PHILLIP A. TALBERT
Acting United States Attorney
GREGORY T. BRODERICK
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2700
Facsimile: (916) 554-2900

Attorneys for Federal Defendants

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 **REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT** Date: September 9, 2016 Time: 10:00 a.m. Court: 3, 15th Floor Judge: Hon. Kimberly J. Mueller

I. INTRODUCTION

Plaintiffs' Third Amended Complaint must be dismissed because they have failed to state any valid claim over which this Court has jurisdiction. Their attempts to sue Bureau of Indian Affairs officials Amy Dutschke and John Rydzik under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), fail because no *Bivens* remedy exists for the claims they assert. Nor have they pled individual actions by Dutschke or Rydzik that violated any "clearly established" constitutional rights. They thus fail to state a claim, and both Dutschke and Rydzik are entitled to qualified immunity in any event. Plaintiffs' attempt at stating a tort claim also fails because they did not "present" a claim for a "sum certain" as required by 28 U.S.C. § 2675, and they failed to state a conversion claim under California law because they do not allege that Dutschke or Rydzik exercised dominion over their property. Plaintiffs' Native American Graves Protection and Repatriation Act ("NAGPRA") claims fail because NAGPRA does not waive the United States' sovereign immunity, and their Administrative Procedure Act ("APA") claims fail because they have not identified any final agency action which harms them. In sum, all of Plaintiffs' claims fail and the Court should dismiss their Third Amended Complaint in its entirety and without leave to amend.

II. STANDARD OF REVIEW

Plaintiffs erroneously assert that the Third Amended Complaint cannot be dismissed unless there is "no set of facts" that could theoretically support his claim. (*See* Opp'n, Dkt. No. 74, at 2:5-8). This is no longer the standard. *Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (describing the "no set of facts" standard as "retired" and "best forgotten"). Plaintiffs must plead facts which, if true, entitle them to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In addition, this standard has no applicability to the United States' jurisdictional arguments under Rule 12(b)(1). The motion expressly identified the jurisdictional arguments as "a "factual attack" on jurisdiction, meaning that "the allegations of the Complaint are not presumed true, and Plaintiffs' support their assertion of jurisdiction with evidence." (Mtn., Dkt. No. 63-1, at 9:23-25) (*citing Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). Nor does the pleading standard have anything to do with whether there is a *Bivens* remedy; whether the Court should imply a new "direct" claim under the Constitution is a question of law, not of the veracity of allegations in the Third Amended Complaint.

III. ANALYSIS

A. Plaintiffs Fail to State a First Amendment Claim Against Dutschke or Rydzik.

1. There is No *Bivens* Claim for Alleged Violations of the "Free Exercise" Clause.

As noted in the federal defendants' motion, a judicially-created damages remedy for constitutional violations "is not an automatic entitlement," and a *Bivens* action is the exception rather than the rule. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Neither the Supreme Court nor the Ninth Circuit have implied a *Bivens* claim in the "Free Exercise" context. Indeed, the Supreme Court has strongly suggested that no such claim is appropriate. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("we 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.") Plaintiffs badly misread *Ashcroft*. The *Ashcroft* Court "assume[d], without deciding," that a *Bivens* claim existed under the "Free Exercise" clause because no one argued otherwise. *Id*. It did not do so because, as Plaintiffs posit, "First Amendment rights are considered so clearly established…." (Opp'n, Dkt. No. 74, at 3:13-16). Nor do the authorities Plaintiffs cite hold otherwise. *Gibson v. United States* recognized a *Bivens* claim for "Free Speech" violations, not claims under the "Free Exercise" clause. 781 F.2d 1334, 1341-42 (9th Cir. 1986). The only other case

Plaintiffs cite—*Thody v. Ives*, 2016 U.S. Dist. Lexis 24095, *4 (C.D. Cal. 2016)—is a habeas case, and merely states that complaints about prison conditions are more properly addressed in civil rights suits than § 2241 petitions. It does not enumerate what is (or is not) a cognizable *Bivens* claim. Meanwhile, both this district and other Circuit courts have read *Ashcroft* to foreclose the expansion of *Bivens* to "Free Exercise" claims. *See, e.g., Abpikar v. Martin*, 2015 WL 4413841, at *4 (E.D. Cal. July 17, 2015); *see also Turkmen v. Hasty*, 789 F.3d 218, 236 (2d Cir. 2015).

Plaintiffs fail to meaningfully address the arguments, set forth in the motion, for why the Court should decline to extend *Bivens* to this new area, essentially conceding the point. Creating a new remedy is inappropriate where, as here, there are "alternative, existing processes" (including NAGPRA, the APA, and the FTCA), and/or special factors "counseling hesitation" for doing so. *Wilkie*, 551 U.S. at 550. Congress enacted significant legislation in this area, and has chosen to permit some remedies and not others. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013; Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721; Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* These alternative, existing procedures are alone sufficient to preclude a new, judicially invented remedy. *See Sky Ad, Inc. v. McClure*, 951 F.2d 1146, 1148 (9th Cir. 1991) (citing APA for reason to avoid new remedy); *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). Congress' extensive legislation in Indian affairs, combined with its long-standing, "plenary and "exclusive" power on the subject, makes it even less a candidate for judicial intervention. *United States v. Lara*, 541 U.S. 193, 200 (2004).

2. Plaintiffs Fail to Plead a "Free Exercise" Claim, Even if Such a Claim Exists.

Even assuming the existence of a *Bivens* claim under the Free Exercise clause, Plaintiffs have failed to plead such a claim against Dutschke or Rydzik. Indeed, it is difficult to discern from the operative complaint or the opposition what Dutschke or Rydzik are alleged to have done. Plaintiffs do not assert that Dutschke or Rydzik personally disturbed their alleged ancestral remains, nor authorized anyone else to do so. Rather, they assert that Dutschke or Rydzik were supposed to stop some private parties from doing so. Only three paragraphs of the Complaint—¶¶ 7-9—even mention Dutschke or Rydzik, and include only information about who they are, or conclusory allegations 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). Bare "legal conclusions" reciting elements of a claim "do not suffice" to state a claim. *Iqbal*, 556 U.S. at 678. Thus, the Court should dismiss any First Amendment Claim against Dutschke and Rydzik.

3. Qualified Immunity Bars Any First Amendment Against Dutschke or Rydzik.

Even assuming a *Bivens* remedy exists, Plaintiffs' claim must still be dismissed because they fail to allege facts showing that Dutschke or Rydzik violated any clearly established constitutional right, as required to overcome qualified immunity. 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." Qualified immunity recognizes the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (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.

First, Plaintiffs have failed to allege *personal* violations of the constitution by either Dutschke or Rydzik. *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*"); *see also 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). Plaintiffs' failure to allege personal violations of the constitution by Dutschke or Rydzik is fatal because, under *Bivens*, they can only be held *personally* liable for their *personal* actions. And even assuming Plaintiffs could overcome this failure, their claim further fails because they have not identified actions by Dutschke or Rydzik that were *clearly established* as unconstitutional. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Plaintiffs have failed to cite a single case explaining how the failure to act to stop a private party can violate the Free Exercise clause. As the Supreme Court has repeatedly held that government has "no constitutional duty to protect" citizens from tortious acts of third persons, it is particularly inappropriate to subject Dutschke or Rydzik to personal liability even if everything Plaintiffs assert is true. *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).

B. Plaintiffs Fail to State a Fifth Amendment Claim Against Dutschke or Rydzik.

Plaintiffs' opposition asserts that their Fifth Amendment theory is that Dutschke or Rydzik took their property without just compensation. If this is so, the claim fails against Dutschke or Rydzik because there is no authority extending *Bivens* to the "takings" clause. *See, e.g., Krafsur v. Davenport*, 736 F.3d 1032, 1036 (6th Cir. 2013) (*citing Wilkie* for proposition that there is "no *Bivens* action for violations of the Takings Clause"). To the extent construed against the United States, the Court would lack jurisdiction over any takings claim because the Court of Federal Claims has exclusive jurisdiction over any claim which (a) is based directly on the Constitution, and (b) exceeds $10,000. *See* 28 U.S.C. §§ 1346(a)(2) & 1491; *see also Munoz v. Mabus*, 630 F.3d 856, 863 n.5 (9th Cir. 2010) (Court of Federal Claims has exclusive jurisdiction over takings claims over $10,000). Plaintiffs assert that they seek between $250,000 and $4 million, putting them well above the $10,000 jurisdictional limit of the Tucker Act. (Opp'n, Dkt. No. 74 at 16:16-17). Thus, regardless of how it is construed, Plaintiffs' "Fifth Amendment" claim fails, and should be dismissed.

C. Plaintiffs' Tort Claim Fails for Lack of Jurisdiction and for Failure to State a Claim.

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

Plaintiffs failed to submit an administrative claim in writing at least six months before filing suit, a jurisdictional requirement for suing the United States in tort. *See* 28 U.S.C. § 2401; *see also* 28 U.S.C. § 1346; *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir. 1983) ("Exhaustion of the claims procedures established under the [FTCA] is a prerequisite to district court jurisdiction."). Plaintiffs' arguments to the contrary are meritless and misleading, and the Court should reject them.

Plaintiffs' first argument, that they submitted a claim by filing an "amicus" brief in the *Jamul Action Committee* case, is meritless.[1] The FTCA requires a plaintiff to "present" an administrative tort claim to the "appropriate agency" in writing before filing suit. 28 U.S.C. § 2675. Filing an amicus brief in a different case does not "present" anything to the "appropriate agency," and there is no reason to believe the agency actually received it. As many courts have held, the "mere relationship between a defendant and his attorney does not, in itself, convey authority to accept service." *United States v. Ziegler Bolt & Parts*

[1] Plaintiffs have once again failed to participate in the meet and confer process in good faith. The United States specifically raised the claim presentation requirement to Plaintiffs, who never pointed to any amicus brief in the *Jamul* case. This is part of a pattern of refusal which should not be tolerated. (See, e.g., Dkt. No. 78).

Co., 111 F.3d 878, 881 (Fed. Cir. 1997); *see also* 4A *Wright & Miller* § 1097, at 85–86 ("[D]efendant's attorney probably will not be deemed an agent appointed to receive process absent a factual basis for believing that an appointment of this type has taken place."). Moreover, nothing in that 50+ page amicus brief or the 300+ pages attached to it would lead one to believe it was a claim that should be evaluated under the FTCA. (*See Jamul Action Committee v. Steves, et al.*, Case No. 13-1920, at Dkt. Nos. 75-76). It does not request payment, suggest that payment is owed, or do anything similar. The amicus brief also fails to demand a "sum certain damages claim," without which the Court lacks jurisdiction. *Warren v. United States Dep't of Interior Bureau of Land Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc). And even if the amicus brief were construed as an administrative claim, Plaintiffs' action would still be premature. The amicus brief was filed February 11, 2015, and the Complaint in this action, complete with a tort claim, was filed May 27, 2015—less than six months after the amicus brief. (*See* Compl., Dkt. No. 1, at ¶¶ 305-11). Plaintiffs' assertion that the amicus brief satisfies the claim presentation requirement fails in every way, and the Court must dismiss it for lack of jurisdiction.

Plaintiffs' implication that the United States received an administrative claim on September 23, 2015, is also false and irrelevant. The SAC attaches an administrative claim form as an exhibit, but the agency has no record of receiving any written administrative tort claim from Plaintiffs. (*See* Declaration of Donna Reynolds, Dkt. No. 63-2; *see also* Declaration of Charles Wallace, Dkt. No. 63-3, at ¶ 7; Declaration of Anna Owens-Brown, Dkt. No. 63-4, ¶ 5). The claim presentation requirement of the FTCA is not satisfied unless the claim is actually *received*. *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). Yet Plaintiffs fail to offer any evidence that they even sent this claim, much less that it was ever received. Moreover, Plaintiffs' assertion that the claim form attached as Exhibit O and attached to the Third Amended Complaint (Dkt. No. 64-1) "memorializes" a tort claim strongly suggests that it was never submitted. Plaintiffs' counsel has persistently refused to state whether Exhibit O was submitted, whether it was signed after September 23, 2015, and then back-dated. (*See* Declaration of G. Broderick in Support of Reply Brief at ¶¶ 3-6 & Exhs. 1-2). Either way, there is no evidence that Plaintiffs ever sent this claim, or that it was ever received, and the Court should thus dismiss Plaintiffs' tort claims.

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2. Regardless, Plaintiffs Fail to State a Claim for Conversion.

Plaintiffs have failed to state a claim for conversion because they do not allege that any federal agent or agency actually took their property. "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). Plaintiffs have not made any such allegation, but instead claim that the United States failed to stop other, non-federal entities from taking their property. (*See, e.g.*, Opp'n, Dkt. No. 74 at 9:26-10:9) (repeatedly asserting "fail[ure] to stop" others' actions). Because Plaintiffs cannot 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," their conversion claim fails as a matter of law. *Shopoff & Cavallo LLP v. Hyon*, 167 Cal.App.4th 1489, 1507 (Cal. Ct. App. 2008).

D. <u>This Court Lacks Jurisdiction Over Tucker Act Claims</u>.

Plaintiffs may not rely on the Tucker Act for any assertion of jurisdiction in this Court. First, the "Indian Tucker Act" (28 U.S.C. § 1505) expressly applies only to tribes or bands of Indians, not to two persons like Plaintiffs, and requires resort to the Court of Federal Claims. Second, the Tucker Act provisions cited by Plaintiffs, 28 U.S.C. § 1491(b)(1), apply only to contract disputes. Even assuming Plaintiffs meant to cite § 1491(a)(1), that provision provides for exclusive jurisdiction in the Court of Federal Claims. Finally, the "Little Tucker Act" only permits jurisdiction in the District Courts for claims "not exceeding $10,000 in amount." 28 U.S.C. § 1346(a)(2). As set forth above, Plaintiffs assert that they seek between $250,000 and $4 million, well in excess of § 1346(a)(2)'s limits. Thus, the "Tucker Acts" cannot solve Plaintiffs' jurisdictional problems here.[2]

E. <u>NAGPRA Does Not Waive the United States' Sovereign Immunity</u>.

Plaintiffs' attempt to state a claim directly under NAGPRA also fails. First, NAGPRA "does not provide grounds for recovery of monetary damages for individuals who allege Native American

[2] The existence of the Tucker Act(s) as a remedy for the unlawful confiscation of property is yet a further special factor counseling against creation of the new *Bivens* remedy Plaintiffs seek. *See, e.g., Eastern Enter. v. Aphel*, 524 U.S. 498, 520 (1998) ("a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance"); *see also AAA Pharmacy, Inc. v. Palmetto GBA, LLC*, 2008 WL 5070958, *5 (W.D. Okla. Nov. 25, 2008); *Lloyd v. United States*, 1999 WL 759375, *3 (N.D. Ill. Sept. 3, 1999) ("[T]he United States may be sued for a taking of property in excess of $10,000 only in the Court of Claims, and a Bivens action is not a way around that jurisdictional limitation.").

ancestry." *Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001). Second, Plaintiffs cannot proceed directly under NAGPRA, but must proceed under the APA. *See White v. Univ. of California*, 765 F.3d 1010, 1024 (9th Cir. 2014) (suits against the United States "not authorized" directly under NAGPRA, but must proceed under APA).

F. Plaintiffs Have Failed to State an APA Claim.

The balance of Plaintiffs' hodge-podge of claims fail because they have failed (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. As set forth in the motion, 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), simply is not an Indian Lands Determination as Plaintiffs assert. *See* SAC, ¶¶ 22, 34; *see also* Opp'n, Dkt. No. 74 at 14:4-7). 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. It cannot satisfy the final agency action requirement. *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).

Plaintiffs' attempt to challenge the 2013 gaming ordinance also fails. First, Plaintiffs confuse the roles of the BIA and NIGC, which are separate entities. It is no answer to say that BIA has agreed to perform certain functions for NIGC. A challenge to final agency action is a challenge to that agency's final decision, not a challenge to others who may have helped the agency along the way. Plaintiffs are attempting to challenge the gaming ordinance's approval, which neither Dutschke nor Rydzik, nor BIA, were involved in, and which they have do not have the power to repeal. Plaintiffs have not sued the NIGC, the proper defendant for any such challenge, and cannot rely on the United States' substitution for Dutschke and Rydzik, which was limited to "tort causes of action." (Dkt. No. 60 at 1:18).

Additionally, Plaintiffs lack standing to challenge the approval of the gaming ordinance 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). Plaintiffs have

not alleged facts showing that the NIGC's approval of amendments to the Tribe's gaming ordinance caused the alleged disinterment. 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). They have not and cannot, and any challenge to NIGC's approval of the gaming ordinance fails.

Finally, Plaintiffs' "failure to act" theory fails because they have not identified discrete and mandatory actions Dutschke or Rydzik failed to take. *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). There is no "failure to act" claim based on such "general mandates." *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). None of the cases Plaintiffs cite support the assertion that they can use NAGPRA to compel BIA to compel private persons to act or cease to act. The *Yankton Souix* cases, for example, involve claims that the U.S. Army Corps of Engineers was directly operating a dam in a way that violated NAGRPA. *See Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1048 (D.S.D. 2000). *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 866 (D. Ariz. 2003), also involved the operation of a water project in a way alleged to harm Native American remains. It is one thing to sue to stop an agency from violating a statute. It is quite another to sue to force an agency to stop others from allegedly violating a law. Because Plaintiffs have failed to identify any discrete agency action that Dutschke or Rydzik was "legally required" to undertake, their claim fails as a matter of law. *Luciano Farms, LLC v. United States*, 2014 WL 1912356, at *3 (E.D. Cal. May 13, 2014).

G. State Law Does Not Apply to Federal Agencies or Employees.

Plaintiffs' repeated citation to the California Public Resources Code, Penal Code, and other state statutes has no bearing on this action. Put simply, state law cannot provide a basis for an action against the United States, its agencies, or employees, and has no application to federal agents doing their duties. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); *see also In Re Neagle*, 135 U.S. 1, 3 (1890) (federal agent discharging "his duty as an officer of the United States" cannot be held by state "for an act done in pursuance of the laws of the United States."); *Ohio v. Thomas*, 173 U.S. 276 (1899) (federal agent "was not subject to the state law in question" because he was acting "as a Federal officer in and by virtue of valid Federal authority"); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (law purporting to require U.S. Postal employees to obtain a state driver's license before delivering mail invalid). Thus, Plaintiffs' citations to state law cannot provide any basis for relief in this action.

H. Declaratory and Injunctive Relief is Not a 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.

IV. CONCLUSION

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

Respectfully Submitted,

Dated: August 30, 2016

PHILLIP A. TALBERT
Acting United States Attorney

/s/ Gregory T. Broderick
GREGORY T. BRODERICK
Assistant U.S. Attorney