UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

CROW ALLOTTEES ASSOCIATION, *et al.*	)	Case No. 1:14-cv-00062-SPW-CSO
Plaintiffs,	)	REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
v.	)	
UNITED STATES BUREAU OF, INDIAN AFFAIRS, *et al.*	)	
Defendants.	)	

INTRODUCTION

Federal Defendants request judgment on the pleadings for both lack of jurisdiction and failure to state a claim. The bases for this Motion go unrebutted by Plaintiffs' Response. Plaintiffs have not pled any concrete and particularized injury to establish their standing, identified any applicable waiver of the United States' sovereign immunity, or pled any legally cognizable claim.

ARGUMENT

I. This Court Lacks Jurisdiction Over This Case.

A. Plaintiffs still cannot demonstrate any injury to establish standing, nor are their claims ripe.

As discussed in Federal Defendants' opening brief, this Court lacks jurisdiction because Plaintiffs cannot demonstrate that they have been harmed by federal action. Fed. Defs.' Br. at 15–18 (ECF No. 35).[1] Plaintiffs still cannot demonstrate any present injury, and their claims of potential future injury are purely speculative.

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[1] In summary, the challenged waiver of allottees' water claims is not yet effective; even when effective the waiver of claims alone cannot establish injury because Congress effected a substitution of assets; and, as the Tribe has not yet enacted a tribal water code, no allottee has yet had their rights affected under that system.

Rather than identifying a concrete, particularized harm suffered because of federal action, Plaintiffs argue that 28 U.S.C. § 1353[2] "specifically confers standing to Indian Allottees." Pls.' Resp. at 8–9, 15. But Congress cannot "confer[] standing" by statute. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Instead, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.* Article III places "an outer limit [on] the power of Congress to confer rights of action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue").

Even if Plaintiffs' position were constitutionally feasible, § 1353 does not purport to confer standing. Section § 1353 reads in pertinent part:

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

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[2] As discussed in Part I.B. of this brief, *infra*, § 1353 is the jurisdictional counterpart of 25 U.S.C. § 345, which Plaintiffs cite elsewhere in their response. The arguments set out here regarding § 1353 apply equally to 25 U.S.C. § 345.

This statute does not create a cause of action but is instead a choice of forum provision. Many statutes grant the district courts original jurisdiction over "any civil action" arising under certain areas of law, but that does not enable plaintiffs to establish their standing simply by invoking those statutes absent any injury. *See, e.g.,* 28 U.S.C. § 1339 (claims involving the postal service); 28 U.S.C. § 1400 (patent infringement); 28 U.S.C. § 1402(b) (tort claims against the United States). Jurisdictional provisions, including § 1353, are inapposite if no "civil action"—i.e., a case or controversy—exists.

Plaintiffs also attempt to establish their standing by relying on *Carlo v. Gustafson*, where the "plaintiffs allege[d] that property in which they have a legal interest has been deeded to another through invalid agency action." 512 F. Supp. 833, 837 (D. Alaska 1981). But here none of Plaintiffs' property "has been deeded to another." The Settlement Act effected a substitution of assets by providing that "[t]he benefits realized by allottees under [the Settlement Act] shall be in complete replacement of and substitution for, and full satisfaction of [the claims to be waived]." Pub. L. No. 111-291, 124 Stat. 3064, Title IV, § 409(a)(2) (2012) ("Settlement Act") or ("Act"). Contrary to

Plaintiffs' conclusory allegation[3] that "Federal Defendants have taken their water rights and given them to the Crow Tribe"—Pls.' Resp. at 10—the tribal water rights established through settlement are "held in trust by the United States for the use and benefit of the Tribe *and the allottees*." Settlement Act § 407(c)(1) (emphasis added). None of allottees' rights have been, or will be, deed to the Tribe.

Next, Plaintiffs argue that "issues of Indian law are within the exclusive jurisdiction of the federal courts." Pls.' Resp. at 12. But the McCarran Amendment, 43 U.S.C. § 666, waived the United States' sovereign immunity for state adjudications of water rights, including federal Indian reserved water rights, and thus contradicts Plaintiffs' argument. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *see also* Br. in Supp. of Judges' Mot. to Dismiss, ECF No. 23 at 6–7.

Finally, Plaintiffs argue that their Complaint "raises issues that the Montana state Water Court cannot resolve." Pls.' Resp. at 13. But "issues" without standing do not create a case or controversy under Article III.

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[3] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not entitled to a presumption of validity. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs are effectively seeking an impermissible advisory opinion. And even if Plaintiffs may someday suffer an injury—following finalization of the water court's proceedings, finalization and adoption of the water code process, and resolution of allottees' claims through that process—any claims that might result from those hypothetical future events are not yet ripe.

B. Plaintiffs have not identified any applicable waiver of the United States' sovereign immunity.

Plaintiffs' Complaint does not invoke any applicable waiver of the United States' sovereign immunity. Fed. Defs.' Br. at 18–22. In Response, Plaintiffs' argue that Federal Defendants' Motion improperly seeks "adjudication prior to trial." Pls.' Resp. at 17. The sole authority cited for this proposition is Fed. R. Civ. P. 1, which states that the Civil Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action." Plaintiffs state, without citation, that the Civil Rules "presume that justice is best served through trial on the merits." Pls.' Resp. at 17. But Rule 12 expressly provides for motions to dismiss and for judgment on the pleadings like this one. Plaintiffs' argument is flatly contrary to the Rules.

Plaintiffs next attempt to identify purported waivers of the United States' sovereign immunity, none of which applies here. They first cite to 25 U.S.C. § 345 and 28 U.S.C. § 1353. Pls.' Resp. at 18. But 25 U.S.C. § 345 waives the United States' sovereign immunity only in cases where the plaintiff is seeking the grant of an allotment *ab initio*:

> Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings 'involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty,' and (ii) proceedings 'in relation to' the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment . . . and suits involving 'the interests and rights of the Indian in his allotment or patent after he has acquired it,'
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> The structure of § 345 suggests, however, that § 345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original allotment. . . . Accordingly, in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), this Court held that, to the extent that § 345 involves a waiver of federal immunity, as opposed to a grant of subject-matter jurisdiction to the district court, that section 'authorizes, and provides governmental consent for, only actions *for* allotments.'

United States v. Mottaz, 476 U.S. 834, 845–46 (1986) (citations omitted). The cases Plaintiffs cite primarily fall within the former category, where individual Indians sought grants of allotments. *See Pence v. Kleppe*, 529 F.2d 135, 139 (9th Cir. 1976); *Lord v. Babbitt*, 943 F. Supp. 1203 (D. Alaska

1996). In contrast, this case falls within the second category, "suits involving the interests and rights of the Indian in his allotment or patent after he has acquired it," to which § 345's limited waiver of sovereign immunity is inapplicable. *Mottaz*, 476 U.S. at 845 (internal quotation omitted).[4]

Plaintiffs then invoke § 706(2) of the Administrative Procedure Act ("APA"). Pls.' Resp. at 21–25 (citing 5 U.S.C. § 706(2)).[5] Claims under § 706(2) must challenge a final agency action. *See* Fed. Def. Br. at 20-21. Plaintiffs argue that final agency action has occurred here because "[d]ue to the Federal Defendants' agreement to the Crow Compact and the Settlement Act, the Crow Allottees' appurtenant water rights have been legally severed from their land and given to the Crow Indian Tribe." Pls.' Resp. at 21–22. But again, the United States holds the tribal water rights in trust, and has not deeded them to the Tribe. Settlement Act § 407(c).

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[4] Plaintiffs also cite 28 U.S.C. § 1353. That provision is merely a "corresponding provision [to § 345] governing district court jurisdiction," *i.e.*, it is § 345's "jurisdictional counterpart." *Id*. at 845, 850; *see also Pence*, 529 F.2d at 139 n.4 (holding that § 1353 "is a recodification of the jurisdictional portion of § 345"). Because § 345 does not provide a waiver of the United States' sovereign immunity, neither does § 1353.

[5] As discussed in Federal Defendants' opening brief, claims that satisfy the statutory pre-requisites of § 706(1) of the APA can trigger a waiver of the United States' sovereign immunity. Fed. Defs.' Br. at 21–22. Plaintiffs do not invoke that provision in their Response and would appear to rely exclusively on § 706(2) of the APA.

To the extent Plaintiffs challenge the Secretary's execution of waivers, those waivers will not become effective unless the Secretary publishes in the Federal Register a statement of findings as required by the Settlement Act § 410(e). This publication cannot take place unless the Montana Water Court issues a final judgment and decree approving the Compact. Settlement Act § 410(e)(1)(i). Water Court proceedings are ongoing, so no final decree has been entered. Assuming a decree is entered, the Water Court's decision will not be deemed "final" until appeals have been resolved or the time for appeals has lapsed. Settlement Act § 403(7). Furthermore, if the waivers become effective, further agency action will be necessary before any allottees' water allocations are affected. *See* Fed. Defs.' Br. at 21. Accordingly, the Secretary's execution of the waivers alone does not constitute final agency action. Thus, § 706(2)'s limited waiver of sovereign immunity is inapplicable here.

II. Plaintiffs Have Failed to State a Claim.

A. *Count IV fails to state a claim: 25 U.S.C. § 175 does not require the United States to provide attorneys to individual allottees under these facts.*

As discussed previously argued, 25 U.S.C. § 175 is discretionary and does not give rise to a cause of action. Fed. Defs.' Br. at 23–24. Plaintiffs

attempt to distinguish the cases cited by Federal Defendants on their facts, rather than grappling with their core holding that § 175 "is not mandatory" and "offers no standards for judicial evaluation of the Attorney General's litigating decisions." *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972); *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). Plaintiffs argue that the court must look "at the facts to determine whether the United States has appropriately applied its discretion." Pls.' Resp. at 26. But when "agency action is committed to agency discretion by law," review under the APA is unavailable. *Adams v. F.A.A.*, 1 F.3d 955, 956 (9th Cir. 1993) (citing 5 U.S.C. §§ 701(a)(1)–(2)). As recognized in *Shoshone Bannock Tribes*, that is the case with § 175. 56 F.3d at 1480, n.3.

Plaintiffs do not cite any case where the United States was required to provide counsel under § 175. In *Rincon Band* the court noted that the Attorney General would have faced a conflict of interest if he had endeavored to represent the appellant in water rights litigation because doing so would "have placed the Attorney General on both sides of the case." 459 F.2d at 1084. But *Rincon Band*'s discussion of conflicts of interest is mere *dicta*, as

it does not analyze whether that conflict supported the United States' exercise of discretion; it does not even set forth a standard for such an analysis.

Plaintiffs also cite *Robinson v. New Jersey Mercer County Vicinage-Family Div.*, 514 F. App'x 146 (3d. Cir. 2013); but contrary to Plaintiffs' parenthetical summary of that case, the Court did not "determine whether the United States appropriately applied its discretion." *See* Pls.' Resp. at 26. No officer or agency of the United States was a defendant in *Robinson* and no federal agency action was challenged, so there was no exercise of discretion to analyze. 514 F. App'x at 151. As *Robinson* recognized, "the unanimous weight of authority suggests that the duty of representation contained [in § 175] is discretionary, not mandatory." *Id*.

Furthermore, Plaintiffs' allegation that "the United States had a conflict of interest and could not represent both the Crow Indian Tribe and the Crow Allottees"— Pls.' Resp. at 27—is not legally defensible. Not only is § 175 discretionary, but in *Nevada v. United States*—where the United States represented both a tribe and the Bureau of Reclamation in a water rights adjudication—the Supreme Court held that "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes

in litigation when Congress has obliged it to represent other interests as well." 463 U.S. 110, 128 (1983) In representing those diverse interests:

> the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

Id. Accordingly, the United States' representation of both the Tribe's interests and the allottees' interests would not itself constitute a conflict of interest as a matter of law.

In sum, Count IV does not establish any "factual issue that cannot be determined at this time," Pls.' Resp. at 27, because courts have overwhelmingly found, as a matter of law, that § 175 is discretionary and does not impose any duty giving rise to a cause of action.

B. Count III fails to state a claim: The United States has not violated Plaintiffs' due process rights by not providing them with independent counsel.

The fundamental bar to Plaintiffs' due process claim is that the United States has not deprived them of any property interest protected by the Due Process Clause. Fed. Defs.' Br. at 24–26. Plaintiffs argue in response that

Federal Defendants' argument is "somewhat disingenuous." Pls' Resp. at 28. But Plaintiffs do not identify any actual deprivation of property by the United States. They again argue that "the Federal Government has given [allottees' water claims] to the Crow Indian Tribe." *Id*. at 29. But as has been discussed at length, the United States has not deeded any property to the Crow Tribe through the Compact or the Settlement Act. Even once the waivers become effective the United States will continue to hold the tribal water rights in trust, including those to satisfy allottee rights.

Plaintiffs also attempt to pre-emptively challenge the process that will be established in the tribal water code by arguing that it "is outside of the Federal Government's jurisdiction." Pls.' Resp. at 29. But the Settlement Act provides for Secretarial review of all tribal water code provisions affecting the rights of allottees. § 407(f)(3). Further, after exhausting remedies under tribal law, allottees may appeal to the Secretary or initiate an action against the United States. Settlement Act § 407(d)(6), (f)(2)(E). Until the tribal process has been established and exhausted, allottees cannot show that that system deprives them of any property, let alone deprives them of property without due process. Count III should thus be dismissed.

C. Count II fails to state a claim: The United States had no fiduciary duty to provide attorneys to individual allottees under these facts.

Plaintiffs attempt to support this claim by broadening it, arguing that it includes wide-ranging allegations of asset mismanagement separate from their claims regarding provision of counsel. Pls.' Resp. at 30. This is not apparent from the face of the Complaint, where Count II focuses on representation of Plaintiffs by counsel and obtaining their consent as to the Compact, and specifically invokes only the alleged right to counsel in its title. Amd. Compl. p. 36.

Despite their attempts to broaden their claim, Plaintiffs have still not adequately pled any breach of trust claim. As discussed in Federal Defendants' opening brief, Plaintiffs must identify positive law imposing the obligations they claim the United States, as trustee, has violated. Fed. Defs' Br. at 26–30. Yet Plaintiffs' Response does not identify any positive law imposing such obligations on the United States. Pls.' Resp. at 29-31.

Plaintiffs' Response propounds only the general proposition that the United States cannot <u>improvidently</u> alienate allotted trust land. *See* Pls.' Resp. at 30 (citing *United States v. Mitchell*, 463 U.S. 206 (1983)). But

Federal Defendants have demonstrated as a matter of law that they have not "alienated Allottees' *Winters* water rights and deeded them to the Crow Indian Tribe." As discussed above, the Settlement Act flatly contradicts such allegations. Like the federal Indian reserved water rights, the United States holds in trust the settlement tribal water rights for the use and benefit of the Tribe and allottees. Settlement Act § 407(c). And asset substitutions made in good faith, like this one, are entirely compatible with the United States' trust obligations and are not tantamount to improvident alienations of trust property. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). Accordingly, Count II should be dismissed for failure to state a claim.

D. Counts I, V, and VI do not even attempt to state a claim, but instead merely request relief.

Plaintiffs characterize Federal Defendants' arguments against these claims as an "uber technical argument[]" and note that a complaint should not be dismissed for an "imperfect statement of the legal theory supporting the claim asserted." Pls.' Resp. at 32 (citations omitted). Federal Defendants' theory is not technical and can be summarized in one sentence: Counts I, V, and VI do not allege any claim, imperfect or not. As Plaintiffs concede, at least Count I does not "alleg[e] a claim per se." *Id.* at 31. It is not clear why

Plaintiffs are attempting to defend these counts, which merely request relief that is largely redundant of their separate Request for Relief. Regardless, the counts do not purport to state any claim and should be dismissed.

CONCLUSION

The United States respectfully requests that this Court enter judgment on the pleadings and dismiss Plaintiffs' Complaint.

Dated and respectfully submitted: April 24, 2015.

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The body of this brief consists of 3169 words, meeting the 3250 word limit imposed by Local Rule 7.1(d)(2)(A).

*/s/ Ty Bair*____________________
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