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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, et al., Defendants.	**GOVERNOR COX, UTAH DEPARTMENT OF NATURAL RESOURCES, FORMER DNR DIRECTOR STYLER, AND CURRENT DNR DIRECTOR JOEL FERRY'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS** Case No. 2:23-CV-295 Judge David B. Barlow Magistrate Judge Cecilia M. Romero

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

INTRODUCTION

Plaintiff Ute Indian Tribe of the Uintah and Ouray Indian Reservation has been given multiple attempts to state legal claims against the DNR Defendants Utah Department of Natural Resources, Governor Spencer Cox, former DNR Executive Director Michael Styler, and current DNR Execute Director Joel Ferry. Through a complaint, an amended complaint, and two sets of briefing on motions to dismiss, they still have failed to do so.

LEGAL ARGUMENT

1. Claims not addressed by the Tribe should be dismissed with prejudice.

In their Response to the DNR Defendant's Motion to Dismiss,[1] the Tribe fails to refute, concede, or even address[2] several issues raised and claims challenged by the DNR Defendants. For the reasons stated in the DNR Defendants' original motion, and because the Tribe has failed to address the

[1] Doc. 86 (hereinafter, "Pl.'s Opp.").

[2] In its Introduction, the Tribe says that "in the interest of judicial economy," it "responds only to the arguments Defendants bring in their motion to dismiss the Amended Complaint" and "preserves, for purposes of any necessary appeal, all claims against Defendants, including Defendant Governor Cox, for all the reasons set forth in its prior briefing." Pl.'s Opp. at 2. Regardless, the Court should consider these claims abandoned, at least for the purposes of this motion, and dismiss them with prejudice.

issues raised, DUCivR 7–1(f), the following claims should be dismissed with prejudice:

- All claims against Governor Cox;[3]
- All §§ 1981–1985 constitutional claims against DNR, because it is "not a person" subject to suit under those statutes. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 70–71 (1989);[4] and
- All state tort claims, because they are barred by the Governmental Immunity Act of Utah, or because the Tribe failed to file a proper Notice of Claim under the Act. Utah Code §§ 63G-7-201(4)(b), -401, -402.[5]

2. Claims against current Executive Director Ferry should be dismissed because Executive Director Ferry cannot provide any requested injunctive relief.

As correctly noted by the Tribe, Joel Ferry is the current Executive Director of DNR. There is no proper claim against the DNR Executive Director in his official capacity for injunctive relief because the DNR Executive Director does not have "some connection with the enforcement of the act" to be enjoined. *Ex parte Young*, 209 U.S. 123, 157 (1908). Put another way, Director Ferry does not

[3] *See* DNR Defs.' Mot. (doc. 79) § 1, at 19–20.
[4] *See also* DNR Defs.' Mot. § 4.1, at 25–27.
[5] *See also* DNR Defs.' Mot. at 31–32, 35.

"possess[]" "enforcement authority … in connection with" the challenged actions "that a federal court might enjoin him from exercising." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 43 (2021).

Director Ferry's authority must be based on the challenged actions or statutes, not a "series of hypotheticals" based on actions that "might in the future" happen. *Id.* Furthermore, the request to enjoin Director Ferry cannot be the equivalent of "enjoin[ing] the world at large …." *Id.; accord Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021); *Free Speech Coal., Inc. v. Anderson*, 119 F.4th 732, 737–39 (10th Cir. 2024) (dismissing attorney general and Commissioner of Public Safety from lawsuit challenging age verification for adult material).

As discussed in the DNR Defendants' Motion to Dismiss, the only equitable relief requested by the Tribe is for specific performance of the alleged "contract" between SITLA and the Tribe for the sale of Tabby Mountain.[6] It is undisputed that DNR was not a party to that contract, does not own Tabby Mountain, and cannot provide that relief requested. Therefore, there is no nexus between the action to be enjoined and Director Ferry.

[6] Pl.'s Am. Compl. ¶ 198, Wherefore ¶¶ (b),(c).

The Tribe argues that "DNR and Director Ferry are taking efforts to purchase Tabby Mountain from SITLA" and attached an email regarding the 2018 valuation of Tabby Mountain.[7] That argument suffers from two fatal flaws.

First, the Tribe is attempting to amend their complaint by adding new facts in their memorandum in opposition. This is impermissible: "[I]n determining whether to grant a motion to dismiss, the district court, [is] limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint …." *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995). A plaintiff "cannot amend her complaint by adding factual allegations in response to defendant's motion to dismiss." *Abdulina v. Eberl's Temp. Servs., Inc.*, 79 F. Supp. 3d 1201, 1206 (D. Colo. 2015).

Second, even if the court considered those supplemental facts, the Tribe has not articulated how they establish Director Ferry's requisite enforcement authority. At most, the Tribe's theory is that DNR may, some day, offer another bid on Tabby Mountain, and Tabby Mountain might be sold (by SITLA) even through the Tribe is forever entitled to buy it (even though there was no contract and the Court lacks the authority to require SITLA to sell land to the Tribe).

[7] Pl.'s Opp. at 13 & Ex. 2.

Notwithstanding all the factual and legal flaws with this theory highlighted by the SITLA defendants in their Motion to Dismiss and Reply,[8] this theory is nothing more than a "series of hypotheticals" that may happen in the future and is insufficient to currently permit a claim to go forward against Director Ferry in his official capacity. *Whole Woman's Health*, 595 U.S. at 43; *Free Speech Coal.*, 119 F.4th at 739.

Claims against current DNR Executive Director Ferry should be dismissed.

3. **Claims against former Director Styler should be dismissed.**

The Tribe provides no factual or legal basis for former Director Styler to remain as a defendant in the case, either in his official or his individual capacity.

3.1. The Tribe does not state a plausible claim against former Director Styler in his official capacity.

As argued in the DNR Defendants' Motion, the Tribe's claims against former Director Styler in his official capacity are "meritless" because he is no longer the Executive Director of the Department of Natural Resources. *Gregory v. Texas Youth Comm'n*, 111 F. App'x 719, 721 (5th Cir. 2004) (unreported, per curiam op.). There is no basis in law for Director Styler to be sued in his official capacity

[8] *See* SITLA Reply (doc. 89) § 2, at 2–8.

because he is no longer a government official. *See Swearingen v. Pleasanton Unified Sch. Dist. 344*, 641 F. Supp. 3d 1141, 1162 (D. Kan 2022).

The Tribe argues that the "continuing violation" doctrine somehow allows Styler to continue to be named.[9] That is an "equitable doctrine" that keeps alive a cause of action "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" and when the action would otherwise be barred by the statute of limitations. *Herrera v. City of Espanola*, 32 F.4th 980, 994 (10th Cir. 2022). The doctrine, meant to ensure that plaintiffs who have been victims to ongoing constitutional rights violations have their day in court, has no applicability to official-capacity suits against long-departed government officials.

3.2. The Tribe does not state a plausible claim against former Director Styler in his individual capacity—

Likewise, the Tribe's claims for damages against former Director Styler in his individual capacity should be dismissed. They should be dismissed because the Tribe has failed to appropriately plead intentional discrimination by Director

[9] Pl.'s Opp. at 3.

Styler against the Tribe. They fail on their merits. And they fail because the Tribe has not met its burden to show that the rights they assert were violated by Director Styler were clearly established at the time to overcome qualified immunity.

3.2.1. —Because the Tribe fails to plead intentional discrimination.

Claims brought under the equal protection clause must include allegations that a government official engaged in intentional discrimination on the basis of a protected class. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, (1977). As described in the DNR Defendants' Motion, the Tribe has failed to do so.

The Tribe argues that it need not "allege facts establishing each element of a prima facie case of discrimination" to withstand a motion to dismiss.[10] The Tribe cites the non-binding, out-of-circuit, district court case of *Taylor v. City of New York*, 207 F. Supp. 3d 293 (S.D.N.Y 2016) for that proposition. But even if that case was controlling on this court, a closer look at it shows the Tribe fails to meet the standards contained in it.

[10] Pl.'s Opp. at 5–6 (quoting *Taylor v. City of New York*, 207 F. Supp. 3d 293, 299 (S.D.N.Y. 1996)).

Taylor is an employment-discrimination case brought by a former city employee against the City of New York and included § 1981 as well as Title VII claims. *Id.* at 296. As such, the court applied the burden-shifting framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), which is inapplicable here, and noted that to state a claim a plaintiff must allege facts that provide "at least minimal support for the proposition that the employer was motivated by discriminatory intent." *Id.* at 304 (citations and quotations omitted).

It concluded that the plaintiff in that case stated a claim under Title VII[11] on a sex-discrimination theory because she identified facts (1) showing she was qualified for a promotion, (2) applied 14 times over twelve years and never was promoted, (3) "identified multiple male applicants who were hired over a period in which she submitted applications," (4) was told by supervisors not to apply because she was a woman, and (5) identified that just two out of 370 construction laborers were female. *Id.* at 305.

Contrast that case with *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There, post-9/11 detainees brought equal protection and free exercise *Bivens* claims against

[11] Conversely, her § 1981 claims were dismissed because she stated no facts "that could give rise to an inference that she was not hired" on the basis of race. *Id.*

the United States Attorney General and the FBI director. *Id.* at 666, 676. The Court recognized that, to state a claim, the plaintiffs needed to plead facts showing "purposeful discrimination" on the basis of race or religion. *Id.* at 677. Even though the plaintiffs alleged that the AG was the "principal architect" of a policy resulting in lower-level government officials holding "thousands of Arab Muslim men" under "highly restrictive conditions of confinement" "solely on account of [their] religion, race, and/or national origin," *id.* at 669, the Court concluded that the plaintiffs did not state a plausible claim of discrimination. *Id.* at 682. That was because the plaintiffs' allegations of intentional discrimination were a "conclusory" "formulaic recitation of elements of a constitutional discrimination claim," and the "incidental" effect on Arab Muslim men during the investigation "should come as no surprise" considering that the architect of the 9/11 attacks were perpetrated and organized by Arab Muslim men. *Id.* at 682. None of the pleaded facts "plausibly suggest[ed] [the AG and FBI Director]'s state of mind" and failed to state a plausible claim. *Id.*

This case—and especially the allegations lodged at former Director Styler—is much closer to *Iqbal* than *Taylor*. Even if the standard from *Taylor* applied, the Tribe has not met it. There are no allegations of disparate impact, no allegations

about repeated patterns of statistical discrimination *from Director Styler*,[12] and no specific allegations plausibly alleging Director Styler's "state of mind" beyond conclusory allegations of discriminatory animus. *Iqbal*, 556 U.S. at 683.

For these reasons, the Court should dismiss all claims against former Director Styler, with prejudice.

3.2.2. —On the merits of the §§ 1981 and 1982 (enforceable through § 1983) [13] and 1985 claims.

For the reasons stated in the DNR Defendants' original Motion, and for the reasons stated in §§ 2.1–2.2 of Defendant Ure's Reply Memorandum,[14] which are incorporated by reference herein, DUCivR 7-1(f), the Court should dismiss the

[12] Plaintiffs allege a history of discrimination, largely with federal government officials. But those facts are not relevant because the allegations of discrimination must be examined in a "defendant-by-defendant inquiry …." *Hannah v. Cowlishaw*, 628 F. App'x 629, 634 (10th Cir. 2016) (unreported) (dismissing § 1981 claims because plaintiff pleaded only a violation of Title VII "based on the combined actions of the individual actors").

[13] Section 1983 "is exclusive federal remedy for § 1981 against state actors." *Brown v. Keystone Learning Servs.*, 804 F. App'x 873, 882 (10th Cir. Feb. 11, 2020) (unreported) (citing and quoting *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989). In this case, the Tribe *has* alleged the § 1981 and 1982 claims "via § 1983." Am. Compl. ¶¶ 130, 154. Therefore, the Court may address the legal through the § 1983 claim, but Count I and II—the freestanding §§ 1981 and 1982 claims—should be dismissed. *Brown*, 804 F. App'x at 882.

[14] Doc. 90 at 7–10, §§ 2.1–2.2.

§§ 1981, 1982, and 1985(3) claims on their merits, as the Tribe fails to state legal claims satisfying the elements required under those statutes.

3.2.3. —Because the Tribe fails to show the law is clearly established.

Finally, all claims against Defendant Styler should be dismissed because the Tribe has failed to meet its "heavy" burden demonstrating the right they assert is clearly established, overcoming the defense of qualified immunity. *Lincoln v. Maketa*, 880 F.3d 533, 544 (10th Cir. 2018).

In their opposition, the Tribe gives lip service to the clearly established prong of qualified immunity but fails to follow through. They cite *no* binding Supreme Court or 10th Circuit precedent that puts the legal question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Instead, they cite cases articulating to the broad, overarching legal standards applicable to their constitutional claims, a Supreme Court case that actually *limits* § 1981 recovery when the plaintiff does not "have rights" under an impaired contractual relationship,[15] a § 1981 case involving private parties where qualified immunity is not applicable,[16] a § 1982 case involving a sale of private

[15] Pl.'s Opp. at 7 (citing *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006)).
[16] Pl.'s Opp. at 7–8 (citing *Hampton v. Dillard Dep't Stores, Inc.*, 247 F. 3d 1091 (10th Cir. 2001)

property against the property owner,[17] and a slew of employment-law cases. None of these put a reasonable government official in Director Styler's position on notice that his conduct would violate the Constitution or the civil-rights statutes.

An independent survey of relevant law fares no better. The Tenth Circuit, in a pre-*Iqbal* decision, determined that allegations of employment discrimination on the basis of race stated clearly established rights under § 1981. *Ramirez v. Dep't of Corrs., Colo*, 222 F.3d 1238, 1244 (10th Cir. 2000). However, there are no cases clearly establishing that former Director Styler's alleged acts attempting, but failing, to acquire property on behalf of a government agency, are clearly established violations of the constitution or the civil-rights statutes. Moreover, cases from the Tenth and other circuits suggest that these facts would *not* give rise to liability. *See, e.g.*, *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989) (concluding that plaintiffs' allegations that published reports about his lawsuits interfered with his ability to contract failed to state § 1981 claim because plaintiff alleged only "*possible* loss of *future* opportunities"); *McCarthy v. City of Cordele, Ga.*, 111 F. 4th 1141, 1147 (11th Cir. 2024) (affirming dismissal of § 1981 claim against commissioner because, even though he "encouraged" breach

[17] Pl.'s Opp. at 8 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)).

of an employment contract § 1981 did not apply because he did not have "the power to make official decisions" regarding the termination); *Perry v. VHS San Antonio Partners, L.L.C.*, 990 F.3d 918, 932–33 (5th Cir. 2021) (rejecting theory that third party's "interference" with plaintiff's contract gives rise to a § 1981 claim).

Accordingly, the Court may dismiss all claims for damages against former Director Styler under the clearly established prong of the qualified immunity analysis.

4. The Tribe's Title VI claim against DNR should be dismissed.

The only claim now asserted by the Tribe against DNR is one for violation of Title VI. Because the Tribe has not pleaded that they were discriminated against in a "program" or "activity" operated by DNR, the claim should be dismissed. 42 U.S.C. § 2000d. *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

The Tribe argues that it has stated a Title VI claim against DNR because "DNR wanted to purchase Tabby Mountain and to keep the Tribe from owning it and, therefore, worked together with Defendants SITLA, Ure, and Styler to

fabricate a public record to hide their discrimination."[18] The Tribe also alleges that DNR was "neck deep"[19] in a plan to stop *SITLA* from selling *SITLA's* property to the Tribe.

Nowhere, either in their complaint or their opposition, does the Tribe describe how the Tribe was "excluded from participation in, be denied the benefits of, or be subject to discrimination under" *any DNR program or activity*. 42 U.S.C. § 2000d.

And extending Title VI liability—which is based on a theory of contract—to a situation where a government agency *does not* complete a program or activity (here, the purchase of a parcel of land) would extend liability far beyond what DNR "voluntarily and knowingly" accepted when it received federal funds. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219–220 (2022).

The claim should be dismissed.

CONCLUSION

For the reasons stated above, the Court should dismiss the Tribe's Complaint as to the DNR Defendants, with prejudice. To aid in the Court's

[18] Pl.'s Opp. at 11.
[19] Pl.'s Opp. at 11.

review, the DNR Defendants provide, attached as Exhibit A, a chart of claims brought against each of the DNR Defendants and a short description of the basis for dismissal of each.

Respectfully submitted on this 19th day of June, 2025,

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/Kyle J. Kaiser
KYLE J. KAISER
Assistant Utah Attorney General

WORD COUNT CERTIFICATION

Under DUCivR 7-1(a)(5)(C), I certify that this Motion to Dismiss contains **2980** words and complies with DUCivR 7-1(a)(4).

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/Kyle J. Kaiser
KYLE J. KAISER
Assistant Utah Attorney General

Exhibit A – Chart of Claims Against and Defenses of DNR Defendants

	Count I (§ 1981, "Denial of due process")	**Count II (§ 1982, "Denial of Equal Protection")**	**Count III § 1983 (remedy for deprivations of §§ 1981 & 1982)**	**Count IV (§ 1985)**	**Count V (Title VI)**	**Count VI (State law breach of trust)**	**Count VII (state-law fraud)**	**Count VIII (Breach of Contract/ Estoppel)**	**Count IX Declaratory and Injunctive relief**
Governor Cox	*No longer asserted*	*No longer asserted*	*No longer asserted*	*No longer asserted*	*Not asserted against this defendant*	*No longer asserted*	*No longer asserted*	*Not asserted against this Defendant*	*No longer asserted / Gov. Cox cannot grant requested relief*
Utah DNR	*Not a "person" subject to suit; no longer asserted*	*Not a "person" subject to suit; no longer asserted*	*Not a "person" subject to suit; no longer asserted*	*Not a "person" subject to suit; no longer asserted*	*Failed to plead that Tribe was subject to discrimination under a DNR "program or activity"*	*No longer asserted; GIAU bars recovery; Tribe failed to file Notice of Claim*	*No longer asserted; GIAU bars recovery; Tribe failed to file Notice of Claim*	*Not asserted against this Defendant*	*Not asserted; Not a "person" subject to injunctive relief; sovereign immunity*
Former DNR Director Styler	*§ 1981 not directly applicable to State officials; § 1983 is the proper vehicle*	*§ 1982 not directly applicable to State officials; § 1983 is the proper vehicle*	*Tribe fails to properly plead intentional discrimination; no contract was or could be formed; no control over property; no violation of clearly established right*	*Tribe fails to properly plead intentional discrimination ; no proof of violation of equal protection; no violation of clearly established right*	*Not asserted against this defendant*	*No longer asserted; GIAU bars recovery; Tribe failed to file Notice of Claim*	*No longer asserted; Tribe failed to file Notice of Claim*	*Not asserted against this Defendant*	*No longer a government official, has no "connection with the enforcement of the act" to be enjoined, Ex parte Young, 209 U.S. 123, 157 (1908)*
Current DNR Director Ferry	*Not asserted against this defendant (except for injunctive relief, which is inapplicable)*	*Not asserted against this defendant (except for injunctive relief, which is inapplicable)*	*Not asserted against this defendant (except for injunctive relief, which is inapplicable)*	*Not asserted against this defendant (except for injunctive relief, which is inapplicable)*	*Not asserted against this defendant.*	*No longer asserted; GIAU bars recovery; Tribe failed to file Notice of Claim*	*No longer asserted; Tribe failed to file Notice of Claim*	*Not asserted against this Defendant*	*Does not "possess" "enforcement authority … in connection with" the challenged actions "that a federal court might enjoin him from exercising."* Whole Woman's Health, 595 U.S. at 43.