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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FLATHEAD IRRIGATION DISTRICT; FLATHEAD JOINT BOARD OF CONTROL, Plaintiffs-Appellants, v. RYAN K. ZINKE, Secretary of the Department of Interior; STANLEY SPEAKS, Portland Area Direct Bureau of Indian Affairs; JOSEPH MORAN, "Bud", Superintendent, Flathead Agency, Bureau of Indian Affairs; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants-Appellees, CONFEDERATED SALISH AND KOOTENAI TRIBES, Appellee-Intervenor.	No. 15-35701 D.C. No. 9:14-cv-00088-DLC MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, Chief District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted February 7, 2018[**]
Seattle, Washington

Before: M. SMITH and MURGUIA, Circuit Judges, and ROBRENO,[***] District Judge.

Plaintiffs-Appellants Flathead Joint Board of Control and Flathead Irrigation District appeal the district court's dismissal of Counts One, Two, Four, and Five of their Amended Complaint (AC) and the court's denial of leave to amend. Because we lack jurisdiction and because the district court did not abuse its discretion in denying leave to amend, we affirm.

As the facts and procedural history are familiar to the parties, we do not recite them here.

1. The district court properly dismissed Counts One and Four for lack of subject matter jurisdiction. First, the district court confined itself to the limits of Defendants-Appellees' Federal Rule of Civil Procedure 12(b)(1) facial challenge, accepting as true all factual allegations in the complaint and the attachments thereto. *See Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (affirming that court must accept complaint's factual allegations as true when

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[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Eduardo C. Robreno, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

resolving a facial attack); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.4 (9th Cir. 2014) (noting that requirement to accept alleged facts as true extends to "factual allegations in the exhibits attached to [a] complaint").

Next, the court correctly determined that Defendants-Appellees' ongoing re-assumption of control was not subject to judicial review because it was an act committed to agency discretion by law. Though the Administrative Procedures Act (APA) provides a general waiver of sovereign immunity that renders reviewable any "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, the APA's § 701 carves out from this category of reviewable conduct any "agency action" that "is committed to agency discretion by law," *id.* § 701(a)(2). This narrow exception applies here because the 1908 Act "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *see also Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 954 (9th Cir. 2017).

The 1908 Act's Turnover Provision provides that upon full repayment, the Flathead Project's management and operation "shall pass to the owners of the lands irrigated thereby, to be maintained . . . under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior." 35 Stat. 444, 450. Even accepting Plaintiffs-Appellants' parsing of the

statute—separating its "shall" component from the clause involving the Secretary—is proper, the relevant portion of the statute is the latter. The 1908 Act directs that the Flathead Project's management and operation "shall pass to the owners of the lands irrigated thereby" upon repayment, and there can be no dispute that such a transfer was effected in 2010.

However, the latter part of the statute provides that the lands are to be managed and operated "under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior." 35 Stat. at 450. This clause plainly confers oversight of the Project's management and operations to the Secretary's discretion upon transfer. Here, the Secretary determined that it was acceptable that the Project be managed and operated according to the terms of the Transfer Agreement. One of these terms allowed for the BIA's "emergency reassumption of the operation and management of all or part of the Project." Acceptability to the Secretary affords us no meaningful standard against which to judge the Secretary's decision to manage the Project in this way. Thus, we lack jurisdiction pursuant to § 701(a)(2).

We likewise lack jurisdiction under § 706(1) of the APA. This section permits a court to compel agency action that has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Thus, for a claim to proceed under this section, a plaintiff must "assert[] 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); *see also Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). "Absent such an assertion, a Section 706(1) claim may be dismissed for lack of jurisdiction." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1019-20 (9th Cir. 2007).

Here, the Secretary performed the discrete action legally required under the 1908 Act: The Secretary transferred the operation and management of the Flathead Project upon full repayment in 2010, and acted to ensure that its management and operation were then "under such form of organization and under such rules and regulations as may be acceptable to the Secretary." Plaintiffs-Appellants provide no authority for their claim that the Secretary's refusal to return the operation and management of the Flathead Project after re-assuming it pursuant to the Transfer Agreement, to an organizational entity not acceptable to the Secretary, constituted a failure to take a legally required action. We thus lack jurisdiction under § 706(1).

2. The district court properly dismissed Counts Two and Five for lack of jurisdiction. Dismissal was proper because the AC failed to identify a *particular* "agency action" that the panel could review. *See, e.g.*, *City of Las Vegas v. Clark County*, 755 F.2d 697, 704 (9th Cir. 1984) (holding that complaint that does not point "to a particular agency action or administrative record for the court to review . . . is 'insufficient to state a claim for judicial review of agency action'"

(quoting *Scott v. City of Hammond*, 741 F.2d 992, 995 (7th Cir. 1984)). With regard to the taking of land into trust, Plaintiffs-Appellants allege only that the United States "has been taking land irrigated by the Project out of fee status and moving it into trust status, rendering it untaxable by the Districts, in violation of the proviso that land within a reclamation project, which the Flathead Project is, shall not be taken into trust." This allegation is devoid of specificity and not sufficiently particular to confer jurisdiction under the APA.

The AC also fails to identify a *final* agency action. *See* 25 C.F.R. § 2.6(a) (requiring exhaustion of department appeals prior to judicial review under § 704); *Hells Canyon Pres. Council*, 593 F.3d at 930 ("To bring a claim under 5 U.S.C. § 706(2), plaintiffs must identify a final agency action upon which the claim is based."); *Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) (collecting cases affirming dismissals of unexhausted claims). The apparently ongoing nature of the alleged transfers undermines any purported finality, about which Plaintiffs-Appellants have alleged no facts.

3. The district court properly denied Plaintiffs-Appellants' motion for leave to file a Second Amended Complaint on the basis of futility. After methodically addressing each of Plaintiffs-Appellants' proposed amendments, the court determined that none of Plaintiffs-Appellants' proposals would remedy the flaws that were the basis of the district court's dismissal. We agree, and therefore hold

that the district court's denial of leave to amend on the basis of futility was an appropriate exercise of its discretion. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

For the foregoing reasons, the district court's dismissal of Counts One, Two, Four, and Five of the AC and its denial of leave to amend are AFFIRMED. We decline to address the Appellee-Intervenor's arguments because they concern a turnover that has not yet taken place and raise a question of statutory construction not properly before this court on appeal.