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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FLATHEAD JOINT BOARD OF CONTROL; FLATHEAD IRRIGATION DISTRICT,

Plaintiffs,

v.

JEWELL et al.,

Defendants.

Case No. 9:14-cv-00088-DLC

DEFENDANTS MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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1904 Act	Act of April 23, 1904, 33 Stat. 302
1908 Act	Act of May 29, 1908, 35 Stat. 441
1948 Act	Act of May 25, 1948, 62 Stat. 269
APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
CME	Cooperative Management Entity
CME Agreement	Cooperative Agreement Between the Flathead Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts, a Subdivision of Local Government Under Montana Law, and the Confederated Salish and Kootenai Tribes of the Flathead Nation, A Sovereign Tribal Government
Confederated Tribes	Confederated Salish and Kootenai Tribes
FIIP	Flathead Indian Irrigation Project
FJBC	Flathead Joint Board of Control
Interior	United States Department of the Interior
IRA	Indian Reorganization Act
Project	Flathead Indian Irrigation Project
Self-Determination Act	Indian Self-Determination and Education Assistance Act
Transfer Agreement	Agreement Between the United States of America Department of the Interior and the Confederated Salish and Kootenai Tribes of the Flathead Nation and the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts Acting Through a Cooperative Management Entity to Manage and Operate the Flathead Indian Irrigation Project

INTRODUCTION

Plaintiffs, Flathead Joint Board of Control (FJBC) and Flathead Irrigation District (FID), challenge the Bureau of Indian Affairs' (BIA) decision to reassume management and operation of the Flathead Indian Irrigation Project (FIIP or Project) in the spring of 2014. Plaintiffs also challenge the BIA's decisions to restore surplus lands on the Flathead Indian Reservation to the Confederated Salish and Kootenai Tribes (Confederated Tribes), and allege mismanagement of the Power Division of the FIIP. Plaintiffs seek declaratory relief compelling BIA to transfer responsibility for the operation and maintenance of the FIIP to Plaintiffs, and injunctive relief restraining BIA from reassuming control of the FIIP in the future. Plaintiffs also seek a declaration that BIA has acted unlawfully in restoring surplus lands to the Confederated Tribes and by allowing the Power Division to be operated in contravention of federal law. Plaintiffs ask this Court to enjoin both the future restoration of surplus lands by BIA and the continued mismanagement of the Power Division.

Historically, the BIA operated the FIIP pursuant to Congress' 1908 command that it do so until construction payments were made for the "major part of the unallotted lands irrigable" by the FIIP. Construction costs were repaid in 2004, and in 2010 an agreement was signed between the FJBC, the Confederated Tribes, and the Department of Interior (Interior) transferring operation and

maintenance of the FIIP to a Cooperative Management Entity (CME) composed of representatives of the FJBC and the Confederated Tribes. *See* ECF No. 28-2 (Transfer Agreement). From 2010 to 2013, the CME managed and operated the FIIP.[1] In December 2013, the FJBC dissolved and was unable to reconstitute itself prior to the onset of the 2014 irrigation season. As a result, in March 2014 the BIA reassumed control of the FIIP pursuant to the emergency reassumption provision of the Transfer Agreement.

This Court lacks subject matter jurisdiction over Plaintiffs' claims related to the transfer of the FIIP because the Secretary of the Interior's (Secretary) decision to reassume control of the FIIP was within her discretion. Further, Plaintiffs' have failed to state a claim for which relief may be granted. Pursuant to the Act of May 29, 1908, 35 Stat. 441, 450 (1908 Act), Interior transferred management and operation to the FJBC and Confederated Tribes in 2010. After the FJBC dissolved in 2013, the BIA reassumed control of the FIIP under the Transfer Agreement to protect a federal asset, the FIIP, and to fulfill its trust obligations to the Confederated Tribes. Nothing in the 1908 Act or the Reclamation Act, require otherwise.

[1] The CME was created by a separate agreement entered into by the Confederated Tribes and the FJBC, and approved by the Montana, Attorney General. *See* ECF No. 28-2, ¶ 1(e); Ex. 1 (Cooperative Agreement between FJBC and the Confederated Tribes) (CME Agreement).

Regarding Plaintiffs' other claims, the BIA has previously restored surplus lands to tribal ownership of the Confederated Tribes under the Indian Reorganization Act (IRA), but not since 1938. Regarding the Power Division, in 1988 the BIA entered into a contract under the Indian Self-Determination and Education Assistance Act (Self-Determination Act) with the Confederated Tribes for operation of the Power Division, which continues to this day. The Power Division operates consistent with, and pursuant to, federal law.

Plaintiffs lack Article III standing for their bare allegations that the BIA has violated the IRA, 25 U.S.C. § 463(a) (2006), the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, and Section 2 of the Act of May 25, 1948, 62 Stat. 269, therefore the Court lacks jurisdiction. In addition, these claims contest actions that exceed the six-year statute of limitations, Plaintiffs have failed to exhaust administrative remedies, Plaintiffs have failed to state claims for which relief may be granted, and Plaintiffs lack statutory standing.

PROCEDURAL BACKGROUND

Plaintiff FID's original complaint sought declaratory and injunctive relief, including a declaration that Defendants had refused to transfer the authority to operate and manage the Project. Compl. ¶ 66 (ECF No. 1). FID alleged that the CME lacked proportional representation and that BIA's reassumption of control of the Project in 2014 violated the Act of 1908. *Id.* ¶¶ 9-24. Plaintiff FID asked the

Court to create a new entity to operate and manage the Project and that it give the FID permanent majority control of that entity. *Id.* ¶ 66. Plaintiff FID also sought an injunction prohibiting federal takeover of the Project. *Id.* ¶ 68.

After Defendants moved for a more definite statement (ECF No. 7), Plaintiffs, FJBC and FID, amended the complaint (ECF No. 14). Plaintiffs alleged that BIA unlawfully reassumed of control of the FIIP. *Id.* ¶¶ 10, 17, 44, 81-82. Plaintiffs also added new claims alleging that (1) the BIA violated the IRA by taking certain lands into trust for the Confederated Tribes, *id.* ¶ 70, (2) that the Power Division has been unlawfully operated by the Confederated Tribes, *id.* ¶ 71, (3) that the BIA has operated the FIIP in violation of guidelines and regulations, *id.* ¶¶ 72-75, and (4) that funds have been improperly expended by the FIIP, *id.* ¶¶ 76-79.

FACTUAL AND LEGAL BACKGROUND

I. The Project

The Flathead Reservation was set aside for tribal use by the Treaty of Hell Gate, 12 Stat. 975 (1855). The Confederated Tribes "ceded to the United States a vast area of land, located within the present borders of the States of Montana and Idaho, theretofore held by aboriginal title." *Confederated Salish & Kootenai Tribes of Flathead Reservation v. United States*, 437 F.2d 458, 472 (Ct. Cl. 1971). The FIIP is an irrigation project on the Flathead Reservation presently managed by

the BIA. *Flathead Joint Bd. of Control v. United States*, 30 Fed. Cl. 287, 290 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995) (per curiam); Am. Compl. ¶ 21. The BIA previously operated the irrigation division of the Project from 1910 to 2010. *Flathead*, 30 Fed. Cl. at 290; ECF No. 28-1 (Ltr. from Nw. Regional Dir., BIA, to W. Blevins, Chairman, Flathead Irrigation District, et al. Aug. 7, 2013). In March 2010, the FJBC and Confederated Tribes entered into the CME Agreement, Ex.1, creating the CME to jointly manage and operate the FIIP. Soon thereafter, the Confederated Tribes, FJBC, and Interior entered into the Transfer Agreement which permitted the CME to assume management and operational control of the FIIP. ECF No. 28-2.

The parties entered into the Transfer Agreement under the Act of April 23, 1904, 33 Stat. 302 (1904 Act), as amended by the 1908 Act. ECF No. 28-2 at 3. The 1904 Act, directed that the lands on the Flathead Reservation be allotted to all persons with tribal rights and that the remaining lands be opened to settlement. 33 Stat. at 303-04. Congress further directed that proceeds received from the sale of land be used to construct irrigation works. *Id.* at 305.

In 1908, "Congress amended the 1904 Act to require payment for the construction and operating costs of the irrigation system to be made through assessments to non-Indian land purchasers." *Flathead*, 30 Fed. Cl. at 290 (citation omitted). Congress also modified how proceeds from the sale of reservation land

would be expended and prioritized the construction of irrigation works for all irrigable lands. 35 Stat. 444, 448-50. The "transfer" provision of the 1908 Act reads as follows:

> When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the *management and operation* of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense *under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior*.

Id. at 450 (emphasis added).

In 1926, Congress appropriated funds for continued construction of a power plant at the FIIP, and for the construction and maintenance of the irrigation works. 44 Stat. 453, 465. However, as a condition precedent Congress required that irrigation districts be formed under state law and that those districts execute repayment contracts with the United States for previously unpaid construction costs. *Flathead*, 30 Fed. Cl. at 290. To help defray costs, Congress directed that the net revenues from the power plant be paid to the United States to liquidate construction, operation, and maintenance costs of the power and irrigation systems. 35 Stat. 453, 465; *see also Flathead Irrigation Project, Montana: Hearings on H.R. 658 Before the Subcomm. on Indian Affairs of the House Comm. on Public Lands*, 18th Cong. 12, 23 (1947) (Memorandum from D.A. Dellwo, Secretary, Flathead Irrigation District, to Rep. Mansfield of Montana).

The Power Division proved to be economically successful, however, the amounts owed from the irrigators for the FIIP remained unpaid. *Hearings on H.R. 658*, 18th Cong. at 25 (statement of G.M. Tunison, counsel, Confederated Tribes). In 1948, by statute, Congress created a repayment schedule to pay back all then-existing construction debt over a 50 year period. *Flathead*, 30 Fed. Cl. at 290-91 (citation omitted); 62 Stat. 269 (Act of 1948). Similar to the Act of 1926, the Act of 1948 "provided that the annual installments initially be paid from net power revenues, by an assessment against lands chargeable with the construction costs." *Flathead*, 30 Fed. Cl. at 291 (footnote omitted) (citation omitted).

The construction costs of the FIIP were repaid by 2004. Am. Compl. ¶ 15; ECF No. 28-1 at 1. After several years of negotiation between the BIA, FJBC, and the Confederated Tribes, the parties entered into the Transfer Agreement on April 7, 2010. Am. Compl. ¶ 16; ECF No. 28-1 at 1-2; *see also* ECF No. 28-2 at 26. The purpose of the Transfer Agreement was "to fulfill the requirements [of] the 1908 Act by enabling the owners of the lands irrigated by the Project, acting through the [CME], to manage and operate the Project." ECF No. 28-2 at 7. In December 2013, two of the three irrigation districts voted to withdraw from the FJBC. Am. Compl. ¶ 18; ECF No. 28-3 ¶¶ 4-6. The irrigation districts assert that the dissolution of the FJBC rendered the Transfer Agreement and the CME null and void. Am. Compl. ¶ 19; ECF No. 28-4 at 1. The Commissioners of the two

withdrawing districts requested that BIA reassume Project operations. ECF No. 28-4 at 1. In January 2014, BIA invoked the emergency reassumption provision of the Transfer Agreement. ECF No. 28-5 at 1 (Ltr. from Nw. Regional Dir., BIA, to R. Trahan, Chairman, Confederated Salish and Kootenai Tribes, et al. Jan. 15, 2014). However, BIA limited its reassumption to oversight of the CME. ECF No. 28-5 at 1-2. Former and present members of the FJBC, the CME, and the irrigation districts concurred with BIA's reassumption of control, recognizing that the BIA "may have to operate the project throughout the 2014 irrigation season." ECF No. 28-6 at 2 (Ltr. from B. Cole, former Chairman, Joint Board, et. al., to S. Jewell, Sec' of the Interior, et. al., Jan. 13, 2014).

On January 24, 2014, the BIA, the Confederated Tribes, and the three irrigation districts met. ECF No. 28-3 ¶ 7; ECF No. 28-7 at 1 (Ltr. from Nw. Regional Dir., BIA, to Superintendent, Flathead Agency, Feb. 3, 2014). BIA proposed reconstituting the CME and informed the parties that they must agree timely or BIA would be compelled to reassume operation and management of the FIIP for the impending 2014 season. ECF No. 29-3 ¶ 7; ECF No. 28-7 at 1. The FID rejected the proposal, insisting that BIA agree to a new representative management structure for the CME that would have significantly diminished the Confederated Tribes' role. *See* ECF Nos. 14-8, 14-9, 14-10. On March 11, 2014, the BIA notified the relevant parties that it would reassume operation and

management of the Project to protect a federal asset, the FIIP, as well as assets held in trust by the BIA for the Confederated Tribes. Am. Compl. ¶ 20; ECF No. 28-3 ¶ 7; ECF No. 28-8 at 4-5 (Ltr. from Nw. Regional Dir., BIA, to R. Trahan, Chairman, Confederated Salish and Kootenai Tribes, et. al., Mar. 11, 2014).

II. Land-Into-Trust

With passage of the IRA, *see* 48 Stat. 984, Congress ended the allotment policy and turned to principles of tribal self-determination. *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 255 (1992). 25 U.S.C. § 463(a) provides for the restoration of unallotted federal surplus lands to tribal ownership. Under this statute, the Secretary has restored surplus lands to the Confederated Tribes. *See* Order of Restoration, Flathead Reservation, Montana, Apr. 21, 1936, 1 Fed. Reg. 666 (Jun. 26, 1936); Order of Restoration, Flathead Reservation, Montana, Dec. 11, 1937, 3 Fed. Reg. 5 (Jan. 4, 1938). Plaintiffs allege that BIA is violating 25 U.S.C. § 463(a) by taking irrigated land into trust. Am. Compl. ¶¶ 70, 85. Plaintiffs do not identify when these violations are alleged to have occurred, nor do they identify the surplus lands that were allegedly restored.

III. Power Division

In 1986, the Confederated Tribes entered into a contract to operate and manage the Power Division pursuant to the Self-Determination Act, 25 U.S.C. §§

450-458ddd2. *Flathead*, 30 Fed. Cl. at 291. "Pursuant to the Act, the terms of [the] contract include specific provisions designed to ensure that the tribes operate and maintain the power division in accordance with applicable federal laws and regulations." *Id.* (citing 25 U.S.C. § 450m and Contract between the BIA and the Confederated Tribes (October 1, 1991)). Plaintiffs provide no facts supporting their allegations.

STANDARD OF REVIEW

I. Rule 12(b)(1) Subject-Matter Jurisdiction

A Rule 12(b)(1) motion challenges subject matter jurisdiction and may be either facial or factual. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). A facial 12(b)(1) motion involves an inquiry confined to the allegations in the complaint, whereas a factual 12(b)(1) motion permits the court to look beyond the complaint to extrinsic evidence. *Id.* Similarly, Federal Rule of Civil Procedure 12(h)(3) requires dismissal "[i]f the court determines at any time that it lacks subject-matter jurisdiction."

a. Standing

"A plaintiff must demonstrate" standing under Article III of the Constitution "[t]o invoke the jurisdiction of the federal courts . . ." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 645 (9th Cir. 2011) (citation omitted). The three requirements of standing are: (1) "the plaintiff must have suffered an 'injury in

fact[;]'" (2) "there must be a causal connection between the injury and the conduct complained of[, i.e.,] the injury has to be 'fairly trace[able] to the challenged action of the defendant[;]" and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). "Standing is substantially more difficult to establish where the challenged agency action neither requires nor forbids any action on the part of the complaining party." *L.A. Haven Hospice*, 638 F.3d at 655 (citation omitted).

II. Rule 12(b)(6) Failure to State a Claim Upon Which Relief Can be Granted

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of an action for "failure to state a claim upon which relief can be granted." A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claim alleged. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Under Rule 12(b)(6), a complaint should be dismissed for failure to state a claim whenever "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (citation omitted).

To be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable

the opposing party to defend itself effectively. Additionally, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Mere "conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (internal quotation omitted). "The pleading standard set by Rule 8 of the Federal Rules of Civil Procedure 'does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Kelley v. Corr. Corp. of Am.*, 750 F. Supp. 2d 1132, 1137 (E.D. Cal. 2010) (citation omitted) (internal quotation marks omitted).

a. Statutory Standing

Statutory standing concerns whether Congress intended a plaintiff to recover for the harms it alleges. *City of L.A. v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1056 (C.D. Cal. 2014). "First, it is 'presume[d] that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interest protected by the law invoked' . . . Second, it is also presumed that a statutory cause of action 'is limited to plaintiffs whose injuries are proximately caused by violations of the statute.'" *Id.* (quoting *Lexmark Intern'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388-90 (2014)). The zone-of-interest test for statutory standing

"'forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed' that Congress authorized the plaintiff to sue." *Lexmark*, 134 S.Ct. at 1389 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012)) (internal quotation marks omitted). The "[p]roximate cause analysis is controlled by the nature of the statutory cause of action . . . [T]he proximate-cause requirement generally bars suits for alleged harm that is too remote from the defendant's unlawful conduct." *Id.* at 1390.

III. Statute of Limitations

Claims against the United States under the Administrative Procedure Act (APA) are subject to a six-year statute of limitations. *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (citations omitted). A claim accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action, although actual knowledge is not necessary. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990).

IV. Summary Judgment

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate where there are no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "[T]he moving party['s burden]

may be discharged by 'showing' . . . there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

V. The Administrative Procedure Act[2]

a. 5 U.S.C. §§ 702, 704

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. A party "claiming a right to sue must identify some 'agency action' that affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled. The meaning of 'agency action' for purposes of § 702 is set forth in 5 U.S.C. § 551(13) . . . which defines the term as 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act' . . . Second, the party seeking review under § 702 must show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action

[2] Plaintiffs cite to the Declaratory Judgment Act, 28 U.S.C. § 2201 (2006) and *Ex parte Young*, 209 U.S. 123 (1908) as bases for jurisdiction. Am. Compl. ¶ 11. The Declaratory Judgment Act is not a waiver of sovereign immunity but simply grants another remedy where jurisdiction already exists. *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 280 (9th Cir. 1988) (citations omitted). Since 1976, the federal courts have looked to the APA, 5 U.S.C. § 702 (2006), to serve the purposes of the *Ex parte Young* doctrine. *Ex parte Young* is not a basis for jurisdiction. *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1028 (E.D. Cal. 2012) (citations omitted).

'within the meaning of a relevant statute.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

Under 5 U.S.C. § 704, "for an administrative agency action to be considered final, (1) the action should mark the consummation of the agency's decision-making process; and (2) the action should be one by which rights or obligations have been determined . . . to flow . . ." *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat. Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001) (citation omitted) (internal quotation marks omitted). However, where "Congress commits to an agency discretionary authority to perform an act without prescribing meaningful governing standards, that exercise of discretion is placed beyond review by section 701(a)(2) of the [APA]." *Black Dog Outfitters, Inc. v. State of Idaho Outfitters & Guides Licensing Bd.*, 790 F. Supp. 2d 1248, 1256 (D. Idaho 2011) (citation omitted).

b. Exhaustion of Administrative Remedies

Parties are required "to pursue all administrative remedies prior to judicial review in order to allow agencies to develop a complete factual record and to apply their expertise and discretion." *White Mtn. Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) (citation omitted). "In addition, the doctrine insures that a court will have before it a factual record to review, not merely an administrative decision to contradict." *Id.* (citation omitted)

"No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department [of the Interior], shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704 . . ." 25 C.F.R. § 2.6(a) (2013). A decision made by a lower-level BIA official must be appealed to the BIA Area Director; the Director's decision may be appealed directly to the Interior Board of Indian Appeals. *See White Mtn. Apache Tribe*, 840 F.2d at 677. The bar to judicial review lies even when the deadline for seeking administrative review has expired. *See Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1394 (9th Cir. 1993).

c. 5 U.S.C. § 706(1)

Where a claim seeks to "'compel agency action unlawfully withheld or unreasonably delayed[,]'" it "can only proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*" and that "no other adequate remedy" is available. *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1019 (9th Cir. 2007) (emphasis in the original) (citations omitted). "The principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004). A failure to act constitutes agency action challengeable under 5 U.S.C.

§ 706(1) only if the required action constitutes a "rule, order, license, sanction, relief or the equivalent[s] . . . thereof," as defined by the APA. *Id.* at 62-63. (citation omitted)

d. 5 U.S.C. § 706(2)(A)

Final agency action may not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). This is a very narrow and highly deferential standard under which the agencies' action is presumed valid. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

In the area of Indian affairs, the court "must assume that [Interior] has been given reasonable power to discharge effectively its broad responsibilit[y.]" *Parravano v. Masten*, 70 F.3d 539, 544 (9th Cir. 1995) (citations omitted). "[C]onsiderable weight [is] accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (footnote omitted). Therefore, although the court reviews questions of statutory interpretation de novo, it gives substantial deference to the Secretary's interpretation of applicable statutes in reviewing her actions especially where tribal rights are at issue. *Parravano*, 70 F.3d at 544 (citation omitted).

ARGUMENT

I. Plaintiffs' Claims Related to the Turnover of the FIIP Should be Dismissed for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief May be Granted or, in the Alternative, Summary Judgment Should be Entered for Defendants

a. Lack of Subject Matter Jurisdiction

This Court lacks subject matter jurisdiction over Plaintiffs' claim regarding the transfer of operation and management of the FIIP because the Secretary's reassumption of control of the FIIP was discretionary and not reviewable under the APA. 5 U.S.C. § 701(a)(2) ("This chapter applies . . . except to the extent that . . . agency action is committed to agency discretion by law."). Plaintiffs have not asserted a cause of action related to the Secretary's decision to enter into the Transfer Agreement in 2010. They instead ask this Court to review the Secretary's decision to reassume control of the FIIP in 2014 which is indisputably authorized by the Transfer Agreement.

The Secretary's decision to invoke the Transfer Agreement's reassumption provision is founded upon the unambiguous terms of the Agreement itself and not upon statute or regulation, and is, therefore, within her discretion. The Transfer Agreement provides that "[t]he Secretary may determine that an emergency reassumption of the operation and management . . . of the Project is necessary"; "If the Secretary determines that an emergency reassumption is necessary, the

Secretary shall direct the BIA to assume control of the operation and management of all or part of the Project." ECF No. 28-2 ¶ 6(b)(1) & (2). That decision by the Secretary is not required by the Act of 1908. It, therefore, cannot be reviewed by this Court under the APA because it is not agency action under 5 U.S.C. §§ 551(13) & 702, and Congress has not provided any governing standards for this Court to do so. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The Act of 1908 provided only that the irrigations works would transfer to the non-Indian irrigators "under such form of organization and under such rules and regulations as may be acceptable to the Secretary . . ." 35 Stat. 450. The form of organization, rules, and regulations, are found the 2010 Transfer Agreement—an agreement the FJBC entered.[3] Congress has not given this Court jurisdiction under the APA to review the Secretary's exercise of discretion flowing from the Transfer Agreement itself.

Additionally, Plaintiffs lack standing. Plaintiffs have not suffered an injury in fact. Their self-dissolution precipitated their alleged injury.[4] Plaintiffs created

[3] The FJBC agreed that the purpose of the Transfer Agreement was "to fulfill the requirements of the 1908 Act by enabling the owners of the lands irrigated by the Project, acting through the CME, to manage and operate the Project." ECF No. 28-2 at 7.

[4] In the Amended Complaint, Plaintiffs assert that the Transfer Agreement was voided by the FJBC's unilateral decision to dissolve itself. Am. Compl. ¶ 19. However, by its express terms the Transfer Agreement "remain[s] in effect until

the crisis, but the Secretary's decision to act to protect federal and tribal assets cannot reasonably be said to have injured Plaintiffs in the face of their own acts. Moreover, the injury will not be redressed by this Court imposing a new Transfer Agreement on the parties. *See infra* pp. 22-23. Any new Transfer Agreement must satisfy the requirements of the 1908 Act, which makes clear that transfer can only occur if there is a "form of organization" and "rules and regulations" that are acceptable to the Secretary. The BIA is open to negotiating a new Transfer Agreement that meets these statutory requirements.

b. Failure to State a Claim Upon Which Relief May be Granted

Plaintiffs, in their claim to compel transfer of the FIIP, have failed to plead under 5 U.S.C. § 706(1) any discrete agency action that the Secretary was required, or failed, to take. The Act of 1908 requires the Secretary to pass management and operations of the Project to the owners of the irrigable lands, to be maintained at their expense under such form of organization and under such rules and regulations

terminated by written agreement of all signatory parties." ECF No. 28-2 at 18. Additionally, the CME Agreement requires written consent of the parties for termination and one year's notice for withdrawal. Ex. 1 at 11. Further, even assuming for purposes of argument that the Transfer Agreement was void, under the Act of 1908 the Secretary acted within her discretion to protect a federal asset, the FIIP, and assets of the Confederated Tribes that BIA holds in trust.

acceptable to the Secretary. 35 Stat. 448. The Secretary passed the management and operation to the FJBC and Confederated Tribes in 2010.

The Transfer Agreement contained an emergency provision permitting the BIA to reassume management and operations under certain circumstances. BIA recognized, in early 2014, that dissolution of the FJBC threatened federal interests—the FIIP is a federal asset and serves Indian trust lands and fisheries[5]—and so the BIA took action under the Transfer Agreement. That action was not the equivalent of a "rule, order, license, sanction, [or] relief[.]" 5 U.S.C. § 551(13). Rather, it was an option anticipated by all parties entering into the Transfer Agreement. Therefore, under *S. Utah Wilderness Alliance*, 542 U.S. at 62-63, the Secretary's decision to reassume control was not the "specific, unequivocal command[]" from Congress required under 5 U.S.C. § 706(1).

Plaintiffs also request that this Court draft new terms of the Transfer Agreement, terms not "acceptable to the Secretary." Act of 1908. Similar to the discussion above, this Court can only compel agency action unlawfully withheld. Plaintiffs seek here to impose terms it did not seek in the 2010 Transfer Agreement or could not obtain in negotiations. A claim under 5 U.S.C. § 706(1) is not the proper process for negotiating terms to a contract. To impose terms as Plaintiffs request would be "undue judicial interference with [Interior's] lawful discretion"

[5] *Joint Bd. of Control etc. v. United States*, 862 F.2d 195, 196-97 (9th Cir. 1988).

and entangle the Court in abstract policy decisions. *S. Utah Wilderness Alliance*, 542 U.S. at 66. Plaintiffs' allegation that the Act of 1908, or Montana statutes require proportional representation on the CME is entirely unsupported. Indeed, Montana's Attorney General approved the CME Agreement.[6] Ex. 1 at 13. Therefore, Plaintiffs' claim related to the transfer of the FIIP should be dismissed for failure to state a claim.[7]

II. Plaintiffs' Claims Related to 25 U.S.C. § 463(a) Should be Dismissed for Lack of Jurisdiction, For Exceeding the Statute of Limitations, Failure to Exhaust Administrative Remedies, and Failure to State a Claim Upon Which Relief May be Granted or, in the Alternative, Summary Judgment Should be Entered for Defendants

Plaintiffs alleged that the Secretary unlawfully took land into trust for the Confederated Tribes in violation of 25 U.S.C. § 463(a). Am. Compl. ¶¶ 70, 85-86, 93. Section 463(a) provides for the *restoration* of unallotted federal *surplus* lands to tribal ownership. It does not address acquisition of land by the Secretary to be taken *into trust* for Indians under 25 U.S.C. § 465. *See also* Land Acquisition, 25

[6] Plaintiffs also plead that the Reclamation Act informs the reading of the Act of 1908. Am. Compl. ¶¶ 25-26. Nothing in the Reclamation Act informs the Secretary's lawful (and, given the circumstances, necessary) actions under the Transfer Agreement. The FIIP is not a Bureau of Reclamation Project.

[7] Plaintiffs make unspecified allegations regarding misuse of funds by the BIA after reassuming control of the FIIP. Am. Compl. ¶¶ 76-77. These claims fail to identify a legal basis or provide factual information putting Defendants on notice of the nature of the claim. These generic "the-defendant-unlawfully-harmed-me" allegations, *Kelley*, 750 F. Supp. 2d at 1137, do not plausibly suggest Plaintiffs are entitled to relief.

C.F.R. pt. 151 (2014). 25 U.S.C. § 465 is a separate and distinct statutory authority from Section 463(a).

This Court lacks jurisdiction over this claim because Plaintiffs lack standing. Plaintiffs have not alleged injury in fact, a causal connection, or redressibility related to any actions by the Secretary by way of restoring surplus lands to the Confederated Tribes. In addition, Plaintiffs failed to plead the restorations of any surplus lands within the six year statute of limitations. 28 U.S.C. § 2401(a).

Plaintiffs have not exhausted administrative remedies under 25 C.F.R. § 2.6 and, therefore, any decision would not be final agency action subject to review. *White Mtn. Apache Tribe*, 840 F.2d at 677. Finally, Plaintiffs have not identified a discrete agency action which has been unlawfully withheld or a final agency action that they seek to challenge under the APA with respect to surplus land restoration. 5 U.S.C. §§ 706(1) & (2)(A).[8] Plaintiffs' claim, instead, is a general "the-defendant-unlawfully-harmed-me[,]" allegation, *Kelley*, 750 F. Supp. 2d at 1137, that does not plausibly suggest they are entitled to relief. Plaintiffs request for declaratory and injunctive relief regarding the restoration of surplus lands should

[8] Plaintiffs are not specific in the Amended Complaint regarding the provision of the APA they seek review under. Although the relief requested on Plaintiffs' claim related to the transfer of the FIIP fairly indicates their claim falls under 5 U.S.C. § 706(1), Plaintiffs' other two claims are ambiguous as to whether they seek to compel agency action, 5 U.S.C. § 706(1), or to have agency action set aside, 5 U.S.C. § 706(2)(A).

be dismissed or, in the alternative, summary judgment should be entered for Defendants.

III. Plaintiffs' Claims Related to the Self-Determination Act Should be Dismissed for Lack of Jurisdiction, For Exceeding the Statute of Limitations, Failure to Exhaust Administrative Remedies, and Failure to State a Claim Upon Which Relief May be Granted or, in the Alternative, Summary Judgment Should be Entered for Defendants

Plaintiffs' claim regarding the Self-Determination Act should be dismissed for lack of jurisdiction. Plaintiffs have not alleged facts sufficient to demonstrate Article III standing nor have they alleged injury by the Confederated Tribes' operation of the Power Division, nor have they alleged a causal connection between the Confederated Tribes' operation of the Power Division and any harm. Further, redressibility for this claim is entirely speculative given Plaintiffs' vague and unsupported allegations. In addition, Plaintiffs have failed to plead facts demonstrating that this claim accrued within the six-year statute of limitations. 28 U.S.C. § 2401(a). Indeed, Plaintiffs assert conduct from the "early 1990's." Am. Compl. ¶ 89.

Plaintiffs have also failed to state a claim upon which relief may be granted. Plaintiffs failed to exhausted administrative remedies under 25 C.F.R. § 2.6 and, therefore, any decision would not be final agency action subject to review. *White Mtn. Apache Tribe*, 840 F.2d at 677.

Plaintiffs also lack statutory standing. Nothing in the Self-Determination Act demonstrates that Congress intended Plaintiffs to be within the zone of interest protected by the Act. Congress declared its commitment "to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes . . . through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). Further, the injuries Congress was concerned with under the Self Determination Act are not the remote injuries Plaintiffs allege, but with self-determination contracts with tribes and tribal organizations. *See e.g.*, Contract Disputes and Claims, 25 U.S.C. § 450m-1.[9]

Under the APA, Plaintiffs have not identified a discrete agency action that has been unlawfully withheld or a final agency action to challenge. 5 U.S.C. §§ 706(1) & (2)(A). Similar to their claims regarding 5 U.S.C § 463(a), *supra* pp. 23-25, Plaintiffs' Self-Determination Act claim is a general "the-defendant-

[9] Plaintiffs' attempt to relitigate this issue is barred by the doctrine of issue preclusion. *See* Ex. 2 (*Joint Bd. of Control v. United States*, No. CV 86-216-M-CCL, Opinion and Order (D. Mont. May 4, 1988)); *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 466 n. 6 (1982).

unlawfully-harmed-me[,]" allegation, *Kelley*, 750 F. Supp. 2d at 1137, that does not plausibly suggest they are entitled to relief.

In addition, Plaintiffs assert unspecified violations of the Act of 1948. Am. Compl. ¶¶ 88, 95. The purpose of the Act of 1948 was to adjust the repayment charges for the irrigations works. 62 Stat. 269. The principle adjustment was to use revenues from the Power Division to pay for the irrigation works because irrigation farming did not raise sufficient revenues to repay construction costs. *Hearings on H.R. 658*, 18th Cong. 25-26 (1947) (testimony of George M. Tunison, Counsel, Confederated Tribes). All parties agree that repayment was completed in 2004. The purposes of the Act of 1948 were met ten years ago when the construction costs of the irrigation works were liquidated, therefore, Plaintiffs have failed to state a claim under the APA.

Plaintiffs' request for declaration and injunctive relief related to BIA's Self-Determination contract with the Confederated Tribes to manage and operate the Power Division should be dismissed or, in the alternative, summary judgment should be entered for Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint or, in the alternative, enter summary judgment for Defendants.

Dated this 13th day of March, 2015.

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CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.1(d)(2)

I hereby certify that, pursuant to Local Rule 7.1(d)(2), the attached Motion to Dismiss or, in the Alternative for Summary Judgment is proportionately spaced, has a typeface of 14 points or more and contains 5764 words, excluding the caption, certificates of service and compliance, and tables of contents, authorities, and exhibits.

/s/ Stephen Finn
Stephen Finn, Trial Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I HERBY CERTIFY that, on March 13, 2015, I filed the foregoing electronically through the CM/ECF System, which caused parties to be served by electronic means.

/s/ Stephen Finn
Stephen Finn, Trial Attorney
United States Department of Justice