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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lasse Norgaard-Larsen, et al., Plaintiffs, vs. The City of Phoenix, et al., Defendants.	No. 20-cv-02467-PHX-GMS **DEFENDANT CITY OF PHOENIX'S MOTION TO DISMISS** (Assigned to the Honorable G. Murray Snow)

This lawsuit stems from Plaintiffs' disagreement with a November 2018 lease between the cities of Phoenix and Scottsdale for a portion of Papago Park, and Scottsdale's December 2018 sublease of some of that land to the San Francisco Giants baseball franchise. Plaintiffs certainly expended significant effort drafting the 27-page single-spaced complaint (and assembling the 112 pages of attached exhibits), but Plaintiffs' legal theories uniformly fail and cannot be cured through amendment. Plaintiffs lack both Article III and prudential standing, they lack cognizable legal theories, and their federal claims are untimely even if Plaintiffs had standing. The Court should dismiss this action with prejudice under Rules 12(b)(1) and 12(b)(6).

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Pursuant to LRCiv 12.1(c), the undersigned certifies that the parties conferred on the issues set forth in this motion. The parties could not resolve the issues set forth herein short of motion practice.

I. RELEVANT FACTS

Plaintiffs are residents of Tempe and Scottsdale who take issue with a November 2018 lease between the cities of Phoenix and Scottsdale for a portion of Papago Park, and Scottsdale's December 2018 sublease of some of that land to the San Francisco Giants baseball club. (Doc. 1, pp. 2, 5.) Plaintiffs make a series of allegations concerning prior deeds and conveyances of the land between the federal government, the State of Arizona, and the cities of Phoenix and Scottsdale. (Doc. 1, pp. 5-7.)

Plaintiffs raise claims under: (1) the Property Clause of the U.S. Constitution; (2) the Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460*l*-4, et seq.; (3) a provision of the Federal Property and Administrative Services Act, 40 U.S.C. § 550(e); and (4) the Contracts Clause of the U.S. Constitution. (Doc. 1, p. 2.)

II. LEGAL ARGUMENT

The complaint in this action is both procedurally and substantively deficient, and the Court should dismiss it with prejudice. The 27-page, single spaced complaint does not comply with Rules 8 and 10 of the Federal Rules of Civil Procedure or LRCiv 7.1 of the Local Rules for the District of Arizona. Amending to remedy these procedural/formatting issues would be futile because of the significant flaws in Plaintiffs' legal claims, which cannot be cured through amendment. Plaintiffs lack both Article III and prudential standing, and they lack cognizable legal theories. Even if Plaintiffs had standing, their federal claims are untimely.

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A. The Complaint Is Procedurally Improper and Improperly Formatted

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The 27-page, single-spaced complaint here is not the short and plain statement envisioned by Rule 8. Indeed, dismissal is proper where, as here, "the very prolixity of the complaint ma[kes] it difficult to determine just what circumstances were supposed to have given rise to the various causes of action." *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).

Similarly, Rule 10(b) of the Federal Rules of Civil Procedure requires that a complaint be set out in numbered paragraphs "each limited as far as practicable to a single set of circumstances." The complaint here does not contain such numbered paragraphs.

Finally, LRCiv 7.1 requires that a complaint be double-spaced, in a font not smaller than 13 point, with no more than 28 lines per page. The complaint here is single-spaced, the font appears to be smaller than 13 point, and there are as many as 50 lines on a given page.

Each of the above issues warrants dismissal, and dismissal with leave to amend would generally be proper if the procedural and formatting defects identified above were the only issue with the complaint. However, the legal issues discussed below cannot be cured by amendment. Therefore, amending the complaint to remedy the procedural/formatting issues identified here would be futile. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("A district court does not err in denying leave to amend where the amendment would be futile . . . or would be subject to dismissal.").

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B. Relevant Legal Standards under Rules 12(b)(1) and 12(b)(6)

The remainder of this motion to dismiss is brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Rule 12(b)(1) "allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction." *Kinlichee v. United States*, 929 F.Supp.2d 951, 954 (D. Ariz. 2013) (citing *Tosco Corp. v. Comtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001)). Arguments raised under Rule 12(b)(1) should be addressed before other reasons for dismissal because if the complaint is dismissed for lack of subject matter jurisdiction, other defenses raised become moot. *Id.*

Plaintiffs—as the parties asserting jurisdiction here—bear the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). "[U]nlike a Rule 12(b)(6) motion, in a Rule 12(b)(1) motion, the district court is not confined by the facts contained in the four corners of the complaint—it may consider facts and need not assume the truthfulness of the complaint." *Americopters, LLC v. FAA*, 441 F.3d 726, 732 n.4 (9th Cir. 2006).

Rule 12(b)(6) allows a party to seek dismissal of a claim if the claimant fails to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal v.*

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Ashcroft, 556 U.S. 662, 677 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Starr v. Baca*, 653 F.3d 1201, 1216 (9th Cir. 2011) (noting the complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."). Although the "plausibility standard" does not rise to the level of a "probability requirement," it does require that a plaintiff plead sufficient facts that show more than the mere "possibility" of a defendant's liability; and facts that are more than merely "consistent" with liability. *Iqbal*, 556 U.S. at 677.

C. Plaintiffs Lack Standing / There Is No Subject Matter Jurisdiction

Although the complaint is not entirely clear, Plaintiffs appears to raise four legal bases for relief: (1) the Property Clause of the U.S. Constitution; (2) the Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460*l*-4, et seq.; (3) a provision of the Federal Property and Administrative Services Act, 40 U.S.C. § 550(e); and (4) the Contracts Clause of the U.S. Constitution.[1] (Doc. 1, p. 2.) However, Plaintiffs do not have standing to advance these claims in this lawsuit.

"Standing includes two components: Article III constitutional standing and prudential standing." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011). Prudential standing examines whether "a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004).

[1] The complaint discusses four Arizona cases at various points: *Arizona Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356 (App. 1991); *Cont'l Oil Co. v. Fennemore*, 38 Ariz. 277 (1931); *Federoff v. Pioneer Title & Tr. Co. of Arizona*, 166 Ariz. 383 (1990); *O'Malley v. Cent. Methodist Church*, 67 Ariz. 245 (1948). (Doc. 1, pp. 5, 17, 18.) During the parties' LRCiv 12.1 process, Plaintiffs clarified that these cases are included for context. Plaintiffs are not asserting any violations of state law.

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However, the "core component of standing" is the case-or-controversy requirement found in Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing requires a plaintiff to "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). "[A] suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

A plaintiff bears the burden of establishing the existence of a justiciable case or controversy, and "'must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Plaintiffs cannot meet their burden here.

1. LWCFA and FPASA – No Subject Matter Jurisdiction

As noted above, Plaintiffs allege that the City of Phoenix has violated the Land and Water Conservation Fund Act (16 U.S.C. § 460*l*-4, et seq.) and a provision of the Federal Property and Administrative Services Act (40 U.S.C. § 550(e)). However, the Court lacks subject matter jurisdiction over these claims and dismissal is appropriate under Rule 12(b)(1).

There is no private cause of action for alleged violations of the Land and Water Conservation Fund Act. *See, e.g., Friends of Roeding Park v. City of Fresno*, 848 F.Supp.2d 1152, 1160 (E.D. Cal. 2012) (stating that it is "well-accepted" that there is no private right of action under the LWCFA); *Sportsmen's Wildlife Def. Fund v. U.S.*

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Dep't of Interior, 40 F.Supp.2d 1192, 1200 (D. Colo. 1999) ("no private right of action exists for alleged violations of the [Land and Water Conservation Fund Act]"); *Weiss v. Kempthorne*, 2009 WL 960183, at *1 (W.D. Mich. Apr. 7, 2009) ("[T]he Court is not aware any authority for a private right of action under the LWCFA, and Plaintiffs cite none.").

Similarly, there is no private right of action under the Federal Property and Administrative Services Act. *See, e.g., Cooper v. Haase*, 750 Fed. Appx. 600, 601 (9th Cir. 2019) ("The Federal Property and Administrative Services Act ('FPASA') does not provide for a private cause of action."); *Conservation Law Found. of New England, Inc. v. Harper*, 587 F.Supp. 357, 366-67 (D. Mass. 1984) ("[Plaintiffs] do not have a private right of action under the [FPASA]"); *Northrop Univ. v. Harper*, 580 F.Supp. 959, 963 (C.D. Cal. 1983) ("[FPASA] does not provide for such private enforcement actions.").

A claim under LWCFA or FPASA is properly brought against the relevant federal agency under the Administrative Procedure Act ("APA"). *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 317-19 (1979) (APA is the proper method to enforce a federal agency's compliance with a particular federal statute); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1238 (9th Cir. 2005) ("Because NFMA and NEPA do not provide a private cause of action to enforce their provisions, agency decisions allegedly violating NFMA and NEPA are reviewed under the Administrative Procedure Act[.]"). The APA does not apply to the City of Phoenix because a city "is not an 'authority of the Government of the United States.'" *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir. 1979) (quoting 5 U.S.C. § 701(b)(1)). *See also Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014)

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("Actions under the APA may be brought only against federal agencies.").

Without a right of action for alleged violations of LWCFA or FPASA, Plaintiffs' alleged injuries cannot be redressed by the Court and Plaintiffs lack Article III standing for these claims. *See Bennett*, 520 U.S. at 162 (Article III standing requires that the plaintiff's injury will likely be redressed by a favorable court decision). The Court thus lacks subject matter jurisdiction over these claims. *See Cetacean Community*, 386 F.3d at 1174 ("[A] suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit.").

Dismissal of these claims is appropriate under Rule 12(b)(1).

2. Property Clause and Contracts Clause – No Prudential Standing

Plaintiffs' next two claims are brought under two portions of the U.S. Constitution, the Property Clause and the Contracts Clause. Plaintiffs lack prudential standing to advance these claims, and dismissal is appropriate under Rule 12(b)(6).

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belong[ing] to the United States." U.S. Const. art. IV, § 3, cl. 2. The Property Clause "precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp. v. Las Vegas Dev. Group, LLC*, 106 F.Supp.3d 1174, 1179 (D. Nev. 2015). Claims under the Property Clause are properly brought by the federal government because "the federal government is the best advocate of its *own* interests." *The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1172 (10th Cir. 2011) (italics in original).

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Here, Plaintiffs are not the federal government and have no standing to assert the federal government's rights in any of the deeds or land grants discussed in the complaint. Indeed, Plaintiffs' complaint indicates that the federal government has disclaimed any interest in Papago Park and has not agreed to be involved in this lawsuit either. (Doc. 1, pp. 7-8.) Plaintiffs do not have standing to assert the federal government's rights under the Property Clause merely because they are citizens or taxpayers. *See Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981).

The Contracts Clause provides in pertinent part: "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Contracts Clause can, in certain circumstances and within the Ninth Circuit, provide a private cause of action through 42 U.S.C. § 1983. *See S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) (ruling that Section 1983 provides a private right of action premised on a Contracts Clause violation when "a State, or a political subdivision thereof, impair[s] its obligations of contract").[2] However, such a claim is properly brought by an individual whose own vested contract rights are impaired by the government. *Lazar v. Kroncke*, 862 F.3d 1186, 1199-1200 (9th Cir. 2017).

Here, the complaint alleges that the rights of the federal government (and possibly the State of Arizona) in the deeds at issue are being diminished, not any contract right held by Plaintiffs themselves. (Doc. 1, p. 25.) Plaintiffs are strangers to all of the contracts mentioned in the complaint, and thus, they have no vested contract rights in these transactions. Without vested contractual rights at issue in the transactions at hand,

[2] There is a circuit split on this issue. *Compare S. Cal. Gas Co.*, 336 F.3d at 887 *with Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017) ("[A]n alleged Contracts Clause violation cannot give rise to a cause of action under § 1983.") *and Crosby v. City of Gastonia*, 635 F.3d 634, 641 (4th Cir. 2011) (same).

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Plaintiffs lack prudential standing. *See Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 80 (1937) (Contracts Clause challenge failed in the absence of vested contractual rights); *Lazar*, 862 at 1200 ("Because Lazar never possessed a vested contractual right, she suffered no contractual impairment" under the Contracts Clause).

Dismissal of these claims is proper under Rule 12(b)(6).

D. Plaintiffs Lack Cognizable Legal Theories

Dismissal under Rule 12(b)(6) is proper if a plaintiff lacks a cognizable legal theory. *Balistreri*, 901 F.2d at 699. Plaintiffs' claims lack a cognizable legal theory.

1. LWCFA and FPASA

As detailed above, there is no private right of action for Plaintiffs' claims under the LWCFA and FPASA. *See Friends of Roeding Park*, 848 F.Supp.2d at 1160 (LWCFA); *Conservation Law Found. of New England*, 587 F.Supp. at 366-67 (FPASA). Even assuming Plaintiffs had standing to assert these claims here, they lack a cognizable legal theory without a private right of action. *See, e.g., Lan Thi Hoang v. Burke*, 2017 WL 4443144, at *3 (C.D. Cal. Oct. 3, 2017) ("Because Plaintiff does not have a private right of action under these statutes, she does not allege a cognizable legal theory, and her claims must be dismissed."); *325-343 E. 56th St. Corp. v. Mobil Oil Corp.*, 906 F.Supp. 669, 686 n.26 (D.D.C. 1995) ("As the court finds no express or implied private right of action for money damages, and hence no cognizable legal theory under which Plaintiff can seek redress. . . .").

2. Property Clause

Plaintiffs' claim under the Property Clause fares no better.

The City of Phoenix has broad power to dispose of and utilize its property. As the Supreme Court explained in *Wilcox v. Jackson*, a "state has an undoubted right to

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legislate as she may please in regard to the remedies to be prosecuted in her Courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation." *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839). The Property Clause prevents the City from disposing of land owned or controlled by the federal government, though. *See id.* (stating that when the property is "part of the public domain of the United States[,] Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it."). "If a state were able to pass laws that could dispose of federal lands . . . the practical result . . . would be, by force of state legislation to take from the United States their own land, against their own will, and against their own laws." *Yunis v. United States*, 118 F.Supp.2d 1024, 1032 (C.D. Cal. 2000) (quoting *Wilcox*, 38 U.S. at 517) (internal quotation marks omitted).

Thus, the Property Clause "precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp.*, 106 F.Supp.3d at 1179. Here, though, the City is not seeking to divest any property from the federal government. The transfers from the federal government to the State of Arizona happened decades ago, and Plaintiffs' complaint makes clear that the federal government has no interest in Papago Park or this lawsuit. (Doc. 1, pp. 7-8.) Therefore, Plaintiffs' claim under the Property Clause is not legally cognizable.

3. Contracts Clause

Plaintiffs' claim under the Contracts Clause also lacks a cognizable legal theory.

Although the Contracts Clause is written in absolute terms,[3] the Supreme Court

[3] "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

narrowly construes the Contracts Clause to ensure that local governments can effectively exercise their police powers. *Seltzer v. Cochrane*, 104 F.3d 234, 235 (9th Cir. 1996). State governmental entities "must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

As detailed above, though, Plaintiffs have no contract rights here. They are not parties to any of the contracts at issue, and they are not alleging that the City of Phoenix has otherwise impaired ***Plaintiffs' own*** vested rights in some other contract.

Moreover, even if Plaintiffs had any contract rights here, they were not impaired to a manner that would rise to the level of a violation of the Contracts Clause. Plaintiffs' claim would be legally cognizable under the Contracts Clause only if the City of Phoenix "prevents or materially limits the remedies that would be available if the contract were between private parties." *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1103 (9th Cir. 1999). *Accord Charles v. Baesler*, 910 F.2d 1349, 1356 (6th Cir. 1990) ("[S]o long as governmental action does not foreclose an adequate damages or special performance remedy, a breach does not run afoul of the contracts Clause."). No such allegation is made in the complaint, nor could it be.

E. Plaintiffs' Federal Claims Are Untimely

Even assuming that Plaintiffs have standing to assert any federal claims (and they have cognizable legal theories), the statute of limitations for those claims would be two years. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (statute of limitations for federal claims in Arizona is the two-year personal injury statute of limitations in A.R.S. § 12-821).

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As alleged in the complaint, the cities entered into the lease at issue on November 28, 2018, and the City of Scottsdale entered into its sublease with the San Francisco Giants on December 1, 2018. (Doc. 1, p. 5.) However, Plaintiffs filed this lawsuit challenging the propriety of those agreements on December 23, 2020, more than two years later. Thus, Plaintiffs' federal claims would be time-barred even if Plaintiffs had standing to assert them.

III. CONCLUSION

The Court should dismiss all claims against the City of Phoenix. Even if the Plaintiffs were to amend the complaint to remedy its procedural/formatting defects, the claims would still fail. Plaintiffs lack Article III and prudential standing to assert their federal claims, and they also lack cognizable legal theories. Even if they had standing, these federal claims are untimely under the applicable statute of limitations.

Thus, dismissal with leave to amend would be futile. The Court should dismiss the claims against the City of Phoenix with prejudice.

DATED this 1st day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I served the attached document by mail on the following, who are not registered participants of the CM/ECF System:

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