

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

ANGELA DELORME-GAINES,

Plaintiff,

v.

TARA SWEENEY, Asst. Secretary of
Interior, US Bureau of Indian Affairs, et al.,

Defendants.

Case No. 1:20-cv-00081

**BUREAU OF INDIAN AFFAIRS’ REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PETITION FOR
WRIT OF MANDAMUS**

Bureau of Indian Affairs (“BIA”) replies in support of Bureau of Indian Affairs’ Motion to Dismiss Petition for Writ of Mandamus, Doc. 14 (“Motion to Dismiss”).

INTRODUCTION

Plaintiff’s Memorandum in Support of Plaintiff’s Response to Bureau of Indian Affairs’ Motion to Dismiss, Doc. 24 does not address a single legal argument made in the Motion to Dismiss but instead collaterally attacks BIA’s October 21, 2020 decision denying Plaintiff’s April 8, 2019 request that BIA place a lien against Thomas Joseph Fox’s IIM account. See Doc. 16, Danks Decl. II at ¶6, and Doc. 16-2, Letter from Kayla Danks to Angela Delorme-Gaines, with enclosure, dated October 21, 2020 (“Delorme-Gaines Decision”).¹

Despite invoking both the Administrative Procedure Act, 5 U.S.C. § 701, et seq., and the mandamus statute, 28 U.S.C. § 1361, in her Petition for Writ of Mandamus (“Petition”), Plaintiff makes no attempt to meet her burden of establishing the elements necessary to confer subject-

¹ Both the decision on Fox’s IIM account (Doc. 16, Danks Decl. II at ¶5, and Doc. 16-1, Letter from Kayla Danks to El Marie Conklin, dated September 30, 2020) and the Delorme-Gaines Decision were issued after Plaintiff filed her Petition in this Court. It follows that Plaintiff’s complaints about those decisions cannot have formed the basis for the Petition. None of her complaints are properly before this Court; Plaintiff’s repeated attempts to re-define the nature and scope of this action, and to short-circuit the legal process, are unsupported by law.

matter jurisdiction on this Court. The Court should “decline to consider cursory or summary arguments’ unsupported by facts or legal authorities[.]” Butler v. Crittenden Cty., 708 F.3d 1044, 1051 (8th Cir. 2013)(quoting United States v. Stuckey, 255 F.3d 528, 531 (8th Cir. 2001)).

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION BECAUSE BIA ACTED ON PLAINTIFF’S APRIL 8, 2019 REQUEST; PLAINTIFF’S PETITION FOR A WRIT OF MANDAMUS IS MOOT

A. The Court Lacks Subject-Matter Jurisdiction Over a Moot Claim.

Plaintiff does not dispute BIA’s contention that it has taken action requested in Plaintiff’s Petition, namely BIA issued the Delorme-Gaines Decision based on Plaintiff’s April 8, 2019 request that BIA place a lien against Thomas Joseph Fox’s IIM account. BIA did not adopt Plaintiff’s requested result; but, BIA had no duty to do so. See Doc. 15 at 7-11.²

“Plaintiffs’ failure to oppose Defendants’ specific argument in a motion to dismiss is deemed waiver of that issue. See e.g., Arista Records, LLC v. Tkach, 122 F. Supp. 3d 32, 38–39 (S.D.N.Y. 2015)(finding that when a party fails to oppose specific arguments, then the party

² The propriety of BIA’s decision is not before this Court; but, it is illuminating to note part of the factual basis for BIA’s determination. The Delorme-Gaines Decision discusses BIA’s decision-making process in light of newly discovered information relating to an earlier action filed by Plaintiff against Thomas Joseph Fox in Fort Berthold District Court. That Fort Berthold case, premised on the same contract which formed the basis for the Turtle Mountain Tribal Court Order and Judgment Plaintiff claims entitles her to a lien on Fox’s IIM account, was dismissed with prejudice by Fort Berthold District Court. Dismissal of Plaintiff’s Fort Berthold case occurred more than a year before Plaintiff obtained a judgment in the second action in Turtle Mountain Tribal Court. Doc. 16-2 at 3-4. When Plaintiff sought to “place a lien” on Fox’s IIM, Plaintiff did not inform BIA about the earlier judgment of dismissal with prejudice: “On March 6, 2020, the Agency received a written request for a hearing regarding the restriction on Mr. Fox’s IIM account. Mr. Fox’s counsel stated that Mr. Fox was taking action to vacate the Order and Judgment in Turtle Mountain Tribal Court. Counsel also provided a copy of the Fort Berthold District Court’s Order to Dismiss. This was the first time the Agency learned of the parallel case filed against Mr. Fox in Fort Berthold District Court and the resulting Order to Dismiss.” Doc. 16-2 at 2.

waives those issues.” Kao v. British Airways, PLC, No. 17 Civ. 0232 (LGS), 2018 WL 501609, at *5 (S.D.N.Y. Jan. 19, 2018); Hongxia Wang v. Enlander, No. 17 Civ. 4932 (LGS), 2018 WL 1276854, at *7 (S.D.N.Y. Mar. 6, 2018)(same). “A party’s failure to oppose specific arguments in a motion to dismiss results in waiver of those issues. Graham v. United States, 753 F.Supp. 994, 1000 (D.Me.1990)(see Collins v. Marina–Martinez, 894 F.2d 474, 481 n.9 (1st Cir.1990)) (“It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.”).” In re Compact Disc Minimum Advertised Price Antitrust Litig., 456 F. Supp. 2d 131, 152–53 (D. Me. 2006), supplemented, MDL Docket No. 1361, 2006 WL 2943308 (D. Me. Oct. 13, 2006). Plaintiff has waived any argument on the mootness issue.

B. Mandamus Is Not Available for Plaintiff’s Requested Relief.

1. Plaintiff Does Not Have a Clear Right to Relief.

Plaintiff did not materially oppose.³

2. BIA Has No Nondiscretionary Duty to Act.

Plaintiff did not materially oppose.⁴

3. Plaintiff Has An Adequate Alternative Remedy.

Plaintiff did not materially oppose.⁵

Further, as Plaintiff well knows, or should know at this point, the only appropriate venue to challenge the Delorme-Gaines Decision at this time is at the agency level, pursuant to the applicable provisions of the Code of Federal Regulations. See Bureau of Indian Affairs’

³ Plaintiff’s conclusory argument is: “The BIA has a clear duty to perform the distribution plan (see again Document 7-10).” Doc. 24 at 4.

⁴ See note 3, supra.

⁵ Plaintiff’s conclusory argument is: “And, Plaintiff has no adequate alternative remedy to make the BIA perform their clear duty except for this Court to intervene.” Doc. 24 at 4.

Memorandum in Support of Motion to Dismiss Petition for Writ of Mandamus. Doc. 15 at 10-11. The Delorme-Gaines Decision included a statement of administrative appeal rights pursuant to 25 C.F.R. § 2.7(c). Doc. 16, Danks Decl. II at ¶6, and Doc. 16-2 at 4. Every alleged defect in BIA’s decision-making process—e.g. complaints about the timing of BIA’s actions, complaints regarding BIA’s application of 25 C.F.R. § 115.607, and BIA’s decision not to encumber the IIM account at issue—would be addressed through a properly invoked BIA administrative appeal at the Regional Director level, which in turn could be appealed to the Interior Board of Indian Appeals.⁶ See Doc. 15 at 10.

And, under 25 C.F.R. § 2.6 judicial review of a BIA decision by this Court under the Administrative Procedures Act is precluded unless there is a “final” decision, i.e. “final agency action” by the agency. Doc. 15 at 10-11. Plaintiff’s claims must first be addressed by BIA, and administratively exhausted. Finality is required prior to invoking the jurisdiction of this Court to prevent “premature interference with agency processes ... and to compile a record which is adequate for judicial review.” J.M. v. Francis Howell Sch. Dist., 850 F.3d 944, 950 (8th Cir. 2017)(citation omitted). No subject-matter jurisdiction exists under the facts of this case.

II. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE PLAINTIFF HAS FAILED TO PLEAD FACTS ADEQUATE TO ESTABLISH A PLAUSIBLE RIGHT TO THE AFFIRMATIVE INJUNCTIVE RELIEF SHE SEEKS.

Plaintiff did not oppose.

⁶ Skipping over her burden to establish subject-matter jurisdiction, Plaintiff jumps right to the merits of the Delorme-Gaines Decision and repeatedly complains BIA’s Motion to Dismiss did not show or argue BIA’s actions were justified under 25 C.F.R. § 115.607. Doc. 24 at 3. Such arguments go to whether BIA properly applied its own regulations and would properly be made during the course of an APA appeal of final agency action, not during a mandamus/5 U.S.C. § 706 action.

CONCLUSION

BIA has established this Court lacks subject-matter jurisdiction and cannot issue a writ of mandamus or enter affirmative injunctive relief under the APA. Plaintiff does not advance any argument to the contrary. This case must be dismissed.

Dated: December 8, 2020

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