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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, et al.
Defendants.

Case No.: 3:16-cv-2442-AJB-KSC

ORDER:

- (1) GRANTING INDIVIDUAL DEFENDANTS’ MOTION TO DISMISS, (Doc. No. 66); and**
- (2) GRANTING PLAINTIFFS LEAVE TO AMEND.**

Before the Court is Defendants Amy Dutschke and Javin Moore’s (“Individual Defendants”) motion to dismiss the claims that seek personal liability against them in the Third Amended Complaint (“TAC”). (Doc. No. 66.) Those claims include: (1) Violation of Civil Rights – Due Process under the Fifth Amendment, (2) Violation of Civil Rights – Equal Protection under the Fourteenth Amendment; and (3) Conspiracy to Interfere with Civil Rights under *Bivens*. The Court finds: (1) the case does not warrant a new *Bivens* remedy, (2) a claim against any federal employees or government under the Fourteenth Amendment is inapplicable; and (3) plaintiffs failed to plead facts showing a conspiracy existed. The Court also finds that, nevertheless, qualified immunity applies to Dutschke and Moore for claims brought against them in their personal capacities. For these reasons,

1 the Court **GRANTS** the motion to dismiss and **DISMISSES** Dutschke and Moore in their
2 individual capacities from litigation. (Doc. No. 66.)

3 I. BACKGROUND

4 The following facts are taken from the TAC and construed as true for the limited
5 purpose of resolving the instant motion. *See Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247
6 (9th Cir. 2013).

7 The facts of this case have been thoroughly detailed in previous documents,
8 including this Court's previous order granting a motion to dismiss. (*See* Doc. No. 43.)
9 Although the complaint has been amended several times, the core facts remain the same.
10 Plaintiffs are the descendants of Jose Juan Martinez, Guadalupe Martinez, and their
11 daughter Modesta Martinez Contreras (collectively, "Martinez Ancestors"). (Doc. No. 62
12 ¶ 28.) Plaintiffs are split into Groups A and B. (*Id.* ¶¶ 13–18.) Group A Plaintiffs include
13 Plaintiffs who are: residents of San Diego County, "direct lineal descendants of Jose Juan
14 Martinez and Guadalupe Martinez," "direct lineal descendants of Modesta Contreras,"
15 enrolled in the Band, but are not federally recognized as Band members by the BIA. (*Id.* ¶
16 15.) Group B Plaintiffs include Plaintiff who are also San Diego County residents, are
17 enrolled in the Bank, and are federally recognized by the BIA as Band members. (*Id.* ¶ 18.)
18 Group A's claims are the subject of the instant motion to dismiss.

19 Plaintiffs assert each of the Martinez Ancestors was a full blood San Pasqual Indian.
20 (*Id.*) In 2005, Plaintiffs submitted their applications to the Enrollment Committee for
21 enrollment with the San Pasqual Band of Mission Indians in California ("Band"). (*Id.* ¶ 29.)
22 The Enrollment Committee unanimously voted that Plaintiffs had established they were
23 qualified for enrollment. (*Id.*) This determination "was predicated on a finding that
24 Plaintiffs' ancestor Modesta's blood degree should be increased from $\frac{3}{4}$ to $\frac{4}{4}$ ["
25 (*Id.* ¶ 30.) The Band's General Council then unanimously agreed with the Enrollment
26 Committee on April 10, 2005. (*Id.* ¶ 30.) Later, on September 12, 2005, the Band's
27 Business Committee concurred with both the General Council and the Enrollment
28 Committee and sent its findings to former Superintendent of the Southern California

1 Agency, James Fletcher. (*Id.* ¶ 31.)

2 Three months later, on December 8, 2005, Fletcher sent Individual Defendant Amy
3 Dutschke a letter stating that “the preponderance of the evidence does not sufficiently
4 demonstrate that Modesta [] is full blood[,]” (*id.* ¶ 33), to which Dutschke concurred,
5 (*id.* ¶ 35). However, Plaintiffs were never given written notice of either Fletcher or
6 Dutschke’s findings. (*Id.* ¶ 38.) Plaintiffs subsequently submitted FOIA requests to
7 determine the status of their applications, to which they received responses on October 1,
8 2014, and May 27, 2015. (*Id.* ¶ 44). It was at this time Plaintiffs learned of Dutschke’s
9 negative determination of Plaintiffs’ enrollment requests. (*Id.*)

10 II. LEGAL STANDARDS

11 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s
12 complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “[A] court may dismiss
13 a complaint as a matter of law for (1) lack of cognizable legal theory or (2) insufficient
14 facts under a cognizable legal claim.” *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*,
15 88 F.3d 780, 783 (9th Cir. 1996) (citation and internal quotation marks omitted). However,
16 a complaint will survive a motion to dismiss if it contains “enough facts to state a claim to
17 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
18 In making this determination, a court reviews the contents of the complaint, accepting all
19 factual allegations as true and drawing all reasonable inferences in favor of the nonmoving
20 party. *See Cedars-Sinai Med. Ctr. v. Nat’l League of Postmasters of U.S.*, 497 F.3d 972,
21 975 (9th Cir. 2007).

22 Notwithstanding this deference, the reviewing court need not accept legal
23 conclusions as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for
24 a court to assume “the [plaintiff] can prove facts that [he or she] has not alleged”
25 *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519,
26 526 (1983). However, “[w]hen there are well-pleaded factual allegations, a court should
27 assume their veracity and then determine whether they plausibly give rise to an entitlement
28 to relief.” *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

1
2 Plaintiffs' Fifth, Seventh, and Eleventh claims for relief in their TAC bring actions
3 against Individual Defendants in their individual capacities. The Fifth and Eleventh claims
4 are brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403
5 U.S. 388 (1971), while the Seventh claim is brought under the Fourteenth Amendment of
6 the United States Constitution. Plaintiff's Eleventh claim is also brought under 42 U.S.C.
7 § 1981. The Court discusses each in turn below.

8 A. Plaintiffs' Fifth Claim for Relief Does Not Warrant a *Bivens* Remedy

9 Group A Plaintiffs first bring this action under *Bivens*, alleging Individual
10 Defendants violated constitutional mandates by failing to adjudicate Plaintiffs'
11 applications to be federally recognized members of the San Pasqual Band of Mission
12 Indians. (Doc. No. 62 ¶ 130.) Individual Defendants move to dismiss Plaintiffs' *Bivens*
13 claims based on: (1) an insufficient basis for implying a new *Bivens* action, (2) substantive
14 defects in the *Bivens* claims, and (3) the qualified immunity doctrine. (Doc. No. 66-1 at 6.)
15 Specifically, Individual Defendants argue a claim under *Bivens* is unwarranted for tribal
16 enrollment application violations. (*Id.* at 13.) Individual Defendants further contend that in
17 *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the U.S. Supreme Court cautioned against
18 expanding constitutional claims beyond the three scenarios in *Bivens*, *Davis*, and *Carlson*.
19 (*Id.*) Therefore, because this case differs from the three previously-decided Supreme Court
20 *Bivens* cases, Individual Defendants state a *Bivens* remedy should not be granted. (*Id.*)
21 However, Plaintiffs argue the Supreme Court has already expanded *Bivens* claims to
22 violations of the Fifth Amendment's Due Process Clause, under which they seek relief.
23 (Doc. No. 79 at 15.) Additionally, Plaintiffs contend Congress has not provided an
24 alternative remedy and has not explicitly declared that Plaintiffs may not recover damages
25 under Fifth Amendment constitutional claims. (*Id.* at 17.)

26 In *Bivens*, the court established an implied private right of action for tortious
27 deprivation of constitutional rights against federal officials in their personal capacity.
28 *Bivens*, 403 U.S. at 389. However, "[a] *Bivens* remedy will generally not be available if a

1 comprehensive statutory scheme already exists for a defendant to seek redress of the
2 alleged constitutional violation.” *Loumiet v. U.S.*, 255 F. Supp. 3d 75, 84 (D.D.C. 2017);
3 *see also, Ziglar*, 137 S. Ct. at 1858 (finding if there is an alternative remedial structure
4 present in a certain case, that alone may limit the power of the Judiciary to infer a new
5 *Bivens* cause of action).

6 As Individual Defendants correctly point out, the Supreme Court has granted *Bivens*
7 remedies in only three cases: *Bivens*, *Davis*, and *Carlson*. (Doc. No. 66-1 at 13.) First, the
8 Court in *Bivens* provided a damages remedy under the Fourth Amendment to persons who
9 had been subjected by federal officers to unreasonable searches and seizures. *Bivens*, 403
10 U.S. at 396. The Court then held under *Davis v. Passman* that the Fifth Amendment Due
11 Process Clause gave Plaintiff a damages remedy for gender discrimination. 442 U.S. 228,
12 248 (1979). Most recently, the Court in *Carlson v. Green* held that the Eighth
13 Amendment’s Cruel and Unusual Punishments Clause gave decedent’s estate a damages
14 remedy when federal jailers failed to treat decedent’s asthma, resulting in his death. 446
15 U.S. 14, 25 (1980). Expanding the *Bivens* remedy beyond these three scenarios has recently
16 been a “disfavored” judicial activity. *Iqbal*, 556 U.S. at 675. The Supreme Court has
17 “consistently refused to extend *Bivens* to any new context or new category of defendants.”
18 *Corr. Services Corp.*, 534 U.S. at 68. When deciding whether to provide a damages
19 remedy, Congress is in a better position than the courts to consider if “the public interest
20 would be served” by imposing a “new substantive legal liability.” *Schweiker v. Chilicky*,
21 487 U.S. 412, 426–27 (1988) (quoting *Bush v. Lucas*, 462 U.S. 367, 390 (1983)).

22 ***1. Plaintiffs’ Sufficiently Plead a Fifth Amendment Procedural Due***
23 ***Process Violation***

24 Plaintiffs’ factual allegations here raise issues of procedural due process under the
25 Fifth Amendment—specifically, that Defendants failed to give Plaintiffs written notice of
26 their determination that the Martinez Ancestors were not full blood San Pasqual Indian,
27 resulting in denial of tribal enrollment. (Doc. No. 62 ¶ 133.) Plaintiffs contend the Martinez
28 Ancestors are indeed full blood San Pasqual Indian, giving them a potential property

1 interest in the benefits of tribal enrollment. (*Id.* ¶ 28.) However, even if the Court found
2 there was in fact a Fifth Amendment Due Process violation, Plaintiffs’ claims still fail
3 because they cannot state a *Bivens* claim and the Individual Defendants have qualified
4 immunity.

5 2. ***Plaintiffs’ Case Presents a “New Bivens Context”***

6 The *Ziglar* court articulated a test to determine whether a case presents a “new
7 *Bivens* context.” *Ziglar*, 137 S. Ct. at 1859. Simply put, if the case is meaningfully different
8 from the three *Bivens* cases, the context is new:

9 A case might differ in a meaningful way because of the rank of
10 the officers involved; the constitutional right at issue; the
11 generality or specificity of the official action; the extent of
12 judicial guidance as to how an officer should respond to the
13 problem or emergency to be confronted; the statutory or other
14 legal mandate under which the officer was operating; the risk of
15 disruptive intrusion by the Judiciary into the functioning of other
16 branches; or the presence of potential special factors that
17 previous *Bivens* cases did not consider.

18 *Id.* If the case presents a “new *Bivens* context” and there are special factors counselling
19 hesitation in the absence of affirmative action by Congress, then a *Bivens* remedy is not
20 available. *Id.* at 1857; *see also Carlson*, 446 U.S. at 18.

21 Applying previous courts’ rulings to the case at hand, this Court finds that Plaintiffs’
22 case presents a “new *Bivens* context.” Here, the Plaintiff pleads a Fifth Amendment Due
23 Process Clause violation, to which the Court granted a remedy in *Davis*. (Doc. No. 62
24 ¶ 128.) However, the facts here meaningfully differ from the three *Bivens* cases.
25 (Doc. No. 66-1 at 13.) First, the Individual Defendants here are civil servants, unlike the
26 defendants in the three *Bivens* cases. (*Id.*) Second, compared to the overt acts in the *Bivens*
27 cases, the Individual Defendants’ official actions were general, rather than specific—here,
28 Individual Defendants allegedly “failed” to take certain administrative actions, such as
“fail[ing] to review and make a decision (adjudicate) Plaintiffs applications[.]” (Doc. No.
62 ¶ 130.) Moreover, the Individual Defendants allegedly operated under or violated 25

1 C.F.R. § 61.11(b), differing from the statutory mandates of federal officers, prison officials,
2 and Congressmen. (*Id.* ¶¶ 130, 132, 136.) Lastly, *Bivens* has yet to be applied in the context
3 of tribal enrollment disputes.

4 **3. Individual Defendants Have Demonstrated an Adequate Alternative**
5 **Remedy and Special Factors Counseling Hesitation**

6 As such, this Court must determine whether the Individual Defendants: (1) “show
7 that Congress has provided an alternative remedy which it explicitly declared to be a
8 *substitute* for recovery directly under the Constitution and viewed as equally effective[.]”
9 or (2) “demonstrate special factors counselling hesitation in the absence of affirmative
10 action by Congress.” *Carlson*, 446 U.S. at 18–19 (internal citations omitted) (original
11 emphasis). Here, Individual Defendants correctly articulate the Ninth Circuit has
12 previously held that the Administrative Procedures Act (“APA”) provides an adequate
13 alternative remedy to a *Bivens* claim. (Doc. No. 66-1 at 14, *see Western Radio Servs. Co.*
14 *v. U.S. Forest Service*, 578 F.3d 1116, 1123 (9th Cir. 2009) (“We therefore conclude that
15 the APA leaves no room for *Bivens* claims based on agency action or inaction”); *see also*
16 *Winnemem Wintu Tribe v. U.S. Dept. of Interior*, 725 F. Supp. 2d 1119, 1148–49 (E.D.
17 Cal. 2010) (holding that because Plaintiffs pled the same allegations under both the APA
18 and *Bivens*, the APA provided an “adequate remedial scheme.”) Plaintiffs’ First claim
19 under the APA against Individual Defendants in their official capacity substantially mirrors
20 their Fifth claim under *Bivens*. (*See* Doc. No. 62 ¶¶ 57, 72, 130, 132.) Moreover, Plaintiffs
21 fail to address why the APA would not preclude their *Bivens* claim. (*See generally*
22 Doc. No. 79.) Although the APA does not provide for either monetary damages (though it
23 does provide “specific relief,” including money payments) or the right to a trial by jury,
24 both the Supreme Court and the Ninth Circuit have stated that alternative remedial
25 measures without these features may still be adequate, “provided that the absence of such
26 procedural protections was not inadvertent on the part of Congress.” *Western Radio*, 578
27 F.3d at 1123. Therefore, Plaintiffs’ *Bivens* claim fails this first test and recognizing a new
28 *Bivens* claim is unwarranted.

1 Individual Defendants further contend that even if the APA did not provide an
2 adequate remedy to Plaintiffs, there are special factors counseling hesitation here.
3 (Doc. No. 66-1 at 14.) This Court agrees with Individual Defendants that “‘Congress is in
4 a far better position than a court to evaluate the impact of a new species of litigation’ against
5 those who act on the public’s behalf.” *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (quoting
6 *Bush*, 462 U.S. at 389.) Indeed, in addition to money damages, Plaintiffs here seek orders
7 directing Individual Defendants to perform within their official governmental capacities.
8 (Doc. No. 62 at 57.) However, “relief under *Bivens* does not encompass injunctive and
9 declaratory relief where, as here, the equitable relief sought requires official government
10 action.” *Solida v. McKelvey*, 820 F.3d 1090, 1093 (9th Cir. 2016). Thus, this Court finds
11 special factors counseling hesitation in expanding *Bivens* to the case at hand.

12 **4. Remaining Defendants’ Under Fifth Claim**

13 Moreover, the Group A Plaintiffs bring this *Bivens* claim against all Defendants in
14 their official capacity. (Doc. No. 66-1 ¶ 127.) However, *Bivens* claims only provide a
15 remedy against officials in their individual capacity. *See Higazy v. Templeton*, 505 F.3d
16 161, 169 (2d Cir. 2007) (“The only remedy available in a *Bivens* action is an award for
17 monetary damages from defendants in their individual capacities.”). “By definition, *Bivens*
18 suits are individual capacity suits and thus cannot enjoin official government action.”
19 *Solida*, 820 F.3d at 1094. Thus, the Fifth Claim is **DISMISSED WITH PREJUDICE** in
20 its entirety against both Individual Defendants in their individual capacities and all
21 Defendants in their official capacities.

22 **B. Plaintiffs’ Seventh Claim Under the Fourteenth Amendment is** 23 **Inapplicable Here**

24 Plaintiffs contend both the Individual and non-Individual Defendants violated
25 Plaintiffs’ equal protection rights under both the Fourteenth Amendment and the Indian
26 Civil Rights Act, 25 U.S.C. § 1302. (Doc. No. 62 ¶ 142.) However, the Fourteenth
27 Amendment only applies to State actions. *Hall v. Mueller*, 84 Fed. App’x 814, at *815–16
28 (9th Cir. 2003). Because Individual Defendants are federal employees acting under color

1 of federal law, the Fourteenth Amendment is inapplicable to them. Also, because the non-
2 Individual Defendants (the USA and the Dept. of Interior) are federal government entities,
3 the Fourteenth Amendment does not apply. *San Francisco Arts & Athletics, Inc. v. U.S.*
4 *Olympic Comm.*, 483 U.S. 522, 543 n.21 (1987) (“The Fourteenth Amendment applies to
5 actions by a State.”). Finally, the Indian Civil Rights Act is similarly inapplicable because
6 it expressly applies only to “Indian tribe[s] in exercising powers of self-government[.]”
7 25 U.S.C. § 1302.

8 The Court notes any Equal Protection violation against the federal government
9 and/or its employees can only be brought under the Fifth Amendment, however, Plaintiffs
10 failed to allege such a violation. Thus, the Court **DISMISSES WITH PREJUDICE** any
11 equal protection claim under the Fourteenth Amendment. However, the Court **GRANTS**
12 **LEAVE TO AMEND** to allege an equal protection claim under the Fifth Amendment.

13 **C. Plaintiffs’ Eleventh Claim for Conspiracy to Interfere with Civil Rights**
14 **Does Not Warrant a *Bivens* Remedy**

15 Plaintiffs claim Individual Defendants “conspired to deny Plaintiffs their rightful
16 inheritance” of the San Pasqual land. (Doc. No. 62 ¶ 192.) However, Plaintiffs fail to state
17 specific actions Individual Defendants committed in furtherance of a conspiracy, and rather
18 make conclusory statements. (*See generally id.* ¶¶ 188–205.) Moreover, Plaintiffs’ claim
19 for conspiracy presents a “new *Bivens* context” not encompassed by the Supreme Court’s
20 three *Bivens* cases. Plaintiffs contend there are no “special factors” to cause this Court
21 hesitation in applying a *Bivens* remedy here “because there is an absence of affirmative
22 action by Congress to provide a substitute for recovering money damages for the
23 Defendants’ constitutional violations.” (*Id.* ¶ 190.) However, Plaintiffs’ Eleventh claim
24 raises similar concerns as their Fifth claim, which could be further addressed under the
25 APA. Furthermore, Plaintiffs’ claims against the Individual Defendants are predominantly
26 conclusory allegations that do not warrant a *Bivens* remedy here. (*See generally id.* ¶¶ 192–
27 205.) For example, Plaintiffs assert that Defendants “conspired to deny Plaintiffs their
28 rightful inheritance” (*id.* ¶ 192); “conspired to interfere with Plaintiffs’ civil rights” (*id.* ¶

1 196); and “[i]n furtherance of their conspiracy . . . exceeded their authority by illegally
2 construing the statutory language of 25 C.F.R. 48[,]” (*id.* ¶ 197). Plaintiffs fail to plead any
3 factual allegations supporting the existence, or plausible existence, of a conspiracy.

4 Additionally, Plaintiffs’ allegations against Individual Defendant Moore in their
5 Eleventh claim relies upon vicarious or successor liability: “Defendants had full knowledge
6 that their predecessors knew non-San Pasqual blood persons were occupying San Pasqual
7 land[.]” (*Id.* ¶ 192.) However, “*Bivens* liability is premised on proof of direct personal
8 responsibility.” *See Pellegrino v. U.S.*, 73 F.3d 934, 936 (9th Cir. 1996). Thus, Individual
9 Defendant Moore may not be held liable for actions allegedly committed by others.

10 **D. Plaintiffs’ Alternate Eleventh Claim for Conspiracy to Interfere with**
11 **Civil Rights Under 42 U.S.C. § 1981**

12 Plaintiffs additionally pursue their conspiracy claim under 42 U.S.C. § 1981.
13 (Doc. No. 62 ¶ 206.) Section 1983 specifically provides a remedy for alleged violations of
14 § 1981 against those officials acting “under color of any statute, ordinance, regulation,
15 custom, or usage, of any *State or Territory or the District of Columbia.*” (emphasis added).
16 42 U.S.C. § 1983; *see also Cerrato v. San Francisco Cmty. College Dist.*, 26 F.3d 968, 972
17 (9th Cir. 1994). Because Individual Defendants acted under color of federal law, this action
18 is inapplicable to Individual Defendants.

19 Moreover, “[t]o state a conspiracy claim under § 1983, a plaintiff must show (1) an
20 agreement between the defendants to deprive the plaintiff of a constitutional right, (2) an
21 overt act in furtherance of the conspiracy, and (3) a constitutional deprivation.” *Davis v.*
22 *Powell*, 901 F. Supp. 2d 1196, 1217 (S.D. Cal. 2012). However, “conclusory allegations
23 of official participation in civil rights violations are not sufficient to withstand a motion to
24 dismiss.” *Id.* (quoting *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.3d 266, 268 (9th Cir.
25 1982)) (internal quotations omitted).

26 Here, Plaintiffs have failed to show any agreement between Individual Defendants
27 to deprive Plaintiffs of their tribal benefits. Plaintiffs offer only conclusory assertions of
28 Individual Defendants’ alleged conspiracy. (*See* Doc. No. 62 ¶¶ 192, 196, 197, 201, 203.)

1 Next, Plaintiffs have not pled any overt acts in furtherance of this conspiracy, merely
2 stating Individual Defendants “did nothing to protect Plaintiffs’ rights and heritage[,]”
3 (*id.* ¶ 194), “allowed this situation to continue, allowing the non-San Pasqual blood persons
4 to exert themselves,” (*id.* ¶ 195), and “exceeded their authority by illegally construing []
5 statutory language” (*id.* ¶ 197).

6 Therefore, Individual Defendants’ motion to dismiss the Eleventh Cause of Action
7 is **GRANTED**.

8 9 **E. Individual Defendants Dutschke and Moore Have Qualified Immunity**

10 “Qualified immunity shields federal and state officials from money damages unless
11 a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional
12 right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.”
13 *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800,
14 818 (1982)). A government official’s actions or inactions violate “clearly established” law
15 when the constitutional right is “sufficiently clear that every reasonable official would have
16 understood that what he is doing violates that right.” *Id.* at 741 (quoting *Anderson v.*
17 *Creighton*, 483 U.S. 635, 640 (1987)) (internal citations omitted).

18 Regarding the first prong of the qualified immunity analysis, Plaintiffs have
19 sufficiently pled at this stage that Individual Defendants violated Plaintiffs’ Fifth
20 Amendment Procedural Due Process rights. However, the statutes which Plaintiffs further
21 rely upon (25 C.F.R. §§ 48.5–48.10) were removed from the Code of Federal Regulations
22 in 1996, nine years before the alleged violations occurred, though they are incorporated
23 into the Band’s tribal law. *See Alto v. Black*, 738 F.3d 1111, 1116 (9th Cir. 2013); *see also*
24 *Enrollment of Indians of the San Pasqual Band of Mission Indians in California*, 52 Fed.
25 Reg. 31391–01 (Aug. 20, 1987) (redesignating the 1960 Regulations from 25 C.F.R. Part
26 48 to 25 C.F.R. Part 76); *Enrollment of Indians; Removal of Regulations*, 61 Fed. Reg.
27 27780–01 (June 3, 1996) (removing Part 76). Thus, Individual Defendants have not
28 violated a statutory right.

1 Moving to the second prong of the analysis, Plaintiffs fail to allege their statutory
2 and constitutional rights were clearly established at the time of Individual Defendants’
3 actions or inactions. (Doc. No. 79 at 14.) Plaintiffs must point to “existing precedent [that
4 has] placed the statutory or constitutional question beyond debate.” *al-Kidd*, 563 U.S. at
5 741. However, Plaintiffs again repeat legal conclusions throughout their opposition without
6 providing specific examples of existing case law or facts to support their proposition.
7 (Doc. No. 79 at 12–15.) For example, Plaintiffs argue the facts “clearly show” that
8 Individual Defendants’ actions violated ‘clearly established statutory or constitutional
9 rights of which a reasonable person would have known,’” but fail to specify what those
10 rights were. (*Id.* at 12.) Plaintiffs also decide Individual Defendants’ actions were
11 unreasonable and thus violated clearly established authority, but again, Plaintiffs do not
12 articulate any legal basis for their conclusion the actions were unreasonable or what right
13 was clearly established. (*Id.* at 13 (“Qualified immunity only protects reasonable official
14 actions. The actions taken by DUTSCHKE and MOORE violated ‘clearly established’
15 statutory and constitutional rules. Therefore, their actions were not reasonable official
16 actions.”).) In another example, Plaintiffs provide that “[n]either DUTSCHKE’s nor
17 MOORE’s decisions as pled in plaintiffs’ TAC were or are reasonable.” (*Id.* at 14.)
18 However, conclusory assertions of law do not suffice.

19 Because Plaintiffs have not offered any preceding case or judicial opinion that a
20 federal official’s failure to notify tribal enrollment applicants of a denial is a “clearly
21 established” violation of the Fifth Amendment Due Process Clause, this Court finds that
22 Individual Defendants Dutschke and Moore have qualified immunity, and thus **DISMISS**
23 them as defendants in their individual capacities.

24 **IV. CONCLUSION**

25 For the reasons stated above, the Court **GRANTS** Defendants’ motion to dismiss
26 and **DISMISSES** Defendants Dutschke and Moore in their individual capacities.
27 (Doc. No. 66.)

28 Additionally, the Court **DISMISSES WITH PREJUDICE** the following claims:

- 1 1. The Fifth Claim for Violation of Civil Rights – Due Process under *Bivens*
2 because the Court finds Plaintiffs failed to state a *Bivens* action against
3 Individual Defendants and cannot bring a *Bivens* claim against Defendants
4 in their official capacity; and
- 5 2. The Eleventh claim for Conspiracy to Interfere with Civil Rights under
6 *Bivens* brought under both *Bivens* and alternatively under 42 U.S.C. § 1981
7 because Plaintiffs failed to state a claim.

8 However, the Court **DISMISSES WITH LEAVE TO AMEND** the following
9 claim.

- 10 1. The Seventh Claim for Violation of Civil Rights – Equal Protection under
11 the Fourteenth Amendment because a claim under the Fourteenth
12 Amendment can only be brought against the States.

13 The scope of Plaintiffs’ leave to amend will be determined in accordance with the
14 Court’s forthcoming order on the second motion to dismiss, (Doc. No. 68). Thus, a date to
15 amend the complaint will be provided in that Order.

16 The remaining Defendants are as follows:

- 17 1. Amy Dutschke and Javin Moore, in their official capacity;
- 18 2. Michael Black and Weldon Loudermilk, in their official capacity;
- 19 3. The United States of America; and
- 20 4. The Department of the Interior.


21 The remaining causes of actions are as follows:

- 22 1. Group A Plaintiffs’ First Claim under the APA against Defendants
23 Dutschke, Moore, Zinke, Black, and Loudermilk, in their official
24 capacities;
- 25 2. Group B Plaintiffs’ Second Claim under the APA against Zinke, Black,
26 and Loudermilk, in their official capacities;
- 27 3. Group A Plaintiffs’ Third Claim for Declaratory Relief, or in the
28 alternative, Mandamus, against all Defendants, in their official capacities;
4. Group A Plaintiffs’ Fourth Claim for unconstitutional delegation of
authority against Dutschke, Moore, Zinke, Black, and Loudermilk, in their
official capacities; and Group B Plaintiffs against all Defendants, in their
official capacities;
5. Group B Plaintiffs’ Sixth Claim against all Defendants in their official
capacities for violation of civil rights and due process;
6. Group A and Group B Plaintiffs’ Eighth Claim for breach of statutory
fiduciary duty against all Defendants in their official capacity;

- 1 7. Group A Plaintiffs' Ninth Claim for denial of tribal property rights against
- 2 all Defendants in their official capacity; and
- 3 8. Group A Plaintiffs' Tenth Claim against all Defendants in their official
- 4 capacity for unconstitutional diminution of tribal land rights.

5 **IT IS SO ORDERED.**

6 Dated: July 23, 2019

7 
8 Hon. Anthony J. Battaglia
9 United States District Judge
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