ROBERT S. BREWER, JR.
United States Attorney
George V. Manahan (SBN 239130)
Glen F. Dorgan (SBN 160502)
Assistant United States Attorneys
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, California 92101
Tel: (619) 546-7607 Fax: (619) 546-7751

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al.,

Plaintiffs,

v.

UNITED STATES, et al.,

Defendants.

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

FEDERAL DEFENDANTS' REPLY TO PLAINTIFFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICITON THIRD CAUSE OF ACTION IN FOURTH AMENDED COMPLAINT

DATE: January 9, 2019
TIME: 2:00 p.m.
CTRM: 4A
JUDGE: Hon. Anthony J. Battaglia

On October 7, 2019, Defendants United States of America and the Department of the Interior, and Defendants Michael Black, Weldon Loudermilk, Amy Dutschke, and Javin Moore sued in their official capacities (collectively "Federal Defendants"), moved to dismiss for lack of subject matter jurisdiction Plaintiffs' third claim in their Fourth Amended Complaint ("4AC") alleging violations of Plaintiffs' Fifth Amendment rights to Equal Protection, arguing the United States has not waived its sovereign immunity over such a claim. (ECF No. 110.) On November 18, 2019, Plaintiffs filed an opposition to that motion. (ECF No. 116.) Federal Defendants hereby file their reply to Plaintiffs' opposition brief.

I. Plaintiffs' Arguments that Sovereign Immunity Should Not Exist and There Is No Need for a Statutory Waiver of Sovereign Immunity Are Without Merit

At various points in their opposition brief, Plaintiffs appear to argue that their third claim in the 4AC should be permitted to go forward because the doctrine of sovereign immunity should not exist. Such arguments are without merit. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). As noted in Federal Defendants' motion, the Supreme Court "regard[s] as unsound the argument . . . that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." United States v. Testan, 424 U.S. 392, 400–01 (1976). As the Supreme Court has "said on many occasions[,] a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text."[1] F.A.A. v. Cooper, 566 U.S. 284, 290 (2012); see also United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be 'unequivocally expressed.'" (citations omitted)); Jaffee v. United States, 592 F.2d 712, 718 (3d Cir. 1979) ("Because of sovereign immunity, [a plaintiff] can sue the United States only if Congress has waived the immunity by statute."). The Court must reject any of Plaintiff's arguments that contradict these precedents.

II. Former Regulations Codified at 25 C.F.R. Part 48 Do Not Waive the United States' Sovereign Immunity

Equally unpersuasive is Plaintiffs' argument that regulations formerly codified at 25 C.F.R. Part 48 waive sovereign immunity over their third cause of action. In 1960, the

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[1] Indeed, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." F.A.A., 566 U.S. at 290. "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." Id. at 290-91; cf. United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) (if a plausible interpretation of a statute would preserve Eleventh Amendment immunity, it does not matter that other interpretations would create a waiver of such immunity, even if those interpretations are supported by legislative history).

Department of the Interior published regulations, formerly codified at 25 C.F.R. §§ 48.1–48.15 (the "1960 Regulations") addressing, among other things, enrollment criteria for the San Pasqual Band of Mission Indians (the "Band"). See Alto v. Black, 738 F.3d 1111, 1116 (9th Cir. 2013). In 1996, those regulations were removed from the Code. See id. at 1116 & n.1. Since then, the defunct 1960 Regulations survive only as Tribal law of the Band, as they were incorporated into the Band's Constitution. See id. at 1116.

Plaintiffs' argument that these regulations constitute a waiver of sovereign immunity allowing the third cause of action of their 4AC to proceed fails for multiple reasons. Most obviously, they cannot constitute a waiver of sovereign immunity for a claim filed over two decades after the regulations have ceased to exist.

Furthermore, regulations promulgated by the Department of the Interior "are not acts of Congress, so they cannot effect a waiver of sovereign immunity." Tobar v. United States, 639 F.3d 1191, 1195 (9th Cir. 2011). Indeed, to their credit, Plaintiffs admit that "only Congress can waive the United States' sovereign immunity," citing Dunn & Black, PS v. United States, 492 F.3d 1084, 1090 (9th Cir. 2007). See Pls.' Opp. Br at 18. Plaintiffs mistakenly argue, however, that the former 1960 Regulations are congressional statutes, see id. at 29, 32, which they are not. Furthermore, the fact that the Band adopted the former 1960 Regulations into their Constitution does not create a waiver of sovereign immunity since the Band is also not Congress.

Moreover, Plaintiffs fail to specify what portion of these now defunct regulations they believe constitute a waiver of sovereign immunity. Unspecified reference to a group of (former) regulations[2] does not constitute the required unequivocally expression of a waiver of sovereign immunity the Supreme Court has repeatedly demanded.[3] See F.A.A., 566 U.S. at 290.

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[2] Indeed, while at times Plaintiffs refer to the former regulations found at Part 48 of Title 25 of the Code of Federal Regulations, at other times they simply refer to Title 25 generally. See Pls' Opp. Br. at 2, 35.

[3] Neither can unspecified, defunct regulations be fairly interpreted as mandating compensation by the Federal Government for damages, as described in the next section.

"The party who sues the United States bears the burden of pointing to . . . an unequivocal waiver of immunity." Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983) (concluding sovereign immunity prevents suit against officials of United States Bureau of Indian Affairs (BIA) for money damages for violation of due process in causing plaintiffs to lose tribal privileges, even where officials admitted error in removing plaintiffs from tribal role). Plaintiffs have failed to meet their burden.

III. Neither The Tucker Act, the Little Tucker Act, the Indian Tucker Act, nor Any Other Source of Law Mentioned By Plaintiffs Waives Sovereign Immunity Over Plaintiffs' Third Cause of Action

Neither does the Tucker Act, 28 U.S.C. § 1491,[4] the Little Tucker Act, 28 U.S.C. § 1346,[5] nor the Indian Tucker Act, 28 U.S.C. § 1505,[6] (collectively the "Tucker Acts") supply the requisite waiver of sovereign immunity. Other than the fact that the Tucker Act and the Indian Tucker Act assign jurisdiction exclusively to the Court of Federal Claims,[7]

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[4] 28 U.S.C. § 1491(a)(1) grants jurisdiction to the United States Court of Federal Claims for suits "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Implied contracts must be implied in fact, not implied in law. See Merritt v. United States, 267 U.S. 338, 340–41 (1925).

[5] 28 U.S.C. § 1346(a)(2) grants concurrent jurisdiction to the Court of Federal Claims and district courts for a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

[6] 28 U.S.C. § 1505 grants jurisdiction to the Court of Federal Claims for suits "against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group."

[7] Since the Tucker Act and the Indian Tucker Act rest jurisdiction exclusively with the Court of Federal Claims, see Hou 1778 Hawaiians v. United States Dep't of Justice, No. CV 15-00320 SOM/BMK, 2016 WL 335851, at *4 (D. Haw. Jan. 27, 2016), Plaintiff could only possibly rely on the Littler Tucker Act for jurisdiction with this Court. Regardless, as indicated above, none of the Tucker Acts statutes waive subject matter jurisdiction over the third cause of action in Plaintiffs' 4AC. Even if the Court disagreed, it would only be able to retain jurisdiction under the Little Tucker Act if Plaintiffs' claims did not exceed $10,000 in amount. Cf. Dettling v. United States, 948 F. Supp. 2d 1116, 1129–

the scope of each of these three statutes is the same. See United States v. Bormes, 568 U.S. 6, 10 & n.2 (2012). The Tucker Acts are jurisdictional provisions operating to waive sovereign immunity for claims premised on other sources of law such as the Constitution, statutes, or contracts. See United States v. Navajo Nation, 556 U.S. 287, 290 (2009) (Navajo II) (ordering Federal Circuit to affirm dismissal of suit by Indian tribe for lack of subject matter jurisdiction for failure to identify source of law to allow suit for money damages against United States based on breach of trust theory); Hopi Tribe v. United States, 782 F.3d 662, 666-67 (Fed. Cir. 2015) (affirming denial for lack of subject matter jurisdiction Indian tribe's suit seeking money damages for alleged breach of trust by BIA). However, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act[s]." United States v. Mitchell, 463 U.S. 206, 216 (1983). Rather, the Tucker Acts only waive sovereign immunity if "the claimant [can] demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"[8] Id. at 216-17 (internal citation omitted); see also Fisher v. United States, 402 F.3d 1167, 1173 (Fed. Cir. 2005) ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal—

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30 (D. Haw. 2013) ("If a Tucker Act claim is brought in district court for an amount over $10,000, the court may dismiss the claim for lack of subject matter jurisdiction or transfer the claim to the Court of Federal Claims; if the plaintiff wishes to remain in district court, he must waive his damages in excess of $10,000.").

[8] Plaintiffs also briefly indicate that sue and be sued statutes can effect a waiver of sovereign immunity (Pls' Opp. Br. at 34,) Plaintiffs cite Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), to support their statement that "the DOI is a 'sue[] and be sued' agency," but do not cite a specific statute, and Ruckelshaus does not discuss the Department of the Interior or any sue and be sued statutes. Furthermore: 1) sue and be sued statutes limit sovereign immunity for commercial (such as the Post Office and the Tennessee Valley Authority (which creates electricity)), rather than governmental functions which may be gravely interfered with, see Thacker v. Tennessee Valley Auth., 139 S. Ct. 1435, 1442–43 (2019), but Plaintiffs are challenging the latter type functions; and 2) like the Tucker Acts, a sue and be sued statute only potentially allows a suit against a government agency if "the source of substantive law upon which the claimant relies provides an avenue for relief." F.D.I.C. v. Meyer, 510 U.S. 471, 484 (1994). As discussed above, Plaintiffs have failed to point to any such substantive law allowing their third cause of action.

the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act.").

Here, although Plaintiffs' opposition brief mentions other possible sources of substantive law to permit their third cause of action, the 4AC clearly states it seeks damages based on the Equal Protection Clause of the Fifth Amendment. See 4AC ¶¶ 110, 125-128, 131-136, 138-140.[9] "[T]he legal theories set forth in [a plaintiff's opposition] brief are helpful only to the extent that they find support in the allegations set forth in the complaint." Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 181 (3d Cir. 1988). "[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984); quoted with approval in Fischer v. Minneapolis Pub. Sch., 792 F.3d 985, 990 n.4 (8th Cir. 2015). Therefore, Plaintiffs may only survive Federal Defendants' motion to dismiss if the Equal Protection Clause can be fairly interpreted as mandating compensation by the Federal Government. It cannot.[10] See Mullenberg v. United States, 857 F.2d 770, 773 (Fed. Cir. 1988) ("[I]t is firmly settled that [due process and equal protection clauses of the Constitution] do not obligate the United States to pay money damages."); Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980) ("[N]o jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages."); Orion Ins. Grp. v. Washington State Office of Minority & Women's Bus. Enterprises, No. 16-5582 RJB, 2016 WL 6805335, at *5 (W.D. Wash. Nov. 17, 2016) (dismissing claim for

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[9] Possibly, paragraph 140 of the 4AC refers to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (ICRA). Regardless, Plaintiffs' opposition brief only mentions the ICRA in passing.

[10] Indeed, the "founded upon the constitution" clause of the Tucker Act is limited to claims under the Takings Clause of the Fifth Amendment, because only that clause contemplates payment by the federal government. See United States v. $4,480,466.16 in Funds Seized from Bank of Am. Account Ending in 2653, No. 18-10801, 2019 WL 5704523, at *6 n.17 (5th Cir. Nov. 5, 2019) (citing Rothe Dev. Corp. v. U.S. Dept. of Defense, 194 F.3d 622, 625 (5th Cir. 1999)); Clark v. Library of Congress, 750 F.2d 89, 104 n. 31 (D.C. Cir. 1984). As explained below, Plaintiffs' third cause of action is not actionable under the Takings Clause.

monetary damages for alleged violation of the Equal Protection clause based on sovereign immunity). Therefore, the Court should grant Federal Defendants' motion to dismiss Plaintiffs' third cause of action of their 4AC.

Furthermore, even if Plaintiffs' 4AC had actually alleged the trust relationship between Indians and the Federal Government was the basis for their third cause of action, that relationship would not affect the conclusion that the claim should be dismissed because of sovereign immunity. Although there is undisputedly a general trust relationship between the United States and Indian people, "that relationship alone is insufficient to support jurisdiction under the . . . Tucker Act[s]." United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (Navajo I). Rather, "a further source of law" is needed to permit a fair inference that the Government is subject to fiduciary duties as a trustee and liable in damages for a breach of those duties. See Marceau v. Blackfeet Hous. Auth., 540 F.3d 916, 924 (9th Cir. 2008) (explaining that in White Mountain, 537 U.S. 465 (2003), that further source of law was the 1960 Fort Apache Statute); see also Navajo II, 556 U.S. at 302 (if a plaintiff fails to "identify a specific, applicable, trust-creating statute or regulation that the Government violated, [a court does] not reach the question whether the trust duty was money mandating. [In such case,] neither the Government's 'control' over [Indian assets] nor common-law trust principles matter."). Plaintiffs have not pointed to any further source of law that can be fairly interpreted as creating a fiduciary duty as a trustee on the United States in association with their third cause of action, or that would make the United States susceptible to money damages for the breach of any such duty.

Moreover, Plaintiffs' third cause of action is not a takings claim (and it was not alleged to be one in the 4AC), and therefore the Takings Clause of the Fifth Amendment does not save that claim. The Takings Clause of the Fifth Amendment provides: "[N]or shall property be taken for public use, without just compensation." A "taking" has occurred only if the subject matter is "property" within the meaning of the Fifth Amendment, and a

taking of that property has occurred.[11] See In re Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982, 988 (9th Cir. 1987).

"Takings claims are divided into two classes: permanent physical occupation claims and regulatory takings." Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 684–85 (9th Cir. 1993); see also Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28, (2015) ("Our cases have stressed the 'longstanding distinction' between government acquisitions of property and regulations.").[12] A physical taking occurs when the government takes title of the property, takes possession and control of the property, or requires the owner to submit to the physical occupation of his property. See Yee v. City of Escondido, 503 U.S. 519, 527 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 431 (1982). A physical taking occurs when, for example, raisins are transferred from the growers to the government, see Horne, 135 S. Ct. at 2428, the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, see Loretto, 458 U.S. at 440-41, or the government seizes and operates a coal mine to counteract a national coal miner strike, see United States v. Pewee Coal Co., 341 U.S. 114, 115-16 (1951). A regulatory taking occurs when a regulatory restriction on the use of property goes "too far" in redefining the range of interests included in the ownership of property or significantly qualifies the uses of the property. See Horne, 135 S. Ct. at 2427; Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992); see also Yee, 503 U.S. at 522–23 ("[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic

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[11] An actual takings claim is subject to a strict six-year statute of limitations period. This limitations period "is a jurisdictional requirement attached by Congress" that must be strictly construed. See Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988), cited with approval by Mishewal Wappo Tribe of Alexander Valley v. Zinke, 688 F. App'x 480, 482 (9th Cir. 2017).

[12] "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002).

use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole."). "[T]the test for how far [is] 'too far' require[s] an 'ad hoc' factual inquiry [including] considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations,[13] and the character of the government action." Horne, 135 S. Ct. at 2427.

Plaintiffs' third cause of action neither fits the mold of a physical takings nor a regulatory takings claim. It does not allege the United States physically took and possesses anything from Plaintiffs, and it does not challenge a regulation enacted by the United States that interfered with their investment-backed expectations. As described above, Plaintiffs cannot rely on the former 1960 Regulations, which have been defunct since 1996. The fact that the Band incorporated those regulations into their Constitution does not make them a regulation by the United States.[14]

Furthermore, Plaintiffs' third cause of action involves subject matter that is not "property" within the meaning of the Fifth Amendment, and fails to allege a "taking" of any such property. Contingent property interests that lack investment-backed expectations[15] are not sufficient property interests to support a Fifth Amendment Takings Claim. See Atmospheric Testing Litig., 820 F.2d at 989 (pending lawsuit against contractor for

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[13] In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (which was cited in Horne), the Supreme Court concluded that owners of Grand Central Terminal in New York City were not subject to Fifth Amendment Taking by landmark preservation law that prevented them from construction 50-story office building over the terminal since, inter alia, they still allowed owners to obtain a reasonable return on their investment in purchasing the building, even if the regulation prohibited greater profit potential.

[14] Besides, again, Plaintiffs fail to specify what portion of those former regulations they can possibly rely on as the basis of a regulatory takings claim, let alone one that can plausibly be argued to have gone "too far" to constitute a taking.

[15] When determining whether a regulatory taking has occurred, one of the considerations is the extent to which the regulation has interfered with distinct investment-backed expectations. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (owners of Grand Central Terminal in New York City were not subject to Fifth Amendment Taking by landmark preservation law that prevented them from construction 50-story office building over the terminal since, inter alia, they still allowed owners to obtain a reasonable return on their investment in purchasing the building).

radiation injuries resulting from atomic weapons testing program contingent and therefore not property within meaning of Fifth Amendment when FTCA disallowed such suits). Many, if not all of the interests Plaintiffs allege in their third cause of action involve contingency interests (for example, their desire to be members of the Band).

Moreover, Plaintiffs' third cause of action does not allege a Fifth Amendment "taking." Rather, at most, it alleges that the government erred in fulfilling its duties with regard to Plaintiffs' (and others') applications to be members Band, and other similar duties. A necessary element of a takings claim, however, is that the government took an authorized action[16] that results in the taking of private property for public use. See Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802-03 (Fed. Cir. 1993). "A mistake may give rise to a due process claim, [but] not a taking claim." Id. at 803; see also Atmospheric Testing Litig., 820 F.2d at 988 (a claim of deprivation of property in violation of due process cannot also form the basis of a takings claim). Even in the context of a government entity that denies granting a land permit unless the landowner cedes to the entity's unconstitutionally extortionate demand to fund an offsite mitigation project on public land, the denial of such a land use permit is not a Fifth Amendment Taking because "nothing has been taken." Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 608 (2013) (explaining that while remedies other than money damages may be available in such a case, the remedy of just compensation applies only to valid takings claims). Similarly, the allegations of Plaintiffs' third cause of action fail to allege a Fifth Amendment Takings claim.

Plaintiffs also find no relief from their third cause of action lacking subject matter jurisdiction due to sovereign immunity based on their citation to Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and its progeny. The Larson exception allows a suit seeking specific relief against a federal officer who acts beyond his statutory powers, or pursuant to powers that are themselves unconstitutional, or when the manner in

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[16] A government official who engages in unauthorized or ultra vires conduct cannot create a Fifth Amendment Takings claim against the Government. See Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362 (Fed. Cir. 1998).

which they are exercised are unconstitutional, because such suit is not considered to be against the government, and thus is not barred by sovereign immunity. See E. V. v. Robinson, 906 F.3d 1082, 1090-91 (9th Cir. 2018), cert. denied, No. 18-1400, 2019 WL 5875128 (U.S. Nov. 12, 2019). When such suits seek money damages, however, ipso facto they are against the government and therefore must overcome sovereign immunity. See id. at 1095. In other words, "the Larson framework does not apply in suits for damages." Id. Since that is what Plaintiffs seek from their third cause of action, see 4AC at 41 (ECF No. 105-1 at 26), the Larson framework does not change the fact that sovereign immunity requires their third cause of action be dismissed.[17]

IV. Conclusion

The Court should grant Federal Defendants' motion to dismiss the third claim in Plaintiffs' Fourth Amended Complaint with prejudice, as argued here and in Federal Defendants' initial motion. As indicated above, none of the arguments made in Plaintiffs' Opposition Brief meritoriously persuades otherwise.

DATED: November 27, 2019

Respectfully submitted,

ROBERT S. BREWER, JR.
United States Attorney

s/ *George Manahan*
George Manahan
Assistant United States Attorney
Email: george.manahan@usdoj.gov
Attorneys for United States

[17] Furthermore, a "mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority." E. V., 906 F.3d at 1096. Alleged errors in the exercise of delegated power, unlike a claim that a federal employee lacked a delegated power, may only be brought against the government, and thus are barred unless sovereign immunity has been waived. See id. at 1097. Plaintiffs' claims are of this type, and therefore would need to be dismissed even if the Larson framework applied to claims for damages.