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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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| SOUTH FORK LIVESTOCK PARTNERSHIP,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR-BUREAU OF LAND MANAGEMENT and BUREAU OF INDIAN AFFAIRS, WAYNE BILL, CHERYL MOSE-TeMOKE, GILBERT Te-MOKE, EDITH SMARTT, BRANDON REYNOLDS, BRAD SONES, JOSEPH McDADE, RICH ADAMS, ALICE TYBO, DAVE SMITH, AMY LEUDERS, BRYAN L. BOWKER, et al.,<br><br>Defendants. | 3:15-cv-66-LRH-VPC<br><br>FEDERAL DEFENDANTS' MOTION TO DISMISS CLAIMS ALLEGED IN AMENDED COMPLAINT (#32) |

Come now the "federal defendants" named in the caption of the amended complaint (#32), individually and collectively and through their undersigned counsel, and move this Court to dismiss

the claims alleged against them in this action pursuant to Rule 7(b), Fed.R.Civ.P.[1] This motion is brought pursuant to Rules 12(b)(1)(lack of subject matter jurisdiction) and 12(b)(6)(failure to state a claim upon which relief may be granted), Fed.R.Civ.P.

This motion is made on the grounds that the amended complaint seeks damages and other relief against the named federal defendants (and others) based on federal statutes and federal authorities which do not support the relief requested. Moreover, the claims seek relief which are outside the subject matter jurisdiction of this Court. Accordingly, the claims alleged against the federal defendants must be dismissed.

This motion is based on the pleadings and papers filed in this action and on the memorandum of law below.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Greg Addington
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[1] The "federal defendants" who are seeking dismissal through the current motion are: 1) United States of America, 2) United States Department of the Interior-Bureau of Land Management and Bureau of Indian Affairs, 3) Brad Sones, 4) Joseph McDade, 5) Rich Adams, 6) Dave Smith, 7) Amy Leuders, and 8) Bryan L. Bowker. Defendant Dave Smith retired from BLM in October 2014 (prior to this action being commenced).

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS

## I. INTRODUCTION

This is an action initiated by South Fork Livestock Partnership (SFLP) against several "tribal defendants" and several "federal defendants" arising out of a cattle grazing dispute on lands in Elko County, Nevada. As to the federal defendants, the *original* complaint (#1) sought damages for "civil rights" claims, sought a "quiet title" declaration, and sought injunctive relief. The original complaint was notable for the conspicuous absence of *any* factual allegations concerning the federal defendants, a circumstance which prompted the filing of a motion to dismiss on behalf of the federal defendants (#24). The original complaint also sought damages and other relief from several "tribal defendants" who collectively requested dismissal (#7) of those claims. By Order (#27) entered July 13, 2015, the Court granted the tribal defendants' motion to dismiss and also granted SFLP leave to file an amended complaint consistent with the Order. SFLP filed its amended complaint (#32) on September 12, 2015. No order has been entered on the federal defendants' motion to dismiss (#24); however, that motion is now moot on account of the amended complaint being filed.

While the amended complaint is somewhat longer than the original complaint and the claims have been re-phrased and re-characterized, there are again no jurisdictionally viable claims alleged against any of the federal defendants.[2] The amended complaint correctly alleges that the six individual federal defendants (see fn. 1, supra) are – or were – federal employees employed by the Bureau of Land Management (BLM) or the Bureau of Indian Affairs (BIA). See Amended Complaint ("AC")(#32), paras. 10, 11, 12, 14, 15, and 16. The amended complaint alleges that SFLP has obtained

[2] The original complaint named BLM employee Jill Silvey as a defendant. She is not a defendant in the amended complaint. The amended complaint also adds "U.S. Department of the Interior" as a defendant. There also are multiple "tribal defendants" who are newly named in the amended complaint (not in original complaint) and multiple "tribal defendants" who were named in the original complaint but who do not appear in the amended complaint.

certain BLM grazing permits since 2000 to graze livestock on various grazing allotments located on public lands managed by BLM (see AC, paras. 27-41).[3] The amended complaint also alleges that the six named "tribal defendants" (Tybo, Bill, Mose, Te-Moke, Smartt, and Reynolds) are members of an unspecified Tribal Council and have made it "their mission to do anything and everything that they can to damage the members of SFLP and the partnership business." (See AC, para. 19). The amended complaint describes a dispute which arose in 2003 (or earlier) concerning a water pump and references internal BIA/ BLM e-mail correspondence in 2012 regarding grazing activity on tribal lands administered by BIA and separate grazing activity on public lands administered by BLM (see AC, paras. 22-24). The bulk of the factual allegations (AC, paras. 44-63) reflect a continuing dispute between SFLP (holding BLM-issued grazing permits for use of BLM-administered public lands) and tribal officials (administering grazing privileges on adjacent tribal trust lands jointly administered by BIA and the tribe) concerning cattle grazing.[4]

The amended complaint alleges (para. 1) subject-matter jurisdiction under several federal statutes as well as the U.S. Constitution and the Te-Moak Constitution. None of the referenced statutes or resources provides any relevant grant of jurisdiction for any of the claims alleged against any of the federal defendants. The original complaint (#1) alleged "Bivens" as a jurisdictional basis for the claims alleged therein (see ¶ 1, Original Complaint); however, the amended complaint omits any

[3] The amended complaint references multiple exhibits numbered 1-18. However, there are no exhibits attached to the amended complaint.

[4] The Joint Case Management Report (#30) filed August 19 describes the substantive dispute regarding grazing privileges in the subject area. The report states: "It is the federal defendants' view that SFLP's claims rest on a fundamentally faulty premise; namely, the purported management authority of BLM regarding certain property held in trust for Te-Moak Tribe and managed by the Tribe and BIA for grazing and other purposes. BLM has no management authority regarding said property and plaintiff's BLM-issued grazing permits confer no rights or privileges on the Tribe-managed trust property. SFLP's grazing permits issued by BLM authorize use of BLM-managed property which is adjacent to the Tribe-managed trust property."

reference to "Bivens" as a source of jurisdiction. It is inferred, therefore, that SFLP is *not* advancing any claim against any of the federal defendants based on a "Bivens" theory of liability.[5]

After the general factual narrative concludes at paragraph 63, the amended complaint contains six separate claims for relief. "Count one" is labelled "Breach of Contract." It alleges a contract between SFLP and the United States (BLM), the contract obviously being the grazing permit issued by BLM for use of designated grazing allotments on BLM-managed public lands (see AC, para. 65). It also alleges that SFLP has suffered compensable damages on account of a "breach" of the contract, the alleged "breach" consisting of BLM allowing others to use areas of the allotment and BIA placing fences on the allotment. See fn. 4, supra. SFLP seeks to recover damages and attorney's fees based on the "breach of contract." See AC, Prayer for Relief. "Count two" is labelled "Intentional Interference with the SFLP Contract." Count two alleges that tribal defendants and federal defendants conspired to interfere with SFLP's grazing privileges by erecting fences and allowing overgrazing in certain areas (AC, paras. 74-78). SFLP seeks recovery of tort damages and attorney's fees based on the "effort to interfere with the exercise of the contract rights of SFLP." (AC, para. 79 and Prayer for Relief). "Count three" is labelled "Interference with Right to Access Water." Count three claims that the six *tribal* defendants have "sought to restrict access to the water" located on specified property. An injunction and damages is sought only against the tribal defendants based on their actions (AC, para. 83). No relief is sought against any of the "federal defendants" in count three. "Count four" is labelled "Procedural Due Process." Count four alleges that "defendant BLM" and "defendant BIA" have allowed grazing activity on certain public lands and that the affected area has been overgrazed to the detriment of plaintiff's grazing permits. Count four requests "injunctive relief as against defendant BLM and BIA from further action regarding the use of SFLP's grazing permits without being afforded

[5] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *see also Butz v. Economu*, 438 U.S. 478 (1978).

procedural due process." (AC, para. 88). "Count five" is labelled "Substantive Due Process." Count five alleges that the actions by the federal defendants "have amounted to a taking by the Federal Government under the Constitution of the United States without just compensation." (AC, para. 90). "Count six" is labelled "Conspiracy." Count six alleges that all of the defendants (tribal and federal) have conspired to harm SFLP's business by tortiously interfering with SFLP's grazing permits. Count six seeks to recover "general damages and punitive damages" from all of the defendants. (AC, para.95).

As discussed below, the amended complaint fails to state a viable claim for relief against *any* of the federal defendants. As to the defendant United States and defendant Department of the Interior (and BLM and BIA), there are no viable tort claims alleged because SFLP has not alleged compliance with the jurisdictional requirement that an administrative tort claim be first presented to the affected agency (and, in fact, has not so complied) and the jurisdictional statute referenced by SFLP is not applicable to *any* federal entity. Moreover, the Department of the Interior cannot be sued for tort damages. The "breach of contract" claim and the "takings" claim must be dismissed because they were brought in the wrong forum and this Court has no jurisdiction to adjudicate those claims. Moreover, no compensable "taking" is alleged in the amended complaint.

As to the six *individual* federal defendants, they are not proper parties to a "takings" claim or to a "breach of contract" claim concerning a federal contract. They also are not proper parties to a tort claim arising out of their federal functions. They also are not amenable to suit under § 1983 (the jurisdictional statute invoked by SFLP) because as federal employees they do not operate "under color of state law." Accordingly, all of the "federal defendants" (see fn. 1, supra) should be dismissed.

## II. LEGAL STANDARDS UNDER RULES 12(b)(1) and 12(b)(6)

Rule 12(b)(1), Fed.R.Civ.P., provides for dismissal of a claim based on the lack of subject matter jurisdiction. While the defendant is the moving party in a motion to dismiss, the plaintiff is the

party invoking the court's jurisdiction. Consequently, "the plaintiff bears the burden of proving that the case is properly in federal court." *Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F.Supp.2d 1191, 1198 (D.Nev.)(citing *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)). A motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may take one of two forms. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It may be a "facial" challenge or it may be a "factual" challenge. *Id*. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id*.

If the movant's challenge is a facial one, then the "court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff." *Nevada ex rel Colo. River Comm. V. Pioneer Cos.*, 245 F.Supp.2d 1120, 1124 (D.Nev. 2003)(citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989)). If the attach is factual, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g*, 594 F.2d at 733 (quoting *Mortenson v. First Fed. Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The plaintiff always has the burden of establishing that the court, in fact, possesses subject matter jurisdiction "by present[ing] affidavits or other evidence necessary." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Indeed, the district court is "free to hear evidence regarding jurisdiction and rule on that issue prior to trial, resolving factual disputes when necessary." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)(quoting *Thornhill Publ'g*, 594 F.2d at 733).

Rule 12(b)(6), Fed.R.Civ.P., mandates that a court dismiss a cause of action that fails to state a claim upon which relief may be granted. A dismissal under Rule 12(b)(6) may be based on the lack of

a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001); *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir.1988). In either event, a motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are accepted as true and construed in the light most favorable to the non-moving party. *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir.2008); *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir.1999). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). This tenet - that the court must accept as true all of the allegations contained in the complaint - "is inapplicable to legal conclusions." *Iqbal v. Ashcroft*, 556 U.S. 662, 678 (2009). Moreover, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id; see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)("[A]llegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.").

As the Supreme Court has explained, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, to "avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Weber v. Department of Veterans*

*Affairs*, 521 F.3d 1061, 1065 (9th Cir.2008) (quoting *Twombly*, 550 U.S. at 570). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678 (2009)(citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.1990); *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001). Similarly, documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion without converting the motion into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Moreover, a court may take judicial notice of "matters of public record" under Rule 201, Fed.R.Evid. *Mack v. S. Bay Beer Distribs, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the court considers materials outside of the pleadings, the Rule 12(b)(6) motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001).

## III. ARGUMENT

In this case, all of the claims advanced by SFLP against the "federal defendants" fail because of a variety of substantive and procedural deficiencies.

The claims against the United States fail because 1) the United States is not a proper party to a claim for damages under § 1983, 2) there is no allegation that SFLP complied with the jurisdictional requirement that an administrative tort claim be first presented to and denied by the appropriate federal

agency, 3) the breach of contract claim is brought in the wrong court, and 4) the takings claim is brought in the wrong court and no compensable "taking" is alleged.

The claims against the Department of the Interior (and BLM and BIA) fail because 1) a federal agency is not a proper party to a claim for damages under § 1983, 2) a federal agency is not the proper party to a tort claim, 3) the breach of contract claim is brought in the wrong court, and 4) the takings claim is brought in the wrong court, is not maintainable against a federal agency, and no compensable "taking" is alleged.

The claims against the six individual federal defendants fail because 1) a federal employee is not a proper party to a claim for damages under § 1983, 2) a federal employee is not a proper party to a tort claim, 3) a federal employee is not a proper party to a breach of contract claim and, in any event, the breach of contract claim is brought in the wrong court, and 4) a federal employee is not a proper party to a takings claim and, in any event, the takings claim is brought in the wrong court and no compensable "taking" is alleged.

A. There Are No Viable Claims Alleged Against the United States or the Department of the Interior.

The claims alleged against the federal defendants in the amended complaint can be categorized as a breach of contract claim (count 1), tort claims (counts 2 and 6), a "procedural due process" claim (count 4), and a takings claim (count 5). As noted above, count three (labelled "Interference with Right to Access Water") makes no claim against the United States (or any other "federal defendant"). Rather, count three is a claim for relief only against the "tribal defendants."

SFLP invokes 42 USC § 1983 as a basis for its claim for tort damages. Neither the United States nor the Department of the Interior is a viable defendant in a claim for damages under § 1983. Such a claim is not viable because neither the United States nor its agencies can be sued under § 1983.

Section 1983, title 42, provides a remedy for the deprivation of rights by "a person." The courts have repeatedly held that the federal government and its agencies are not "persons" for purposes of section 1983. *Petrenko v. United States*, 859 F.Supp. 647 (EDNY, 1994); *see Monell v. Dept. of Social Services*, 436 U.S. 658 (1978)(holding that only local governmental agencies are "persons" within the meaning of section 1983). Likewise, a federal institutional defendant such as Department of the Interior (or BLM or BIA) may not be sued under section 1983 or under the Constitutional theories of tort liability because a federal agency may not be sued in its own name unless Congress has specifically authorized such suit in legislation containing explicit authorizing language. *See Blackmar v. Guerre*, 342 U.S. 512 (1952)(government agency may not be sued eo nomine without explicit authorizing statute).

A suit for damages against a federal agency (or a suit against a federal official in his or her official capacity) is essentially a suit against the United States. *See Brandon v. Holt*, 469 U.S. 464, 471-73 (1985); *Lehner v. United States*, 685 F.2d 1187, 1189 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Gilbert v. DaGorssa*, 756 F.2d 1455, 1458 (9th Cir. 1985); *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987). The United States, as sovereign, is immune from suit except as it consents to be sued. *See Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). Thus, a damages claim against a federal agency (or a federal official in his or her official capacity) must be dismissed on the ground of sovereign immunity if the United States has not consented to be sued for damages regarding the claim. *See Ross v. United States*, 574 F. Supp. 536, 540-41 (S.D.N.Y. 1983); *Safeway Portland Employees' Federal Credit Union v. FDIC*, 506 F.2d 1213 (9th Cir. 1974). In this instance, SFLP has explicitly based its tort claims on § 1983, which is a statute that does not impose liability on federal agencies.

SFLP's references to the U.S. Constitution do not salvage the tort claims alleged against the United States or the Department of the Interior. Constitutional tort actions are not maintainable against

the United States and thus are not maintainable against federal agencies. *See Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979)(FTCA does not authorize suits against the United States based on a constitutional tort theory); *Boda v. United States*, 698 F.2d 1174, 1176 (11th Cir. 1983)(constitutional torts are barred by sovereign immunity, and the court lacks jurisdiction to consider such a claim). Thus, neither the United States nor its agencies is subject to suits based on constitutional tort. *See Daly-Murphy*, 820 F.2d at 1478; *Arnsberg*, 757 F.2d at 980.

Accordingly, whether SFLP's tort claims against the United States or its agencies (Interior, BLM, and BIA) are characterized as so-called "Constitutional" claims or statutory claims under § 1983, the claims are barred by sovereign immunity and must be dismissed.

Although the amended complaint makes no mention of the Federal Tort Claims Act (FTCA), SFLP's claim for tort damages against the United States (and Interior) would fail if the FTCA was invoked. The FTCA provides the *exclusive* judicial remedy to persons who are damaged by tortious conduct committed by federal employees or agencies. 28 USC § 2679(b). To maintain a tort action against the United States under the FTCA (which SFLP does *not* purport to do), a prospective plaintiff must first present an administrative claim to the appropriate federal agency and obtain the agency's denial of that claim (or waited six months to then deem the claim denied). *See Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992); *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). Here, SFLP does not invoke the FTCA to support its tort claims and does not allege compliance with the FTCA's administrative claim requirement (and, in fact, SFLP has not so complied). Accordingly, there are no viable tort claims alleged against the United States or the Department of the Interior. The United States is the only proper party to a suit under the FTCA. *Allen v. Veteran's Administration*, 749 F.2d 1386, 1388 (9th Cir. 1984).

SFLP's "breach of contract" claim also must be dismissed. The Tucker Act provides jurisdiction in the Court of Federal Claims for claims against the United States "founded either upon

the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 USC § 1491(a)(1). The Little Tucker Act, as amended by the Contract Disputes Act, carves out a minor exception creating concurrent jurisdiction in the district courts for contract claims against the United States not exceeding $10,000. *See* 28 USC § 1346(a)(2); *Mallard Automotive Group v. United States*, 343 F.Supp.2d 949 (D.Nev. 2004). Here, SFLP plainly seeks recovery of greater than $10,000.[6] Accordingly, the breach of contract claims against the United States (and Interior) can only be brought in the Court of Federal Claims under the Tucker Act. [7]

SFLP's so-called "takings claim" also must be dismissed because no viable "takings" claim is stated in the amended complaint and, moreover, any such claim (if it was legally viable) is brought in the wrong court. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Where the government authorizes a permanent physical occupation of property or actually takes title, the Takings Clause requires compensation. *Loretto v. Teleprompter Manhattan CATVCorp.*, 458 U.S. 419, 441 (1982); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). While permanent physical occupations are takings, "[n]ot every physical invasion is a taking." *Loretto*, 458 U.S. at 436 n.12; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed.Cir. 2002)(quoting *Loretto*).

The U.S. Court of Federal Claims (which, as discussed below, has exclusive jurisdiction over Takings claims which exceed $10,000) has repeatedly distinguished between tort claims (which *are not* compensable as a Fifth Amendment "Taking") and claims which are based on an *authorized*

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[6] SFLP's original complaint (#1) requested damages "in excess of $75,000."

[7] Prior to1992, the Court of Federal Claims was called the Claims Court, which, in turn, inherited substantially all of the trial court jurisdiction of the Court of Claims in 1982. *See Hercules v. United States*, 516 U.S. 417, 423 n.5 (1996).

government appropriation of property for public use (which *are* compensable under the Fifth Amendment). *See Nicholson v. United States*, 77 Fed.Cl. 605, 614 (2007)("Unauthorized or tortious conduct is not compensable under the Fifth Amendment."). Simply stated, claims which are grounded in allegations of tortious or unauthorized government conduct are not "takings" claims which are compensable under the Fifth Amendment. *See Thunev v. United States*, 41 Fed.Cl. 49, 52 (1998)(accidental or negligent impairment of the value of property is not a taking but, at most, a tort); *Brown v. United States*, 105 F.3d 621, 623 (Fed.Cir. 1997). This is so because a compensable "taking" under the Fifth Amendment must be based on government action which is "authorized and legitimate." *Nicholson*, 77 Fed.Cl. at 614.

SFLP's claims are clearly based on allegations of negligent or otherwise tortious conduct. The amended complaint alleges willful and malicious interference by all of the defendants in SFLP's grazing privileges causing damages to SFLP's members. SFLP's "takings" claim should be dismissed because tort-based claims are not "takings" claims compensable under the Fifth Amendment.[8]

In addition to being legally non-viable because it is grounded in allegations of tortious conduct, SFLP's "takings" claim is brought in the wrong court. The district courts lack subject matter jurisdiction to consider a takings claim unless the claim does not exceed $10,000. Takings claims above that amount are within the exclusive jurisdiction of the U.S. Court of Federal Claims. *See* 28 U.S.C. §§ 1491(a)(1), 1346(a)(2); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984); *Eastern Enter. v. Aphel*, 524 U.S. 498, 520 (1998); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

The amended complaint does not explicitly limit SFLP's "takings" claim to $10,000 and it is apparent that SFLP is seeking recovery of a sum much greater than that amount. See fn. 6, supra.

[8] Additionally, only the United States is a proper federal defendant in a "takings" claim.

Accordingly, this court lacks jurisdiction to adjudicate any Fifth Amendment-based "takings" claim alleged against the United States – even if plaintiffs have alleged a "takings" claim which is viable (which they have not). Therefore, that claim should be dismissed as to the United States and Department of the Interior.

SFLP's so-called "procedural due process" claim is not a model of clarity. It simply repeats the allegations that BLM and BIA have interfered with SFLP's grazing permits by allowing other persons to graze on public lands and by allowing overgrazing of the allotment. Adding the qualifier "without due process under the United States Constitution" (AC, para. 85) appears to be the only factual basis for advancing a "due process" claim. SFLP has not alleged a viable "procedural due process" claim against the United States or its agencies BLM and BIA. There also is no jurisdictionally viable cause of action for SFLP to use as a procedural vehicle to advance such a claim. As the term suggests, a "procedural due process" claim challenges the procedures used in effecting a deprivation of a Constitutionally-protected property or liberty interest. *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991). To adequately allege a claim for procedural due process, a plaintiff must establish a life, liberty, or property interest for which the protection is sought and allege what process was constitutionally inadequate. *Ky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Other than the conclusory allegation that the defendants interfered with SFLP's grazing permits "without due process," there are no factual allegations to describe or support the claim. More specifically, SFLP does not allege – even minimally – what processes were constitutionally inadequate and what protected interests are implicated. It appears that the "due process" claim is nothing more than an effort to cloak jurisdictionally deficient claims in a mantle of Constitutional verbiage. While that effort may have some rhetorical value, the deficient claims do not thereby obtain jurisdictional viability.

Based on the foregoing, the United States and the Department of the Interior should be dismissed from this action because there are no viable claims alleged against them or against their subordinate agencies – BLM and BIA.

B. There Are No Viable Claims Alleged Against Any of the Individual Federal Defendants.

In addition to naming the United States and the Department of the Interior as defendants, SFLP seeks recovery of damages against six *individual* federal officials named as defendants. See fn. 1, supra. All of these claims fail and must be dismissed.

The § 1983 claims fail because the individual federal defendants do not act under "color of state law" – a necessary predicate for § 1983 liability. Section 1983 of title 42 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress, . . ."

To establish a claim under 42 U.S.C. § 1983, a plaintiff must allege that the defendant(s) acted "under color of State law" at the time of the acts complained of and that the actions of the defendant(s) deprived plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See West v. Atkins*, 487 U.S. 42 (1988), *Collins v. Womancare*, 878 F.2d 1145, 1147, (9th Cir.1989), *cert. denied*, 110 S.Ct. 865 (1990); *Canlis v. San Joaquin Sherrif's Posse Comitatus*, 641 F.2d 711, 716 (and cases cited therein) (9th Cir.), *cert. denied*, 454 U.S. 967 (1981); *Briley v. State of California*, 564 F.2d 849, 853 (9th Cir. 1977). A plaintiff must also show that the defendant(s) acted with discriminatory intent, in order to bring the suit within the scope of § 1983. *See Cruz v. Skelton*, 543 F.2d 86, 92 (5th Cir. 1976), *cert. denied*, 433 U.S. 911 (1977).

As federal officials and federal employees performing federal functions for BLM or BIA, not one of the individual federal defendants acts "under color of State law" and the amended complaint cannot, therefore, state a section 1983 claim against *any* of them. *Smith v. Kitchen*, 156 F.3d 1025 (10th Cir. 1997); *Stonechipher v. Bray*, 653 F.2d 398 (9th Cir.1991), *Brown v. Quigly*, 853 F.Supp. 325 (ND Cal. 1994). SFLP has failed to allege any facts which would support a claim under section 1983 and SFLP plainly cannot meet the "under color of State law" requirement for a viable section 1983 claim. Rather, SFLP's claims against the individual federal defendants are directed to the (unspecified) conduct of BLM and BIA officials acting under *federal* law in carrying out their *federal* employment land management responsibilities. Section 1983 does not apply to federal agencies or "federal officials acting under color of federal law." *See Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995) (affirming dismissal of section 1983 claim grounds that state provided no claim for relief against federal agents of the U.S. Secret Service who acted under color of federal law); *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987); *Merrit v. Mackey*, 932 F.2d 1317, 1323 (9th Cir. 1991); *Martinez v. United States*, 812 F.Supp.2d 1052, 1058 (C.D.Cal. 2010). Accordingly, even if SFLP's allegations regarding the actions of the individual defendants were taken as true, SFLP has failed to include allegations that would support a finding that those actions were taken "under color of State law."

The ordinary common-law tort claims also must be dismissed as to the individual federal defendants because they are immune from such tort liability. The FTCA provides the *exclusive* judicial remedy to persons who are damaged by tortious conduct committed by federal employees or agencies. 28 USC § 2679(b). One of the conditions of the FTCA, contained in 28 USC § 2679(a), plainly provides that only the United States is a proper defendant to such a suit, not individual federal agencies or employees. Section 2679(b)(1) specifically provides that "[a]ny other civil action …against the employee or the employee's estate is precluded…" It is thus clear that no damages action can be maintained against individual federal employees based on tort allegations in connection

with their federal duties. *Allen v. Veteran's Administration*, 749 F.2d 1386, 1388 (9th Cir. 1984)("The [FTCA] provides that the United States is the sole party which may be sued for personal injuries arising out of the negligence of its employees."); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998)("[T]he courts have consistently held that an agency or government employee can not be sued eo nomine under the [FTCA]"); *Galvin v OSHA*, 860 F.2d 181, 183 (5th Cir. 1988)("an FTCA claim against a federal agency or employer as opposed to the United States itself must be dismissed for ant of jurisdiction"). SFLP cannot bypass or otherwise eschew the only remedy available (the FTCA) for recovery of tort damages by advancing claims for tort damages against individual employees.

Similarly, and as discussed above, the "breach of contract" claim and the "takings" claim can not be maintained against any of the individual federal defendants (if, indeed, they are alleged against any of them).[9] Moreover, and as discussed above, neither of those claims is properly before this court because those claims can only be brought in the U.S. Court of Federal Claims (and there advanced against the correct party and with facts which would support such claims).

## IV. CONCLUSION

Based on the foregoing, all of the "federal defendants" identified in the amended complaint, including each of the six individual federal defendants, should be dismissed from this action because no viable claim for relief against any of them is alleged in the amended complaint.

Respectfully submitted,

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United States Attorney

/s/ Greg Addington
GREG ADDINGTON
Assistant United States Attorney

[9] It appears that neither the "breach of contract" claim (count one) nor the "takings" claim (count four) is asserted against any of the individual federal defendants.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing FEDERAL DEFENDANTS' MOTION TO DISMISS CLAIMS ALLEGED IN AMENDED COMPLAINT (#32) was made through the court's electronic filing and notice system (CM/ECF) or, as appropriate, by first class mail from Reno, Nevada, addressed to the following on September 23, 2015:

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