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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, *et al.*, Plaintiffs. v. AMY DUTSCHKE, Regional Director, BIA; *et al.*, Defendants	CASE NO. 2:15-cv-1145-KJM-KJN **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** **[Fed R. Civ. P. 12(b)(1), (6)]** Date: July 29, 2016 Time: 10:00 a.m. Court: 3, 15th Floor Judge: Hon. Kimberly J. Mueller

I. INTRODUCTION

Plaintiffs' operative complaint[1] should be dismissed because it fails to state a claim against the United States, or Bureau of Indian Affairs (BIA) officials Amy Dutschke and John Rydzik in their official or individual capacities. First, the Court should decline to imply a "*Bivens*" remedy under the circumstances of this case. Second, even if a remedy were appropriate, qualified immunity bars the *Bivens* claims because Plaintiffs have failed to allege that Dutschke or Rydzik personally violated their clearly established constitutional rights. This is fatal. Federal officials cannot be held personally liable unless a plaintiff proves that the official, "through [his] own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Even if such a claim existed, Dutschke and Rydzik would be entitled to qualified immunity. Plaintiffs' claims against these federal officials thus fail.

Plaintiffs' claims against the United States are also barred. Plaintiffs' first claim fails because the United States has not waived sovereign immunity for "constitutional torts." Plaintiffs' second claim, for conversion, fails because they did not comply with the Federal Tort Claims Act (FTCA) before filing this action, and because they have failed to state a claim in any event. Plaintiffs' third claim for "declaratory and injunctive" relief fails because some of the actions they challenge are not "final agency action" as required under the Administrative Procedure Act (APA), and because they lack standing to challenge the only "final agency action" they have identified. Thus, each of Plaintiffs' claims is barred, and the Court should grant this motion and dismiss Plaintiffs' operative Complaint in its entirety.

II. FACTS

As this Court is by now well aware, this action is part of a long-running attempt to stop an Indian casino in Southern California.[2] This action, filed in May 2015, is still not "at issue" and was previously dismissed for lack of a "short and plain" statement of facts as required by Rule 8(a), and for failure of service on the individual federal defendants under Rule 4. (Order, Dkt. No. 40). The Second Amended Complaint (SAC) and its exhibits are more than 100 pages long, but assert only three claims against the United States and BIA officials Amy Dutschke and John Rydzik. Although the Complaint alleges constitutional and

[1] The Court has granted leave to amend to redact birth dates from exhibits, due July 5. (Dkt. No. 61). This motion should be construed as against the operative pleading at that time, which should be identical except for the redactions.

[2] *See, e.g., Jamul Action Committee v. Chaudhuri*, 3:13-cv-01920 KJM-KJN; *see also Rosales v. United States*, 89 Fed. Cl. 565, 571 n.2 (2009) (cataloguing "no fewer than fourteen legal actions" already "brought before tribal tribunals, administrative boards, and federal courts … all without success").

common law tort claims against Dutschke and Rydzik, the United States has substituted itself in place of Dutschke and Rydzik on all claims except for the "constitutional tort" claims brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). (*See* Notice of Substitution, Dkt. No. 60). Other than being identified as federal employees, the only specific factual allegation against Dutschke and Rydzik is that they "failed to stop the disinterment and removal of Plaintiffs' families human remains and funerary objects" from the Tribal cemetery in violation of federal and state law. (SAC, Dkt. No. 52, at ¶¶ 9 & 22). That is insufficient under *Bivens*, and this first claim thus fails as a matter of law.

Plaintiffs' second claim is for conversion. This claim is only permissible against the United States under the FTCA, but Plaintiffs did not comply with the FTCA's requirements. Plaintiffs did not present a written administrative claim to BIA prior to filing this action, and the Court thus lacks jurisdiction. Moreover, Plaintiffs fail to state a claim for conversion. While the Complaint repeatedly asserts that federal employees "failed to stop" other, non-federal actors from acting, (*see, e.g.*, SAC, Dkt. No. 52 at ¶¶ 9, 22, 31, & 33-35), it does not assert that any federal employee took control of, or prevented Plaintiffs from accessing, their alleged property (i.e. their ancestors' remains). Plaintiffs must allege either that the alleged converter physically took control of the item, or "applied the property to his own use." *Spates v. Dameron Hosp. Assn.*, 114 Cal. App. 4th 208, 221 (Cal. Ct. App. 2003). Because Plaintiffs here allege neither, they thus fail to state a claim for conversion. *See* CACI 2100 (Conversion).

Plaintiffs' third and final cause of action is "for declaratory and injunctive relief," which is not an independent claim. NAGPRA cannot supply the claim, because it does not allow claims for monetary relief. The APA cannot supply the claim, because Plaintiffs fail to allege final agency action. The purported final agency actions they do allege either do not qualify as such, or could not have caused the harm they claim. Of the two that Plaintiffs rely upon, the April 2013 alleged "Indian Lands Determination" (ILD) is not a final agency action, and has nothing to do with the alleged tortious conduct. The July 2013 alleged "Gaming Ordinance," is also unrelated to the alleged disturbance of ancestral remains, and was rendered by officials of a different federal agency that is not a party to this action and over whom federal defendants exercise no control. *See Jamul Action Committee, et al. v. Stevens*, E.D. Cal., 13-cv-1067, ¶ 1 ("The ILD was issued by the Chairwoman of the NIGC"); *see also* 78 Fed. Reg. 21,398 (Apr. 10, 2013).") Plaintiffs' alternative theory—that BIA "failed to act" under APA § 706—fails because Plaintiffs do not, and cannot, cite a

specific, mandatory, and ministerial duty that BIA has failed to undertake. In sum, they have not alleged final agency action under the APA, and their third claim thus fails. Because each of Plaintiffs' claims fails, the Court should grant this motion and enter judgment for the United States, Dutschke, and Rydzik.

III. ANALYSIS

A. Plaintiffs Fail to State a Claim under *Bivens* Against Dutschke or Rydzik.

1. The Court Should Decline to Imply a *Bivens* Remedy In This Context.

A judicially-created damages remedy for constitutional violations "is not an automatic entitlement." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In *Bivens*, the Supreme Court held that the victim of an alleged Fourth Amendment violation could bring suit to recover damages in the absence of a statutory cause of action where there were "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. In the decade following *Bivens*, the Supreme Court recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980), in both instances specifically determining that there were no such "special factors." Since *Carlson*, however, the Supreme Court has "in most instances . . . found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550. "Because implied causes of action are disfavored," *Iqbal*, 556 U.S. at 675, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 & 70-72 (2001).[3] As Circuits have recognized, the "strict limits" on *Bivens* claims "exist in part because 'the Supreme Court has long counselled restraint in implying new remedies at law.' Such restraint counsels that we review a plaintiff's 'invitation to imply a *Bivens* action . . . with skepticism.'" *Cioca v. Rumsfeld*, 720 F.3d 505, 509 (4th Cir. 2013) (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 547-48 (4th Cir. 2012)); *see also Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (recognizing that Supreme Court "has instructed the federal courts to respond cautiously to suggestions that *Bivens* remedies be extended into new contexts." (internal quotations omitted)).[4]

[3] *See also F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994) (no *Bivens* claim due to potential impact on fiscal policy); *Schweiker v. Chilicky*, 487 U.S. 412, 425-29 (1988) (no *Bivens* remedy for Social Security denial due to statutory procedure for challenge); *Bush v. Lucas*, 462 U.S. 367, 389-90 (1983) (refusing *Bivens* remedy for First Amendment violations arising out of federal personnel decisions).

[4] *Accord Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (recognizing "presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees").

Plaintiffs' allege violations of the First Amendment's "free exercise" clause (SAC, Dkt. No. 52, at ¶¶ 31 & 35), for which the Supreme Court has repeatedly declined to imply a *Bivens* action. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *Iqbal*, 556 U.S. at 675 ("[W]e have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment."); *Reichle v. Howards*, --- U.S. ---, 132 S.Ct. 2088, 2093 n.4 (2012) ("We have never held that Bivens extends to First Amendment claims.").[5] Thus, this Court must decide whether to recognize a *Bivens* remedy for Plaintiffs' claims. *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d. Cir. 2009). This is a two-part inquiry:

(1) whether there is "an alternative, existing process for protecting the [relevant] interest [which] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550; and

(2) whether there are "any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Bush*, 462 U.S. at 378).

Both existing processes and special factors preclude the implication of a *Bivens* remedy here.

a. Alternative, Existing Processes Counsel Against a New Implied *Bivens* Remedy.

Congress has adopted comprehensive schemes regarding the treatment of Native American remains and funerary objects on federal lands, as well as Indian gaming. *See* Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013; Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. Congress recognized particular rights and remedies under those statutes, and generally limited the remedy to review of final agency action in accordance with the APA, 5 U.S.C. §§ 551 *et seq.* The APA expressly declares itself to be comprehensive, stating that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. As set forth further below, Plaintiffs have failed to allege Article III injury from a final agency action, and thus have no APA claim. But assuming that Plaintiffs were actually aggrieved by an agency action, the APA would be the appropriate remedy for claims that the agency failed to take action it was required to take, or authorized action it was precluded from authorizing.

Numerous courts of appeal have found the APA to be a special factor precluding *Bivens* claims, even without legislation such as NAGPRA or IGRA. *See Sky Ad, Inc. v. McClure*, 951 F.2d 1146, 1148 (9th Cir. 1991) (citing "the presence of an explicit remedy for unconstitutional rulemaking in the APA");

[5] The Ninth Circuit has recognized a First Amendment *Bivens* remedy only for speech-related claims. *See Gibson v. United States*, 781 F.2d 1334, 1342 (9th Cir. 1986) (recognizing First Amendment *Bivens* remedy where "FBI agents acted with the impermissible motive of curbing [Plaintiffs'] protected speech).

Miller v. U.S. Dep't of Agr. Farm Servs. Agency, 143 F.3d 1413, 1416 (11th Cir. 1998) (*Bivens* remedy precluded for federal worker outside the protections of the CSRA because he already had a statutory right to review under the APA); *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003) ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a *Bivens* action."). In short, the APA, NAGPRA, and IGRA constitute a comprehensive scheme, and the "courts should defer to 'Congress' ability to make an evenhanded assessment of the desirability of creating a new remedy'" in light of that scheme. *Berry v. Hollander*, 925 F.2d 311, 313 (9th Cir. 1991) (quoting *Bush*, 462 U.S. at 389).

b. Special Factors Also Counsel Against a *Bivens* Remedy

A wide range of "special factors" may make it inappropriate to create a *Bivens* remedy, even if there is no alternative remedy. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997) (noting that "the range of concerns to be considered in answering the [special factors] inquiry is broad"). Special factors should be considered in the aggregate, along with the presence of any alternative, existing process. *Id.* There are numerous special factors which, in the absence of an affirmative action by Congress permitting a suit for damages, separately and collectively counsel against judicial creation of the *Bivens* remedy Plaintiffs seeks.

First, Plaintiffs ask this Court to create new claims in an area in which Congress has paid careful attention, but declined to create the remedy Plaintiffs' seek. *See, e.g.*, Senate Report 101-473 at 9 (providing "cause of action" in Federal district court for disputes between tribes and museums regarding remains, but not for other NAGPRA claims).[6] As the Supreme Court has recognized, "Congress has for many years legislated extensively in the field of Indian affairs." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 177 (1980). The U.S. Code is full of such laws, including NAGPRA (graves and funerary objects), IGRA (Indian gaming), the Indian Child Welfare Act (child welfare), the Indian Reorganization Act (tribal organization and lands restoration), the General Crimes Act and Major Crimes Act (prosecutorial jurisdiction in Indian country), the Indian and Self-Determination and Education Assistance Act of 1975 (tribal self-governance and education). With such an "extensive" program of "comprehensive" legislation, the federal courts have been reticent to intervene by implying a *Bivens* remedy. *See Adams v. Johnson*, 355 F.3d 1179, 1183–84 (9th Cir. 2004) (*citing*

[6] Available at https://www.nps.gov/nagpra/MANDATES/SR101-473.pdf.

Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)). The Court should thus reject Plaintiffs' request to create an entirely new species of litigation without congressional approval. *See Bush*, 462 U.S. at 389-90.

Second, implying a *Bivens* remedy would interfere with Congress' long-standing and plenary power over Indian affairs. For nearly 200 years, the federal courts have recognized that this "is a power which from its nature is exclusive." *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 7 (1831). The "Constitution grants Congress broad general powers to legislate in respect to Indian tribes," and the Supreme Court has "consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004), federal courts "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-60 (1978). The fact that Congress has such powers and has acted on the specific subject at issue, but chosen *not* to create a damages remedy, further counsels against implying a *Bivens* remedy.

Finally, it is apparent that Plaintiffs really seek to challenge official actions (or inactions) and policies, not "rogue" actions of federal employees that violate the Constitution. Plaintiffs' true object is collateral attack on control of the Tribe and its reservation, which they have repeatedly and unsuccessfully pursued in the federal courts.[7] Such challenges are not the proper subject of a *Bivens* claim. The Ninth Circuit has recently reiterated its long-standing warning that "*Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government" because, by "definition, *Bivens* suits are individual capacity suits and thus cannot enjoin official government action." *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016). In sum, there is no compelling reason to imply a *Bivens* remedy here, and many compelling reasons not to do so. Thus, this Court should decline Plaintiffs' invitation to create a new *Bivens* remedy, and should dismiss this claim against Dutschke and Rydzik.

2. Qualified Immunity Bars Plaintiffs' *Bivens* Claims Against Dutschke or Rydzik

Even assuming a *Bivens* remedy exists, Plaintiffs' claim must still be dismissed because they fail to fail to allege facts showing that Dutschke or Rydzik violated any clearly established constitutional right, as required to overcome qualified immunity. Qualified immunity recognizes the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555

[7] *See, e.g.*, *Rosales v. United States*, 2007 U.S. Dist. LEXIS 873368 (S.D. Cal. 2007); *Rosales v. United States*, 89 Fed. Cl. 565, 571 n. 1 (2009), aff'd, 2010 U.S. App. LEXIS 19443 (Fed. Cir. Sept. 17, 2010) (reciting history of Plaintiffs suits and noting "recycling of evidence" and attempts to re-litigate similar claims).

U.S. 223, 231 (2009). In other words, officers are permitted to make mistakes without accruing personal liability. This protection applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id*. at 231-32 (internal citations omitted). As "an immunity from suit rather than a mere defense to liability," qualified immunity should be decided at the earliest stage and "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted); *see also Pearson*, 555 U.S. at 231 ("the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials will be resolved prior to discovery.") (internal quotations omitted).

a. Plaintiffs Have Not Alleged that Dutschke or Rydzik Personally Violated the Constitution

Because Plaintiffs seek to hold the federal employees personally liable, they must allege a personal violation by each defendant. *See Iqbal*, 556 U.S. at 676 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*."). Thus, whether plaintiffs have met the personal involvement requirement is part-and-parcel of the qualified immunity inquiry. *See Wood v. Moss*, 134 S. Ct. 2056, 2070 (2014) ("[I]ndividual[s] … 'cannot be held liable ' in a *Bivens* suit 'unless they themselves acted [unconstitutionally].") (quoting *Iqbal*, 556 U.S. at 683). This requires a Plaintiff to "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id*. Dutschke and Rydzik may not be held liable merely because of their job titles, nor because they have some connection to the activities Plaintiffs complain about. Rather, they can only be held liable for their personal actions.

Here, Plaintiffs' Complaint lacks any particularized facts alleging what Dutschke and Rydzik did to violate the Constitution. The Complaint consists largely of legal conclusions and allegations of disconnected actions by unspecified persons over many years. There is virtually nothing in the Complaint that says what Dutschke or Rydzik did. Paragraphs 7 & 8 merely identify who they are, and Paragraph 9 contains nothing more than the conclusory allegation that they each "acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal and state law and in excess of federal limitations upon their power and authority as allowed" under *Bivens*. (SAC, Dkt. No. 52 at ¶ 9). Such bare "legal conclusions" reciting elements of a claim "do not suffice" to state a claim. *Iqbal*, 556 U.S. at 678.

There is no indication in the Complaint that Dutschke or Rydzik took any action of any kind, much

less took action with the intent or effect of interfering with Plaintiffs' exercise of their worship. Because Plaintiffs have failed to "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution," their Bivens claims fail and the Court should dismiss any Bivens claims against them. *Iqbal*, 556 U.S. at 676. The only facts alleged in the Complaint accuse Dutschke and Rydzik of failing to stop some non-federal, third party from disturbing Plaintiffs' ancestral remains. That is not a constitutional violation; it does not even bear a clear relationship to any constitutional provision. Plaintiffs' assertion that this lack of action violates their First Amendment "free exercise" rights, or somehow constitutes a religious preference to someone else, also fails to state a claim.

b. Plaintiffs Have Failed to Allege a Violation of a *Cleary Established* Constitutional Right.

Even if Plaintiffs had alleged the violation of a constitutional right, Dutschke and Rydzik would still be entitled to qualified immunity because Plaintiffs have not alleged the violation of a *clearly established* constitutional right. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There is no clearly established law that "failing to stop" a third party from disturbing an ancestor's remains violates the Constitution. The Supreme Court has repeatedly held that government has "no constitutional duty to protect" citizens from tortious acts of third persons. *See, e.g., DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) (no constitutional duty to protect minor child from abuse by father when minor child was not in state custody, even though state knew of risk of danger to child). Thus, even if the Court found a constitutional violation directly attributable to either Dutschke or Rydzik, there is no "clearly established" law so holding. They are thus entitled to qualified immunity for any such claim.

B. <u>Plaintiffs' Tort Claim Fails for Lack of Jurisdiction and for Failure to State a Claim.</u>

1. Plaintiff Failed to Submit a Claim to BIA At Least Six Months Before Initiating this Action.

The doctrine of sovereign immunity provides that the United States (including its agencies and employees) may not be sued without its express consent. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983); *accord Balser v. Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). Plaintiffs bear the burden of both pleading and proving subject matter jurisdiction. *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). This includes a waiver of sovereign immunity, without which the district courts lack

jurisdiction over any claims against the United States or its agencies. *See Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007). Although the FTCA includes a limited waiver of sovereign immunity, that waiver is subject to strict compliance with the requirement to submit an administrative claim in writing at least six months before filing suit. *See* 28 U.S.C. § 2401; *see also* 28 U.S.C. § 1346. The Ninth Circuit has long-held that "[e]xhaustion of the claims procedures established under the [FTCA] is a prerequisite to district court jurisdiction." *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir. 1983).

Here, Plaintiffs failed to comply with the requirement to "present" an administrative tort claim to the agency before filing suit. 28 U.S.C. § 2675. Although the SAC obliquely alleges compliance with this requirement (SAC, Dkt. No. at ¶ 21) and attaches an administrative claim form as an exhibit, the agency has no record of receiving any written administrative tort claim from Plaintiffs. (*See* Declaration of Donna Reynolds; *see also* Declaration of Charles Wallace at ¶ 7; Declaration of Anna Owens-Brown, ¶ 5).[8] Plaintiff may well assert that the document was sent, but that is not the standard. As the federal regulations provide, and the Ninth Circuit has held, a plaintiff does not comply with the FTCA's claim presentation requirement by merely *sending* an administrative claim; rather, the claim must actually be *received* by the agency. *See* 28 C.F.R. § 14.2; *see also Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1251 (9th Cir. 2006) (affirming dismissal for lack of jurisdiction where Plaintiff could not prove that his administrative claim was actually received). As set forth in the Reynolds, Wallace, and Owens-Brown declarations, the Department of the Interior and BIA have extensive procedures for cataloguing and responding to such administrative claims, but has no record of receiving any claim from Plaintiffs. The fact that Plaintiffs attached an administrative tort claim as Exhibit O to their SAC does not alter the fact that no such claim was received.[9] In *Vacek*, the Ninth Circuit held that the mailbox rule does not apply to FTCA claims; the claim must actually be received or the Court lacks jurisdiction. *See Vacek*, 447 F.3d at 1251. Because Plaintiffs cannot

[8] Because this is a "factual attack" on jurisdiction under Rule 12(b)(1), the allegations of the Complaint are not presumed true, and Plaintiffs' support their assertion of jurisdiction with evidence. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

[9] Plaintiffs never mentioned this written tort claim, signed by counsel and dated September 23, 2015, in their briefing on the previous motions to dismiss. The issue of their compliance with the FTCA's exhaustion requirement was briefed in the United States' prior motion (Dkt. No. 33 at 5), and Plaintiffs' April 4, 2016, Opposition addressed this subject, asserting that BIA was on notice of the claim more than 6 months before the lawsuit. (Dkt. No. 40 at 12-13). Yet Plaintiffs *never* asserted that they submitted a written claim on September 23, 2015—more than six months before that opposition. Even now, they merely claim that their demand was "memorialized" in the claim form attached as Exhibit O, but never directly state that they submitted that claim on that date. (SAC, Dkt. No. 52, at ¶ 29).

prove that BIA actually received the claim, and because the evidence shows that it was not received, they have failed to comply with the FTCA's claim presentment requirement and their tort claim is barred by sovereign immunity. Plaintiffs' tort claim must therefore be dismissed for lack of subject matter jurisdiction.

2. Even if Plaintiff Submitted a Claim on September 23, 2015, This Action is Still Untimely.

Although there is no evidence to support their allegation, this lawsuit would still be untimely even if Plaintiffs submitted a written administrative claim on September 23, 2015, as they imply. The FTCA provides that a claimant must wait at least six months after submitting the tort claim before filing a lawsuit. *See* 28 U.S.C. § 2675(a). But this lawsuit was filed May 27, 2015—several months before Plaintiffs' administrative tort claim is dated. Thus, even assuming Plaintiffs submitted an administrative tort claim in September 2015, they had already filed too early, and thus the Court lacks jurisdiction.

The FTCA requires "complete exhaustion of [administrative] remedies before invocation of the judicial process." *McNeil v. United States*, 508 U.S. 106, 112 (1993). Strict compliance with the administrative obligations is required because:

> Every premature filing under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest of orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Id. The exhaustion requirement is simple: a lawsuit cannot be filed against the United States until the agency has had six months to evaluate the claim. 28 U.S.C. 2675(a). It is of no significance that Plaintiffs amended their complaint more than six months after September 23, 2015. As the Supreme Court has held, it is the filing of the Complaint that "begins" or "commences" the action for purposes of § 2675(a). *McNeil*, 508 U.S. at 112 ("The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process.") (emphasis added). The Supreme Court has held that a plaintiff may not satisfy the FTCA by filing a premature lawsuit and then exhausting administrative remedies before any "substantial progress has taken place in the litigation." *Id*. at 110. Other federal courts are in accord. *See Jerves v. United States*, 966 F.2d 517, 519 (9th Cir. 1992) (holding dismissal of a premature FTCA complaint was required, even though no there was no substantial progress in the suit before denial of the administrative claim); *see also Sparrow v. U.S. Postal Service*, 825 F.Supp. 252, 254 (E.D. Cal. 1993) ("permit[ting]

the premature filing of an FTCA action to be cured by the filing of an amended complaint upon denial of the administrative claim would be inconsistent with both *McNeil* and the rationale behind" the FTCA).

Moreover, Plaintiffs knew that Dutschke and Rydzik were federal officials before they filed this litigation, and sued each of them in their individual and official capacities. (*See, e.g.*, Complaint, Dkt. No. 1, at ¶¶ 4 & 12); *see also* SAC, Dkt. No. 52, at ¶ 9). Plaintiffs' action was thus *always* against the United States, regardless of the name on the caption. The FTCA is "exclusive of any other civil action or proceeding … against the employee." 28 U.S.C. § 2679(b)(1). Plaintiffs know this, having alleged in the SAC that "[f]or any acts causing injury to the Plaintiffs that are within the scope of the individual federal defendants' authority, the United States is automatically substituted as the Defendant, pursuant to the Westfall Act…." (SAC, Dkt. No. 52, at 3:9-12). Regardless, Plaintiffs cannot rely on amending a complaint to satisfy the six-month requirement of 28 U.S.C. § 2675(a). *See, e.g., Galvan v. Brock*, 2012 WL 4863068, at *4 (E.D. Cal. 2012) (case dismissed where "Plaintiffs were aware when they filed the instant suit in [state court] that the United States was a proper defendant and that § 2675(a) applied").

3. Alternatively, Plaintiffs Fail to State a Claim for Conversion.

Plaintiffs' sole claim is for conversion under *state* law, which does not even apply in Indian country. *See McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170 (1973) (state laws generally inapplicable on Indian reservation absent express Congressional direction). Even if it does apply, they fail to state a claim under California law.[10] "In California, conversion has three elements: ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992). Here, the United States is not alleged to have made any disposition of Plaintiffs' property.[11] Rather, the core claim is that the United States failed to take action to stop someone else from taking control of their property. There is no allegation that the United States even possessed Plaintiffs' property. While a conversion claim does not always depend on showing "a manual taking of the property," a plaintiff must still establish "an assumption of control or ownership over the property [by the defendant], or that the alleged converter has applied the property to his own use."

[10] The FTCA makes the United States liable for torts "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, the court looks to state law for substance. *See United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 922 (9th Cir. 2009).

[11] The sole allegation is a "bare" legal conclusion aimed at multiple defendants in violation of *Iqbal*, 556 U.S. at 678.

Shopoff & Cavallo LLP v. Hyon, 167 Cal.App.4th 1489, 1507 (Cal. Ct. App. 2008). Plaintiffs have not, and cannot, allege that the United States took their property. Their conversion claim thus fails for lack of this essential element.

C. Declaratory and Injunctive Relief Claim is Not a Separate Cause of Action.

Plaintiffs' "cause of action" for declaratory and injunctive relief fails because there is no such cause of action under federal law; declaratory relief is merely a remedy available if plaintiff has an independent claim. *See* 28 U.S.C. §§ 2201, 2202; *see also North County Commc'ns Corp. v. Verizon Global Networks, Inc.*, 685 F.Supp.2d 1112, 1122 (S.D. Cal. 2010). The Declaratory Judgment Act only permits federal courts to "declare the rights and other legal relations" of parties to "a case of actual controversy." 28 U.S.C. § 2201; *see Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986). It does not create a case or controversy, nor provide an independent claim. Because Plaintiffs' other claims (sounding in tort) must be dismissed as set forth above, and because there is no independent cause of action supporting their request for declaratory and injunctive relief, the Court should dismiss this claim as well.

D. Plaintiffs' Have Failed to State an APA Claim.

Plaintiffs' declaratory and injunctive relief claim might be read to assert a claim under NAGPRA or the APA. To the extent Plaintiffs point to NAGPRA, 25 U.S.C. §§ 3001-3013, they have failed to state a claim because NAGPRA does not provide a claim for monetary relief. *See, e.g., Romero v. Becken*, 256 F.3d 349, 353 (5th Cir. 2001). Second, NAGPRA does not waive the United States' sovereign immunity—a point on which Plaintiffs have lost in federal court before. *Rosales v. United States*, 2007 WL 4233060, at *3 (S.D. Cal. Nov. 28, 2007) (noting that NAGPRA contains "no waiver of sovereign immunity").[12] In sum, they may not assert a claim under NAGPRA but may proceed, if at all, only under the APA. As set forth further below, Plaintiffs' APA claims fail because Plaintiffs fail (1) to identify final agency action causing their alleged injury, or (2) to identify any ministerial action that that may be compelled under the APA.

1. The April 10, 2013, Notice of Intent was Issued by the NIGC and is Not Final Agency Action.

Plaintiffs have failed to allege any final agency action by BIA. Plaintiffs first allege final agency action by the federal defendants based on the April 10, 2013, publication of a Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract (NOI).

[12] These claims are also barred by collateral estoppel. *Rosales v. U.S.*, 2007 WL 4233060, at *4 (S.D. Cal. Nov. 28, 2007).

See SAC, ¶¶ 22, 34. Even if the NOI constituted final agency action, it would be the final agency action of the National Indian Gaming Commission ("NIGC"), a separate federal instrumentality over which federal defendants have no control or authority. *See* 25 U.S.C. § 2704 (establishing NIGC within the Department of the Interior). It is an independent agency housed in the Department of the Interior, run by its own Commission appointed by the President with the advice and consent of the Senate. *Id.* Plaintiffs have not sued the NIGC, which issued the Notice as Plaintiffs well know. *See* 78 Fed. Reg. 21,398; *see also Jamul Action Committee, et al. v. Stevens*, E.D. Cal., 13-cv-1067, Complaint at ¶ 1 (alleging that "The ILD was issued by the Chairwoman of the NIGC..."). The claim does not lie against federal defendants sued here.

Even if federal defendants somehow were responsible for issuing the NIGC's NOI, it would not constitute "final agency action," a requirement for an APA claim. The APA's waiver of sovereign immunity is limited to "agency action," a term of art that does not cover everything an agency does. *See, e.g., American Trucking Ass'n, Inc. v. United States*, 755 F.2d 1292, 1296 (7th Cir. 1985) (economic impact study not "agency action" subject to challenge under APA); *see also Physicians Committee for Responsible Medicine v. Vilsack*, 867 F.Supp.2d 24 (D. D.C. 2011) ("Food Pyramid" not "agency action"). Rather, "agency action" under the APA is limited to "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). *See, e.g., Hearst Radio v. FCC*, 167 F.2d 225, 229 (D.C. Cir. 1948) (finding that tort claim for libel was not a challenge to an "agency action" under the APA); *see also Aleck v. United States*, 2005 WL 1586939, at *4 (D.Or. 2005) (trespass claim does not fall within the definition of "agency action" set forth in the APA). Such action must also be *final*, meaning that it marks the "culmination" of the agency's decisionmaking process. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

As is plain from its face, the NOI does nothing more than provide public notice and seek comments with respect to a proposed gaming management contract. 78 F.R. 21,398. Multiple courts have held that such notices are not "final agency action" subject to APA review. *See, e.g., Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1092 (E.D. Cal. 2009) (Notice of Intent to prepare EIS is not a "final agency action" under APA); *see also Muhly v. Espy*, 877 F.Supp. 294, 300 (W.D.Va. 1995) (Notice of intent and scoping process are "infancy" of agency decisionmaking, not culmination of process); *Colorado Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1174 (10th Cir. 2000) ("agency's intent to take action" is not "final agency action" under APA). Thus, Plaintiff may

not challenge the April 10, 2013, notice under the APA. The fact also remains that Plaintiffs nowhere even attempt to show how the tortious conduct they complain is fairly traceable to the NOI.

2. Plaintiffs Lack Standing to Challenge the 2013 Approval of the Amended Gaming Ordinance.

Plaintiffs' reliance on a separate decision by the NIGC to approve amendments to the Tribe's gaming ordinance, (*see* SAC, ¶¶ 22 & 34), fails for the same reasons. Plaintiffs have not sued the NIGC or its officials, and lack standing to challenge the NIGC's approval in any event. As explained above, BIA and NIGC are separate entities. Neither Dutschke nor Rydzik, nor BIA, were involved in approving the challenged gaming ordinances, and they have no power to repeal it. Any injury Plaintiffs assert from the approval of the amended gaming ordinance is not "fairly traceable" to Dutschke or Rydzik, and would not be "redressible" by an order to Dutschke or Rydzik (or BIA). *Pony v. Cty. of Los Angeles*, 433 F.3d 1138, 1145-46 (9th Cir. 2006). Thus, the Court lacks authority under Article III of the Constitution to hear any claim against Dutschke or Rydzik regarding the NIGC's approval of the 2013 amended ordinance.[13]

Additionally, Plaintiffs lack standing to challenge the approval because they cannot show "injury in fact" from that decision. *Pony*, 433 F.3d at 1145. The Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). Plaintiffs' only claimed injury is the alleged disturbance in 2014 of Plaintiffs' families' purported remains on lands within the Tribe's reservation . (SAC, Dkt. No. 52, at ¶ 26). As with NIGC's NOI, Plaintiffs fail even to attempt to explain how the NIGC's approval of amendments to the Tribe's gaming ordinance authorized, approved, promoted, or caused the alleged disinterment. It is Plaintiffs' duty to allege and articulate an injury from this final agency action, but they have failed to do so. It is not enough that there be some injury and some final agency action; rather, Plaintiffs must plead and prove that the final agency action caused the injury asserted. *See Snake River Farmers' Ass'n v. Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993) ("federal courts lack power to make a decision unless the plaintiff has suffered an injury in fact, *traceable to the challenged action*, and likely to be redressed by a favorable decision.") (emphasis added). Because Plaintiffs have not alleged how the approval of the gaming ordinance (the only final agency action) caused their only claimed

[13] The Ninth Circuit recently rejected claims that the land at issue is not Indian land. *See Jamul Action Committee, et al. v. Chaudhuri*, 2016 WL 3219593 (9th Cir., June 9, 2016) (citing *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015) (*en banc*)).

injury (the alleged disturbance of Plaintiffs' families' purported remains on lands within the Tribe's reservation), they lack standing and this Court must dismiss for lack of jurisdiction.

3. Plaintiffs Have Failed to Allege a "Failure to Act" Claim under the APA.

Plaintiffs' only other assertion is the alleged failure to take affirmative action to stop others from harming Plaintiffs. The APA permits "failure to act" claims, but only to require agencies to take discrete and mandatory actions. *See* 5 U.S.C. § 706(2); 551(13). Plaintiffs allege only that the agency "fail[ed] to stop" others from taking particular actions and owe them a duty to "enforce" the "protections of Plaintiffs' families' remains" under a variety of Constitutional and statutory provisions. (SAC, Dkt. No. 52 at ¶¶ 21 & 31-32). The Ninth Circuit and Supreme Court have long rejected "failure to act" claims based on such "general mandates," instead holding that failure-to-act claims under the APA may be brought only to enforce "a discrete action." *Norton v. S. Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55, 63 (2004); see also *Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1113 (9th Cir. 2005). *Citizens Legal Enf't & Restoration v. Connor*, 540 F. App'x 587, 589 (9th Cir. 2013) (rejecting "failure to act" APA claim based on "public trust and state constitutional claims," as well as other "broad mandates, such as obligations to consider the public interest and not to unreasonably waste water."); *Luciano Farms, LLC v. United States*, No. 2:13-CV-02116-KJM-AC, 2014 WL 1912356, at *3 (E.D. Cal. May 13, 2014) (judicial review of "a 'failure to act' is ... limited ... to a *discrete* action" that is "legally *required*.") (emphases in original) (*citing SUWA*, 542 U.S. at 63). Plaintiffs have failed to identify any discrete agency action that Dutschke or Rydzik was "legally required" to undertake. *Id*. at *3. Thus, they may not rely on the APA's "failure to act" provision.

IV. CONCLUSION

Based on the foregoing, the Court should dismiss all claims against the federal defendants.

Respectfully Submitted,

Dated: July 1, 2016

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/s/ Gregory T. Broderick
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