No. 07-17052

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS ROBINSON; SPENCER ROBINSON, JR.;
RICKIE ROBINSON; CYNTHIA ROBINSON; VICKIE ROBINSON,

Appellants,

vs.

UNITED STATES OF AMERICA, as Trustee for the Indians of the Mooretown Rancheria a.k.a. Maidu Indians of California; DEPARTMENT OF INTERIOR, Bureau of Indian Affairs,

Appellees.

APPELLANTS' OPENING BRIEF

Appeal from Judgment Entered in
USDC, Eastern District, No. CV-04-00734-RRB/KJM
(Honorable Ralph R. Beistline)

RANDOLPH CREGGER & CHALFANT LLP
JOHN S. GILMORE, SBN 32491
JOSEPH P. MASCOVICH, SBN 103167
1030 G Street
Sacramento, California 95814
Telephone: (916) 443-4443
Telecopier: (916) 443-2124

Attorneys for Said Appellants

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, plaintiffs and appellants state that they are all individuals.

Dated: March 4, 2008

RANDOLPH CREGGER & CHALFANT LLP

By _____
JOSEPH P. MASCOVICH
Attorneys for Appellants
DENNIS ROBINSON; SPENCER ROBINSON, JR; RICKIE ROBINSON; CYNTHIA ROBINSON; VICKIE ROBINSON

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I.

JURISDICTIONAL STATEMENT

Plaintiffs (collectively Robinson) filed this action in the U.S. District Court, Eastern District of California. Because Robinson sued the United States, the district court had jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1346(b)(1) (tort claims against the U.S.). The district court entered final judgment on September 5, 2007. (ER 22) Robinson filed a timely notice of appeal on November 1, 2007. (ER 1) *See* Fed. R. App. Proc. 4(a)(1)(B) (notice of appeal must be filed 60 days after entry of judgment in cases in which the United States is a party). This Court has jurisdiction under 28 U.S.C. § 1291.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves important questions about the United States's alleged sovereign immunity where it holds title to real property in trust for a Native American tribe. As shown below, the United States argues that Robinson has no legal remedy for interference with an easement that, if not corrected, will severely hinder his ability to develop his land. Under the

circumstances presented here, no principle of sovereign immunity should reach that far.

For many years the Robinson family has owned land in Butte County, California, that they eventually intended to develop. An adjoining parcel was owned by friends, the Millers. Robinson had the benefit of a 60-foot, non-exclusive dominant road and utility easement over part of the Millers' property. Through subsequent conveyances, the Indians of the Mooretown Rancheria (the Tribe) acquired the land subject to the easement. The Tribe then transferred that land to the United States in trust. The Tribe subsequently constructed a casino on its property and made related road and other improvements. Some of the improvements encroached onto the easement and others were constructed in substandard manner, which damaged the roadway. After Robinson's repeated efforts to resolve the matter informally went nowhere, he sued the United States as owner of the land on which the improvements are located, alleging several causes of action, including for negligence and nuisance.

The district court dismissed Robinson's complaint for lack of subject matter jurisdiction, ruling that (1) the claims were subject to the Quiet Title

Act (28 U.S.C. § 2409a) (sometimes referred to as the Act), and (2) by its terms, the Quiet Title Act's waiver of sovereign immunity does not apply to "Indian lands." This appeal presents the following issues:

1. Did the "Indian lands" exception to the Quiet Title Act deprive the district court of subject matter jurisdiction where (a) there is no dispute regarding who owns title to the properties at issue, (b) there is no dispute regarding the terms of the easement at issue, which is the subject of properly recorded documents, and (c) the principal dispute involves what duties the United States as a landowner owes to adjoining landowners who are indisputably entitled to use an easement that burdens the United States's land?

2. Does Robinson's complaint, which contains claims for negligence and nuisance, allege claims cognizable under the Federal Tort Claims Act (FTCA) against the United States as owner of the land subject to the easement?

III.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In September 1979, members of the Robinson family and Clinton and Lorene Miller entered into a "Road Maintenance Agreement" for the benefit of the adjoining parcels of real property they owned in Butte County, California. (ER 151, 317-20) This Agreement created a duty to maintain and repair a 60-foot easement that followed the same course as Alverda Drive. (*Id.*) (Alverda Drive is named for plaintiff Robinson's mother.) The easement is for roadway and utility purposes. (ER 151) The parties duly recorded the easement and the Agreement, thereby giving notice to the world of their existence. (ER 412-42)

The Tribe later acquired the parcels of property adjoining Robinson's land, including the parcels on which Alverda Drive and the easement are located. (ER 329-54, 412-42) The full details of these property transactions are immaterial, except for the undisputed fact that the documentation for them unmistakably disclosed the existence of the easement and the Maintenance Agreement. (*Id.*) When the Tribe subsequently conveyed the property burdened by the easement to the

United States to hold in trust, notice of the existence of easement was necessarily given as well. (*Id.*, 266-74)

The Tribe's ensuing construction of a casino and related improvements on the land has damaged and interfered with the easement in the following particulars:

- Some of the construction has disrupted the roadway's lateral and subjacent support, causing "alligatoring" of the road surface and the need for repairs;

- A slope that is 20x100 feet in dimension encroaches onto the easement;

- A bullnose curb and concrete walkway encroach 15 feet onto the easement;

- A wrought iron fence embedded in concrete encroaches 15 feet onto the easement; and

- A water hydrant is located on the easement and obstructs use of that portion of the roadway. (ER 152-53, 401-02)

The encroachments are a particular problem because Robinson has long intended to develop his land, which consists of approximately 360 acres that lie east of the easement. (ER 153-54) Development of the land will require the ability to use all of the 60-foot easement for access and utility purposes. (*Id.*) The existing, unlawful encroachments accordingly threaten to block Robinson's development plans. (*Id.*)

Robinson's efforts toward an informal resolution of the easement interference and encroachment issues proved futile. (ER 217-19) Thus, In April 2004 Robinson filed a complaint based on the Federal Tort Claims Act that alleged several tort claims for disruption of lateral and subjacent support, negligence and nuisance. (ER 399-442)

The United States responded to the complaint with a motion to dismiss or for summary judgment. (ER 377-98) In relevant part, the United States argued that (1) the court lacked subject matter jurisdiction because Robinson's allegations fall under the Quiet Title Act, which denies jurisdiction for claims involving "Indian lands," and (2) its status as trustee does not require it to perform any acts that could give rise to tort liability. (ER 387-93)

Robinson opposed the United States's motion, demonstrating that the Quiet Title Act did not apply because the complaint's allegations did not involve any dispute over title to property interests. (ER 172-75) On the contrary, the terms of the easement and Maintenance Agreement are undisputed. (*Id.*) Robinson further demonstrated that the complaint properly alleged tort claims because under the applicable California law, a trustee would have a duty to prevent or remedy interference with and encroachments onto an easement. (ER 166-72, 175-77) Robinson also pointed out that, aside from the required initial disclosures, the court has stayed discovery pending a ruling on the government's motion. (ER 168, 248-49)

The district court (the Hon. David F. Levi) held a lengthy hearing on June 22, 2005. (RT for 6/22/05) During the hearing, counsel for the United States candidly acknowledged that, in its view, Robinson had no legal remedy for the interference with the easement. (*Id.* at 5-8, 16-17) Chief Judge Levi expressed skepticism about this position and ultimately ordered the parties to file supplemental briefs. (*Id.* at 9, 27-28, 32-33) The parties complied, with the United States repeating its position that no

remedy was available to Robinson. (ER 33-43) For his part, Robinson explained at more length why an action under the FTCA was his proper remedy. (ER 57-67)

Chief Judge Levi did not rule on the motion before he left the bench. Ultimately, more than two years after the hearing, on September 4, 2007, the Honorable Ralph R. Beistline issued an order granting the motion. (ER 23-32) The court concluded that the Quiet Title Act applied, thereby depriving the court of subject matter jurisdiction under the "Indian lands" exception, and that a claim under the FTCA could not circumvent the Quiet Title Act's strictures on jurisdiction. (ER 28-32)

Judgment was entered on September 4, 2007, and Robinson thereafter filed a notice of appeal. (ER 1, 5)

IV.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

This Court reviews de novo a district court's ruling that it lacked jurisdiction by virtue of the Quiet Title Act's provisions. *See Shultz v. Department of Army*, 886 F.2d 1157, 1159 (9th Cir. 1989). Here, that de novo review should lead the Court to reverse the judgment dismissing

Robinson's action and to remand for further proceedings on his tort causes of action.

First, the "Indian lands" exception to the Quiet Title Act did not deprive the district court of subject matter jurisdiction. The Quiet Title Act does not apply simply because Robinson's action involves an easement. Rather, the Quiet Title Act applies when a plaintiff's action, if successful, would result in a significant change in the terms of title to property in which the United States has or claims an interest. Robinson's action does not come close to meeting that requirement.

Second, Robinson has alleged valid claims under the Federal Tort Claims Act. In this case, California law determines the nature and extent of the United States's duties as trustee holding title to the real property burdened by the easement. As Robinson demonstrates below, California law would impose liability under the circumstances of this case, and the Court should so hold.

V.

ARGUMENT

A. The District Court Erred When It Ruled That The "Indian Lands" Exception To The Quiet Title Act Deprived It Of Subject Matter Jurisdiction Over Robinson's Action

The district court's ruling based on the "Indian lands" exception to the Quiet Title Act is unsupported by the Act's provisions and unreasonably deprives Robinson of a remedy for the damage to and interference with the easement. By its plain terms, that Act applies only when an action seeks to "adjudicate *title* to real property in which the United States claims an interest." [1] But Robinson's lawsuit does not seek

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[1] The relevant part of the Quiet Title Act is 28 U.S.C. § 2409a(a), which states:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424,

to "adjudicate title" to any real property under the settled construction of that phrase, and actions alleging the overburdening of an easement are not automatically subject to the Act. Consequently, the Quiet Title Act, including its "Indian lands" exception, is irrelevant here. The Court should so hold and reverse.

1. The Quiet Title Act Applies Only When The Plaintiff's Action Would Result In A Significant Change In The Terms Of The Title For Property In Which The United States Has Or Claims An Interest

The Court's construction of the Quiet Title Act is guided by long-settled principles. The Court begins with the "text of the statute," and when Congress has "'expressed its intent in reasonably plain terms, that language ordinarily must be regarded as conclusive.'" *Hulteen v. AT & T Corp.*, 498 F.3d 1001, 1010 (9th Cir. 2007) (en banc), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). Further, "when 'the meaning of the words seems to us to be intelligible upon a simple reading, ... we shall spend no time upon generalities concerning the

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7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

principles of [statutory] interpretation.'" *Hulteen*, 498 F.3d at 1010, quoting *United States v. Pulaski Co.*, 243 U.S. 97, 106 (1917).

Consistent with these principles, the courts have observed that the Quiet Title Act represents "the exclusive means" by which a person can challenge the United States's title to real property. *Block v. North Dakota*, 461 U.S. 273, 286 (1983). Based on the statutory text, this Court has stated that jurisdiction arises under the Quiet Title Act only if two conditions exist: "1) the United States must claim an interest in the property at issue; and 2) there must be a disputed title to real property between interests of the plaintiff and the United States." *Leisnoi, Inc. v. United States*, 267 F.3d 1019, 1023 (9th Cir. 2001).

It's true that Act's concept of "quieting title" is not limited to situations in which the government has a fee simple interest or a close equivalent in the land at issue. Rather, Congress used that phrase as a "shorthand" means of describing litigation involving interests in real property. *See United States v. Bedford Assoc.*, 657 F.2d 1300, 1316 (2nd Cir. 1981) (discussing legislative history). For example, the Act encompasses "litigation against the United States to adjudicate disputes

about lesser interests," such as an action to foreclose a mortgage in a building in which the United States has a leasehold interest. *Id.* at 1316; *see also Fidelity Exploration & Prod. Co. v. United States*, 506 F.3d 1182, 1184 (9th Cir. 2007) (action sought to quiet title to portion of river bed in which the plaintiff held oil and gas leases). Courts also have held that the Quiet Title Act encompasses disputes involving easements. *See, e.g., Narramore v. United States*, 852 F.2d 485 (9th Cir. 1988).

However, whether a fee simple or lesser property interest is at issue, the cases that base their subject matter jurisdiction on the Act all have one critical factor in common. Consistent with the Act's jurisdictional requirements, in every situation a judgment for the plaintiff would result in a significant change in the terms of title, with corresponding restrictions on the use or possession of the land in which the United States has or claims an interest. *See, e.g., Alaska v. Babbitt*, 182 F.3d 672 (9th Cir. 1999) (the plaintiff sought to establish that he owned land the U.S. later conveyed to state for construction of a highway); *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987) (Act applied to dispute involving determination of reservation boundaries, which was necessary to establish

tribe's water rights), *aff'd sub nom. California v. Department of Army*, 490 U.S. 920 (1988); *United States v. Bedford Assoc.*, 657 F.2d at 1316 (defendant mortgagee's cross-claim could force sale of property in which U.S. had interest); *McMaster v. United States*, 177 F.3d 936 (11th Cir. 1999) (action sought to enforce alleged oral and written restrictive covenants regarding hunting and camping that U.S. argued were unenforceable).

2. Robinson's Action Seeks Only To Enforce The Terms Of Title To The Property Involved, Not Alter Those Terms

Here, unlike the foregoing cases, this critical factor — the potential for a significant change in the terms of title — is conspicuously absent. No one disputes ownership of the property affected by the easement at issue. Those property interests are documented by deeds and related instruments that have been duly recorded. Nor has anyone — including the United States — disputed the terms of the non-exclusive easement at issue. Those terms are documented by recorded instruments as well.

On the contrary, the government's position simply amounts to variations of the phrase "tough luck" — even though the Tribe's

interference with and damage to the easement are not subject to reasonable dispute, the government's consistent refrain has been that it has no obligation as landowner to correct the situation. While that argument is misplaced (as Robinson demonstrates below), neither Robinson's allegations nor the government's position calls into question the terms of title. Thus, to find for Robinson, the district court merely would have to rule that the United States must honor the terms of the easement. It would not have to rewrite or clarify the easement's terms. The Quiet Title Act thus is inapplicable here, just as it does not apply to a dispute over what the United States as tenant owes under the terms of a lease. *Ginsberg v. United States*, 707 F.2d 91, 93 (4th Cir. 1983) (stating that "the dispute over an alleged breach of contract hardly casts doubt on the title or ownership of the property").

That is precisely why, moreover, the district court's ruling that the Quiet Title Act applies to overburdened easement actions is unsupported by the two cases it cited: *Shultz v. Department of Army*, 886 F.2d 1157;

Narramore v. United States, 852 F.2d 485.[2] To begin with, neither decision indicates that application of the Quiet Title Act was a contested issue or contains a discussion about the Act's proper scope. As such, nothing in these decisions, not even dicta, sheds light on whether the district court correctly applied the Quiet Title Act in this case.

Just as important, these decisions are factually distinguishable because in each the terms of the easement were in dispute. *Narramore* arose out of condemnation proceedings in which the United States acquired flowage easements for land that would be affected by a reservoir. The plaintiff-landowners argued that incidents of flooding had exceeded the scope of the easements. Much of the controversy involved the meaning of the judgments entered in the earlier condemnation actions, specifically whether a "Plan A" governed the amount of water the United States could release. 852 F.2d at 488-89, 491. Although the opinion understandably lacks factual detail because the scope of the Quiet Title Act was not at

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[2] None of the United States's memoranda relied on or cited either decision.

issue, it appears that if the plaintiffs prevailed, they would obtain a quiet title judgment that would define the flowage easements more precisely based on Plan A, which would bar similar flooding incidents in the future. *See id.*

Shultz addressed whether Quiet Title Act's statute of limitations barred the plaintiff's claim that the United States Army had wrongfully restricted access to his property over a road that passed through a military reservation. Again, because the scope of the Quiet Title Act was not at issue, the opinion does not give a full account of the facts or relief sought. It appears reasonably plain, however, that the plaintiff sought a legal determination that would have redefined and restricted the Army's right to control access to the portion of the road that served the plaintiff's property. 886 F.2d at 1159-60.

Robinson has no quarrel with these decisions, but application of the Act in them does not address whether the Act also would apply to this hypothetical situation: (1) assume that the *Narramore* plaintiffs obtained the desired judgment restricting the scope of the government's flowage easements; and (2) assume further that after entry of that judgment, the

government negligently allowed flooding to occur that exceeded the scope of the easements as defined by the judgment. In an action for damages based on the post-judgment flooding, which would be an overburdening of the easement, it would be anomalous to maintain that the Quiet Title Act provided the basis for subject matter jurisdiction. After all, there could be no dispute involving title because the judgment in the first action had settled the terms of the flowage easement. That second action, though based in tort, should not be subject to the Act because it would be akin to enforcing the rent terms of a lease. *See Ginsberg*, 707 F.2d at 93 (holding Quiet Title Act inapplicable to such a lease dispute).

This case is essentially the same as the foregoing hypothetical because the United States does not contest the terms of the easement. The district court thus plainly erred in concluding that the Quiet Title Act applies any time an action can be classified as a claim for overburdening of an easement. The Act applies to some, but by no means all, such actions. The pivotal issue is whether the action requires the court to resolve a dispute over the terms of the easement to determine whether the government's actions were permissible. There is no such dispute here

because the United States' position does not concern the easement's terms but only whether it can be held liable for the Tribe's interference with it.

In sum, the Quiet Title Act does not apply to Robinson's action, and the Act's "Indian lands" exception did not deprive the district court of subject matter jurisdiction.

B. The Court Also Should Hold That Robinson Has Alleged Tort Claims Cognizable Under The Federal Tort Claims Act

Because of its ruling based on the Quiet Title Act, the district court did not consider on its merits the government's argument that Robinson had failed to state a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*[3] However, because the United States may raise the issue, out of caution Robinson demonstrates that his complaint alleges theories of recovery permitted by the FTCA. Further, if the Court has any doubt about the legal adequacy of Robinson's claim, it should remand because

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[3] As explained, after concluding that the Quiet Title Act applied to Robinson's action, the district court's discussion of the FTCA was limited to the further observation that a litigant cannot avoid the Quiet Title Act's provisions by alleging government employee negligence. (ER 31-32)

Robinson has not had an opportunity to pursue discovery. (ER 168, 248-49) *See Burlington N. & Santa Fe Ry. Co. v. Assinboine & Sioux Tribes*, 323 F.3d 767, 774 (9th Cir. 2003) (observing that "lightning-quick summary judgment motions can impede informed resolution of fact-specific disputes. Further, where, as in the present litigation, no discovery whatsoever has taken place, the party making a Rule 56(f) motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid.").

1. The FTCA Encompasses Tort Actions Related To A Landowner's Failure To Maintain An Easement

In its principal provision, the FTCA provides that "The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances ...." 28 U.S.C. § 2674. This provision means what it says. The FTCA provides a remedy even when a "uniquely governmental" function is involved that private individuals do not perform. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955); *see also United States v. Olson*, 546 U.S. 43, 45-46 (2005) (reaffirming validity of *Indian Towing*). That is because application of the

FTCA hinges on "like," rather than "identical," circumstances. *See Indian Towing Co.*, 350 U.S. at 64-65.

Here, therefore, the relevant inquiry is whether the United States, as trustee, would face liability under California law for the interference with Robinson's use of the easement. In this respect, California law is straightforward. California Probate Code § 18001 provides: "A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault." As used in this statute, the trustee's "fault" may arise when "'the trustee either intentionally or negligently, acts or *fails to act* ....'" *Haskett v. The Villas at Desert Falls*, 90 Cal. App. 4th 864, 877, 108 Cal.Rptr.2d 888 (2001) (italics added), quoting Cal. Law Revision Comm'n comment to Cal. Probate Code § 18001; *see also Bianchi v. Western Title Ins. Co.*, 14 Cal. App. 3d 235, 237-42, 96 Cal.Rptr. 750 (1971) (reversing nonsuit in favor of trustee that claimed it merely was the holder of legal title to commercial property).

Robinson's complaint alleges facts that establish the requisite trustee "fault." Each of Robinson's causes of action is premised on the factual allegation that the United States knowingly and intentionally approved or

has since supported the Tribe's construction of improvements and related activities that have damaged and interfered with the easement. This allegation buttresses the allegations regarding (1) the "slope/slump" problem that has damaged the easement's lateral and subjacent support; (2) the bullnose curb and sidewalk that encroaches into the easement by approximately 15 feet; and (3) water valves, other equipment, and a wrought iron fence that also encroach into the easement. Further, despite its awareness of the "slope/slump" problem and encroachments, as well as their implications for Robinson's ability to make full use of the easement, the United States has refused to take any steps toward rectifying the problems that exist on the land that it owns and that is subject to the easement.

Even without the benefit of discovery, other information available to Robinson corroborates these allegations. Specifically, the Tribe requested that the Bureau of Indian Affairs (BIA) accept into the BIA's road system Alverda Drive, the road affected by the easement, and provided BIA employees with project plans. (E.g., ER 258-306) Although the BIA was not directly involved in the construction, as trustee and legal owner of the

property it should have made sure that the construction and planned use was consistent with any restrictions on title, including the easement at issue. *See Kapner v. Meadowlark Ranch Ass'n*, 116 Cal. App. 4th 1182, 1187, 11 Cal.Rptr.3d 138 (2004) (holding that a party with a duty to maintain/repair an easement may not permit obstructions on it); *Healy v. Onstott*, 192 Cal. App. 3d 612, 617, 237 Cal.Rptr. 540 (1987) (California law recognizes duty to maintain and repair a non-exclusive easement); *see also Bianchi v. Western Title Ins. Co.*, 14 Cal. App. 3d at 237-42 (although trustee claimed it merely was the holder of legal title to commercial property, the court held that it could be held liable for an injury that occurred on the property where it had arranged for elevator inspections and the like).

Moreover, allegations like these fit well within the causes of action available under the FTCA. This Court has held that the FTCA encompasses an action for negligent maintenance of an easement. *Walsh v. United States*, 672 F.2d 746, 750 (9th Cir. 1982). The FTCA encompasses nuisance claims too. *See Bartelson v. United States*, 96 F.3d 1270 (9th Cir. 1996); *see also Arcade Water Dist. v. United States*, 940 F.2d 1265, 1268

(9th Cir. 1991) (holding that when not abated, a continuing nuisance can support successive actions for damages under the FTCA). These are precisely the causes of action Robinson has asserted in his complaint, and the Court should hold that they are cognizable under the FTCA.

2. There Is No Merit To The Government's Argument That It Is A "Bare Trustee" That Owes No Duties To Robinson

The conclusion that Robinson has properly alleged claims under the FTCA is unaffected by the United States' principal claim that it holds Native American lands as a "bare trustee." *See United States v. Mitchell*, 445 U.S. 535 (1980). To begin with, this argument is just a thinly disguised variant of the meritless claim that the United States should not be liable under the FTCA when uniquely governmental functions are involved. *See Indian Towing Co. v. United States*, 350 U.S. at 64-65. Although it's true that no private relationship matches the unique relationship that exists between the United States and Native American tribes, it's equally true that such a matching of public and private functions need not exist for liability to arise. *See id.*

Just as important, the "bare trustee" line of cases does not address the FTCA or the government's liability to non-Native American persons. In *United States v. Mitchell*, 445 U.S. 535 (*Mitchell* I), for example, a Native American tribe sued the United States, alleging that the government had mismanaged timber resources on the tribe's reservation land. Rejecting this claim, the Supreme Court held that the Indian General Allotment Act, which authorized the land grants at issue, did not impose on the government a fiduciary duty to manage the timber resources for the benefit of the tribe's members. *Id.* at 541-45. The Court observed that a right to damages, if any, "must be found in some source other than that [General Allotment] Act." *Id.* at 546. In contrast, in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Court reached a different result based on obligations imposed on the government by laws other than the General Allotment Act. The Court held that certain timber management statutes and regulations gave the United States "elaborate control" over tribal forest lands, giving rise to a duty to manage them properly. *Id.* at 209, 225; *see also United States v. White Mtn. Apache*

Tribe, 537 U.S. 465, 470, 473-74 (2003) (reviewing and summarizing holdings and rationales of *Mitchell I* and *Mitchell II*).

Against this backdrop, the United States's reliance on its supposed "bare trustee" status in this case erroneously conflates two distinct concepts. The two *Mitchell* cases and similar decisions concern the circumstances in which the United States may have a fiduciary or quasi-fiduciary duty to Native American tribes to manage tribal resources. It's one thing for the United States to say that it may not have a fiduciary duty to a Native American tribe to manage their resources for their benefit. But it's something else entirely for the United States to claim that it can turn a blind eye to planned tribal activities on land it holds in trust that adversely affect the undisputed property interests of third parties and then turn a deaf ear to the third party's legitimate complaints.

Simply stated, in this case Robinson's ability to recover damages under the FTCA does not turn on whether the United States has a duty to the Tribe to take affirmative steps to manage its real property resources. Quite to the contrary — as explained above, the gist of Robinson's claim is that, under the applicable California law, the United States, through the

BIA, either had the opportunity to determine that the Tribe's plans would interfere with the easement or the duty to rectify the encroachments and related problems once Robinson requested that it do so.

For this reason as well, the Court should reverse and remand.

VI.

CONCLUSION

The Court should not countenance the United States's position that the damage to and encroachments on the easement are just Robinson's "tough luck." That position is unsupported either by the terms of the Quiet Title Act or the rules that govern application of the Federal Tort Claims Act. Robinson respectfully urges the Court to so hold and reverse the judgment of dismissal.

Dated: March 4, 2008.

RANDOLPH CREGGER & CHALFANT LLP

By _____
JOSEPH P. MASCOVICH
Attorneys for Appellants

STATEMENT OF RELATED CASES

The Robinsons are unaware any related cases as defined in Circuit Rule 28-2.6.

Dated: March 4, 2008.

RANDOLPH CREGGER & CHALFANT LLP

By _____
JOSEPH P. MASCOVICH
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(B) the attached Appellants' Brief is produced using 14-point Roman type including footnotes and contains 5033 words, which is less than the total words permitted by the Federal Rules of Appellate Procedure. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 4, 2008

RANDOLPH CREGGER & CHALFANT LLP

By _____
JOSEPH P. MASCOVICH
Attorneys for Appellants
DENNIS ROBINSON; SPENCER ROBINSON, JR; RICKIE ROBINSON; CYNTHIA ROBINSON; VICKIE ROBINSON

PROOF OF SERVICE

CASE: *Dennis Robinson, et al. v. USA, etc.*
NO: U. S. Court of Appeals, Ninth Circuit, No. 07-17052
U. S. District Court, Eastern District of California, No. CV 04-00734-RRB/KJM

The undersigned declares:

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of 18 years and not a party to the within above-entitled action; my business address is 1030 G Street, Sacramento, CA 95814.

I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service; said correspondence will be deposited with the United States Postal Service the same day in the ordinary course of business.

On the date indicated below I served the within **APPELLANTS' OPENING BRIEF** on all parties in said action as addressed below by causing a true copy thereof to be:

xx **placed in a sealed envelope** with postage thereon fully prepaid in the designated area for outgoing mail:

__ **delivered by hand:**

__ **telecopied by facsimile:**

__ **express mailed:**

Attorneys for Appellees USA, etc. (2 copies)
David Shelledy, Esq.
U.S. Attorney's Office
501 I Street
Suite 10-100
Sacramento, CA 95814

District Court
U. S. District Court
Eastern District of California
Attn: The Honorable Ralph R. Beistline
501 I Street., #4-200
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 3/4/08 at Sacramento, California.

SUSAN R. DARMS