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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' RESPONSE TO PLAINTIFFS' MOTION TO FILE**

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.

SECOND AMENDED COMPLAINT (FED. R. CIV. P. 15(a))

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INTRODUCTION

Plaintiffs filed a motion with this Court for leave to file a second amended complaint asserting (1) a new cause of action related to the passage of Senate Bill No. 262 and (2) continued mismanagement of the Flathead Indian Irrigation Project (FIIP) by the Bureau of Indian Affairs (BIA). Plaintiffs' motion and memorandum do not meet even the most liberal standard for amending a complaint for numerous reasons, including:

(1) Plaintiffs seek to join the Mission and Jocko Valley Irrigation Districts as plaintiffs and the State of Montana as a defendant by adding these parties to the complaint without mention in their motion or memorandum;

(2) contrary to Plaintiffs' assertion, the State of Montana has not waived its sovereign immunity;

(3) because Plaintiffs seek to amend their complaint with facts allegedly occurring after the filing of their first amended complaint, their motion should be a motion to supplement under Federal Rule of Civil Procedure 15(d) and not a motion to amend under Rule 15(a);

(4) Plaintiffs' proposed second amended complaint includes additional factual assertions and stylistic changes that Plaintiffs do not address or attempt to justify in their motion and memorandum in support;

(5) the allegations that relate to the operation of the FIIP do not raise a new cause of action or legal issues not previously addressed in Defendants' motion to dismiss;

(6) Plaintiffs' conflict preemption claim is futile because Plaintiffs, as political subdivisions of the State of Montana, lack standing to sue the State in federal court for a violation of the Supremacy Clause;

(7) Plaintiffs' preemption claim is not ripe for adjudication because the compact has not been ratified by the Confederated Salish and Kootenai Tribes (Tribes) or Congress; and

(8) Plaintiffs have failed to allege claims against Defendants upon which relief may be granted.

Plaintiffs' motion, memorandum, and proposed second amended complaint also fundamentally misconstrue Montana Senate Bill 262 (S.B. 262 or Act). S.B. 262 is legislation ratifying a compact between the State, the Tribes, and the United States, related to water rights and uses but that does not control who operates the FIIP. Because Plaintiffs' motion to amend does not substantively correct Plaintiffs' First Amended Complaint (ECF No. 14) which is presently the subject of a motion to dismiss, Plaintiffs' supplemental claims will not lead to judicial efficiency, and/or are futile, Plaintiffs' motion should be denied.

BACKGROUND

I. Procedural Background

Plaintiff Flathead Irrigation District (FID) filed its complaint on April 2, 2014, seeking declaratory and injunctive relief, including a declaration that Defendants had refused to transfer the authority to operate and manage the FIIP. Compl. ¶¶ 66, 68 (ECF No. 1). In its complaint, FID alleged that the BIA's reassumption of control of the FIIP violated the Act of May, 28, 1908, H.R. 14018, 60th Cong. Ch. 89, 35 Stat. 44, 450, (1908 Act) and that the Cooperative Management Entity (CME), created to operate the FIIP in furtherance of the 1908

Act lacked proportional representation as required under Montana law. Comp. ¶¶ 9-24.

Defendants moved for a more definite statement (ECF No. 7) and Plaintiffs, Flathead Joint Board of Control (FJBC) and FID, filed an amended complaint. Am. Compl. (ECF No. 14). Plaintiffs repeated their allegations that the BIA unlawfully reassumed control of the FIIP. *Id.* ¶¶ 10, 17, 44, 81-82. Plaintiffs also added claims alleging that (1) the BIA violated Section 3 of the Indian Reorganization Act, 25 U.S.C. § 463(a) by taking lands within a reclamation project into trust for the Tribes, Am. Comp. ¶ 70, (2) the Power Division of the FIIP had been unlawfully operated under the Indian Self-Determination and Education Assistance Act by the Tribes, *id.* ¶ 71, and (3) that "revenues of the Power Division have been systematically generated and, to some degree, misdirected in violation of the 1948 Act," *id.* ¶¶ 76-79, 88.

On October 23, 2014, Defendants filed their motion to dismiss or, in the alternative, for summary judgment. ECF No. 35. The Court denied the motion without prejudice due to Defendants' failure to file a statement of undisputed facts. ECF No. 54.

On March 13, 2015, Defendants renewed their motion to dismiss. ECF No. 55. Briefing on the motion to dismiss was completed when Defendants filed their reply brief on April 10, 2015. ECF No. 63. In addition, Plaintiffs moved under

Federal Rule of Civil Procedure 56(d) to obtain discovery. ECF No. 60. Briefing on that motion was complete on May 7, 2015. ECF No. 65. On May 21, 2015, Plaintiffs filed their motion requesting leave to file a second amended complaint. ECF No. 66.

II. Factual Background--Montana S.B. No. 262

On April 24, 2015, the governor of Montana approved an act ratifying a water rights compact entered into by the Tribes, the State of Montana, and the United States. 2015 Montana Laws Ch. 294 (S.B. 262 or Act)[1] (intended to be codified in Mont. Code, Title 85, ch. 20). The Act also created an administration and management board to "to be the exclusive regulatory body on the Reservation" over all water rights on the Flathead Indian Reservation (FIR), the FRWMB. Art. IV.I.1 and I.4.

Section One of the Act is the water rights compact (Compact). *Id.* § 1, ¶ 1 pmbl. The purpose of the Compact is to "settle all existing claims to water of or on behalf of the [Tribes] within the State of Montana." *Id.* Under the Compact, the "project operator" is "the entity with the legal authority . . . and responsibility to operate the [FIIP]." *Id.* § 1, Art. II, subsec. 55; § 2, ch. 1, pt. 1, subsec. 1-1-104(47).

[1] A copy of the Act, as approved, is provided at Appendix A.

Article III of the Compact describes water rights under federal and state law asserted or, in some instances, relinquished by the Tribes to include "Call Protection" for certain non-tribal water rights holders. *Id.* § 1, Art. III. The "Tribes have the right to water . . . supplied to the [FIIP]" and, in lieu of pursuing claims in the Montana general stream adjudication, the Tribes, United States, and Project Operator "relinquish [the] right to exercise the Tribal Water Right to make a Call against" certain rights arising under State law. *Id.* at subsecs. C.1.a. & G.1.

Article IV, "Implementation of Compact," addresses the Tribal Water Right and its uses. The FRWMD is created under Article IV. *See* Act § 1, Art. IV, subsec. I. The FRWMB is the "exclusive regulatory body on the Reservation for the issuance of Appropriation Rights and authorizations for Changes in Use of Appropriation Rights and Existing Uses, and for the administration and enforcement of all Appropriation Rights and Existing Uses." *Id.* at subsec. I.1. The FRWMB has jurisdiction to resolve controversies over "the meaning and interpretation of the Compact on the Reservation" and "the right to the use of water as between the Parties or between or among holders of Appropriation Rights and Existing Uses on the Reservation." *Id.* The FRWMB is to consist of five voting members, two selected by the governor under criteria set forth in the Compact, two selected by the Tribes, and one selected by the other four members. *Id.* at subsec. 2.a.

In addition to the FRWMB, the Compact creates the Compact Implementation Technical Team (CITT) and the Compact Management Committee (CMC). *Id.* Art. II, §§ 24 & 25; Art. IV. subsec. G. The CITT's task is to plan and implement operational improvements, rehabilitation and betterment, and adaptive management for the FIIP. *Id.* & Appendix 3.5: Adaptive Management & CITT (App. 3.5).[2] The CITT is to be composed of four members representing the three parties and the Project Operator.[3] *Id.* at App. 3.5 ¶ 2.a. The CMC provides administrative oversight of the CITT and consists of the Director of Montana DNR, the Tribal Council chairman, and the BIA Regional Director. Act Art. IV. subsec. G.5. The CMC has jurisdiction to resolve disputes referred by the CITT. *Id*. at G.5.c. If the CMC is unable to resolve a dispute, the dispute may be appealed under applicable BIA regulations, to the FRWMB, or to a court of competent jurisdiction. *Id.* at G.5.d.

The Compact must be ratified by the Tribes and Congress to effectuate settlement of the water rights claims. Act Art. VII, subsect. D. The State and

[2] The appendices to the Compact may be found at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes[.]

[3] If operational control is transferred to the irrigators, the CITT position for the irrigators becomes an "at large" position selected by the other members. *Id.* at App. 3.5 ¶ 2.d.

Tribes have reserved the right to unilaterally withdraw from the Compact if Congress fails to ratify. *Id.*, subsecs. A.2.a. & A.4.a.

Section 2 of the Act is the Unitary Administration and Management Ordinance (Ordinance). *Id.*, § 2. The Ordinance parallels legislation to be adopted by the Tribes, the Montana Water Use Act of 1973, and "governs all water rights . . . and . . . controls all water use, including all permitting of new uses, changes of existing uses, enforcement of water rights calls and all aspects of enforcement within the exterior boundaries of the [FIR]." *Id.* ch. 1, pt. 1, subsecs. 1-1-101(1) & (3). Section 2 provides the rules for the FWRMB to fulfill its duties as the exclusive regulatory body for on-reservation water rights and uses. *Id.* ch. 1, pt. 2, & ch. 2. Of note, the enforcement powers contained in the Ordinance, which permit appeal to the FRWMB, do not apply to disputes between irrigators served by the FIIP. *Id.* § 2, ch. 3, subsec. 3-1-101.1.

ARGUMENT

I. Legal Standards

a. Supplemental Pleadings

Pursuant to Fed. R. Civ. P. 15(a) "[a] party may amend its pleading once as a matter of course . . . In all other cases, a party may amend its pleading only with . . . the court's leave. The court should freely give leave when justice so requires." However, for "any transaction, occurrences, or event that happened *after the date*

of the pleading . . . . The court may permit supplementation[.]" Fed. R. Civ. P. 15(d) (emphasis added); *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988); *see also Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) ("Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed"). Rule 15(d) does not contain the admonition that consent should be freely given "when justice so requires."

Rule 15(d) is a "tool of judicial economy and convenience . . . enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions[.]" *Keith*, 858 F.2d at 473 (internal quotation marks and citation omitted). However, "some relationship must exist between the newly alleged matters and the subject of the original action[.]" *Id.* at 474. A supplemental pleading cannot be used to introduce a "separate, distinct, and new cause of action" that should be the subject of a separate suit. *Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (per curiam) (quoting *Berrsebrugge v. Luce Mfg. Co.*, 30 F. Supp. 101, 102 (W.D. Mo. 1939)). "The goal of Rule 15(d) is judicial efficiency, and supplementation is appropriate where the entire controversy can be settled in one action." *Alliance for the Wild Rockies v. Kruger*, 15 F. Supp. 3d 1052, 1055 (D. Mont. 2014) (citing *Neely*, 130 F.3d at 402).

"Some district courts in [the Ninth] Circuit [have] import[ed] the Rule 15(a) standard when analyzing a motion to supplement . . . under Rule 15(d)[.]" *Oregon Natural Desert Assn'n v. McDaniel*, 282 F.R.D. 533, 537 (D. Or. 2012) (citing cases); *see also Yates v. Auto City 76*, 299 F.R.D. 611, 614 n. 4 (N.D.Cal. 2013) (recognizing that other courts have analogized Rules 15(d) and 15(a)).[4] Regarding Rule 15(a), the Ninth Circuit has stated that leave to amend should be granted absent: "(1) bad faith on the part of the plaintiffs; (2) undue delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *see also Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009). When determining whether to grant a motion under Rule 15(a), "the district court considers the presence of any of the four factors[.]" *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (internal quotation marks and citation omitted). "[T]he court should 'examine each case on its facts' and determine the propriety of granting leave to amend on that basis." *Fresno Unified Sch. Dist. v. K.U.*, 980 F. Supp. 2d 1160, 1175 (E.D. Ca. 2013) (applying the standards for Rule 15(a) to a motion to both amend and supplement a complaint) (citations omitted); *see also San Luis & Delta-Mendota Water Auth. v. U.S. Dept.*

[4] "No Ninth Circuit case . . . explicitly applies the four factors courts routinely consider under Rule 15(a) . . . to motions brought under Rule 15(d)." *Oregon Natural Desert Assn'n*, 282 F.R.D. at 537.

of the Interior, 236 F.R.D. 491, 497 (E.D. Cal. 2006) (listing factors based on Ninth Circuit cases applied to motion to supplement complaint).

Futile or legally insufficient amendments are not permitted. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002) (citation omitted). A party may not amend if it appears beyond doubt that the party could prove no set of facts in support of their claim which would entitle them to relief and the amended pleading would be dismissed for failure to state a claim. *DCD Programs, LTD. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) ("[l]eave to amend need not be given if a complaint, as amended, is subject to dismissal") (citation omitted); *Fresno Unified Sch. Dist.*, 980 F. Supp. 2d at 1179 (stating that the test for futility is the same as for considering the sufficiency of the pleadings under Fed. R. Civ. P. 12(b)(6)).

Moreover, the Ninth Circuit has recognized that adding a party by amending a complaint "poses an especially acute threat of prejudice to the entering party . . . [and in such cases] [a]voiding prejudice to the party to be added . . . becomes our major objective." *DCD Programs, LTD.* 833 F.3d at 187 (first alteration added, second in the original) (quoting *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1400 (9th Cir. 1984)).

b. Standing and Ripeness

"Ripeness and standing are closely related because they originate from the same Article III limitation" *Mont. Envt'l. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188-89 (9th Cir. 2014) (internal quotations omitted). The Ninth Circuit has recognized that ripeness often coincides with standing's injury-in-fact prong. *Id.* at 1189 (citations omitted).

"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, 654 (9th Cir. 2011) (citation omitted). The three requirements of standing are: (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical'" (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, 560-61 (1992) (citations and internal quotation marks omitted). "Plaintiffs who seek prospective injunctive relief must demonstrate both a sufficient likelihood of future injury . . . and that there is 'a likelihood of substantial and immediate irreparable injury.'" *Artichoke Joe's v. Norton*, 216 F.

Supp. 2d 1084, 1100 (E.D.Ca. 2002), *aff'd on other grounds* 353 F.3d 712 (9th Cir. 2003) (citation and quotation omitted).

"[T]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured . . . [T]o have standing a plaintiff must have suffered a concrete and particularized injury; particularized means that the injury must affect the plaintiff in a personal and individual way." *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240, 1244 (9th Cir. 1996) (quoting *Lujan*, 504 U.S. at 560, 563) (internal quotation marks omitted) (first alteration in the original, second added). Furthermore, "[u]nder established Ninth Circuit law, political subdivisions of a state [lack standing to] challenge the validity of a state statute in a federal court on federal constitutional grounds." *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1107 (9th Cir. 1999) (quoting *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (citation omitted)) (alterations in original and internal quotation marks omitted).

Ripeness is "peculiarly a question of timing, designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (citations, internal quotations omitted). "[C]onstitutional ripeness of a declaratory judgment action depends upon whether

the facts as alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *In re Coleman v. Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (internal quotation marks and citation omitted) .

> The issues presented must be "definite and concrete, not hypothetical or abstract." *Thomas*, 220 F.3d at 1139 (internal quotation marks omitted). Where a dispute hangs on "future contingencies that may or may not occur," *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir.1996), it may be too "impermissibly speculative" to present a justiciable controversy. *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir.1981).

Id. "In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999).

c. State Sovereign Immunity

"The States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]" *Alden v. Maine*, 527 U.S. 706, 713 (1999).

> [A] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts and thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court* . . .

> Courts will find that a State has waived its Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction. Because the language of article 2, section 18, of the Montana Constitution does not meet that standard, the State has not waived its immunity from suit in federal court.

State of Montana v. Gilham, 133 F.3d 1133, 1138-39 (9th Cir. 1998) (internal quotation marks, brackets, and citations omitted) (emphasis in original); *see also Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981) (per curiam); *Peretti v. State*, 777 P.2d 329, 332 (Mont. 1989).

d. Preemption

Article VI, Clause 2 of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." The Supreme Court has "long recognized that state laws that conflict with federal law are without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotation marks omitted).

> Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (citations and internal quotation marks omitted). Where a court is confronted with two plausible interpretations of a statute, the court has "a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). "In determining whether a state statute is preempted [by a federal statute], '[t]he purpose of Congress is the ultimate touchstone.'" *Tarrant Reg'l Water Dist. v. Herrman*, 656 F.3d 1222, 1241 (10th Cir. 2011) (citing *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103 (1963)), *aff'd* 133 S. Ct. 2120 (2013). A conflict between state and federal law must be clear to find preemption. *Id.* at 1246. By comparison, "where the subject matter of [an interstate compact] . . . is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 & n. 8 (1981).

e. The Administrative Procedure Act

"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. Congress is not an agency under the Administrative Procedure Act (APA). 5 U.S.C. §§ 551(1)(A), 701(b)(1)(A). 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 "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'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001) (citation and internal quotation marks omitted).

II. Plaintiffs' Proposed Amended Complaint

Plaintiffs' motion to amend acknowledges only two of many changes to the First Amended Complaint; this response addresses most of the other changes. The first change addressed by Plaintiffs assert that the enactment of Montana Senate Bill 262 created the Flathead Reservation Water Management Board (FRWMB) and other administrative bodies whose existence allegedly conflicts with the 1908

Act.[5] Pls.' Br. in Supp. of Mot. for Leave to File 2d Am. Compl. (Pls.' Br.) at 4 (ECF No. 67). In making this argument, Plaintiffs also allege that the bill was passed by less than a 2/3 vote in the Montana legislative chambers and that a separate State court action has been brought on that basis. *Id.*; *see also* Proposed 2d Am. Compl. ¶¶ 82-83 (ECF No. 66-1). The second change Plaintiffs' motion discusses involves allegations of continued mismanagement of the FIIP due to a recently announced increase in charges to water users, unspecified flooding, and violations of undefined operational requirements. Pls.' Br. at 4; *see also* Proposed 2d Am. Compl. ¶¶ 22, 50, 61, 64, 66-67, 69. However, the proposed second amended complaint also contains significant additional changes for which Plaintiffs provide no support or explanation.[6] The most significant change, and one not addressed in Plaintiffs' motion or memorandum, is that the State of Montana would be joined as a defendant. Proposed 2d Am. Compl. ¶ 9.

Plaintiffs also expand their allegations related to the impact on former CME employees of BIA's reassumption of control over the FIIP, *id.* ¶¶ 61, 65-67, and

[5] The text of the 1908 Act and discussion of its requirements may be found in Defendants' memorandum in support of their motion to dismiss and reply brief. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 5-6, 20-23 (ECF No. 56); Defs.' Reply at 3-6 (ECF No. 63).

[6] Appendix B to this response brief is a version of Plaintiffs' proposed amended complaint annotating the changes in text using the Adobe Acrobat compare documents function.

assert that change in employees because of BIA's reassumption of the FIIP resulted in inefficient operation. *Id.* ¶ 69. Similarly, Plaintiffs allege that certain funds held by the CME have been, or will be transferred to "another entity" and that the funds belong to the irrigators. *Id.* ¶ 81. Plaintiffs have also made basic corrections to their prior complaint, *see e.g.*, ¶ 25 (adding "Emphasis added"), ¶ 32 (changing "JVID" to "JID"), adding a footnote, *see e.g.*, pg. 25 n.6, and adding language to update allegations, *see e.g.*, ¶¶ 17, 22, 49, 53.

Notwithstanding these allegations in their proposed second amended complaint, Plaintiffs have only added counts related to conflict preemption, *see* Proposed 2d Am. Compl. ¶¶ 95-96, 104 (referring to the FWRMB as the UMB), and the transfer of CME funds, *see id.* ¶¶ 98, 106. *See also id.* Prayer for Relief ¶¶ A. 6-7, B. 5-6. In both instances, they seek declaratory and injunctive relief.

III. Plaintiffs' Motion Should be Denied Because Their Proposed Second Amended Complaint Frustrates Rather than Serves Judicial Efficiency and Introduces Unrelated, Distinct, and Separate Claims

Plaintiffs' motion and supporting memorandum seek to supplement the Amended Complaint by inserting six different claims or issues. They are: (1) conflict preemption; (2) FIIP mismanagement; (3) improper transfer of funds; (4) passage of S.B. 262 with less than a 2/3 vote of the Montana legislative bodies and attendant State court litigation; (5) joinder of the State of Montana; and (6) impact on former CME employees of BIA's decision to reassume control of the FIIP.

Defendants will first address those claims and issues that are readily dismissed because they are either State court matters or encompassed within the claims previously brought and the subject of Defendants' motion to dismiss. Defendants will then address those claims and issues which should be rejected under substantive law.

Regarding the passage of S.B. 262 by less than 2/3 vote of the legislature and the related State court litigation, Plaintiffs have not added a cause of action in the proposed second amended complaint related to those assertions and those assertions encompass issues purely of State law. Under Rule 15(d), a motion to supplement should be denied if it seeks to supplement with a separate, distinct, cause of action. The claim based on alleged defects in the state statute is unrelated to the APA action concerning the Department of the Interior under the 1908 Act presently set forth in the Amended Complaint (ECF No. 14). There is no judicial efficiency in having these new allegations before this Court.

Plaintiffs' preemption claims fails for the same reason. The enactment of S.B. 262 by the State of Montana and whether it is preempted by the 1908 Act is unrelated to a review of the decision of the Secretary of the Interior to reassume control of the FIIP. Plaintiffs make no allegations against the Secretary under their preemption claim, because there a none to make. This is properly a claim against the State of Montana and is not related to review under the APA. There is no

allegation that S.B. 262 impacts the Secretary's determinations over transfer of the FIIP; indeed, under the theory of Plaintiffs' proposed claim (that the state law is pre-empted by the federal law), there is no effect. As set forth above, the administrative bodies created by the Compact do not determine who operates or manages the FIIP. Plaintiffs should have brought the preemption claim, assuming it were viable (it is not) in a separate proceeding because it is unrelated to the APA claim presently before the Court.

The FIIP mismanagement and impact on former CME employees claims in the proposed second amended complaint, although they update the original assertions in immaterial ways, do not add any substance to similar allegations in the Amended Complaint. Similarly, the improper transfer of funds claim is generally indistinct from other claims of FIIP mismanagement. If this Court grants Defendants' motion to dismiss, these allegations would be subject to dismissal on the same bases. Therefore, Plaintiffs' motion to supplement with these claims should be denied for the reasons set forth in Defendants' motion to dismiss. Furthermore, it should be noted that the new assertions are irrelevant to resolution of the central legal issue in this case: whether the Department of Interior's decision to reassume control of the FIIP was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

IV. Plaintiffs' Supplemental Claims are Futile Because Plaintiffs Lack Standing and Their Claims are not Ripe

Plaintiffs lack standing to assert their preemption claim. First, Plaintiffs, as political subdivisions of the State of Montana,[7] lack standing to bring a preemption claim against the State of Montana in this Court. *Palomar Pomerado Health Sys.*, 180 F.3d at 1107. In addition, Plaintiffs do not have standing to bring their preemption claim against the Federal Defendants. Plaintiffs' proposed second amended complaint does not assert any injury in fact or an invasion of a legally protected interest. They assert that Section 2 of the Act "among other things, attempts to place the operation and management of the [FIIP] in a number of politically appointed boards as opposed to the owners of the irrigated lands." Proposed 2d Am. Compl. ¶ 82. However, as discussed above, the FRWMB, CITT, and CMC have responsibilities related to water rights and uses but do not have responsibilities over the operation and management of the FIIP. As the Act makes clear, the Project Operator, retains operation and management control of the FIIP. In other words, the Act does not conflict with the 1908 Act. Therefore, it is difficult to understand what likelihood of future injury, likelihood of substantial and immediate irreparable injury, or invasion of legally protected rights Plaintiffs are attempting to assert against the Federal Defendants given that the Compact is

[7] *See* Am. Compl. ¶ 1 & 2; Proposed 2d Am. Compl. ¶ 1 & 2.

neutral as to who operates the FIIP. The Act does not distinguish between the irrigators or BIA as the Project Operator. The Compact's purpose is to resolve issues of water rights and uses, and the role of the administrative bodies is to formally administer all state and federal water rights and uses, not be the operator of the FIIP. In addition, Plaintiffs have not alleged any injury that is concrete and particularized, and actual and imminent.

In addition to failing the first prong of the showing for standing, Plaintiffs' new claim also fails under other elements of standing. Regarding the second prong of Article III standing, causal connection, Plaintiffs do not have standing to bring this claim against the Federal Defendants. Plaintiffs allege that passage of S.B. 262 creates the implied conflict. Thus, the causal connection is to an act of the Montana State government and not to federal Defendants because "[a]ttributing the actions of a legislature to third parties rather than to the legislature is of dubious legitimacy, and the cases uniformly decline to do so." *Chem. Producers and Distrib. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006) (discussing vacatur of moot judgment). Moreover, because Plaintiffs' injury is so speculative, it is not redressable.

Regarding ripeness, as set forth above, Plaintiffs' conflict preemption claim is not definite and concrete. Although the State has passed the Act, two other parties, the Tribes and Congress, must ratify the Compact. If Congress ratifies the

Compact, it will become federal law overriding any preemption claims. *Cuyler*, 449 U.S. at 440. In other words, to the extent a conflict exists, which it does not, it hinges on "future contingencies that may or may not occur." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1993) (citation omitted). Therefore, any harm from the conflict is impermissibly speculative and does not present a justiciable controversy. *Portland Police Ass'n v. City of Portland*, 658 F.2d 1272, 1273 (9th Cir. 1981).

V. The State of Montana has not Waived its Eleventh Amendment Immunity

Plaintiffs assert that the State of Montana is subject to suit under Article II, Section 18 of the Montana Constitution. The Ninth Circuit has recognized that this provision of the Montana Constitution does not waive the State's immunity from suit in federal court. *State of Montana*, 133 F.3d at 1138-39. Therefore, Plaintiffs' attempt to join the State, and its claims against the State, are futile and their motion should be denied.

VI. Because There is no Conflict Between the 1908 Act and S.B. 262, Plaintiffs' Preemption Claim is Futile

Plaintiffs assert that the State of Montana has created an implied conflict with the Act by placing the operation and management of the FIIP in the FWRMB, CMC, and/or CITT. *See e.g.* Proposed 2d Am. Compl. ¶ 82. However, the Act does not do so and this assertion fails under the presumption against preemption.

McDaniel v. Wells Fargo Investments, LLC, 717 F.3d 668, 674 (9th Cir. 2013). The Act, as discussed above, resolves water rights claims between the parties, and establishes administrative bodies to oversee certain water rights and uses on the FIR. The administrative bodies created under the Act do not have authority over operation and maintenance of the FIIP and, in fact, the Act expressly provides that enforcement powers of the FWRMB do not extend to the administration of waters in FIIP facilities. Act § 2, ch. 3, subsec. 3-1-101.

In addition, Congress' ostensible purpose in the 1908 Act was to allow the irrigators to operate and maintain the FIIP under rules and regulations acceptable to the Secretary of the Interior once they had completed payments for its construction. *See* Defs.' Mem. in Supp. of Mot. to Dismiss (ECF No. 56, at 5-6). Nothing in the 1908 Act relates to allocation of water rights or uses. *United States v. Alexander*, 131 F.2d 359, 360 (9th Cir. 1942) ("Being reserved, water rights could only be obtained as specified by Congress . . .")

Finally, it should again be noted that under *Cuyler* there will be no preemption issue whatsoever if Congress ratifies the Compact. Although there is no conflict here, Congress' ratification of the Compact will negate any preemption issue. For the same reason, this case is not ripe for adjudication. Therefore, this Court should deny Plaintiffs' motion.

VII. Under the APA, Plaintiffs Have Failed to State Claims Related to Preemption and Improper Transfer of Funds

Because Plaintiffs' basis for review of their preemption claim against the United States is the APA, Proposed 2d Am. Compl. ¶ 12, Defendants submit this brief analysis to demonstrate that Plaintiffs' preemption and funds transfer claims, which Defendants did not have the opportunity to address in their motion to dismiss, are futile under the APA and should be dismissed.

At this point, Plaintiffs have not alleged any final federal agency action, related to their preemption claim that has resulted in legal harm to their interests. Therefore, Plaintiffs have failed to state a claim upon which relief may be granted by this Court under the APA. 5 U.S.C. §§ 551(13), 702, 704. Ultimately, the Compact will be introduced to Congress and any action taken by Congress is beyond the reach of the APA. 5 U.S.C. §§ 551(1)(A), 701(b)(1)(A).

Similarly, Plaintiffs submit a bare allegation on "information and belief" regarding a transfer of funds by the BIA and request relief as a separate and distinct cause of action. Proposed 2d Am. Compl. ¶¶ 81, 98 & 106. However, Plaintiffs do not allege an agency action that is an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof" in connection with the alleged funds transfer, nor do they allege legal harm that flows from the alleged action or within the meaning of a relevant statute. 5 U.S.C. § 551(13). Rather, Plaintiffs, who currently do not operate the FIIP and whose exit from the Transfer Agreement

precipitated the dissolution of the CME, Defs.' Mem. in Supp. of Mot. to Dismiss (ECF No. 56, at 19-20), now seek to stop an unspecified transfer of funds by the BIA entity managing the FIIP. Nothing in their allegations supports their assertion that this Court has jurisdiction to do so under the APA. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (limitations in APA protect federal agencies "undue judicial interference with their lawful discretion"). Therefore, their motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Leave to File Second Amended Complaint (Fed. R. Civ. P. 15(a)).

Dated this 25th day of June, 2015.

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that, on June 25, 2015, I filed the foregoing Response to Plaintiffs' Motion for Leave to File Second Amended Complaint (Fed. R. Civ. P. 15(a)) 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 Response to Plaintiffs' Motion for Leave to File Second Amended Complaint (Fed. R. Civ. P. 15(a)) is proportionately spaced, has a typeface of 14 points or more and contains 6469 words, excluding the caption, and certificates of service and compliance.

/s/Stephen Finn