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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GENE CHITTENDEN, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.

No. 2:13-cv-1351 MCE CKD PS

ORDER AND
FINDINGS AND RECOMMENDATIONS

Defendant’s motion to dismiss came on regularly for hearing November 27, 2013. Gene Chittenden and Allen Hall appeared in propria persona. Gregory Broderick appeared for defendants. Upon review of the documents in support and opposition, upon hearing the arguments of plaintiff and counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

In this action, plaintiffs allege claims arising out of the installation by Forest Service personnel of a Bat Door inside the Roye-Sum (Seymour) and Dolliegeek mines. Plaintiffs allege they hold unpatented mining claims on federal land in the Tahoe National Forest. They assert federal officials¹ trespassed upon their mining claim in late 2010. Plaintiffs allege that hoists, rails and cables were damaged or destroyed during the installation of the Bat Gates on October

¹ The individually named defendants are sued in their official capacities only.

1 23, 2010 and that a culvert was installed, rendering the shaft unusable and destabilizing the
2 hillside. Plaintiffs allege ten causes of action; defendant moves to dismiss eight of the causes of
3 action.² Defendant does not move to dismiss the first cause of action for trespass and the third
4 claim for private nuisance.

5 An issue raised for the first time in plaintiffs' opposition is whether this action properly
6 sounds in inverse condemnation. In opposing the motion to dismiss the conversion claim,
7 plaintiffs seek leave to amend to file an inverse condemnation claim. Defendant correctly
8 contends that if this is a case of inverse condemnation, as claimed by the plaintiffs, then this court
9 lacks subject matter jurisdiction over the entire action because the United States Court of Federal
10 Claims has exclusive jurisdiction of any claim based solely on the Constitution and which
11 exceeds \$10,000. 28 U.S.C. §§ 1346(a)(2), 1491. Plaintiffs here each claim damages of
12 \$250,000, thus meeting the monetary requirement. The gravamen of plaintiffs' complaint is that
13 the United States' construction of a bat gate on plaintiffs' mining claim constituted a taking of
14 plaintiffs' property in violation of the Fifth Amendment by damaging their real property and
15 interfering with their ability to use the land for mining. Such a claim properly sounds in inverse
16 condemnation, not trespass, and this court lacks subject matter jurisdiction over such a claim. See
17 Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (despite plaintiffs' characterization of
18 claim as one for trespass, construction of road that allegedly encroached onto land plaintiffs
19 claimed to own under patents issued by the United States are in the nature of inverse
20 condemnation; District Court accordingly lacked subject matter jurisdiction because Court of
21 Federal Claims has exclusive jurisdiction). Accordingly, the court will recommend that the entire
22 action be dismissed for lack of subject matter jurisdiction and defendant's motion to dismiss be
23 denied as moot.³

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25 ² In opposition to the motion to dismiss, plaintiffs have submitted copies of e-mails and other
26 correspondence and request that the court take judicial notice of these documents. The
documents are not properly subject to judicial notice under Federal Rule of Evidence 201.

27 ³ Because this court lacks subject matter jurisdiction, the court will recommend dismissal of the
28 action rather than transfer of the matter to the Court of Claims. At the hearing, plaintiffs
indicated that they have limited means and that having to pay another filing fee would impose a

1 Assuming arguendo that this action does not sound in inverse condemnation and this court
2 has subject matter jurisdiction, defendant's motion to dismiss is well taken. Defendant moves to
3 dismiss the second cause of action for negligence per se for violation of the California trespass
4 statute, fourth cause of action for negligence per se for violation of California private nuisance
5 statutes, and fifth cause of action for negligence per se for violation of the General Mining Law.
6 Defendant correctly contends that under California law, there is no claim for negligence per se,
7 which is an evidentiary doctrine, not an independent cause of action. People of California v.
8 Kinder Morgan Energy Partners, L.P., 569 F.Supp.2d 1073, 1087 (S.D. Cal. 2008). In the sixth
9 cause of action, plaintiffs allege negligence but the factual allegations supporting this claim are
10 the same as those giving rise to the claim sounding in trespass. In opposition, plaintiffs in
11 conclusory fashion contend that the United States by way of the Forest Service failed to use due
12 care and thus are entitled to pursue a negligence claim. Fundamentally, however, plaintiffs' claim
13 is that the United States intentionally and improperly entered and damaged their property. Such a
14 claim lies in trespass, if not in inverse condemnation. The sixth cause of action for negligence is
15 duplicative of the trespass claim and should therefore be dismissed.

16 In the seventh and eighth causes of action, plaintiffs assert claims for violation of their
17 rights to substantive and procedural due process. A claim for monetary damages for
18 constitutional torts is not cognizable against the United States or federal employees sued in their
19 official capacities.⁴ Rountree v. United States, 40 F.3d 1036, 1038 (9th Cir. 1994). Nor can such
20 a claim lie against a federal agency. Jachetta v. United States, 653 F.3d 898, 908 (9th Cir. 2011).
21 The seventh and eighth causes of action are accordingly subject to dismissal.

22 Plaintiffs' ninth cause of action alleges conversion. Defendant correctly contends a
23 conversion claim applies to personal property, not real property. California v. Kinder Morgan
24 Energy Partners, L.P., 2013 WL 314825, *17 (S.D. Cal. 2013). In opposition, plaintiffs contend

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26 hardship. Plaintiffs are advised that the filing fee may be waived if they are granted leave to
27 proceed in forma pauperis under 28 U.S.C. § 1915 by the Court of Claims.

28 ⁴ In the opposition to the motion to dismiss, plaintiffs agree to dismiss the seventh and eighth causes of action against the individually named defendants.

1 that the conversion claim applies to their mining equipment, which is personal property.
2 However, the mining equipment plaintiffs allege was damaged were fixtures installed within the
3 mines. See First Amended Complaint, ECF No. 4, p. 16, ¶ 10 (federal employees “ripped out the
4 hoisting system consisting of the Head frame, Rail, Skip and cable”). Plaintiffs’ conversion claim
5 cannot, therefore, lie.

6 Finally, plaintiffs’ tenth claim for relief is brought under the Administrative Procedures
7 Act (“APA”), 5 U.S.C. § 702. A claim may be brought under the APA to challenge agency
8 action. See 5 U.S.C. § 551(13). However, individual agency actions alleged to be tortious are not
9 properly brought under this statute. See Doe v. Attorney General of United States, 941 F.2d 780,
10 793 9th Cir. 1991 (APA’s purpose is to provide administrative forum for challenging
11 administrative and regulatory agency action, not to provide forum for adjudicating government
12 tort liability); see also Aleck v. United States, 2005 WL 1586939, *4 (D.Or. 2005) (trespass
13 claim not within definition of “agency action” under APA). Plaintiffs’ opposition suggests no
14 amendment which would cure this fatal defect.

15 In sum, this court lacks subject matter jurisdiction because the action properly sounds in
16 inverse condemnation and the Court of Federal Claims has exclusive jurisdiction over plaintiffs’
17 claims. In the alternative, defendant’s motion to dismiss the second and fourth through tenth
18 causes of action should be granted.

19 Accordingly, IT IS HEREBY ORDERED that plaintiffs’ request for judicial notice (ECF
20 No. 13) is denied; and

21 IT IS HEREBY RECOMMENDED that:

- 22 1. This action be dismissed for lack of subject matter jurisdiction.
- 23 2. Defendant’s motion to dismiss (ECF No. 11) be denied as moot.

24 These findings and recommendations are submitted to the United States District Judge
25 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
26 after being served with these findings and recommendations, any party may file written
27 objections with the court and serve a copy on all parties. Such a document should be captioned
28 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

1 within the specified time may waive the right to appeal the District Court's order. Martinez v.
2 Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: November 27, 2013



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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