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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FLATHEAD JOINT BOARD OF CONTROL; FLATHEAD IRRIGATION DISTRICT,

Case No. CV 14-88-DLC

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE BRIEF

Plaintiffs,

v.

SARAH "SALLY" JEWELL, Secretary of the Department of the Interior; STANLEY SPEAKS, Portland Area Director, Bureau of Indian Affairs; JOSEPH "BUD" MORAN, Superintendent, Flathead Agency, Bureau of Indian Affairs; U.S. DEPARTMENT OF THE INTERIOR; and U.S. BUREAU OF INDIAN AFFAIRS,

Defendants.

TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs persist in arguing that the Transfer Agreement is void and, therefore, under the 1908 Act this Court should compel BIA to permit Plaintiffs to assume control of the FIIP. Plaintiffs' arguments contravene the plain language of the 1908 Act, fail to acknowledge the Secretary's discretion in transferring the FIIP, and ignore the Secretary's obligations to protect Federal resources and meet fiduciary obligations to the Confederated Tribes. As for Plaintiffs' arguments related to the restoration of surplus lands and revenues of the Power Division, they conflate distinct statutory requirements without stating viable causes of action and demonstrate, inter alia, that Plaintiffs lack standing. Therefore, this Court should dismiss Plaintiffs' Amended Complaint or, alternatively, enter summary judgment for Defendants.

ARGUMENT

I. Plaintiffs' Claim That The Secretary Improperly Reassumed Control of the FIIP Should be Dismissed

a. Plaintiffs' Assertion that the Transfer Agreement is Void is Meritless

Plaintiffs' central argument is that the CME was improperly constituted and the FJBC's dissolution rendered the CME void, which also rendered the Transfer Agreement void. Pls.' Resp. 7-8, ECF No. 58. Dissolution of the FJBC did not void the Transfer Agreement. By its unambiguous terms, the Transfer Agreement provided that it would remain in effect "until terminat[ed] by written agreement of all signatory parties." ECF No. 28-2 at 18. There is no dispute that the parties failed to enter into a termination agreement. Plaintiffs assert that the voided Transfer Agreement revoked the Secretary's discretion, therefore, she was to immediately transfer the FIIP. Pls.' Resp. at 5, 7-8. Plaintiffs have it backwards. Section 6 of the Transfer Agreement was designed to remedy situations such as dissolution of the FJBC and CME. ECF No. 28-2 at 11-12. Under the Transfer Agreement, the Secretary could reassume control on a temporary or emergency basis, which is exactly what she did. This was proper. *See* Defs.' Mem. at 21, ECF No. 56. Assuming the Transfer Agreement is void, the Secretary still would be within her authority to reassume control to protect a federal asset and trust resources of the Confederated Tribes. *See Pyramid Lake Paiute Tribe v. Dept. of the Navy*, 899 F.2d 1410, 1420 (9th Cir. 1990) (Secretary has fiduciary duty to

protect fishery) (citations omitted); ECF No. 28-8 at 4 (notice asserting BIA must protect a federal asset and trust resources).

Congress left the terms of the Transfer Agreement to the Secretary's discretion. *See* 35 Stat. 448. The 1908 Act does not provide this Court guidance for reviewing Secretarial decisions in furtherance of that Act. The decision to reassume control of the FIIP under Section (6)(b) of the Transfer Agreement, ECF No. 28-2 at 12, was entirely within the Secretary's discretion by law. *See Hinck v. United States* 550 U.S. 501, 504 (2007). Because Plaintiffs have not demonstrated how, under the APA, the Secretary's emergency reassumption decision is reviewable, Plaintiffs' argument fails. *See* 5 U.S.C. § 701(a)(2).

Plaintiffs ask this Court to compel the Secretary to transfer the FIIP, and to review and set aside the Secretary's reassumption decision, but in doing so ignore the crucial provision in the 1908 Act that the FIIP will "be maintained . . . under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior." Publ. L. No. 60-156, 35 Stat. 444, 450. The Transfer Agreement was the mechanism by which the Secretary met the requirements of the 1908 Act. ECF 28-2 at 3 (Preamble & Explanatory Recitals). Plaintiffs were a signatory to the Transfer Agreement, *id*. at 26, which included provisions for Temporary Reassumption, *id.* at 11, Emergency Reassumption, *id.* at

12, and CME Request for Permanent BIA Reassumption, *id.*[1] *See also* ECF No. 28-4 (notice of dissolution and request for reassumption); ECF No. 28-5 (BIA notice of emergency reassumption in limited capacity); ECF No. 28-6 (request for reassumption and continued operation); ECF No. 28-7 (notice of reassumption under Section 6(b)). Plaintiffs' strained reading of the 1908 Act renders the language pertaining to the Secretary superfluous which is improper. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous").

Plaintiffs' argument that this Court should compel transfer of the FIIP contradicts the plain meaning of the 1908 Act. Under the Act, transfer of management and operation of the FIIP was limited in that it had to be maintained at the irrigators expense "under such form of organization and under rules and regulations" acceptable to the Secretary. If the Transfer Agreement is void, the Secretary must find another acceptable form of organization, and acceptable rules and regulations, and may not transfer control of the FIIP until she does so.

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[1] Plaintiffs' assertion that emergency reassumption under the Transfer Agreement was temporary in nature, Pls.' Resp. at 9, fails to aknowledge the entirety of Section 6. "Temporary Reassumption" and "Emergency Reassumption" are distinct provisions, and the "Emergency Reassumption" provision has no time limit. ECF No. 28-2 at 11-12. Plaintiffs' assertion that the Transfer Agreement had no mechanism permitting any entity but Plaintiffs and the Confederated Tribes to manage the FIIP, Pls.' Resp. at 7, is directly contradicted by Section 6 of the Transfer Agreement. ECF No. 28-2 at 11-12.

There is no requirement in the 1908 Act regarding the composition of the CME. Pls.' Resp. at 7-8. The issue of representation of the CME is not a question of legislative apportionment. *Id.* Rather, the "form of organization," 35 Stat. 450, of the CME is another instance in which Congress did not provide this Court guidance for reviewing the Secretary's decision and, therefore, the appropriate form of organization acceptable to the Secretary is a matter of discretion by law. *Hinck*, 550 U.S. at 504. Moreover, Plaintiffs have not articulated how Montana's proportional representation requirements for irrigation districts apply to the FIIP, a federal asset. Pls.' Resp. at 7-9. In the Act of May 10, 1926, 44 Stat. 453, 465, Congress merely required the Department of Interior enter into repayment contracts for irrigated non-Indian lands with irrigation districts organized under state law, nothing more.

Finally, Plaintiffs avoided Defendants' argument that Plaintiffs lack standing because Plaintiffs failed to demonstrate injury in fact. Pls.' Resp. at 11. Defendants did not argue that Plaintiffs cannot represent their membership. *Id.* Defendants argued that Plaintiffs have not met the requirements under *Lujan*, 504 U.S. at 560-61. Defs.' Mem. at 19-20, ECF No. 56. Although Plaintiffs say that their dissolution was "involuntary," Pls.' Resp. at 7, they do not articulate how that impacts Article III standing analysis. In determining whether Plaintiffs have standing, this Court should not overlook the fact that Plaintiffs' self-dissolution,

see ECF No. 28-4, was the catalyst in the causal chain resulting in the Secretary's discretionary, emergency reassumption of the FIIP.

b. Review Provisions of the Transfer Agreement do Not Confer Jurisdiction on This Court

Despite their argument that the Transfer Agreement is void, Plaintiffs assert that under Section 6(b)(3) this Court possesses subject matter jurisdiction. Pls.' Resp. at 9-10. Section 6(b)(3) provides that a reassumption decision by the Secretary may be appealed to an appropriate forum with jurisdiction. ECF 28-2 at 12. That provision does not grant jurisdiction to this Court. It is merely permissive. This Court must determine whether Plaintiffs possess standing under Article III and that it has subject matter jurisdiction. If the Court determines that either is lacking, this action must be dismissed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted); Fed. R. Civ. P. 12(h)(3).

c. Plaintiffs Have Failed to State a Claim Upon Which Relief May Be Granted

Plaintiffs point to the 1908 Act as the basis for their argument that the Secretary has unlawfully withheld agency action. Pls.' Resp. at 11-12. This demonstrates a repeated problem with Plaintiffs' claim. Plaintiffs invoke the 1908 Act, however, their claim truly goes to the Secretary's reassumption of control under the Transfer Agreement. Plaintiffs' fail to acknowledge that in 2010 the Secretary and Plaintiffs entered into the Transfer Agreement as required under the

1908 Act. ECF No. 28-2 at 26. Even assuming the Transfer Agreement is void, the 1908 Act requires the Secretary to transfer the FIIP under an appropriate form of organization, and appropriate rules and regulations. 35 Stat. 448. The Secretary, therefore, has not withheld agency action. Instead, her prior action was undermined by Plaintiffs' conduct. The Secretary must now find another appropriate form of organization, and appropriate rules and regulations, to transfer management and operation of the FIIP. *Id.*

Therefore, for the reasons stated here and in Defendants' memorandum, this Court should dismiss Counts I and IV of Plaintiffs' Amended Complaint or, in the alternative, enter summary judgment for Defendants.

II. Plaintiffs' Claim Under 25 U.S.C. § 463 is Speculative And Conflates That Section With 25 U.S.C. § 465

Plaintiffs tell this Court that "if as alleged" the Secretary has restored surplus lands then she has violated 25 U.S.C. § 463 and they "believe discovery will reveal" the Secretary has restored surplus lands to tribal ownership under 25 U.S.C. § 463. Pls.' Resp. at 13, 16. A claim must possess "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face[.]'" *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570). Plaintiffs' claim lacks "factual matter." Further, Plaintiffs confuse the "plausibility" standard under *Iqbal* for mere "possibility," Pls.' Resp. at 16, which is speculation. Plaintiffs fail to

allege an instance in which the Secretary restored surplus lands, therefore, their claim should be dismissed.

Plaintiffs continue to conflate 25 U.S.C. § 463, restoration of surplus lands, with 25 U.S.C. § 465, acquisition of lands by the Secretary to be taken into trust for Indians. Pls. Resp. at 16. These are separate statutory authorities. Plaintiffs' cite to *State v. Barnes*, *id.* at 15, demonstrates this point: "It is clear the restoration authority [under Section 3 of the IRA, Pub. L. No. 73-383, 48 Stat. 984 (1934)] granted to the Secretary was limited to a certain class of lands, i.e., 'remaining surplus land.' Lands which had been previously opened to settlement and sold, or otherwise disposed of, did not fall within such classification . . . Subsequent sections [of the IRA] permit[ted] tribal acquisition of additional lands by purchase or exchange and provided funds therefore." 137 N.W.2d 683, 685-86 (S.D. 1965) (citations and footnotes omitted). Nevertheless, without sufficient factual matter, this Court has no agency action to review under the APA, no acts alleged within the statute of limitations, and no basis to find Plaintiffs have standing.[2]

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[2] Plaintiffs assert a need for discovery. Pls.' Resp. at 3 n.1, 16, 18, 24. The jurisdictional nature of Defendants' motion did not change when alternatively seeking summary judgment. Defendants' motion never strayed into the substance of Plaintiffs' claims. Nevertheless, to the extent Defendants presented matters outside the pleadings that are not excluded by the Court, Defendants moved for summary judgment under Fed. R. Civ. P. 56, as contemplated by Fed. R. Civ. P. 12(d). Plaintiffs' requested discovery is unwarranted.

Plaintiffs also assert that the FIIP was a Bureau of Reclamation project. Although it is ambiguous what Plaintiffs attempt to prove with this assertion, the FIIP was authorized under the 1904 Act, 33 Stat. 302, and 1908 Act, 35 Stat. 441, not under the Reclamation Act, 32 Stat. 388. Under a 1907 agreement between the Office of Indian Affairs and the Reclamation Service, the FIIP was funded by appropriations for the Office of Indian Affairs which set the general policies for contracts with the Reclamation Service for building and operations of Indian irrigation projects until 1924 when the Bureau of Indian Affairs assumed full control. *See e.g.,* Ex. 3 at 5, Eleventh Annual Report of the Reclamation Service ("Annual Report") 1911-1912 (excerpt); Ex. 4 at 547, Fifteenth Annual Report 1915-16 (excerpt); Ex. 5 at 47, 466-67, Twentieth Annual Report 1920-21 (excerpt); 39 Stat. 969, 980 (making appropriations for continuing construction of the FIIP); 41 Stat. 3, 16 (making appropriations for continuing construction, maintenance and operation of the FIIP); ECF No. 58-6; *see also* Ex. 6, *Flathead Lands*, 48 Pub. Lands Dec 475, 476 (1921) (FIIP does not constitute a reclamation project under the Reclamation Act).

Therefore, this Court should dismiss Counts II and V of Plaintiffs' Amended Complaint or, in the alternative, enter summary judgment for Defendants.

III. Plaintiffs' Effort to Conflate the Self-Determination Act and the 1948 Act to Create a Violation of Either, or Both, Fails

Plaintiffs conflate the Self-Determination Act, 25 U.S.C. §§ 450-450n, and the 1948 Act, Pub. L. No. 80-544, 62 Stat. 269, to assert that net power revenues have been misdirected. Plaintiffs argue that the Secretary lacked authority to enter into a self-determination contract with the Confederated Tribes to operate the Power Division. Pls. Resp. at 19-20, 22-23. However, as set forth in Defs.' Mem. at 24-26, ECF No. 56, this Court should dismiss Plaintiffs' claim that the Power Division is operated in violation of the Self-Determination Act and the 1948 Act.

Plaintiffs assert that there are actions or violations of the Self-Determination Act that they have pleaded other than the Secretary's discretionary decision to enter into a contract with the Confederated Tribes. Pls. Resp. at 19-20, 22-23. First, their challenge to the self-determination contract with the Confederated Tribes was raised and rejected in prior litigation where the court found they did not allege injury in fact, their alleged injury was speculative, and they were outside the zone of interest of the statute. *See* ECF No. 56-2 at 9-13. Second, Plaintiffs' alleged injury, the failure to allocate net revenues to the FIIP, is not an injury in fact under the Self-Determination Act. Further, that injury is speculative, at best, and, notwithstanding that asserted violation, Plaintiffs remain outside the zone of interest of the Self-Determination Act.

The fact that Power Division revenues have not been allocated to the FIIP, *see* Pls.' Resp. at 18, 24, does not demonstrate a violation of the Self-Determination Act. The Self-Determination Act and 1948 Act are separate and distinct legal requirements. The Secretary's decision to enter into a contract with the Confederated Tribes under the Self-Determination Act is not the same as allocating net power revenues under the 1948 Act.

Under Section 2(g) of the 1948 Act, electricity must be sold "at the lowest rate which, in the judgment of the Secretary of the Interior, will produce net revenues" to liquidate specific costs—annual installments of the Power Division construction under subsection 2(f), reasonable return on the Power Division construction costs, and funds to cover certain wholesale energy costs. 62 Stat. at 270-71. Section 2(h) provides the priority for applying annual net revenues to costs for the Power Division and FIIP. *Id.* at 271. However, "net revenues" are determined under Section 2(b) of the Act "by deducting from the gross revenues the expenses of operating and maintaining the power system, and the funds necessary to provide for the creation and maintenance of appropriate reserves[.]" Moreover, Section 2(b) requires adherence with the Act of August 7, 1946, Pub. L. No. 79-647, 60 Stat. 895 (codified at 25 U.S.C. § 385c), which is the authorization for the Secretary to appropriate and dispose of revenues from power operations on Indian irrigation projects. In sum, the Power Division must sell electric power at

the lowest rate to produce "net revenues" for certain statutory priorities, but only after the Power Division allocates funds to reserves, and under the act of August 7, 1946, the Secretary has the authority to appropriate and dispose of those funds. To increase net revenues, the Power Division would have to increase rates.

To meet its statutory requirements, the Power Division allocates revenues to a reserve fund when possible, *see* ex. 7 at 3-4 (Affidavit of Jean Matt, General Manager, Mission Valley Power ("MVP"), i.e., the Power Division), and budgets cash to meet its expenses. *Id.* at 5; *see e.g.,* Ex. 8 at 10 (2009 MVP Annual Report ("AR") $7,987 cash on hand at end of year ("cash")); Ex. 9 at 13 (2010 MVP AR $1,574 cash); Ex. 10 at 14 (2011 MVP AR $20,058 cash); Ex. 11 at 14 (2012 MVP AR $1,373 cash); Ex. 12 at 22 (2013 MVP AR $26,056 cash); Ex. 13 at 11 (2014 MVP AR $6,191 cash). Under Section 2(b) of the 1948 Act, those reserves are not "net revenues." Given the size of the Power Division's budget, $22-$28 million annually, the modest cash on hand is only funds needed for ongoing expenses and continued operations and are not "net revenue" under the 1948 Act.

To state a claim under the 1948 Act, and 25 U.S.C. § 385c, Plaintiffs would have to allege that the Secretary improperly appropriated and disposed of net power revenues, i.e., power revenues after allocation of reserve funds. Plaintiffs do not make that allegation. Therefore, Plaintiffs' Amended Complaint does not allege a cause of action upon which relief may be granted. Plaintiffs' claim

remains merely "the-defendant-unlawfully-harmed-me." *Kelley v. Corrs. Corp. of Am.*, 750 F.Supp.2d 1132, 1137 (E.D. Cal. 2010).

If net power revenues were available, they would not simply be applied to FIIP operations and maintenance costs as Plaintiffs allege. In the Transfer Agreement, Plaintiffs agreed that to meet requirements of the 1948 Act, power would be sold at the lowest rates and that net power revenues would be,

> used only for work on the Project that has significant fisheries, water conservation, or water management benefits. The parties further agree that if on an annual basis such work does not require the full amount of such net revenues the remainder shall be set aside and accumulated for expenditure for these purposes when needed for building and maintaining energy reserve.

ECF No. 28-2 at 24.

Finally, the discussion above also demonstrates Plaintiffs lack standing and this Court should dismiss any 1948 Act claims. First, Plaintiffs have not suffered injury in fact. Plaintiffs have failed to state that net power revenues have been improperly generated, allocated, or disposed of. Second, Plaintiffs continue to challenge the Secretary's decision to enter into the self-determination contract with the Confederated Tribes and assert a link with money not being allocated to the FIIP resulting in higher operations and maintenance costs. Pls.' Resp. at 21-25. If the challenged action is the entry into the self-determination contract, that is too remote a causal connection, and barred by the doctrine of issue preclusion. Defs.' Mem. at 25 n.9. In any event, because Plaintiffs have not alleged or provided

sufficient factual matter, *Iqbal*, 556 U.S. at 663, that the Secretary improperly appropriated or disposed of funds, 25 U.S.C. § 385c, they have not demonstrated injury traceable to Defendants. Finally, Plaintiffs' claim is speculative, based merely on the assertion that no net power revenues have been allocated to the FIIP. Pls.' Resp. at 18, 23-24. These allegations are insufficient to demonstrate that Plaintiffs have standing and fail to state a claim upon which relief may be granted.

Therefore, this Court should dismiss Counts III and VI of Plaintiffs' Amended Complaint or, in the alternative, enter summary judgment for Defendants.

IV. Plaintiffs' Statement of Facts is Largely Argument, Not Factual Support

Plaintiffs submitted a statement of 40 disputed facts. ECF No. 59 at 15-24. Statements 12, 15-26, 28, 31, 33-35, 38-40, inappropriately contain in whole, or in part, argument or are legal conclusions. *White v. Maurier*, 2014 WL 1056335 at *10 (D.Mont. Mar. 18, 2014) (unreported) ("There is a difference between an argument, or a party's position, and a fact."). Statements 5 and 6 are erroneous. *See* Section II, *supra*; *Scott v. Harris*, 550 U.S. 372, 382 (2007) (in ruling on summary judgment motion, court should not adopt facts blatantly contradicted by the record).

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendants' Memorandum, Defendants respectfully request that this Court dismiss Plaintiffs' Amended Complaint or, alternatively, enter summary judgment for Defendants.

Dated this 10th day of April, 2015.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that, on April 10, 2015, I filed the foregoing Reply to Plaintiffs' Response Brief to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment electronically through the CM/ECF System, which caused parties to be served by electronic means.

/s/Stephen Finn

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

I HERBY CERTIFY that, pursuant to Local Rule 7.1(d)(2), the attached Reply to Plaintiffs' Response Brief to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is proportionately spaced, has a typeface of 14 points or more and contains 3482 words, excluding the caption, and certificates of service and compliance.

/s/Stephen Finn

TABLE OF EXHIBITS

Exhibit 3

Eleventh Annual Report of the Reclamation Service, 1911-1912 (Excerpt)

Exhibit 4

Fifteenth Annual Report of the Reclamation Service, 1915-1916 (Excerpt)

Exhibit 5

Twentieth Annual Report of the Reclamation Service, 192-1921 (Excerpt)

Exhibit 6

Flathead Lands, 48 Pub. Lands Dec. 475 (1921)

Exhibit 7

Affidavit of Jean Matt, General Manager, Mission Valley Power, February 19, 2015

Exhibit 8

Mission Valley Power FY2009 Annual Report

Exhibit 9

Mission Valley Power FY2010 Annual Report

Exhibit 10

Mission Valley Power FY2011 Annual Report

Exhibit 11

Mission Valley Power FY2012 Annual Report

Exhibit 12

Mission Valley Power FY2013 Annual Report

Exhibit 13

Mission Valley Power FY2014 Annual Report