

1 IN THE UNITED STATES DISTRICT COURT
2
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA

4 VIETNAM VETERANS OF AMERICA; SWORDS
5 TO PLOWSHARES; VETERANS RIGHTS
6 ORGANIZATION; BRUCE PRICE; FRANKLIN
7 D. ROCHELLE; LARRY MEIROW; ERIC P.
8 MUTH; DAVID C. DUFRANE; and WRAY C.
9 FORREST, individually, on behalf of
10 themselves and all others similarly
11 situated,

12 Plaintiffs,

13 v.

14 CENTRAL INTELLIGENCE AGENCY, et al.,

15 Defendants.
16 _____/

No. C 09-0037 CW

ORDER GRANTING IN
PART AND DENYING IN
PART PLAINTIFFS'
MOTION TO FILE A
THIRD AMENDED
COMPLAINT
(Docket No. 87)

17 Plaintiffs Vietnam Veterans of America (VVA), et al., move for
18 leave to file a third amended complaint. Defendants Central
19 Intelligence Agency, et al., oppose Plaintiffs' motion in part.
20 The motion was taken under submission on the papers. Having
21 considered the papers submitted by the parties, the Court GRANTS
22 Plaintiffs' motion in part and DENIES it in part.

23 BACKGROUND

24 Because the Court's Order of January 19, 2010 describes the
25 allegations of this case in sufficient detail, they will not be
26 repeated in their entirety here. In sum, Plaintiffs charge
27 Defendants with various claims arising from the United States'
28 human experimentation programs, many of which were conducted at
29 Edgewood Arsenal and Fort Detrick, both located in Maryland.

30 On December 17, 2009, Plaintiffs filed a second amended
31 complaint (2AC), seeking declaratory and injunctive relief. In

1 their 2AC, Plaintiffs asked the Court to declare that the consent
2 forms signed by the individual Plaintiffs are not valid or
3 enforceable; that the individual Plaintiffs are released from their
4 secrecy oaths; that Defendants are obliged to notify the individual
5 Plaintiffs and other test participants about their exposures and
6 the known health effects and to provide all available documents and
7 evidence concerning their exposures; that Defendants violated the
8 individual Plaintiffs' rights under the Due Process Clause; and
9 that Defendants are obliged to provide medical care to the
10 individual Plaintiffs. Plaintiffs also sought orders requiring
11 Defendants to notify volunteers of the details of their
12 participation in the human experimentation program; to conduct a
13 thorough search of "all available document repositories" and
14 provide victims with all documents concerning their exposure; to
15 provide examinations and medical care to all volunteers involved in
16 the MKULTRA, Edgewood, and other human experiments, to the extent
17 that the volunteers have a disease or condition related to their
18 exposures; to supply the Department of Veterans Affairs with
19 information on the individual Plaintiffs' participation in the
20 experiments, so that they may seek service-connected death or
21 disability compensation (SCDDC); and to cease committing violations
22 of United States and international law. Separately, the
23 organization Plaintiffs requested a declaration that the Supreme
24 Court's holding in United States v. Feres, 340 U.S. 135 (1950), is
25 unconstitutional.¹

26

27 ¹ In Feres, the Court held that injuries that "arise out of or
28 are in the course of activity incident" to military service fall
(continued...)

1 The Court granted in part and denied in part Defendants'
2 motions to dismiss. Plaintiffs' claim for declaratory relief on
3 the lawfulness of the testing program was dismissed with prejudice
4 for lack of standing. The organization Plaintiffs' claim for
5 declaratory relief that the Feres doctrine is unconstitutional was
6 dismissed with prejudice for lack of subject matter jurisdiction.

7 Plaintiffs now move for leave to file a third amended
8 complaint (3AC). They seek to add two new Plaintiffs, Tim Michael
9 Josephs and William Blazinski. In addition, their proposed 3AC
10 includes claims against two new Defendants, the Department of
11 Veterans Affairs and its Secretary, Eric K. Shinseki (collectively,
12 the DVA).

13 Plaintiffs allege that the DVA has become involved in the
14 process of notifying veterans about their participation in the
15 United States' chemical and biological experiments. For various
16 reasons, Plaintiffs complain that the DVA's notification efforts
17 have been inadequate and have misled test participants. For
18 instance, they plead that the DVA has disseminated
19 "misrepresentations of material fact" and other information that
20 have discouraged test participants from applying for SCDDC and
21 health care. Pls.' Mot., Ex. A ¶ 238. Plaintiffs also aver that,
22 because of its participation in experimentation programs, the DVA
23 harbors an institutional bias against Plaintiffs and putative class
24 members and, as a result, its adjudication of these veterans'

25
26 ¹(...continued)
27 outside the sovereign immunity waiver of the Federal Tort Claims
28 Act. 340 U.S. at 146. The Feres doctrine bars suits for money
damages involving injuries incident to military service. See Costo
v. United States, 248 F.3d 863, 866 (9th Cir. 2001).

1 claims for SCDDC and health care violates their due process rights.

2 Id. ¶ 241.

3 Based on these new allegations, Plaintiffs seek leave to add
4 two claims against the DVA. The first is for declaratory and
5 injunctive relief. In particular, they ask the Court to declare
6 that

7 the notification procedures and efforts by the DVA are
8 inadequate, that Defendants' compliance with their
9 notification obligations has been unreasonably
10 delayed . . . , and that decisions made by the DVA
11 respecting entitlement to SCDDC and/or eligibility for
12 free and/or medical care based upon service connection
13 are null and void due to violations of the due process
14 clause of the Fifth Amendment to the U.S. Constitution.

15 Id. ¶ 242. They also seek orders

16 forbidding defendants from continuing to mislead
17 "volunteers" or their survivors concerning the nature and
18 extent of the testing program, health effects, and the
19 other representations described above, and from
20 continuing to use biased decision makers to decide their
21 eligibility for free, priority health care and for
22 SCDDC

23 Id. ¶ 243. In addition, they seek an order

24 directing the DVA to propose a plan to remedy denials of
25 affected claims for SCDDC and/or eligibility for medical
26 care based upon service connection and to devise
27 procedures for resolving such claims that comply with the
28 due process clause, which involve, at a minimum, an
independent decision maker, all to be submitted to the
Court for advance approval.

Id.

In their second proposed claim, Plaintiffs seek to compel
agency action pursuant to the Administrative Procedure Act (APA), 5
U.S.C. § 706(1). They contend that, in adjudicating claims for
SCDDC, the DVA violates 38 C.F.R. § 3.102, an agency regulation

1 that requires resolving reasonable doubts in favor of claimants.²
2 They cite Training Letter 06-04, published by the Veterans Benefits
3 Administration (VBA), which allegedly states "that where a medical
4 examiner determines that 'the effects of exposure are unknown,'
5 that exposure 'could be a contributor,' or that exposure 'may have
6 a relationship' to a veteran's disease or disability, that such
7 determinations 'are insufficient justification for a grant of
8 service connection.'" Pls.' Mot., Ex. A ¶ 245 (emphasis by
9 Plaintiffs). Plaintiffs also allege that the DVA has "unlawfully
10 withheld and unreasonably delayed notice to" affected veterans
11 about their exposures in the experimentation programs. Pls.' Mot.,
12 Ex. A ¶ 246. For their APA claim, Plaintiffs seek "a declaration
13 that DVA's rating procedures and standards for deciding chemical

14
15 ² Section 3.102 provides,

16 It is the defined and consistently applied policy of the
17 Department of Veterans Affairs to administer the law
18 under a broad interpretation, consistent, however, with
19 the facts shown in every case. When, after careful
20 consideration of all procurable and assembled data, a
21 reasonable doubt arises regarding service origin, the
22 degree of disability, or any other point, such doubt will
23 be resolved in favor of the claimant. By reasonable
24 doubt is meant one which exists because of an approximate
25 balance of positive and negative evidence which does not
26 satisfactorily prove or disprove the claim. It is a
27 substantial doubt and one within the range of probability
28 as distinguished from pure speculation or remote
possibility. It is not a means of reconciling actual
conflict or a contradiction in the evidence. Mere
suspicion or doubt as to the truth of any statements
submitted, as distinguished from impeachment or
contradiction by evidence or known facts, is not
justifiable basis for denying the application of the
reasonable doubt doctrine if the entire, complete record
otherwise warrants invoking this doctrine. The
reasonable doubt doctrine is also applicable even in the
absence of official records, particularly if the basic
incident allegedly arose under combat, or similarly
strenuous conditions, and is consistent with the probable
results of such known hardships.

1 and biological weapons claims violate the rule of reasonable
2 doubt." Id. ¶ 247. They also seek orders (1) "compelling the DVA
3 to apply the reasonable doubt doctrine to Plaintiffs and all
4 'volunteers' whose conditions may be related to their participation
5 in testing, or where the effects of their exposure are unknown, and
6 thus may be the cause of their disabilities or diseases" and
7 (2) "forbidding DVA from refusing to notify Plaintiffs and all
8 'volunteers' of the details of their participation in human
9 experimentation programs and provide them with full documentation
10 of the experiments done on them and all known or suspected health
11 effects." Id.

12 DISCUSSION

13 Federal Rule of Civil Procedure 15(a) provides that leave of
14 the court allowing a party to amend its pleading "shall be freely
15 given when justice so requires." Leave to amend lies within the
16 sound discretion of the trial court, which discretion "must be
17 guided by the underlying purpose of Rule 15 to facilitate decision
18 on the merits, rather than on the pleadings or technicalities."
19 United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) (citations
20 omitted). Thus, Rule 15's policy of favoring amendments to
21 pleadings should be applied with "extreme liberality." Eminence
22 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

23 Courts consider five factors when assessing the propriety of a
24 motion for leave to amend: undue delay, bad faith, futility of
25 amendment, prejudice to the opposing party and whether the
26 plaintiff has previously amended the complaint. Ahlmeyer v. Nev.
27 Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).
28 Futility, on its own, can justify denying a motion to amend. Id.

1 at 1055. An amendment that adds a cause of action is futile if it
2 fails to state a claim upon which relief could be granted.

3 Townsend v. Univ. of Alaska, 543 F.3d 478, 486 n.6 (9th Cir. 2009).

4 Defendants do not oppose Plaintiffs' request to add Mr.
5 Josephs and Mr. Blazinski to this action. Defendants, however,
6 object to the addition of claims against the DVA.

7 The proposed 3AC is not clear as to the nature of Plaintiffs'
8 new claims. Plaintiffs' reply, however, clarifies their intended
9 challenges. First, Plaintiffs seek relief under the Constitution
10 and the APA concerning the DVA's adjudication of test participants'
11 claims for SCDDC. Second, they assert that the DVA has unlawfully
12 delayed the fulfillment of its obligation to locate and notify test
13 participants of their exposures, in violation of the APA.³

14 I. Challenges to DVA Claims Adjudication Process

15 A. Futility

16 Defendants assert that Plaintiffs' proposed claims concerning
17 the DVA's adjudication of claims for SCDDC and health care are
18 futile because section 511(a) of title 38 of the United States Code
19 divests the Court of jurisdiction to hear such challenges.

20 Section 511(a) provides that the Secretary of the DVA "shall
21 decide all questions of law and fact necessary to a decision . . .
22 under a law that affects the provision of benefits . . . to
23 veterans or the dependents or survivors of veterans." Subject to
24 some exceptions, "the decision of the Secretary as to any such
25 question shall be final and conclusive and may not be reviewed by
26 any other official or by any court, whether by an action in the

27 _____
28 ³ Plaintiffs disavow any challenge to the adequacy of the
content of the notice. Reply 10 n.8.

1 nature of mandamus or otherwise." 38 U.S.C. § 511(a); see also
2 Littlejohn v. United States, 321 F.3d 915, 921 (9th Cir. 2003)
3 ("Section 511 provides, with certain exceptions, that decisions
4 related to the provision of veterans' benefits 'may not be reviewed
5 by any other official or by any court, whether by an action in the
6 nature of mandamus or otherwise.'"). One exception concerns
7 individual benefits determinations. 38 U.S.C. § 511(b)(4). After
8 exhausting their administrative remedies, veterans may appeal these
9 decisions exclusively to the Court of Appeals for Veterans Claims
10 (CAVC). Id. §§ 511(b)(4) and 7252(a). Further review may then be
11 sought in the Court of Appeals for the Federal Circuit, which has
12 appellate jurisdiction over the CAVC. Id. § 7292(d)(1).

13 It is well-settled that section 511 precludes federal district
14 courts from reviewing challenges to individual benefits
15 determinations, even if they are framed as constitutional
16 challenges. See Tietjen v. U.S. Veterans Admin., 884 F.2d 514, 515
17 (9th Cir. 1989) (interpreting 38 U.S.C. § 211, the predecessor to
18 § 511); see also Vietnam Veterans of Am. v. Shinseki, 599 F.3d 654,
19 658 (D.C. Cir. 2010) (stating that § 511 bars suits in which
20 plaintiffs challenge "whether the VA 'acted properly' in making a
21 benefit determination"); Beamon v. Brown, 125 F.3d 965, 972 (6th
22 Cir. 1997). Less apparent, however, is the effect of section 511
23 on actions, like this one, that purport not to challenge individual
24 benefits decisions, but rather the manner in which such decisions
25 are made. The Ninth Circuit has not squarely addressed this issue,
26 and other circuits considering the extent to which section 511
27 strips district courts of jurisdiction have come to differing
28 conclusions.

1 In Broudy v. Mather, the plaintiffs complained that the DVA
2 unconstitutionally denied or partially denied benefits by relying
3 on allegedly faulty data provided by the U.S. Department of
4 Defense. 460 F.3d 106, 110 (D.C. Cir. 2006). The D.C. Circuit
5 read section 511 narrowly, explaining,

6 Section 511(a) does not give the VA exclusive
7 jurisdiction to construe laws affecting the provision of
8 veterans benefits or to consider all issues that might
9 somehow touch upon whether someone receives veterans
10 benefits. Rather, it simply gives the VA authority to
consider such questions when making a decision about
benefits, and, more importantly for the question of our
jurisdiction, prevents district courts from "review[ing]"
the Secretary's decision once made.

11 Id. at 111 (citations omitted; emphasis and alteration in
12 original). After reviewing out-of-circuit cases, the court stated
13 that

14 while the Secretary is the sole arbiter of benefits
15 claims and issues of law and fact that arise during his
16 disposition of those claims, district courts have
17 jurisdiction to consider questions arising under laws
that affect the provision of benefits as long as the
Secretary has not actually decided them in the course of
a benefits proceeding.

18 Id. at 114.

19 The Broudy court concluded that section 511 did not preclude
20 review of the plaintiffs' challenge because the Secretary never
21 decided a question concerning the use of the faulty data. Id. The
22 court distinguished its precedent, reasoning that, unlike in cases
23 that necessitated the review of decisions on individual claims, the
24 Broudy plaintiffs did not ask "the District Court to decide whether
25 any of the veterans whose claims the Secretary rejected are
26 entitled to benefits." Id. at 115. Thus, the court concluded, the
27 district court had jurisdiction because the issues raised by the
28 plaintiffs were not "'necessary to a decision by the Secretary.'"

1 Id. at 115 (quoting 38 U.S.C. § 511(a)); see also Bates v.
2 Nicholson, 398 F.3d 1355, 1365 (Fed. Cir. 2005) (stating that § 511
3 "only applies where there has been a 'decision by the Secretary'")
4 (citation omitted)).

5 In contrast, the Sixth Circuit has afforded section 511 a
6 broader preclusive effect, holding that the statute can bar
7 district courts from reviewing constitutional challenges to the
8 DVA's claims adjudication process. Beamon, 125 F.3d at 974. In
9 Beamon, the plaintiffs complained that the DVA's claims-handling
10 procedures caused unreasonable delays, which violated their due
11 process rights. Id. at 966. The court held that the plaintiffs'
12 challenge fell within the scope of section 511, explaining,

13 Plaintiffs asked the district court to review the
14 legality and constitutionality of the procedures that the
15 VA uses to decide benefits claims. Such a challenge
16 raises questions of law and fact regarding the
17 appropriate methods for the adjudication of veterans'
18 claims for benefits. Determining the proper procedures
19 for claim adjudication is a necessary precursor to
20 deciding veterans benefits claims. Under § 511(a), the
21 VA Secretary shall decide this type of question.

22 Id. at 970. In reaching its decision, the Sixth Circuit rejected
23 the plaintiffs' argument that they were attacking the process and
24 not individual determinations. The court reasoned, "To adjudicate
25 this claim, the District Court would need to review individual
26 claims for veterans benefits, the manner in which they were
27 processed, and the decisions rendered by the regional office of the
28 VA and the BVA." Id. at 971. Thus, while Broudy limits the effect
of section 511 to decisions "actually decided . . . in the course
of a benefits proceeding," 460 F.3d at 114, Beamon takes a more
expansive view, concluding that the statute encompasses decisions
that are "necessary precursor[s] to deciding veterans benefits

1 claims," 125 F.3d at 970.

2 Here, Plaintiffs raise two legal challenges concerning the
3 DVA's adjudication of test participants' claims for SCDDC and
4 medical care. First, Plaintiffs assert a challenge under the Fifth
5 Amendment. They contend that the DVA, in adjudicating test
6 participants' claims for SCDDC and medical care, acts as "an
7 inherently biased decision maker" and, as a result, violates "the
8 due process rights of test participants across the board." Pls.'
9 Reply at 6. As noted above, Plaintiffs maintain that the DVA's
10 bias arises from its participation in experiments on human
11 subjects. Second, Plaintiffs assert that the DVA violates the APA
12 because its decision-making procedures, as embodied in a VBA
13 training letter, are contrary to 38 C.F.R. § 3.102.

14 Section 511 does not bar Plaintiffs' claim under the Fifth
15 Amendment. Under this theory, they mount a facial attack on the
16 DVA as the decision-maker. They do not challenge the DVA's
17 procedures or seek review of an individual benefits determination.
18 Nor do they attack any particular decision made by the Secretary.
19 The crux of their claim is that, because the DVA allegedly was
20 involved in the testing programs at issue, the agency is incapable
21 of making neutral, unbiased benefits determinations for veterans
22 who were test participants. This bias, according to Plaintiffs,
23 renders the benefits determination process constitutionally
24 defective as to them and other class members. Whether the DVA is
25 an inherently biased adjudicator does not implicate a question of
26 law or fact "necessary to a decision by the Secretary" related to
27 the provision of veterans' benefits. See Thomas v. Principi, 394
28 F.3d 970, 975 (D.C. Cir. 2005). Accordingly, even under Beamon,

1 section 511 does not bar Plaintiffs from raising a facial due
2 process challenge in this Court, and their amendment to add such a
3 claim is not futile.

4 Plaintiffs' APA challenge, however, fares differently. They
5 base this claim on a training letter published by the VBA.
6 Although they have not proffered the letter, Plaintiffs allege that
7 it embodies the "DVA's rating procedures" and guides how service
8 connection determinations are made. Pls.' Mot., Ex. A ¶ 245.
9 These allegations suggest that the letter reflects a decision made
10 by the VBA, a department overseen by a delegee of the Secretary,⁴
11 as to how to evaluate claims for benefits. This decision, in turn,
12 impacts individual benefits determinations. Thus, in contrast to
13 the constitutional challenge and the facts in Broudy, the APA claim
14 concerning the training letter implicates a decision on a question
15 of law necessary to the provision of benefits. Thus, under
16 section 511, the Court lacks jurisdiction to consider whether the
17 training letter violates 38 C.F.R. § 3.102.

18 Plaintiffs maintain that "no review of any decision on any
19 individual veteran's benefits claim will be necessary" to decide
20 whether the training letter violates 38 C.F.R. § 3.102. Reply at
21 7. However, this contention was rejected in Beamon, and Plaintiffs
22 offer no persuasive argument that the Sixth Circuit's reasoning was
23 unsound. Further, the D.C. Circuit's recent decision in Vietnam

24
25 ⁴ The BVA is under the control of the "Under Secretary for
26 Benefits, who is directly responsible to the Secretary for the
27 operations of the Administration." 38 U.S.C. § 7701(b). Pursuant
28 to a delegation by the Secretary, the Under Secretary has
"authority to act on all matters assigned to the Veterans Benefits
Administration . . . and to authorize supervisory or adjudicative
personnel within his/her jurisdiction to perform such functions as
may be assigned." 38 C.F.R. § 2.6(b)(1).

1 Veterans of America is instructive. In that case, the plaintiffs
2 complained that the DVA violated the APA and their due process
3 rights based on the average length of time it takes to adjudicate
4 veterans' claims. 599 F.3d at 656. The D.C. Circuit did not
5 decide whether section 511 precluded the federal district court's
6 review of the challenge. However, the court opined, "Whether
7 looking at an individual case or a mass of cases, a decision or
8 decisions as to when to issue opinions would appear to be a
9 preliminary decision necessary to a final decision -- and although
10 more precisely an administrative determination, it would seem to be
11 covered by the broad cloak 'law and fact' phrase of § 511." Id. at
12 658. Here, the training letter reflects "a preliminary decision
13 necessary to a final decision," which the Court cannot review.

14 Plaintiffs also argue that, if they could not challenge the
15 training letter in this Court, they would be foreclosed from
16 seeking any relief. However, as Plaintiffs allege, individual
17 benefits determinations are based in part on the procedures
18 allegedly set forth in the training letter. Thus, Plaintiffs and
19 putative class members may appeal these individual determinations
20 to the CAVC and, in that forum, raise a challenge against the
21 training letter.

22 Consequently, under section 511, the Court lacks jurisdiction
23 to hear Plaintiffs' APA claim concerning the training letter,
24 rendering the addition of this claim futile. Section 511, however,
25 does not preclude the Court's review of Plaintiffs' constitutional
26 challenge to the DVA as an inherently biased decision-maker as to
27 them and putative class members.

28

1 B. Addition of a "Separate and Distinct Subject"
2 Defendants alternatively argue that Plaintiffs should be
3 denied leave to add any claim concerning the adjudicatory process
4 because doing so "would add a separate and distinct subject to this
5 lawsuit" Opp'n at 7. Defendants complain that the
6 discovery associated with such a claim would delay the resolution
7 of this case.

8 Fact discovery is not scheduled to close in this action until
9 May 31, 2011. The Court is not persuaded that Plaintiffs' claim
10 that the DVA functions as a biased decision-maker would inject any
11 undue delay.

12 Accordingly, Plaintiffs are granted leave to amend their
13 complaint to add claims against the DVA and Secretary Shinseki for
14 due process violations based on the DVA's alleged bias in rendering
15 decisions on Plaintiffs' and putative class members' claims for
16 benefits.

17 II. Challenge to DVA's Efforts to Locate and Notify Test
18 Participants

19 As noted above, Plaintiffs assert that the DVA has
20 unreasonably delayed in fulfilling its obligation to locate and
21 notify test participants, and they seek to compel agency action
22 pursuant to 5 U.S.C. § 706(1). Plaintiffs disavow any challenge to
23 the content of the notice provided by the DVA.

24 Defendants assert that an amendment to add this challenge
25 would be futile because Plaintiffs have not identified a statute or
26 regulation compelling the DVA to undertake any effort to provide
27 notice to test participants of their exposures. In addition, they
28 contend that Plaintiffs unduly delayed in seeking to amend their

1 complaint to add such a claim.

2 Section 706(1) of the APA enables federal courts to "compel
3 agency action unlawfully withheld or unreasonably delayed." A
4 court's "ability to 'compel agency action' is carefully
5 circumscribed to situations where an agency has ignored a specific
6 legislative command.'" Hells Canyon Preservation Council v. U.S.
7 Forest Svc., 593 F.3d 923, 932 (9th Cir. 2010).

8 In Norton v. Southwest Utah Wilderness Alliance (SUWA), the
9 Supreme Court established that "a claim under § 706(1) can proceed
10 only where a plaintiff asserts that an agency failed to take a
11 discrete agency action that it is required to take." 542 U.S. 55,
12 64 (2004) (emphasis in original). "Discrete" actions include
13 providing "rules, orders, licenses, sanctions, and relief." Hells
14 Canyon, 593 F.3d at 932. A discrete action is legally required
15 when "the agency's legal obligation is so clearly set forth that it
16 could traditionally have been enforced through a writ of mandamus."
17 Id. (citing SUWA, 542 U.S. at 63). "The limitation to required
18 agency action rules out judicial direction of even discrete agency
19 action that is not demanded by law (which includes, of course,
20 agency regulations that have the force of law)." SUWA, 542 U.S. at
21 65 (emphasis in original).

22 Plaintiffs contend that DVA's legal obligation to notify test
23 participants flows from two statements. They point to a website,
24 apparently maintained by the Department of Defense, that states,

25 The Department of Defense (DoD) and the Department of
26 Veterans Affairs (VA) play distinct roles in dealing with
27 chemical and biological (CB) exposures. DoD identifies
28 and validates veteran's exposure to CB agents (What was
he exposed to? When and Where was he exposed?) and
provides the names of these individuals along with their
exposure information to the VA. The VA then notifies

1 individuals of their potential exposure, provides
2 treatment, if necessary, for these individuals and
adjudicates any claim for compensation.

3 Welcome to the Chemical-Biological Warfare Exposures Site, Force
4 Health Protection & Readiness Policy & Programs,
5 <http://fhpr.osd.mil/CBexposures/index.jsp> (last visited Nov. 15,
6 2010). Plaintiffs also refer to letters, sent by former DVA
7 Secretary R. James Nicholson to two members of Congress, which
8 discuss "the Department of Veterans Affairs (VA) effort to conduct
9 outreach to veterans who may have received hazardous chemical,
10 biological, or radiological exposure" and states that the "VA is
11 committed to this effort as evidenced by previous and on-going
12 departmental activities regarding atmospheric testing of nuclear
13 weapons, Project 112/Shipboard Hazard and Defense, and mustard
14 gas." E.g., Reply, Ex. 1 at VVA-VA0009309.

15 These statements are not sufficient to establish a legally
16 enforceable obligation. Plaintiffs do not identify any statute or
17 regulation that compels the DVA to participate in the notification
18 process. Nor do they cite controlling precedent that empowers the
19 Court to impose a binding legal obligation on the agency based on
20 such statements. Thus, Plaintiffs cannot bring a claim under
21 section 706(1) to compel the DVA to redouble its notification
22 efforts.

23 Plaintiffs cite Soda Mountain Wilderness Council v. Norton, in
24 which the court opined that an agency's statement, in connection
25 with the adoption of a management plan, constituted a legally
26 binding commitment. 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006).
27 There, the Bureau of Land Management, in a record of decision,
28 stated,

1 The public impressed upon BLM the desire to consolidate
2 public lands in areas with outstanding recreational
3 opportunities and unusual or imperiled biological
4 resources. Conversely, existing public lands with
5 limited recreational potential and/or commonplace natural
6 resources were identified for disposal. This document
7 represents BLM's commitment to these public desires and
8 constitutes a compact with the public.

9 Id. (citation omitted; emphasis by Soda Mountain court). Although
10 the plaintiffs sought relief under section 706(2)(A), not section
11 706(1), the court opined, "It seems clear that the agency went out
12 of its way to make clear it was committing to a certain process,
13 and withdrawing from that 'compact with the public' would appear to
14 subject the agency to suit under § 706(1)." Id.

15 Even if such a statement could bind an agency, Soda Mountain
16 is distinguishable. There, the agency's statement was associated
17 with a specific and detailed management plan, which clearly set
18 forth obligations that could be enforced by a court. Here, the
19 statements Plaintiffs cite are not connected with a similarly
20 specific plan. Further, the DVA did not purport to make a compact
21 with the public. The website merely states the DVA's role in a
22 joint endeavor with the DoD. And the letters by then-Secretary
23 Richardson did not create a legal obligation or commit the DVA to a
24 particular course of action. Cf. Porter v. Bowen, 496 F.3d 1009,
25 1017 (9th Cir. 2007) (noting that letter by California secretary of
26 state to assembly speaker would not "typically create legal
27 obligations"). Although the letters listed steps the agency was
28 taking to notify exposed veterans, they do not indicate that it was
obliged to do so or on what timeline its task would be completed.
Indeed, the letters state that such a timeline had not been
developed. As noted above, Plaintiffs offer no authority that such

1 letters impose enforceable legal obligations.

2 Plaintiffs cannot state a claim under section 706(1) against
3 the DVA based on the website and the Richardson letters.
4 Accordingly, an amendment to add this claim would be futile.

5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS in part and DENIES
7 in part Plaintiffs' motion for leave to file a 3AC. (Docket No.
8 87.) Plaintiffs may amend their complaint to add Tim Michael
9 Josephs and William Blazinski as Plaintiffs and the Department of
10 Veterans Affairs and Secretary Eric K. Shinseki as Defendants.
11 They may also make any correction necessitated by the passing of
12 Plaintiff Wray Forrest. Plaintiffs are also granted leave to add a
13 claim for declaratory and injunctive relief under the Fifth
14 Amendment concerning the DVA's alleged bias in adjudicating
15 Plaintiffs' and putative class members' claims for SCDDC and health
16 care. They may not include their other proposed additions.

17 Plaintiffs shall file their 3AC within three days of the date
18 of this Order. Defendants may not file a motion to dismiss based
19 on the arguments made in this motion.

20 IT IS SO ORDERED.

21 Dated: 11/15/2010



CLAUDIA WILKEN
United States District Judge