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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

BRIAN SCHWEITZER, Governor of
the State of Montana

Plaintiff,

v.

LEON E. PANETTA, in his official
capacity as Secretary of Defense, and
MICHAEL B. DONLEY, in his
official capacity as Secretary of the
Air Force,

Defendants.

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

Plaintiff Brian Schweitzer, in his official capacity as Governor of the State of Montana, submits the following Complaint against defendants, Leon E. Panetta, in his official capacity as Secretary of Defense, and Michael B. Donley, in his official capacity as Secretary of the Air Force.

I. NATURE OF THE CASE

1. This case arises out of defendants' attempt, unilaterally and without seeking or obtaining approval from the Governor of the State of Montana, to fundamentally change the organization and allotment of the Montana Air National Guard under the Fiscal Year 2010 Air Forces Restructure Plan ("2010 Restructure Plan"). Specifically, defendants plans to move six F-15 fighter jets from the Air Guard Station in Great Falls, Montana, to the Air Guard Station in Fresno, California, in August and September of 2012, and the remaining nine jets from Great Falls to Fresno during fiscal year 2013. This action is in violation of 32 U.S.C. § 104(c), which requires the approval of the Governor before this type of change may be made.

II. JURISDICTION AND VENUE

2. This is a declaratory judgment action pursuant to 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rule of Civil Procedure, that involves the interpretation and application of a federal statute (32 U.S.C. § 104(c)). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1331.

3. Venue is proper in the District of Montana, Great Falls Division, under 28 U.S.C. § 1391, because the F-15 fighter jets at issue are currently located in Great Falls.

II. PARTIES

4. Plaintiff, Brian Schweitzer, is Governor of the State of Montana and brings this action in his official capacity and on behalf of the State. Pursuant to the Constitution and laws of the State of Montana (Art. VI, § 13 and § 10-1-102, MCA), Governor Schweitzer is the Commander-in-Chief of the militia in the state, except when they are actively in the service of the United States.

5. Defendant Leon E. Panetta is the Secretary of the Department of Defense of the United States, which oversees all armed forces of the United States including the Air Force and National Guard. He is sued in his official capacity only.

6. Defendant Michael B. Donley is the Secretary of the Air Force and is responsible for the affairs of the Department of the Air Force, including its organization and infrastructure. He is sued in his official capacity only.

III. NATURE OF THE NATIONAL GUARD

7. The National Guard has a dual nature, comprising both units of state militias and a part of the federal armed forces when those units are called into federal service. The National Guard is the modern militia reserved to the States by Art. I, § 8, cl. 16 of the United States Constitution. The Montana National Guard constitutes a portion of the reserve component of the armed forces.

8. States have the right to control the National Guard when not in federal service. Members of the National Guard serve in the state militia under the command of the Governor unless they are called into federal service.

9. The National Guard is the only military force shared by the states and the federal government, and ready to carry out missions for both state and federal purposes.

10. The balance struck by Congress between the federal and state nature of the National Guard is reflected in 32 U.S.C. § 104(c), requiring the consent of the Governor for decisions which change the allotment of personnel and property available for state duties.

11. Currently, the Montana Air National Guard has not been federally mobilized into Title 10 federal status. *See* Exhibit 1 of the Declaration of Adjutant General Quinn, Ex. 1.

IV. THE PROPOSED TRANSFER OF F-15s

12. Included in the 2010 Restructure Plan is a proposal to transfer all 15 F-15 aircraft from the Air Guard Station in Great Falls, Montana (120th Fighter Wing), to the Air Guard Station in Fresno, California (144th Fighter Wing).

13. The Air Force intends to begin the transfer of the F-15s within the next two weeks by moving several truckloads of avionics equipment. *See* Ex. 1; Ex. 2, Air Force spreadsheet.

14. In August, the Air Force intends to transfer four of the F-15s from Great Falls to Fresno. *Id.*

15. In September, the Air Force intends to transfer two additional F-15s from Great Falls to Fresno. *Id.*

16. The Air Force plans to transfer the remaining nine F-15s from Great Falls to Fresno during fiscal year 2013, despite the funding limitation contained within the National Defense Authorization Act for fiscal year 2013 (described more fully below). *Id.*

V. THE REPLACEMENT C-130s

17. The Air Force had intended to transfer eight C-130 aircraft from Texas to Great Falls to replace the F-15s during fiscal year 2013. *See* Ex. 1; Ex. 3, FY 13 Excerpt of FY 2013 Force Structure Announcement, p. 111.

18. However, the Air Force has notified the Montana Air National Guard that it is postponing the transfer of the C-130s to Great Falls until fiscal year 2014, due to the funding limitation contained within the National Defense Authorization Act for fiscal year 2013 (described more fully below). *See* Ex. 1; Ex. 2.

19. The result of the potential lag time between the transfer of the F-15s and the transfer of the replacement C-130s is that the Montana Air National Guard would be without any planes for up to 18 months.

VI. FY 2013 NATIONAL DEFENSE AUTHORIZATION ACT FUNDING LIMITATIONS

20. The National Defense Authorization Act for fiscal year 2013, as passed the House of Representatives, prohibits the use of any appropriated funds to transfer aircraft of the Air National Guard. *See* Ex. 4, H.R. 4310, Sec. 1076 (full bill available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310rh/pdf/BILLS-112hr4310rh.pdf>).

21. The Air Force has interpreted this prohibition as inapplicable to fiscal year 2012 transfers, thus allowing the initial F-15 transfers in fiscal year 2012 (ending September 30, 2012), even where the remaining transfers would occur in fiscal year 2013 (beginning October 1, 2012). This interpretation would allow the Air Force to proceed with its current plan to transfer the F-15s from Great Falls to Fresno during fiscal years 2012 and 2013, resulting in the expenditure of fiscal

year 2013 funds which is prohibited by the National Defense Authorization Act.

See Ex. 5, letter from Sen. Levin to Sec. Panetta; Ex. 4.

22. However, the version recently passed out of the Senate Armed Forces Committee would prohibit the proposed F-15 transfers in August and September as well as in fiscal year 2013. *See* Ex. 5; Ex. 6, S. 3254, Sec. 1708 (full bill available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3254pcs/pdf/BILLS-112s3254pcs.pdf>).

VII. CAUSE OF ACTION

23. Pursuant to 32 U.S.C. § 104(c), “no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.”

24. The proposed transfer of F-15s would change the allotment of the Montana Air National Guard, a unit located entirely within Montana, and the Governor has not granted his approval for this action.

25. The proposed transfer, without gubernatorial consent, violates 32 U.S.C. § 104(c).

26. Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, plaintiff requests a Declaratory Judgment declaring that the proposed transfer, if undertaken without

first obtaining Governor Schweitzer's approval, violates 32 U.S.C. § 104(c); that defendants may not implement the proposed transfer; and further declaring that the proposed transfer is null and void.

27. Pursuant to 28 U.S.C. § 2202, plaintiff requests such further relief as necessary to protect and enforce the Governor's rights as Governor of the State of Montana and as Commander-in-Chief of the Montana National Guard.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered in its favor and against defendants and that the Court grant the following relief:

A. An Order declaring that the proposed transfer of F-15s from Great Falls without the Governor's consent violates 32 U.S.C. § 104 (c), is null and void, and shall not be implemented;

B. An Order enjoining defendant from transferring any F-15s from Great Falls until such time as the replacement C-130s are ready to be transferred to Great Falls;

C. An Order awarding plaintiff costs, fees and other expenses incurred in pursuing this litigation, pursuant to 28 U.S.C. § 2412 and any other applicable statute; and

D. Further Orders providing such additional legal or equitable relief as this Court may deem just and proper.

Respectfully submitted this 15th day of June, 2012.

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Helena, MT 59620-1401

By: /s/ J. Stuart Segrest
J. STUART SEGREST
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF MAILING

I hereby certify that on this date, I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, by using the appellate cm/ecf system. Participants in the case who are registered cm/ecf users will be served by the appellate cm/ecf system.

I further certify that on this date I served a true and correct copy of the foregoing by mail on the following:

Leon E. Panetta
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Michael B. Donley
Secretary of the U.S. Air Force
1400 Defense Pentagon
Washington, DC 20301-1400

Michael W. Cotter
U.S. Attorney, District of Montana
901 Front St. , Rm 1100
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Eric Holder
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Dated: June 15, 2012

/s/ J. Stuart Segrest
J. STUART SEGREST
Assistant Attorney General
Counsel for Plaintiff