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FEDERAL AVIATION ADMINISTRATION

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TULE LAKE COMMITTEE,

Plaintiff,

v.

FEDERAL AVIATION ADMINISTRATION, CITY OF TULELAKE, CALIFORNIA, CITY COUNCIL OF THE CITY OF TULELAKE, BILL G. FOLLIS, JUDY COBB, PHIL FOLLIS, JACK SHADWICK, RAMONA ROSIERE, and MODOC NATION fka MODOC TRIBE OF OKLAHOMA,

Defendants.

No. 2:20-cv-00688-WBS-DMC

DEFENDANT FEDERAL AVIATION ADMINISTRATION'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

Hearing on Motion

DATE: August 10, 2020
TIME: 1:30 p.m.
COURT: Hon. William B. Shubb

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on August 10, 2020, at 1:30 p.m., or as soon thereafter as this matter may be heard, Defendant Federal Aviation Administration will, and hereby does, move to dismiss the Complaint filed by Plaintiff Tule Lake Committee pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Court lacks subject-matter jurisdiction because Plaintiff has not alleged a final agency action under the Administrative Procedure Act and, to the extent Plaintiff brings claims based on a failure to act, Plaintiff cannot point to any discrete action that the agency was required to take by law. But even if Plaintiff could point to some judicially reviewable action by the agency, the Court would still lack

subject-matter jurisdiction because any action challenging an order related to the Federal Aviation Administration's aviation duties must be brought in the United States Courts of Appeals pursuant to 46 U.S.C. § 46110.

This Motion will be made in Courtroom 5 of the United States Courthouse located at 501 I Street in Sacramento, California. This Motion is based on this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the files and records in this case; and such other evidence or argument as the Court may consider.

Dated: July 6, 2020

Respectfully submitted,

McGREGOR W. SCOTT
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By: /s/ *W. Dean Carter*
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Attorneys for Defendant
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Defendants.

No. 2:20-cv-00688-WBS-DMC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT FEDERAL AVIATION ADMINISTRATION'S MOTION TO DISMISS

I. INTRODUCTION

The Federal Aviation Administration ("FAA") moves to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Plaintiff alleges that the FAA violated the Administrative Procedures Act ("APA") by failing to consider its obligations under the National Historic Preservation Act ("NHPA") and the provisions of a 1951 Federal Land Patent (the "Patent") before issuing a letter to the City of Tulelake concerning the City's proposed sale of the Tulelake Municipal Airport (the "Airport") to the Modoc Nation. The Court lacks subject-matter jurisdiction for several reasons.

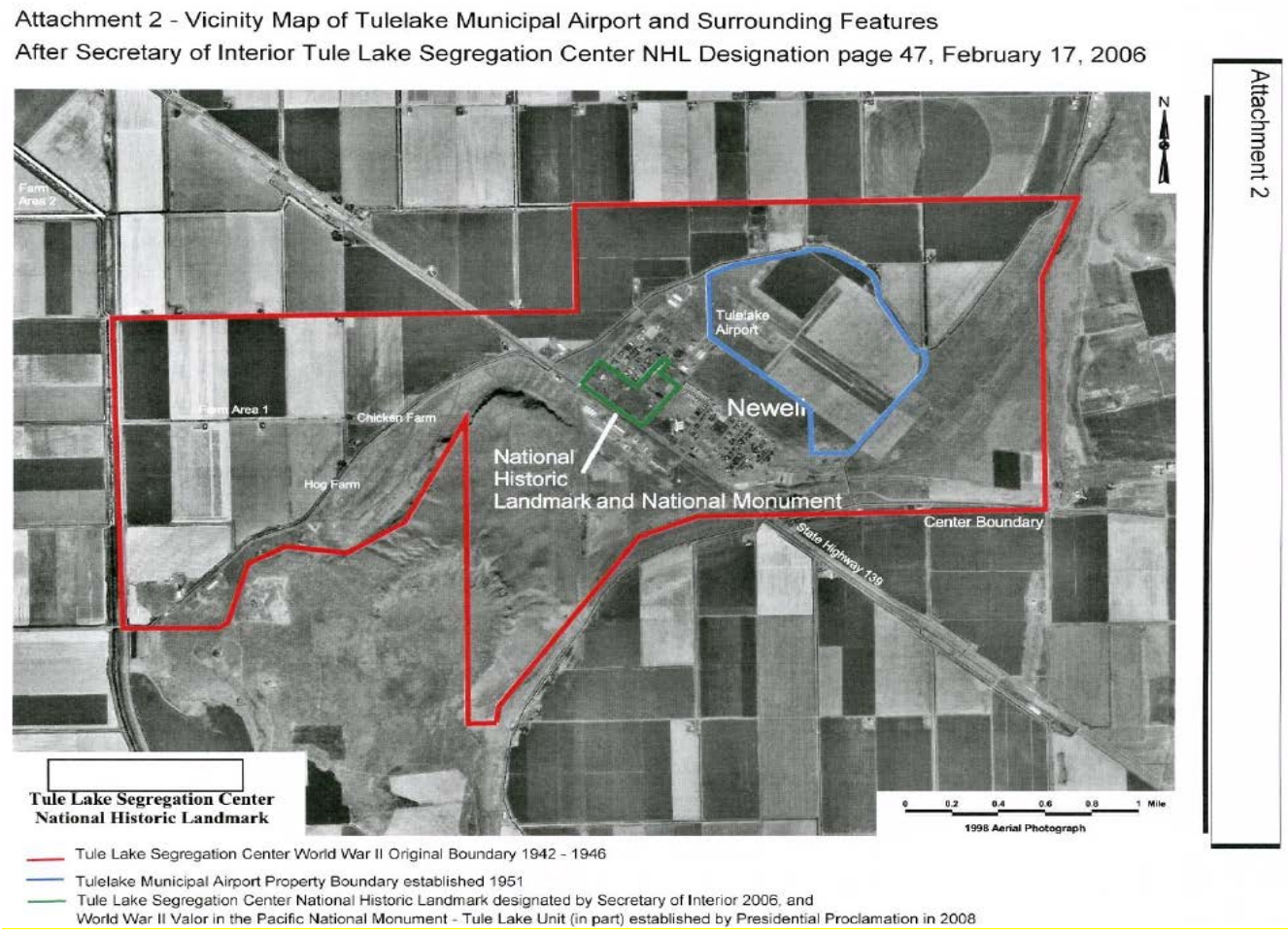
First, the FAA's letter – which merely states that the FAA has "no objection" to the proposed sale – does not constitute "final agency action" within the meaning of 5 U.S.C. § 704 because it is not an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Trasnatlantic*, 400 U.S. 62, 71 (1970)). Second, to the extent Plaintiff is alleging an APA claim for "failure to act" within the meaning of 5 U.S.C. § 706(1), Plaintiff cannot point to any discrete action that the agency was required to take by law, and any FAA decision not to enforce the terms of the Patent are similarly unreviewable because such decisions are "committed to agency discretion by law." *City & Cty. of San Francisco v. U.S. Dep't of Transp.*, 796 F.3d 993, 1001 (9th Cir. 2015). Third, even if some aspect of the FAA's letter were judicially reviewable, this Court would lack jurisdiction because 49 U.S.C. § 46110 provides exclusive jurisdiction in the United States Courts of Appeals over claims seeking review of any FAA order pertaining to its aviation duties. *See Americopters, LLC v. Fed. Aviation Admin.*, 441 F.3d 726, 732 (9th Cir. 2006).

Because the Court lacks subject-matter jurisdiction over Plaintiff's claims against the FAA, the agency respectfully asks the Court to dismiss the claims.

II. BACKGROUND

This suit arises from Defendant City of Tulelake's decision to sell the Airport to the Modoc Nation. During World War II, Americans were incarcerated at the Tule Lake Segregation Center due to their Japanese ancestry. ECF No. 1 ¶ 14. The site of the Tule Lake Segregation Center is located in the City of Tulelake, California. *Id.* In 1951, pursuant to the Patent, the federal government granted

approximately 359 acres of land from this site to the City of Tulelake for use as an airport. *Id.* ¶ 19. The site where the Airport is currently located and the site of the Tule Lake Segregation Center are not coextensive; as illustrated below, the Airport property comprises only a portion of the original Tule Lake Segregation Center and is situated near the Tule Lake National Monument, a federally-designated National Historic Landmark. *Id.* ¶ 29.



By its terms, the Patent granting the Airport property subjects the City of Tulelake and "its successors in function" to several covenants, such as requiring the land to be developed and used as an airport. *See* ECF No. 1 Ex. A pg. 5. Notably, the Patent also states that "[a]ny subsequent transfer of the property interest conveyed hereby will be made subject to all the covenants, conditions, and limitations contained in this instrument." *Id.* In 1974, the City of Tulelake began leasing the Airport to Modoc County. ECF No. 1 ¶ 35. Thus, although the City of Tulelake owns the Airport, the Airport is operated by Modoc County. *Id.*

In 2018, the City of Tulelake decided to transfer its interest in the Airport to the Modoc Nation.

Id. ¶ 55. On August 9, 2018, the City of Tulelake sent the FAA a letter requesting approval of a purchase agreement for the Airport. *Id.* ¶ 71; *see also id.* Ex. D. The FAA responded in an August 23, 2018 letter ("the Armstrong letter"), stating that it "has no objection to the proposed Purchase Agreement" but noting that any buyer would be subject to the same covenants and restrictions as contained in the Patent. *Id.* Ex. F. The Armstrong letter also notes that it is not a "final agency action" or an "order issued by the Secretary of Transportation" under 49 U.S.C. § 46110. *Id.*

On April 2, 2020, Plaintiff filed this action against the FAA, the City of Tulelake and its city council, and the Modoc Nation. Plaintiff brings six causes of action, two of which are brought against the FAA. In its First Cause of Action, Plaintiff brings a claim under the National Historic Preservation Act ("NHPA") and Administrative Procedures Act ("APA"). *Id.* ¶¶ 77-92. Plaintiff contends that the FAA's obligations under the NHPA were triggered when the FAA issued the Armstrong letter to the City of Tulelake, but that the FAA failed to undertake any review of the effect of the sale on historic property and thus violated the APA. *Id.* ¶¶ 78-87. In the Second Cause of Action, Plaintiff alleges that the covenants of the Patent do not allow the City of Tulelake to sell the Airport to the Modoc Nation because the Modoc Nation is not a "successor in function." *Id.* ¶¶ 93-113. Plaintiff thus claims that the FAA violated the APA when it failed to enforce the covenants of the Patent and invalidate the sale. *Id.* The remainder of Plaintiff's claims are not brought against the FAA. *See id.* ¶¶ 114-190.

III. LEGAL STANDARD

Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). An issue of subject-matter jurisdiction is properly decided under Rule 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Association of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citations omitted). Thus, "[w]hen subject-matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001); *see also Thornhill Pub. Co. v. General Tel. & Electronics. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Any claim for

which the plaintiff fails to establish subject-matter jurisdiction should be dismissed without reference to the merits of the claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998); *see also High Country Res. v. FERC*, 255 F.3d 741, 747 (9th Cir. 2001).

A challenge to jurisdiction under Rule 12(b)(1) "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003); *see also White*, 227 F.3d at 1242. "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Further, the court need not presume the truthfulness of the plaintiff's allegations. *White*, 227 F.3d at 1242. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject-matter jurisdiction." *Savage*, 343 F.3d at 1040 n.2.

IV. ARGUMENT

A. The Armstrong letter is not a final agency action under 5 U.S.C. § 704.

Under the APA, a plaintiff may seek judicial review of a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The determination of whether an agency action is "final" is a two-step analysis. First, the action "must mark the 'consummation' of the agency's decision-making process" and not be "merely tentative or interlocutory." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow."' *Id.* at 178. "[C]ertain factors 'provide an indicia of finality, such as whether the [action] amounts to a definitive statement of the agency's position, whether the [action] has a direct and immediate effect on the day-to-day operations of the party seeking review, and whether immediate compliance [with the terms] is expected.'" *Public Utility District No. 1 v. Bonneville Power Admin.*, 506 F.3d 1145, 1152 (9th Cir. 2007) (quoting *Indus. Customers of Nw. Utils. v. BPA*, 408 F.3d 638, 646 (9th Cir. 2005)) (internal quotations omitted).

Here, the Armstrong letter does not constitute "final agency action" within the meaning of 5

U.S.C. § 704. First, the letter does not "grant permission for the sale" of the Airport as Plaintiff alleges. ECF No. 1 ¶¶ 75, 80. The letter simply states that the FAA "has reviewed the proposed Purchase Agreement to ensure it is consistent with the City's federal agreement obligations;" that the Modoc Nation should understand and accept the obligations and commitments of the land grant patent before executing the purchase; that the City has leased the Airport to the County of Modoc since 1974 and that the FAA expects the Modoc Nation "to commit to assuming responsibility for the operation of the Airport and assumption of obligations under the grant assurances to the Airport, in the event that the County's lease is terminated;" and finally that the FAA "has no objection to the proposed Purchase Agreement of the Airport property from the City to the Tribe." *Id.* Ex. F. Second, the letter states only that it represents "the views" of the FAA's Regional Airports Division Office "based on the facts presented in your submissions." *Id.* Third, the letter explicitly states that it "does not constitute a final agency action." *Id.* Finally, Plaintiff has not pointed to any statute, regulation, or policy that actually required the FAA to approve of the sale of the Airport.

In a nutshell, the letter does not constitute an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,"' *see Bennett*, 520 U.S. at 178, and it does not require immediate compliance with its terms. *See Public Utility District No. 1*, 506 F.3d at 1152. At most, the letter simply warns that any future owner of the Airport must comply with the covenants of the Patent. Yet even a warning is not a final agency action. *See Air Cal. v. U.S. Dep't. of Transp.*, 654 F.2d 616, 620-22 (9th Cir. 1981) (letter warning of impending action not final); *Aerosource, Inc. v. Slater*, 142 F.3d 572, 579-80 (3d Cir. 1998) (publications issued by the FAA describing tentative conclusions from ongoing investigations are not final orders). Accordingly, Plaintiff may not challenge the letter because it is not a final agency action under 5 U.S.C. § 704.

B. Plaintiff's "failure to act" claims are also unreviewable.

The APA allows for an individual to bring an APA claim to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). However, such a claim may only proceed "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis in original). Therefore, where an agency action is "committed to agency discretion by law," judicial review is unavailable under

the APA. *City & Cty. of San Francisco*, 796 F.3d at 1001.

Here, Plaintiff cannot point to any action the FAA failed to take that was legally required. With regard to the allegation that the FAA failed to undertake an analysis of its obligations under the NHPA, the only action triggering this requirement that Plaintiff alleges is the Armstrong letter which, as discussed above, is not a final agency action subject to review under the APA. *See San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005) (because NHPA claims must be brought under the APA, challenged undertaking must be final agency action under 5 U.S.C. § 704). But aside from broad, conclusory statements, which are insufficient under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), Plaintiff has failed to plead any factual allegations suggesting that the FAA was required to take by law an action that would trigger the NHPA. Indeed, although Plaintiff contends (incorrectly) that the Armstrong letter was akin to a permit, Plaintiff does not actually allege that the FAA was *required* to permit or otherwise approve of the sale of the Airport.

Similarly, with respect to Plaintiff's Second Cause of Action arguing that the FAA should have blocked the sale under the terms of the Patent, Plaintiff again fails to identify any covenant in the Patent that the FAA was required by law to enforce. In fact, nothing in the Patent suggests that Airport may not be conveyed or may only be conveyed to a "successor in function" of the City of Tulelake. To the contrary, the Patent expressly recognizes that the City may transfer its property interest. *See* ECF No. 1 Ex. A at 5. Regardless, to the extent that Plaintiff contends the FAA should have taken some affirmative action to enforce the covenants of the Patent and prevent the Modoc Nation from taking ownership of the Airport, this claim fails because agency decisions not to take enforcement actions are presumptively unreviewable. *See City & Cty. of San Francisco*, 796 F.3d at 1003 (decisions not to take enforcement actions are presumptively unreviewable under the APA); *see also de Feyter v. Fed. Aviation Admin.*, No. 10-CV-358-JL, 2011 WL 1134657, at *4-6 (D.N.H. Mar. 25, 2011) (FAA's decision not to take enforcement action is unreviewable).

"[T]he only action that can be compelled under the APA is action legally required," and Plaintiff points to none here. *Norton*, 542 U.S. at 63. Therefore, any claims of inaction are either conclusory allegations without merit or discretionary decisions over which the Court lacks subject-matter jurisdiction.

C. 49 U.S.C. § 46110 would nonetheless preclude review in this Court.

Even if the Armstrong letter were a final agency action, 49 U.S.C. § 46110 would divest this court of jurisdiction over any challenge to the letter. Section 46110 provides in relevant part:

> [A] person disclosing a substantial interest in an order issued by . . . the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

"As we have often observed, '[t]he district court's federal question jurisdiction is preempted by [Section 46110] as to those classes of claims reviewable under [Section 46110].'" *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998) (quoting *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992)); *Gilmore v. Gonzales*, 435 F.3d 1125, 1132 (9th Cir. 2006) (stating that "whether the district court had jurisdiction over Gilmore's claims turns on whether the Security Directive that established the identification policy is an 'order' within the meaning [Section 46110]" and that "finality is key").

Section 46110(a) "preempts more general remedies," such as those under Section 1331, because it is a more "precisely drawn, detailed statute" that demonstrates "Congressional intent to carve out from the broader scheme a specific exception for this particular type of claim." *Nat'l Parks & Conservation Ass'n v. F.A.A.*, 998 F.2d 1523, 1527 (10th Cir. 1993) (citing *Block v. North Dakota, ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 285 (1983) and *California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989)). The District of Columbia Circuit discussed this issue in the context of an attempt to bring suit under the APA:

> Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur. In the absence of a statute prescribing review in a particular court, "nonstatutory" review may be sought in district court under any applicable jurisdictional grant. If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.

City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979). The purpose of granting exclusive jurisdiction with the circuit courts of appeals is to preserve "coherence and economy" in the review of FAA decisions. *Sima Prod. Corp. v. McLucas*, 612 F.2d 309, 312-13 (7th Cir. 1980); *see also City of*

Rochester, 603 F.2d at 936. Indeed, "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals [the court] must resolve that ambiguity in favor of review by a court of appeals." *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192-93 (7th Cir. 1986).

Likewise, even if Plaintiff has properly alleged an agency *inaction* that would otherwise be reviewable under the APA, such claims must still be brought pursuant to the petition for review process of Section 46110. Where a statute such as Section 46110(a) provides for exclusive jurisdiction in the circuit courts of appeals, claims of inaction cannot separately be brought in district court pursuant to another statute such as the APA. Courts have reasoned that "[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction." *In re Howard*, 570 F.3d 752, 756 (6th Cir. 2009). Thus, courts generally hold that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Telecommunication Research and Action Center v. FCC*, 750 F.2d 70, 78-79 (D.C. Cir. 1984) (*TRAC*) (holding that the court of appeals has exclusive jurisdiction pursuant to the All Writs Act to address a complaint of agency inaction where the court of appeals is statutorily vested with exclusive jurisdiction to review final agency action).

Courts frequently apply the holding in *TRAC* to claims based on inaction and unreasonable delay by the FAA and hold that such suits must be brought in the circuit courts of appeals pursuant to Section 46110(a). *See, e.g.*, *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532 (1st Cir. 1997) ("It is well established that the exclusive jurisdiction given to the courts of appeals to review FAA actions also extends to lawsuits alleging FAA delay in issuing final orders."); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1420 (11th Cir. 1993) (holding that the direct-review provision in Section 46110 extends to lawsuits involving claims of unreasonable delay); *Kushino on behalf of Patricia L. Kushino Revocable Tr. v. Fed. Aviation Admin.*, No. 4:19-CV-00076-JHM, 2019 WL 6534150, at *3 (W.D. Ky. Dec. 4, 2019) (district court lacked jurisdiction over claims based on FAA inaction).

There is no dispute here that Plaintiff's challenge to the sale of the Airport and the FAA's alleged actions or inactions taken with respect to that sale concern the "aviation duties and powers" of

the FAA. 49 U.S.C. § 46110(a). Consequently, even if Plaintiff had alleged some reviewable action by the FAA, this Court would nonetheless lack subject-matter jurisdiction.

V. CONCLUSION

As set forth above, this Court should dismiss Plaintiff's claims against the FAA for lack of subject-matter jurisdiction.

Dated: July 6, 2020

Respectfully submitted,

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By: /s/ *W. Dean Carter*
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