No. 07-17052

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U.S. COURT OF APPEALS

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' REPLY BRIEF

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

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I.

INTRODUCTION

This case presents the question whether the United States, as trustee-owner of real property for a Native American tribe, can shirk the duties all landowners have under California law. The district court ruled, in effect, that plaintiffs (collectively Robinson) have no remedy at all for the tribe's undeniable interference with a duly recorded easement that is essential to their plans to develop their land. The court concluded that the "Indian lands" exception to the Quiet Title Act deprived it of jurisdiction. But as the opening brief demonstrates, the district court erred. The district court had jurisdiction for a straightforward reason: because the Quiet Title Act does not apply in this case, the "Indian lands" exception is irrelevant. This Court thus should reverse the judgment.

In arguing for affirmance, the United States continues to dismiss the injustice of Robinson's predicament as a case of "tough luck." The government maintains that because an easement is involved, the Quiet Title Act necessarily applies. The United States, however, despite its fondness

for string cites on issues not in dispute, is unable to cite a single case that has placed such an expansive interpretation on the Quiet Title Act. Similarly, despite the utter dearth of authority supporting its position, the United States further urges the Court to ignore the recurring pattern in the cases in which jurisdiction rested on the Quiet Title Act. In those cases, the litigation caused, or could have caused, a material change to the United States' property interest. Robinson's action here is of a different character; it just seeks to enforce the easement as written.

The United States next requests, and Robinson agrees, that the Court should not decide whether Robinson's complaint meets the requirements of the Federal Tort Claims Act (FTCA). However, the United States does address that issue, and there is no merit to its claim that Robinson did not allege a viable theory under the FTCA. In claiming that the complaint does not allege tortious acts by a federal government employee, the United States ignores that Robinson never had a reasonable opportunity to conduct the discovery that would unearth the identity of the government employees who apparently authorized construction that has impaired Robinson's easement. Indeed, the limited information presently available to Robinson

strongly suggests that Bureau of Indian Affairs employees knowingly signed off on construction that encroached onto the easement. (See ER 258-306) For this reason as well, the Court should reverse the judgment so that plaintiffs can pursue their damages claim.

II.

ARGUMENT

A. Contrary To The United States' Claim, The Quiet Title Act Does Not Apply To This Lawsuit

Although Robinson and the United States part company on the correct resolution of the jurisdictional issue, they agree 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). Robinson and the United States likewise agree that the existence of jurisdiction under the Quiet Title Act does not require that the government own the real property in question. Lesser interests in real property, including easements, suffice. *See, e.g., Narramore v. United States*, 852 F.2d 485 (9th Cir. 1988).

However, as Robinson explained, cases in which the Quiet Title Act provide the basis for federal jurisdiction involve situations in which 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. (AOB at 13-14, citing several cases) In addition to the cases cited in the opening brief, the following recent decisions easily fit within the same fact pattern:

- *Governor of Kansas v. Kempthorne*, 516 F.3d 833, 842-43 (10th Cir. 2008). There, the court held that the Indian lands exception to Quiet Title Act barred an action that sought to invalidate the government's decision to take land into trust for benefit of Native American tribe. *Id.* at 842-43 (citing similar cases). Plainly, a ruling that would strip the United States of its title to property is a dispute over title.

- *Ciabattoni v. U.S.*, No. 04-203 GMS, 2008 WL 78744 (D. Del. 2008). There, the court held that that Quiet Title Act provided jurisdiction for an action that sought to create an easement by prescription or necessity over land owned by government. Again, a claim that seeks

recognition of a property interest that did not previously exist involves a dispute over title.

These fact situations, and the holdings of these cases, accurately reflect Congress' intent as expressed in the Quiet Title Act. Addressing the scope of the Act, the Fourth Circuit explains:

> [T]he House Report reflected that the roots of the statute originated in the Equity Courts of England in suits to quiet title or to remove a cloud on title, and recognized that "the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property." H.R.Rep. No. 92-1559, 92d Cong. 2nd Sess. (1972), reprinted in [1972] U.S.Code Cong. & Ad.News 4547, 4551-2.

Ginsberg v. United States, 707 F.2d 91, 93 (4th Cir. 1983) (holding that Quiet Title Act did not encompass a lease dispute because "the dispute over an alleged breach of contract hardly casts doubt on the title or ownership of the property").

These cases and Congress' intent therefore refute the government's claim that Robinson seeks recognition of a non-existent "standard" for application of the Quiet Title Act. This "standard" — that the dispute

could result in a significant change in the terms of title — is inherent in the Act and the cases applying it.

The Quiet Title Act's purpose, moreover, does not support its application in this case. It is undisputed that the terms of the easement at issue are spelled out in duly recorded instruments that put the United States on notice of their existence at the time the Tribe conveyed the property burdened by the easement to the United States to hold in trust. (ER 151, 317-20, 412-42) As such, this case is akin to *Ginsberg*, in that it more closely resembles a breach of contract case rather than an action that would adjudicate title to property or remove a cloud on the title to property. *See Ginsberg*, 707 F.2d at 93 (noting that the plaintiff and the United States were in privity of contract by virtue of their lease and distinguishing cases involving foreclosure of a mortgage and a plaintiff's assertion that he was the "true owner" of condemned property).

The United States dismisses *Ginsberg* as an apparently suspect decision that the Court should decline to follow, but it provides no principled analysis supporting that conclusion. Further, although the United States cites a wealth of case law supporting black letter principles

regarding the Quiet Title Act, its brief suffers from a case of "citational malnutrition" regarding their application here. These two conclusory sentences exemplify the government's argument:

> [T]he Robinsons' contentions call into question, among other things, the scope, conditions, and terms of the title the United States, on behalf of the Tribe, holds in the easement. In fact, the Robinsons' contentions may even call into question the terms of the title the United States holds in the Tribe's land that is subject to the easement.

(Answering Brief at 16) These statements are unsupported by case authority or even citation to evidence in the record. The United States cannot prove an essential element of its argument simply by citing to where the same arguments appear in the record below. That is an exercise in self-levitation, not legal analysis.

True, later in its brief, the United States does cite ER 409-10 (Answering Brief at 19) for a similar proposition, but those pages only contain the prayer for Robinson's complaint. Even then, nothing in the prayer seeks a reformation, revision, or modification of the instruments creating the easement. On the contrary, the prayer, like the complaint as a

whole, rests on the proposition that the terms of the easement are beyond dispute and that a court merely must make factual determinations regarding the effect of the interference with, and encroachment on, the easement. (ER 400-03)

If the United States has any evidence actually proving that the terms of the easement are in dispute, it did not offer it below and do not offer it here. Further, the government does not -- because it cannot -- cite a case applying the Quiet Title Act under the circumstances similar to those here. The government's self-serving *ipse dixit* about what is at stake in this case should not suffice to throw Robinson out of court.

The United States next attempts to show that there is an "unreconciled inconsistency" (Answering Brief at 21) in Robinson's argument regarding the two cases the district court cited as support for its ruling that this case falls within the Quiet Title Act: *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989); *Narramore v. United States*, 852 F.2d 485. This argument betrays a misunderstanding of Robinson's analysis of those cases.

First, as Robinson noted before (AOB At 15-16), neither case discusses the requirements for jurisdiction under the Quiet Title Act. Consequently, the district court's reasoning — which the United States echoes here — is that because those cases involved easements, the Quiet Title Act must apply here as well. That reasoning is logical fallacy, however, because it assumes the truth of its major premise: the Quiet Title Act applies to any and all disputes involving easements affecting United States property. The district court did not establish the validity of that premise. Neither does the United States here.

Robinson also explained before that neither *Narramore* nor *Shultz* supports the judgment because their facts fit into the pattern of the cases that have properly applied the Quiet Title Act. (AOB at 16-17) The United States' response to Robinson's analysis is simply to ignore it. It wrongly asserts without discussion that Robinson failed to show that these cases also involved claims that did or could have resulted in a material change to the government's title to the property involved.

Finally, the government points out that citizens sometimes are left without any remedy when the Quiet Title Act applies. (See Answering

Brief at 23, citing *State of Alaska v. Babbitt,* 38 F.3d 1068, 1077 (9th Cir. 1994). While it's true that some cases recognize that the Quiet Title Act may require that outcome, these cases certainly do not espouse an expansive, even limitless, application of the Act to achieve that result. Yet that is precisely what the United States seeks here.

In sum, because the district court improperly applied the Quiet Title Act and its Indian lands exception, the Court should reverse the judgment.

B. The Record Does Not Permit The Court To Hold That Robinson Failed To Allege Tort Claims Cognizable Under The Federal Tort Claims Act

Out of caution, in his opening brief Robinson addressed another argument the government urged below but which the district court did not decide — whether Robinson had stated a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* In its brief, the United States request that the Court not decide the issue, pointing out that the district court must make a "fact-based analysis" of whether it has jurisdiction under the FTCA. (Answering Brief at 25-27) Robinson agrees, particularly because he has not had an opportunity to pursue necessary

discovery on some of the issues involved. (AOB at 19-20) *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 toturn up useful information, as the ground for such specificity has not yet been laid.").

To aid the Court, however, Robinson will briefly address the United States' principal arguments regarding the FTCA:

First, the United States apparently concedes that Robinson has alleged the types of tort claims, including negligence and nuisance, that have long been cognizable under the FTCA. (AOB at 23-24) *See, e.g., Walsh v. United States*, 672 F.2d 746, 750 (9th Cir. 1982) (holding that the FTCA encompasses an action for negligent maintenance of an easement); *Bartelson v. United States*, 96 F.3d 1270 (9th Cir. 1996) (holding that the FTCA encompasses nuisance claims).

Second, the United States predictably falls back onto its mantra that it is just a "bare trustee" with respect to the Native American lands it holds in trust. (Answering Brief at 31-32) Yet Robinson explained that this argument is immaterial here because the FTCA provides a remedy even when a "uniquely governmental" function is involved that private individuals do not perform. (AOB at 20-21, 24) *See Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955). The pivotal question here is what duties the United States owes to third parties, and the answer to that question cannot be found in the case law devoted to the unique relationship the United States has with Native American tribes. (AOB at 20-21, 24-25) The United States, however, ignores this argument.

Third, the United States erroneously maintains that Robinson seeks to impute to the government the Tribe's actions that have interfered with the easement. Each of Robinson's causes of action is premised on factual allegations 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. (AOB at 21-23) Thus, the mere fact that the Tribe actually committed the acts does

not insulate the United States from liability as trustee. *See* Cal. Probate Code § 18001 ("A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault"); *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).

Finally, Robinson acknowledges that he must be able to prove that he was damaged by the tortious acts of an "employee of the Government." 28 U.S.C. §§ 1346(b)(1), 2675(a). This case never advanced the pleading stage, however, and Robinson accordingly has not had the opportunity to conduct discovery on this question. As noted, by agreeing that the Court

should remand rather than decide the FTCA issues, the United States impliedly agrees that Robinson is entitled to that discovery. In any event, the government has not challenged the record-supported inferences that Bureau of Indian Affairs employees approved the Tribe's construction plans for the trust property with actual or constructive knowledge that they would interfere with Robinson's easement. (ER 258-306) Robinson is entitled to a remedy for those tortious acts. *See Haskett v. The Villas at Desert Falls*, 90 Cal. App. 4th 864, 877, 108 Cal.Rptr.2d 888 (2001) (under Cal. Probate Code § 18001, a the trustee's "fault" may arise when "'the trustee either intentionally or negligently, acts or *fails to act* ....,'", quoting Cal. Law Revision Comm'n comment to Cal. Probate Code § 18001 (italics added).

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

III.

CONCLUSION

For the reasons stated above and in the opening brief, Robinson respectfully requests that the Court reverse the judgment and remand so

that plaintiffs may pursue this action for damages.

Dated: June 5, 2008. RANDOLPH CREGGER & CHALFANT LLP

By _____
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(B) the attached Appellants' Reply Brief is produced using 14-point Roman type including footnotes and contains 2716 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: June 5, 2008

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

Executed this 6/5/08 at Sacramento, California.

SUSAN R. DARMS