiaries, namely, Utah's public school students, to sell the portions of the surface estate in Tabby Mountain which SITLA owned. But when the Tribe was the high bidder (by far) for that property, the State Executive Branch, SITLA, DNR, and their officers worked in secret to 1) prevent the sale of Tabby Mountain to the Tribe; and 2) intentionally concoct a false public record through which they knowingly misled the Tribe and SITLA's trust beneficiaries by claiming they were "suspending" the sale to address two (pretextual) non-discriminatory concerns.

Based upon information brought to light by a state whistleblower, they were caught.

On May 5, 2023, the Tribe filed its Complaint, and all Defendants subsequently filed motions to dismiss. On June 14, 2024, this Court entered its Memorandum Decision and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss [Dkt. 52]. After Defendants

filed a Joint Motion for Clarification of the Court's Order [Dkt. 53], on November 18, 2024, the Court held a hearing on that motion. In response and in deference to the Court's indication that certain clarifications on what claims the Tribe is bringing against which Defendants would be helpful, on January 17, 2025, the Tribe filed its First Amended Complaint. [Dkt. 72]. Another round of motions to dismiss from all Defendants followed.

As a preliminary matter, in their Motion to Dismiss the First Amended Complaint [Dkt. 78], Defendants SITLA and McConkie overstate what claims this Court actually dismissed in its Memorandum Decision and Order Granting in Part and Denying in Part Defendants' Motions to Dismiss [Dkt. 52]. And contrary to Defendants' assertion, the Tribe does not "ignore[] outright the Court's prior order dismissing its claims." See Dkt. 78 at 1. Rather, the Tribe, in its First Amended Complaint, clarifies which specific claims (with reference to particular federal statutes) it brings against each Defendant. It also clarifies that it is suing Defendant McConkie in her official capacity.

To be clear, the Tribe does **not** concede or remove any claims contained in its original Complaint – it simply provides further clarification about these claims. In this regard, the Tribe would remind Defendants that there is judicial precedent supporting the proposition that an amended complaint supersedes and makes of no legal effect a formerly filed initial complaint. *See e.g_United States v. Pansier*, 666 B.R. 198, 201 (E.D. Wis. 2024).[1] Accordingly, out of an abundance of caution and to preserve claims this Court has dismissed for purposes of appeal, should an appeal become necessary, the Tribe is not abandoning any claims that it brought in its original Complaint.

[1] Indeed, Defendant Ure in his renewed motion to dismiss, while inapposite, cites analogous case law for the proposition that an amended complaint renders an original complaint of no legal effect. Dkt. 77 at 25.

However, in the interest of judicial economy, herein the Tribe responds only to the new arguments Defendants bring in their motions to dismiss the First Amended Complaint and hereby incorporates by reference its opposition to the arguments Defendants previously raised in their earlier motions to dismiss the original Complaint. [Dkt. 38, 39, 40]. Specifically, and without limitation, the Tribe preserves all of its arguments as to why SITLA is a proper Defendant in this lawsuit.

The gravamen of Defendants' renewed motion to dismiss appears to be that Defendant McConkie cannot be sued in her official capacity for prospective injunctive relief. She may, however, be sued for prospective injunctive relief to end violations of federal law and remedy the situation for the future. *See Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (articulating the distinction between retroactive and prospective injunctive relief); *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). For all of the reasons set forth herein, Defendants' position is without merit.

ARGUMENT

I. Because the Tribe seeks prospective injunctive relief for Defendants' continuing violations of the law, Defendant McConkie in her official capacity is a "person" within the meaning of 42 U.S.C. § 1981, § 1982, § 1983, and § 1985 and, therefore, a proper Defendant in this lawsuit.

Unlike Defendant Ure[2], Defendant McConkie does not even attempt to argue that in her official capacity she is, *per se,* not a "person" within the meaning of 42 U.S.C. §1983. While not entirely clear, she appears to concede that the Tribe's claims fall squarely within the *Ex Parte*

[2] Defendant Ure, relying on inapposite federal case law, claims that "all official capacity claims against him should be dismissed since his official capacity is not a person under [42 U.S.C. § 1983]. Dkt. 77 at 14-15.. For all of the reasons explained in the Tribe's response to Defendant Ure's motion to dismiss, Defendant Ure is wrong.

Young exception to general rules about state sovereign immunity. Indeed, she acknowledges that "what matters… is whether 'the relief requested is 'properly' characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief.'" [Dkt. 78 at 7]. Further, she acknowledges that a claim "for prospective relief against state officials named in their official capacities based upon an **ongoing** violation of federal law is not considered an action against a state. . . " *Id.* (Emphasis added).[3] It is odd, therefore, that Defendants go on to call, in conclusory fashion, the Tribe's seeking an order of specific performance and a declaration to remedy violations of law "retrospective relief." [Dkt. 78 at 11.] Regardless, at no point does she provide any analysis as to how the Tribe's claims are solely retroactive in nature; nor does she cite any authority in support of such a hypothetical argument.

A. The Tribe has pleaded continuing violations, not simply past violations, of its federal constitutional rights.

In the Tenth Circuit, the "continuing violation doctrine, as a general principle of the federal common law, is available to a § 1983 litigant." *Herrera v. City of Espanola*, 32 F.4th 980, 994 (10th Cir. 2022). It is "an equitable principle." *Id*. at 993 (internal quotations and citation omitted). The doctrine emerged from the idea that certain claims are:

> based on the cumulative effect of individual acts… such that if any acts occurred within the statute of limitations, the entire course of conduct can be pursued in the action. Put another way, the continuing violation doctrine applies when the plaintiff's claim seeks redress for injuries resulting from a series of separate acts that *collectively constitute one unlawful act*, as opposed to conduct that is a discrete unlawful act.

Id. (internal quotations and citation omitted). The doctrine is "triggered by continual unlawful

[3] It is odd, therefore, that Defendants go on to call, in conclusory fashion, the Tribe's seeking an order of specific performance and a declaration to remedy violations of law "retrospective relief." Dkt. 77 at 11.

acts, not by continual ill effects from the original violation." *Id*. (internal quotations and citation omitted). "The continuing violation doctrine permits a court to look backwards to the entirety of a continuing wrong to assess its cumulative effect. . . ." *Burkley v. Corr. Healthcare Mgmt. Of Oklahoma, Inc.*, 141 F. App'x 714, 716 (10th Cir. 2005).

Further, the Tenth Circuit found the application of the doctrine appropriate where a defendant told the plaintiff "that it had every intention of maintaining its commitment to [it]" despite that, before then, internally and unknown to the plaintiff, it had considered abandoning its commitments for self-interested reasons. *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1431 (10th Cir. 1996). The Tenth Circuit noted that "[t]he evidence further shows that [the defendant] never informed [the plaintiff] of its reservations about [its commitments], leaving him to rely on their assurances. … Looking at this set of facts, it is reasonable to infer that [the plaintiff] held [the defendant] to the…agreement while at the same time taking measures to dissolve it. In turn, the last injurious act would be [the defendant's] announcement in February 1990 that it was ending the…program." *Id.*

The case at bar bears a striking resemblance to *Tiberi*. Analogous to the program started by the defendants in *Tiberi*, SITLA decided in 2018 to sell Tabby Mountain through a regulatory sale process that **required** qualified, sealed bids to win and consummate the sale. *See* Tribe's Amended Complaint ¶¶ 67-69. As in *Tiberi*, this demonstrated to the Tribe that the Defendants had every intention of maintaining their commitment to sell the property under the announced program. However, after the Tribe fairly and squarely won the sale as the highest bidder, unbeknownst to the Tribe, the Defendants conspired to abandon their commitment to consummate the sale for self- interested reasons: because they wished to keep the land out of the hands of the Indians.

Like the conflicting assurances made by the defendants in *Tiberi*, the press release issued on February 22, 2019 provided public notice that SITLA had voted to "temporarily suspend proceedings on a proposed sale" and a false letter was sent to the Tribe informing it that the sale was suspended. The stated reason for the suspension of the sale was ostensibly for SITLA to address the trust beneficiaries' concerns regarding the accuracy of the appraisal and the length of time that the property was advertised. Tribe's Amended Complaint, ¶ 94. These communications show that, just as in *Tiberi*, "[the defendants] never informed [the plaintiffs] of [their] reservations about [their commitments], leaving [the plaintiffs] to rely on their assurances." *Tiberi*, 89 F.3d at 1431.

The press release and the letter both intimated that the decision to suspend would be temporary—by either implying that by the nature of a suspension generally—or, in the case of the letter, actually stating that the Tribe would be contacted when the decision to move forward with further action on the sale was made.

In *Tiberi*, the Tenth Circuit found that the last injurious act in the continuing wrong was an actual announcement by the defendants that, despite all of its assurances previously, it was indeed ending the program that the plaintiffs were relying upon once and for all. In this case, though, the Tribe continues to wait. It continues to wait for the "temporary" years-long suspension to be lifted and for the sale to finally be consummated. Here, there has been no announcement that the "program" to sell Tabby Mountain has been ended, and, up until the whistleblower came forward and exposed that the Defendants' assurances were shams all along, the Tribe has continued to wait on the assurances made by the Defendants that they would carry through with the sale as originally promised. The Defendants' conspiracy led the Tribe into limbo—neither consummating the sale nor officially taking it off the table. Thus,

Defendants' wrongs continue to this day.

Certainly with regard to Defendants McConkie and SITLA's role in the violations, it could not be any clearer that the violations are ongoing. After all, Defendant McConkie is the current director of SITLA, that agency that has been discriminating against the Tribe for years now. Indeed, if the Tribe prevails on the prospective injunctive relief it seeks, she is the officer who "would be responsible for ensuring any . . . relief is carried out" and, therefore, cannot be dismissed on a Rule 12 motion. *See Gonzales v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011). As one court in addressing injunctive relief regarding the conditions of a jail stated, "Both the Sheriff and the Warden must have known the Jail's crowded state. In an official-capacity action seeking an injunction, where the Sheriff and Warden are stand-ins for the political bodies they serve, they could well be ordered to take appropriate steps if crowding has exceeded the constitutional limit. That ordinarily would preclude dismissal under Rule 12(b)(6). *Houston v. Sheahan*, 62 F.3d 902, 903 (7th Cir. 1995). By the same token, Director McConkie, when she assumed office, had stopped the ongoing discrimination against the Tribe, perhaps she would have a legitimate argument that she is not part of the ongoing conspiracy and therefore, not a proper defendant in her official capacity. But it defies reason (and the law) for her to both support the ongoing discrimination and then claim she cannot be sued in her official capacity. Instead of reviewing the Tribe's complaint and acting in good faith to remedy the continuing wrongful discrimination by her agency and herself, Defendant McConkie chooses to affirmatively continue to violate the law.

B. The *Ex Parte Young* exception to state sovereign immunity applies to continuing violations of federal law.

The Supreme Court in *Ex Parte Young* established that federal courts could enjoin state officials in their official capacities to prevent ongoing violations of federal law. *Ex parte Young*, 209 U.S. 123, 144 (1908).

While the Eleventh Amendment grants states immunity from retroactive monetary relief, it does not protect state officers from prospective injunctive relief. *Edelman v. Jordan*, 415 U.S. 651, 677, (1974).

Thus, the continuing violation doctrine is integral to the application of the *Ex Parte Young* exception. It requires that, as in the case at bar, the alleged violation of federal law be ongoing, not merely a past occurrence. *See e.g. Lewis v. New Mexico Dep't of Health*, 94 F. Supp. 2d 1217, 1229 (D.N.M. 2000), aff'd, 261 F.3d 970 (10th Cir. 2001) (1983 claims against state officials fell within Ex Parte Young exception to Eleventh Amendment immunity). *See also Columbian Fin. Corp. v. Stork*, 702 F. App'x 717, 718 (10th Cir. 2017) (ongoing exclusion from a fair hearing was deemed a continuing violation that prospective relief could remedy).

C. The relief the Tribe seeks can only fairly be categorized as prospective injunctive relief, rather than some form of retroactive relief.

As the Supreme Court has stated, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002). Here, because Defendants have not remedied their violations of law, the obvious relief available to Defendants is prospective. The distinction between prospective and retroactive relief is crucial; prospective relief aims to prevent future violations of federal law, whereas retroactive relief seeks compensation for past wrongs. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

The Supreme Court emphasized that the overriding question in determining whether relief is prospective is whether it remedies future rather than past wrongs. *Hutto v. Finney*, 437 U.S. 678, 681, 98 (1978). Relief that serves to end a present violation of federal law is not barred by the Eleventh Amendment, even if it has a substantial ancillary effect on the state treasury. *Harris v. Owens*, 264 F.3d 1282, 1291 (10th Cir. 2001). Moreover, the Tenth Circuit held that a declaratory judgment that certain laws are unconstitutional and an injunction prohibiting their enforcement constituted prospective relief under *Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1182 (10th Cir. 1998). This decision aligns with the principle that prospective relief involves enjoining a continuing violation of federal law, which may have incidental effects on state interests but does not equate to retroactive monetary damages. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 911 (10th Cir. 2008).

Here, the Tribe simply seeks to purchase the Tabby Mountain parcel, which it has heretofore been prevented from doing by virtue of Defendants' violations of 42 U.S.C. §§ 1981, 1982, 1983, 1985, et al. Defendant Ure and others set in motion the conspiracy which continues to deprive the Tribe of its constitutional rights to enter a contract for the purchase of property. The only remedy for this ongoing wrong is for the Tribe to be able to consummate the purchase of Tabby Mountain – which will require prospective, injunctive relief.

II. The authorities Defendants rely on for the proposition that the federal court cannot provide the prospective injunctive relief the Tribe seeks are unavailing.

Defendants alternate between arguments that this Court cannot order Defendants to sell Tabby Mountain to the Tribe because 1) it cannot "require a state to specifically perform a contract" and 2) it cannot "force a state to sell land." We take these in turn.

A. The cases cited for the proposition that *Ex Parte Young* "cannot be used to obtain" an "order for specific performance of a state's contract" are inapposite.

Defendants have previously argued that the Tribe cannot prevail on its breach of contract claims because no contract was formed. Perhaps ironically, they now argue that *Ex Parte Young* cannot be used to obtain an "order for specific performance of a state's contract." Dkt. 78 at 8. In any event, the case law on which Defendants rely for the proposition that *Ex Parte Young* cannot be used to obtain an order for specific performance of a state's contract are inapposite.

If official action is unconstitutional, it does not preclude an injunction to halt such action. *Ex Parte Young*, 209 U.S. 123, 144 (1908). Courts have not limited the *Ex Parte Young* doctrine to "negative" relief, and have often ordered positive governmental action. In cases involving deprivation of constitutionally protected rights, "affirmative" relief has been granted, notwithstanding the fact that the incidental effect is that the state will be forced to expend funds from its treasury. *See, e. g. p Graham v. Richardson,* 403 U.S. 365, 366 (1971); *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963); *Inmates of Suffolk Cnty. Jail v. Eisenstadt*, 360 F. Supp. 676, 678 (D. Mass. 1973); *Martarella v. Kelley*, 349 F. Supp. 575, 577 (S.D.N.Y. 1972).

Defendants' arguments that a court cannot order "'specific performance' against the State as restitution for an alleged prior wrong," Dkt. 78 at 11, ignores not only that the Tribe has alleged the wrong continues to this day but also that the Court could simply order Defendants to do precisely what they purport to want to do – sell Tabby Mountain and maximize income for Utah's public school students.

B. The cases cited for the proposition that courts routinely dismiss claims that seek to force a state to sell land are inapposite.

As an initial matter, Defendants' reliance on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 266 (1997) for the proposition that this Court cannot order Defendants to sell Tabby Mountain to the Tribe, the highest bidder, mixes apples and oranges. In *Coeur d'Alene*, the Tribe brought claims against state actors in their individual capacity. Here, the discrete pertinent inquiry is whether the claims can be brought against McConkie in her **official** capacity. Beyond this, as contrasted with *Coeur d'Alene*, the Tabby Mountain dispute is not in any way akin to a "quiet title" action, which is how the Supreme Court described the Coeur d'Alene Tribe's dispute with the state of Idaho. In *Coeur d'Alene*, the Tribe sought a declaratory judgment establishing its entitlement to the exclusive use and occupancy of submerged lands beneath Lake Coeur d'Alene and various navigable tributaries lying with the original boundaries of the Reservation, and a declaration of the invalidity of Idaho's laws with respect to the lands.

Here, by contrast, the Tribe seeks only, as the highest bidder, to purchase the Tabby Mountain parcel. Indeed, the Tribe does not dispute that SITLA currently holds title to certain portions of the surface estate Tabby Mountain; the claims the Tribe brings here relate to the unconstitutional violations of the Tribe's **right to purchase** that estate. In this regard, the *Coeur d'Alene* opinion supports the Tribe's view. There, the Court emphasized that the *Ex Parte Young* doctrine is applicable and allowed for claims for declaratory and injunctive relief against state officials to proceed in so far as they sought to preclude continuing violations of federal law. *Id.*

The other cases Defendants rely on are likewise inapposite. *See Lacano Invs., LLC v. Balosh*, 765 F.3d 1068, 1073-74 (9th Cir. 2014) (owners of land patents that were issued by federal government before Alaska entered the Union, giving them title to certain streambeds in Alaska, brought action against state officials, seeking an injunction prohibiting officials from claiming title to lands beneath the waterways); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d

281, 283 (5th Cir. 2000) (involving an ejectment action); and *West Mohegan Tribe & Nation v. Orange County,* 395 F.3d 18, 23 (2d Cir. 2004) (title dispute). In this action, there is no title dispute as to Tabby Mountain. Again, the Tribe, as the highest bidder, seeks only to purchase Tabby Mountain in a sale that would not only allow the Tribe to regain part of its homeland, but also serve the legitimate interests of SITLA and the public schoolchildren SITLA is required to serve.

For all of the foregoing reasons, Defendants' motion to dismiss the Amended Complaint should be denied.

DATED this 22nd day of May, 2025.

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