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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FLATHEAD JOINT BOARD OF CONTROL; FLATHEAD IRRIGATION DISTRICT, Plaintiffs, vs. SARAH "SALLY" JEWELL, Secretary of the Department of Interior, STANLEY SPEAKS, Portland Area Direct, Bureau of Indian Affairs, JOSEPH "BUD" MORAN, Superintendent, Flathead Agency, Bureau of Indian Affairs, DEPARTMENT OF INTERIOR, and BUREAU OF INDIAN AFFAIRS, Defendants.	Cause No. CV-14-88-M-DLC **PLAINTIFFS' RESPONSE BRIEF TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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INTRODUCTION

COME NOW the Plaintiffs, FLATHEAD JOINT BOARD OF CONTROL and the FLATHEAD IRRIGATION DISTRICT (collectively, "FJBC") and hereby respond to the Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6), or, in the Alternative, for Summary Judgment (collectively, the "Motion"). [ECF 55 and 56]. Per applicable law, the Motion must be denied because:

A. Defendant Bureau of Indian Affairs ("BIA") temporarily reassumed, and wrongfully continues to maintain control of the Flathead Irrigation Project ("FIP" or "Project") in violation of Congressional mandate and has failed to account for operation and maintenance assessment expenditures paid by irrigators. Counts One and Four of the Amended Complaint are proper;

B. Defendants have allowed restoration of surplus lands which are part of a reclamation project (FIP) in violation of 25 U.S.C. § 463 and § 3 of the Indian Reorganization Act of 1934 ("IRA"). Counts Two and Five of the Amended Complaint are proper;

C. Defendants have violated the Indian Self-Determination and Education Assistance Act by entering into an illegal P.L. 93-638 contract with the Confederated Salish and Kootenai Tribes ("CSKT") for the Project's power division, failed to account for and turnover net power revenues mandated to be used for, among other things, annual operation and maintenance costs of the irrigation system, thereby causing injury to the FJBC and the irrigators it represents. Counts Three and Six of the Amended Complaint are proper and viable; and

Accordingly, the Court must deny Defendants' Motion in its entirety.

STANDARDS OF REVIEW

I. Motions to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1) and (b)(6):

A complaint should not be dismissed for lack of subject matter jurisdiction if any ground for jurisdiction exists. *Jorsch v. LeBeau*, 449 F.Supp. 485,488 (N.D.Ill. 1978). Likewise, a motion to dismiss due to improper venue must demonstrate venue is not proper. Fed.R.Civ.P. 12(b)(3).

The purpose of a motion to dismiss for failure to state a claim is to test the statement of the claim for relief set forth in the complaint and should only be granted if it appears no relief can be granted under any set of facts proved consistent with the allegation. *Harris v. Mississippi Valley State University*, 899 F.Supp. 1561, 1566 (N.D. Miss. 1995). The court must assess the legal feasibility of the complaint as opposed to weighing the evidence intended to be offered. *Citibank, N.A. v. K-H Corp.*, 745 F.Supp. 899, 902 (S.D.N.Y. 1990). Such motion is not proper to resolve disputed facts or to decide the merits of the case. *Johnson v. Cullen*, 925 F.Supp. 244, 247 (D.Del. 1996). Rather, it should only be granted in limited circumstances. *Allen v. College of William & Mary*, 245 F.Supp.2d 777, 783 (E.D.Va. 2003). The complaint's allegations must be construed in a light most favorable to the plaintiff and the court must accept plaintiff's factual allegations as true and draw all reasonable inferences from them. *Irvin v. Borough*

of Darby, 937 F. Supp. 446, 450 (E.D. Pa. 1996). Here, grant of the Motion under Fed.R.Civ.P. 12(b)(1) or (b)(6) is not proper.

II. Summary Judgment:

Under Fed.R.Civ.P 56(c), the moving party bears the initial burden of demonstrating that no genuine issues of material fact exist and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rule 56(c) further anticipates that the parties have had sufficient time to conduct discovery to support their claims and defenses. Premature motions for summary judgment may be properly dealt with under Rule 56(d). *Id.* at 326[1]. Both parties' interests should be considered in a Rule 56(c) ruling. *Id.* at 328. A court should act with caution in granting summary judgment when there is reason to believe that the better course would be to proceed to a full trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Accordingly, summary judgment is not permissible as to any count of the Amended Complaint.

ARGUMENT

I. The FJBC's Claims Requesting an Order Requiring Turnover of the Flathead Irrigation Project ("FIP") to the Owners of the Irrigated Lands are Enforceable, as this Court Possesses Subject Matter Jurisdiction; Venue is Proper; the Amended Complaint States Viable Claims; and Summary Judgment is Precluded.

[1] Plaintiffs have attempted to confer with opposing parties regarding discovery. Fed.R.Civ.P. 26(f). Defendants refuse to confer.

A. The Court Possesses Subject Matter Jurisdiction as the Transfer Agreement is Void, or in the Alternative, Supports the Litigation.

In 1908, Congress mandated that the "management and operation" of the FIP "shall pass to the owners of the lands irrigated thereby" when the Project's construction charges had been paid. 35 Stat. 448. [ECF 14-3, § 9.] More particularly, the 1908 Amendment to the Flathead Allotment Act ("FAA") stated:

> When the payments required by this act have been made for the major part of the unallotted lands irrigable under any systems and subject to charges for such 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. (Emphasis added.) 35 Stat. 448.

The FAA Turnover provision anticipated the "Flathead Irrigation District, a Montana corporation, hereinafter called the district, will upon repayment to the United States of the project's cost, become the owner of it." *United States v, McIntire*, 101 F.2d 650, 652 (1939). Construction costs were fully paid in 2004. [ECF 14, ¶ 15.] and 71 Fed.Reg. No. 196, 59809 (Oct. 11, 2006.) Counts One and Four of the Amended Complaint simply ask the Court to enforce this Congressional mandate. [ECF 14.]

First, Defendants challenge Counts One and Four asserting a lack of subject matter jurisdiction and standing. [ECF 56, pp. 18-22.] The Motion must be denied

because: 1) the Transfer Agreement is void, accordingly the Secretary's reassumption of the FIP was not discretionary by law; 2) the FJBC and the approximately 2,500 irrigators (110,000 irrigable acres or 90% of the irrigable acres) it represents have suffered an injury as a result of the Defendants' failure to abide by Congressional mandate; and 3) in any event, any takeover was to be temporary in nature and does not nullify Congressional mandate requiring the FIP's turnover to the irrigated land owners.

This Court has the power to determine and declare the rights and legal relations between the parties. 28 U.S.C. § 2201. Federal question jurisdiction exists. 28 U.S.C. § 1331. Jurisdiction also exists under the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 702 and 706. Section 702 establishes the right of review:

> 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. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . .

Section 706 demonstrates the Counts are well within the scope of review:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
>
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law. . .

Defendants' rely upon the Transfer Agreement entered into between the United States of America Department of the Interior ("DOI"), the CSKT and the FJB to support their argument. [ECF 28-2]. The argument is flawed. The Transfer Agreement is a public contract, the execution of which was, based upon the existence of a cooperative management entity ("CME") to "jointly and cooperatively" manage and operate the FIP. [ECF 28-2 and 56-1]; *Cove Irr. Dist. v. American Surety Co. of New York*, 42 F.2d 957 (1930). See also: State-Tribal

Cooperative Agreements Act at MCA § 18-11-101 *et seq*. Its' purpose was to "fufill 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 28-2, p. 7.]

Defendants rely upon the Transfer Agreement to argue the BIA's reassumption was discretionary and therefore not reviewable. They are wrong because the Transfer Agreement is void:

1. The FJBC's involuntary dissolution and the defunct CME's dissolution voided the Transfer Agreement; and

2. The CME did not comply with Congressional mandate because the CSKT was grossly overrepresented and the irrigation districts were not represented in proportion to their respective acreages. [ECF 14, ¶¶ 18-19.]

The FJBC dissolved involuntarily. *Id.* Its dissolution rendered defunct and nullified the CME's existence which was necessary to implement the Transfer Agreement. [ECF 28-4.] The Transfer Agreement did not address the involuntarily dissolution of a party, nor did it provide a mechanism allowing any organization other than the FJBC and CSKT to manage the FIP. *Id.* As such, it is void.

Further, it is void because it lacked proportional representation and exceeded the authority under which it arose. [ECF 14, ¶ 17.] Irrigation district governments

are based upon an acreage basis. In Montana, an irrigator has one vote per acre owned. § 85-7-1710(2), MCA. [ECF 14, ¶ 30.] As such, the three (3) irrigation districts have different levels of representation based upon acreage. *Id.* ¶ 31. Montana's 1972 Constitution provides various fundamental rights to the public (including tax-paying irrigators), including but not limited to, the right to participate in government prior to decision-making, to know what the government is doing, and the right to have their rights balanced by their privacy interests. Mont. Const. Art. II, §§§ 8, 9, and 10. According to the 2010 United States census, the reservation population was 28,359 comprised of approximately 4,000 to 5,000 tribal members. Approximately 90% of the FIP irrigated lands is fee owned. [ECF 14, ¶ 39.] However, under the CME which was created under statutory authority in conjunction with the Transfer Agreement, the CSKT was grossly overrepresented in proportion to their respective acreages (eight member board with a 50/50 appointment). [ECF 56-1, IIA.]

Regulations and corresponding contracts issued under those regulations which exceed statutory authority are void. *Osborne et al v. United States*, 145 F.2d 892, 895 (9th Cir. 1944). This case is analogous to multi-member districts which are represented by more legislators than voters in single member districts. Courts have deemed the validity of multi-member district systems judiciable and subject

to challenge where the circumstances "[o]perate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb v. Chavis*, 403 U.S. 125, 142-143, 91 S.Ct. 1858, 1868-1869 (1971). As such, the lack of proportional representation is properly reviewable. The FID proposed the creation of the New Management Entity consisting of thirteen members: eight appointed by the FID, two by the Mission Irrigation District ("MID"), one by Jocko Valley Irrigation District ("JCVID") and two by the CSKT which approximately represents the amount of acreage represented by each entity. [ECF-14 at ¶ 60 and ECF-9.] It was rejected.

While the Transfer Agreement contemplated the possibility of an emergency reassumption, any such reassumption was to be temporary in nature. [ECF 28-2, pp. 11.] Even if it was enforceable, it also provides an appeal process. More specifically, Paragraph 6(b)(3) of the Transfer Agreement provides:

> Any decision by the Secretary to reassume operation and management of all or part of the Project may be appealed in an appropriate forum with jurisdiction to review the matter and in accordance with the provisions set forth in Section 29(c) of this Agreement.

[ECF 28-2, p. 12.] The Defendants indicate they are "open to negotiating a new Transfer Agreement that meets these statutory requirements". [ECF 56, p. 20.] Plaintiffs seek a directive from this Court ordering the formation of an entity to

operate and manage the FIP "[b]y way of an organization comprised of representatives of the Irrigation Districts, in numbers proportional to the acres within their jurisdiction, and of trust land irrigated by the Project, in numbers proportional to the number of irrigated acres in that status." [ECF 14, Counts One and Four.] Plaintiffs assert that such an entity would meet the Defendants' statutory requirements. Since the Transfer Agreement is void, it does not apply here and the Secretary did not have discretionary authority by law to reassume the FIP. 5 U.S.C. § 702(a)(2). Rather, it is a properly reviewable agency action which was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 702 and 706; see also: *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971).

In the alternative even if the Transfer Agreement was found to be enforceable, it allows this Court to resolve the claims pertaining to the alleged "emergency reassumption". More particularly, Paragraph 29(c) of the Transfer Agreement provides that disputes between the CME parties and the United States are properly reviewable by this Court. [ECF 28-2, p. 24.] The FJBC has not consented to voluntary, non-binding mediation or ADR. Rather, they seek relief in this forum. Further, Paragraph 16 of the Transfer Agreement provides:

> Nothing in this Agreement shall be construed to in any way extinguish or impair the right to bring any claims or seek any rights, remedies, damages,

or privileges not specifically waived or released pursuant to this Agreement. The FJBC has not waived its right to seek judicial review with respect to Counts One and Four. Accordingly this Court, as a court of competent jurisdiction, possesses jurisdiction to resolve the turnover claims.

Plaintiffs also possess standing as they represent approximately 90% of the irrigable acreage in the FIP. [ECF 14, ¶ 39.] The FJBC, as an organization which represents the interests of their membership, has a sufficient stake in the controversy to justify judicial review under the APA. 5 U.S.C. § 702 and *Sierra Club v. Morton et al.,* 405 U.S. 727, 739, 92 S.Ct. 1361, 1368 (1972). Neither dismissal based upon subject matter jurisdiction nor summary judgment is proper. Accordingly, the Court should deny Defendants' Motion in its entirety.

B. The Amended Complaint States a Viable Claim Under Fed.R.Civ.P. 12(b)(6).

In 1908, Congress mandated that the FIP management and operation "shall pass to the owners of the lands irrigated thereby" when the charges for the construction of the Project had been paid. 35 Stat. 448. [ECF 14-3, § 9.] Contrary to Defendants assertions, Plaintiffs have clearly pled that mandate which was a "specific, unequivocal command" from Congress—an agency action the Secretary is required to take without exercising take-backs. [ECF 14, Counts One and Four.] 5 U.S.C. § 706(1); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55

(2004). The FIP construction charges were paid in full in early January 2004. 71 Fed.Reg. No. 196, 59809. As recognized by Defendants, this Court can compel an agency action unlawfully withheld. 28 U.S.C. § 2201; 5 U.S.C. §§ 702 and 706. [ECF 56, p. 21.] Defendants failed to comply with 35 Stat. 448. Under any of the aforementioned scenarios, review by this Court under the Declaratory Judgment Act and/or APA is proper. As such the Motion must be denied.

II. The FJBC's 25 U.S.C. § 463(a) Claims are Viable; Subject Matter Jurisdiction Exists; the Statute of Limitations has not Expired; Review by this Court under the APA and Declaratory Judgment Act is Proper; and Summary Judgment is Precluded.

Count Two of the Amended Complaint alleges a violation of 25 U.S.C. § 463 regarding the Defendants' alleged restoration of surplus lands to tribal ownership. [ECF 14, p. 33.] 25 U.S.C. § 463 provides in pertinent part:

(a) Protection of existing rights

> The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: ***Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.**

(Emphasis added.) IRA § 3 contains a similar provision.

Defendants move to dismiss the claim on the basis of lack of standing and failure to exhaust administrative remedies. [ECF 56.] The Motion should not be granted because: 1.) if as alleged in the Amended Complaint, the Secretary of the Interior's restoration of surplus lands into trust expressly violates 25 U.S.C. § 463; 2.) restoration of surplus lands to trust status depletes resources, including but not limited to, tax assessments which directly affect the FJBC and those it represents and has resulted in land being removed from irrigable status; and 3.) Defendants' policy and practice of restoring surplus lands, and the act thereof, is subject to challenge under the Administrative Procedures Act ("APA") as a final agency action. 5 U.S.C. § 702 and § 706.

Both 25 U.S.C. 463 and IRA prohibit the restoration of surplus lands contained within a reclamation project to tribal ownership. The FIP is such a reclamation project: the Reclamation Act of 1902 authorized the Secretary of the Interior to construct irrigation projects on arid lands in the western states and established a Reclamation Fund to pay for those projects. [Ex. 1, Ex. 2 and Ex. 3, p. 1.] Between 1902 and 1910, the Bureau of Reclamation ("BOR") authorized various projects. *Id.* The FIP was a ("BOR") Project first authorized under the 1908 Amendment to the FAA. 35 Stat. 448. [ECF 14-3, § 9.] Annual Reclamation Service Reports demonstrate that Reclamation funds were utilized to

pay for the FIP. [Ex. 2.] As do letters from the Acting Secretary of the Treasury and Secretary of Interior. [Ex. 2 and Ex. 3, pp. 1-2.]

Originally, the reclamation fund was a "revolving" fund. Eventually, Congress recognized it was inadequate to finance ongoing expenditures. [Ex. 1, p. 2]. In 1914, Congress made the fund subject to annual appropriations which included revenues associated with, among other things, water and power uses. *Id.* Hydropower receipts were also authorized for receipt into the fund, thereby securing revenues from large projects under construction. 43 U.S.C. § 391(a-1), 392(a). Reclamation funds were used to finance the construction of the FIP which were then repaid by the irrigable land owners whose lands were liened by the United States. [Ex. 4 and Ex. 5.] In 1924, operation of the FIP was transferred to the BIA [Ex. 6 and Ex. 7 at p. 23.] However, annual appropriations continued to fund the construction of irrigation and power works such as the FIP. Annual Reclamation Service Reports demonstrate that reclamation funds were used to pay for the FIP. [Ex. 4.] It is believed discovery will yield additional supporting evidence.

25 U.S.C. § 463 expressly prohibits the restoration to tribal ownership of any surplus lands within a reclamation project in any Indian reservation opened for sale or disposal by Presidential proclamation or federal public land laws. Accordingly,

the SOI does not have authority to add existing reservation lands opened to settlement and which have been under non-Indian ownership with unrestricted non-trust status and have no tribal connection. *State v. Barnes,* 137 N.W.2d 683 (S.D. 1965). Plaintiffs believe discovery will reveal such transfers have and continue to occur. The Court should dismiss the Motion to allow the parties to undertake reasonable discovery efforts as Plaintiffs have demonstrated sufficient plausibility to allow the claims to proceed. Fed.R.Civ.P. 12 and see for example: *Harris v. Mississippi Valley State University*, 899 F.Supp. 1561, 1566 (N.D. Miss. 1995).

Plaintiffs have standing to assert the cause of action because the FJBC represents the irrigated acreage owned in fee which comprises approximately 90% of the acreage contained within the FIP. [ECF 14, ¶ 39.] The FID and other districts are elected local governments empowered to represent landowners within district boundaries as to irrigation matters. *See generally* Title 85, Chapter 7, Parts 1 through 22, MCA. Their broad powers include the authority and responsibility to levy taxes, collected twice-yearly as property taxes and to pay for the operation and maintenance of the irrigation projects. *See* Title 85, Chapter 7, Part 19, MCA. As such, the restoration of fee land back to trust status removes the land from taxable status, results in the lands being removed from irrigation and depletes

FJBC resources thereby directly damaging the FJBC and its constituents.

The return of fee land to trust status is ongoing in nature and is believed to continue to date. Each violation operates to start the statute of limitations running anew. Accordingly, any argument pertaining to the statute of limitations is a red herring as the statute of limitations on transfers within the past 6 years certainly would not be prohibited from challenge. 28 U.S.C. § 2401(1). Discovery will reveal the true extent of the transfers.

Finally, the actions alleged are reviewable under the APA. The Court may properly review an agency action including those which are arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 702 and 706; and *Overton Park,*401 U.S. 402, 91 S.Ct. 814. Restoration of surplus lands to tribal ownership in violation of 25 U.S.C. § 463 certainly falls within those parameters. And whether the land acquisitions have been acquired under 25 U.S.C. § 463 or § 465, as Defendants assert, creates a question of material fact. It is plausible that Plaintiffs can prove the allegations contained in the Amended Complaint. Neither dismissal nor summary judgment is proper.

III. The FJBC's Claims Alleging Violation of the Indian Self-Determination and Education Assistance Act are Viable; Subject Matter Jurisdiction Exists; the Statute of Limitations has not Expired; Judicial Review Under the APA is Proper; and Summary Judgment is Precluded.

Count Three of the Amended Complaint alleges violation of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). P.L. 93-638. In sum, net power revenues generated from the power division, which by Congressional mandate were earmarked, in part, to assist in paying for FIP annual operation and maintenance costs ("O&M"), have been misdirected and remain unaccounted for in violation of the 1948 Act. [ECF 14, ¶ 71.] 62 Stat. 269.

More particularly, the 1908 Amendment to the FAA contemplated construction of an irrigation project to serve all lands within the Flathead Indian Reservation ("FIR"). 35 Stat. 448. [ECF 14-3, § 9.] A power component was also part of the Project. 45 Stat. 212-213. Ultimately irrigators, through what is now known as the Jocko, Mission Valley and Flathead irrigation districts (previously Mission, Jocko and Camas), became responsible for paying the FIP construction including the power features ("Power Division"). Act of May 25, 1948, 62 Stat. 269. [ECF 14-6, § 2(a).] Valuable irrigation water rights were used to generate power. In return, a low cost block of power was reserved for the Flathead Irrigation and Power Project which is intrinsically linked to the Power Division net revenues discussed below. [Ex. 8, p. 6, 9, 40-46.] Plaintiffs assert that the low cost block of power component (and corresponding net revenues) is a permanent feature of the Kerr Dam project as irrigation water rights are still used to generate

power and are linked to net revenue generation. [ECF 14.]

The 1948 Act further provided net revenues generated from the Power Division be utilized for specific purposes, including, but not limited to: applied to reduce reimbursable costs for the construction of the power and irrigation systems; to liquidate construction costs chargeable against Indian-owned lands; and to liquidate the annual operation and maintenance costs of the irrigation system. 62 Stat. 269. [ECF 14-6, § 2.] To date, those funds have not been accounted for or made available. Rather, irrigators continue to pay O&M charges assessed against their lands each year without accountability for those funds. Since the takeover the FIP has been operated in violation of applicable manuals, guidelines or regulations and has substantially exceeded budget projections. [ECF 14, ¶ 72.] For example, under the BIA operation of the FIP since its unauthorized takeover in March 2014, the BIA has failed to adequately account for the expenditure of O&M tax monies collected and has exceeded the 2014 budget by over $200,000. [Ex. 9.] The released 2015 budget, which irrigators have already paid the first half 2015 annual assessments, exceeds prior budgets particularly as to costs for employees and will likely result in increased O&M charges. [Ex. 10.] Receipt of net revenue monies would assist in paying O&M and deferring the hardship placed on irrigators. 62 Stat. 269. Discovery is proper as to this issue.

The Power Division was turned over to the CSKT under the ISDEAA. Generally speaking, P.L. 93-638 authorizes the SOI to enter into self-determination contracts with tribes for specific types of government programs. 25 U.S.C. § 450f(a)(1)(A)-(E). More specifically, the SOI may enter into a self-determination contract "*for the benefit of Indians because of their status as Indians.*" 25 U.S.C. § 450f(a)(1)(E). However, neither the Power Division nor the FIP serve only the Tribes. Rather, tribal lands comprise only about 10% of the FIP acreage. [ECF 14, ¶ 71.]

The United States expressly acknowledged in an analogous matter that P.L. 93-638 contracts are not appropriate where non-tribal individuals are served by the program. On December 21, 2007, the DOI issued a letter to CSKT Chairman, James Steel, Jr., rejecting its argument that the ISDEAA could legally be used to transfer operation and management of the FIP to the CSKT because the FIP was not exclusively for benefit of the tribe, but also included lands that had passed out of tribal ownership. [ECF 14-1.] It stated:

> The intent of Congress to remove the operation and management of the Project from federal control is reinforced by the language of the 1908 Act. This Act states that, after the Project passes to the "owners of the lands irrigated thereby," the Project shall ["be maintained *at their expense*[.]" 35 Stat. 450 (emphasis added). Congress clearly intended that, after transfer, operation and management of the Project no longer be funded or subsidized by federal funds. ***One of the primary objectives of Public Law 93-638 is to transfer federal programs and services to tribes and to ensure Federal***

> ***funds are provided to allow tribes to operate those programs and services. Allowing transfer of the Project's operation and management here through a self-determination contract would contradict Congress's directive that these specific functions be stripped of their federal status and maintained through non-federal funds.*** (Emphasis added.)

The power distribution system (now known as Mission Valley Power) passed to the CSKT via a P.L. 93-638 contract between the BIA and CSKT. *Id.* p. 6. The DOI also discussed that contract. While it noted that the "history behind the construction and evolution of these two programs, however, is markedly different", it did not conclude that transfer of the power division under the ISDEAA was legal. Rather it left the question unanswered, stating "these distinctions highlight why a self-determination contract may have been appropriate for Mission Valley Power but not for the transfer of the project." (Emphasis added.) *Id.*

The P.L. 93-638 Power Division contract and the legal determination regarding payment of net revenues generated by the Power Division for the outlined purposes, as required by the 1948 Act, is an action over which this Court possesses jurisdiction. Courts must apply federal common law of contract when interpreting contracts with the federal government, including ISDEAA contracts. *Red Lake Band of Chippewa Indians v. U.S. Dept. of the Interior*, 624 F.Supp.2d 1, 12 (2009). Contracts entered into by government personnel who lack authority to bind the Government are unenforceable. *Id.* at 19. As such, it stands to reason that

contracts entered into by government personnel that are prohibited by law are also unenforceable.

The Plaintiffs have standing to challenge the P.L. 93-638 contract as they represent the non-tribal land owners' side of the equation. Article III standing consists of three (3) elements: 1) the complaint must allege injury that is "distinct and palpable" and is not "abstract", "conjectural", or "hypothetical"; 2) the injury must be "fairly traceable" to the government's allegedly unlawful conduct; and 3) the injury must be likely to be redressed by the requested relief. *General Motors v. California Board of Equalization*, 815 F.2d 1305, 1307 (9th Cir. 1987) quoting *Warth v. Seldin*, 442 U.S. 490, 501 (1975); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); and *Allen v. Wright*, 468 U.S. 737, 751 (1984)). An association may legally establish standing if it demonstrates: 1) its' members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Local 186, Intern. Broth. of Teamsters v. Brock*, 812 F.2d 1235, 1238 (9th Cir. 1987).

The Defendants rely upon a 1988 decision in *The Joint Board of Control of The Flathead, Mission and Jocko Valley Irrigation Districts v. United States et al.*,

U.S. District Court for the District of Montana, Missoula Division, CV 86-216-M-CCL, to support their Motion. Their reliance is misplaced. In that case, the Court considered a request for injunctive relief and judicial review from the FJBC to prohibit the United States from performing a § 638 contract under which the operation and management of the electric power system of the Project would be transferred to the CSKT. The defendants challenged the FJBC's standing as it related to the FJBC's challenge of the CSKT's takeover of the power division. [ECF 56-2.] The Court considered whether or not an organization could successfully assert standing on behalf of its membership. It found the FJBC satisfied the first element. However, it further found that the FJBC failed to present facts that actual injury would occur if the Tribes were transferred the control, operation and management of the power division. The Court ultimately entered summary judgment dismissing the complaint while concluding that the FJBC lacked standing since it was outside the zone of interests protected by the ISDEAA and failed to establish injury in fact . [ECF 56-2, p. 10 and 13.] However, the present case is distinguishable from that case. Significantly, the Court also related:

> Plaintiff alleges that the 638Contract and resulting delegation of authority to the Tribes constitute breach of the Secretary's statutory and contractual obligation to turn over the management and operation of the Project to plaintiff and its members. The court finds that this allegation fails to allege

> injury in fact. JBC has failed to show how the 638 Contract would impede turnover of either division of the Project. By its terms, the Contract is subject to existing law. *Whether JBC is entitled to turnover of the power division is the subject of another action before this court. If a determination is made in plaintiff's favor, the Tribes and the United States agree that the contract would be terminated.* (Emphasis added.) (Transcript of Proceedings, Nov. 20, 1987, at 32, 41-42.) [ECF 56-2, p. 10.]

The Court recognized its decision did not preclude other actions relating to the § 638 Contract. Here, the Plaintiffs are within the zone of interest as they represent the irrigators who pay the annual O&M costs. *Local 186, Intern. Broth. of Teamsters, supra.* Receipt of net revenues from the Power Division to offset O&M costs directly affects irrigators' interests. Failure to receive net revenues subjects them to higher O&M assessments. Given this violation, the FJBC seeks a declaration that the United States has since the early 1990's allowed the operation of the Power Division of the Project in contravention of the 1948 Act. [ECF 14.] Net power revenues were to be used to reimburse irrigation and power project costs and to liquidate annual O&M charges after repayment of the FIP construction costs. 62 Stat. 269. [ECF 14-6, § 2.] The § 638 contract did not modify the terms of the 1948 Repayment Contract. The FIP construction costs were fully repaid in 2004. 71 Fed.Reg. No. 196, 59809. Still those net power revenues have never been accounted for or paid over for O&M costs. The lack of accounting for net revenues demonstrates injury in fact as to the Plaintiffs and those they represent

sufficient to preclude dismissal. Fed.R.Civ.P. 12. The Plaintiffs are also entitled to seek discovery as to these issues.

The failure to submit net power revenues to assist in liquidating the annual O&M costs of the irrigation system constitutes a violation subject to review by this Court under the Declaratory Judgment Act and potentially the APA. 28 U.S.C. § 2201 *et seq.*; 62 Stat. 269; and 25 U.S.C. § 702 and 706. This Court has the power to order Defendants to discharge the duties Congress required them to perform and to declare the terms of how they must do so. *Id.*

Further, the statute of limitations has not expired. The United States / BIA did not turn the FIP project over until April 2010, with the alleged formation of the CME and execution of the Transfer Agreement. At that time the Plaintiffs learned that the obligations under the 1948 Repayment Contract were being violated and that the CSKT has not made any net power revenue funds available. The violation is continuing in nature as the obligation to pay over net power revenues to the FIP continues to accrue each year under the 1948 Repayment Contract and its progeny. Plaintiffs filed their Complaint in 2014 and are well within any applicable statute of limitations. 28 U.S.C. § 240(a). The FJBC possesses standing and has demonstrated a likelihood of injury sufficient to defeat the Motion. Neither dismissal under Fed.R.Civ.P 12 or 56 is appropriate as material questions of fact

exist. The Court should deny the Defendants' Motion as to Counts Three and Six.

CONCLUSION

Fed.R.Civ.P. 12(b)(1) and (b)(6) do not support dismissal of the Amended Complaint. Further, this Court possesses subject matter jurisdiction. Summary judgment is not proper as genuine issues of material facts exist. As such, the Motion should be denied in its entirety.

DATED this 3rd day of April, 2015.

ROCKY MOUNTAIN LAW PARTNERS PLLP

/s/ Kristin L. Omvig
Kristin L. Omvig
Attorneys for Plaintiffs Flathead Joint Board of Control and Flathead Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the District of Montana, using cm/ecf system. Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

DATED this 3rd day of April, 2015.

/s/ Kristin L. Omvig
Kristin L. Omvig
Attorneys for Plaintiffs Flathead Joint Board of Control and Flathead Irrigation District

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this *Plaintiffs' Response Brief to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment,* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010, is 6,135 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

DATED this 3rd day of April, 2015.

/s/ Kristin L. Omvig
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