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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DENNIS ROBINSON, SPENCER ROBINSON, JR., RICKE ROBINSON, CYNTHIA ROBINSON, VICKIE ROBINSON, Plaintiffs, vs. UNITED STATES OF AMERICA, as Trustee for the Indians of the Mooretown Rancheria, aka MAIDU INDIANS OF CALIFORNIA, DEPARTMENT OF THE INTERIOR [BUREAU OF INDIAN AFFAIRS] and DOES 1 - 50, inclusive, Defendants.	No.: 2:04-CV-00734 RRB KJM **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: TBA Time: TBA Judge: The Honorable Ralph R. Beistline

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I. INTRODUCTION

This action involves important questions about the United States' alleged sovereign immunity where it holds title to real property in trust for a Native American tribe. The United States argues Plaintiffs (Robinson) have no legal remedy for interference with an easement that, if not corrected, has and will continue to severely hinder their ability to develop their land. Under circumstances presented here, no principle of sovereign immunity does or should reach that far.

For years the Robinson family has owned land in Butte County, CA they eventually intend to develop. An adjoining parcel was owned by friends, the Millers. Robinson had benefit of a 60 foot non-exclusive dominant road and utility easement over part of the Millers' property. Through subsequent conveyances, Mooretown Rancheria (Tribe) acquired the land subject to that easement. Tribe then transferred that land with their easement rights to United States in trust. Tribe constructed a casino on trust property, narrowing the easement to 45 feet in two places, and made related road and other improvements. Some improvements encroached into both sides of the easement and others were constructed in a substandard manner, which damaged the easement. After initially acting as a trustee, the United States turned a deaf ear to Robinson's repeated efforts to resolve the matter informally.

In *Robinson, et al. v. United States of America, et al.*, 586 F.3d 683, 688 (9th Cir. 2009) the Court of Appeal held, "there is no dispute that the trust property was subject to a 60 foot easement for specified purposes. The parties agree to that much. ... and the Robinsons' suit properly sounds in tort, as alleged."

The question presented this Court is whether the Complaint, which contains claims based in tort including negligence and nuisance, alleges claims cognizable under the Federal Tort Claims Act (FTCA) against United States as owner of the land and the easement in trust.

II. UNDISPUTED FACTS ESTABLISH ROBINSON'S RIGHTS

On September 26, 1979, Clinton and Lorene Miller entered into a "Road Maintenance

Agreement" with adjoining landowners Spencer (Sr.) and Alverda Robinson. (UF ¶68).[1] Under that agreement, the landowners set forth their duties to maintain and repair a 60 foot easement over the entirety of Alverda Drive for the benefit of their adjoining lands. (UF¶69). That agreement was recorded in Book 2500, pages 262-264 in the Office of the Butte County Clerk-Recorder, Butte County, California, where the lands and the subject easement are located. (UF ¶70).

The Millers sold their property to Thomas and Manuela G. Poole. Poole recorded a Deed of Trust and Parcel Map 119-28, 29 and 30 ("Parcel Map"). The Parcel Map expressly incorporated the agreement by reference to "Road Maintenance Agreement for Alverda Drive is contained within 2500 O.R. 262." (UF ¶71). Meanwhile, Robinson's land remained within the family as an undivided interest among Plaintiffs. (UF ¶72).

On December 5, 1991, the Pooles sold a part of their interest to Tribe (Mooretown Rancheria), specifically, "Parcel Four as shown on that certain Parcel Map filed in the office of the Recorder of the County of Butte, State of California, on April 30, 1990 in Book 119 of Maps, at pages 28, 29 and 30" and "a 60.00 foot right-of-way for road and public utility purposes over Alverda Drive and Lorene Court over Parcels Two and Three as shown on that certain Parcel Map ...." On February 8, 1993, Tribe conveyed that interest in its entirety to United States in trust with reference to the same Parcel Map. (UF ¶73).

On November 20, 1995, Mr. Poole sold Parcel Three and "a 60.00 foot right-of-way for road and utility purposes ... over Parcels Three and Four" to Tribe. Again, Tribe conveyed its interest to United States in trust, but having already conveyed the right-of-way over Parcel Three, Tribe merely conveyed the remaining 60 foot right-of-way over Parcel Four. (UF ¶74).

On review of the Parcel Map, Parcel 4 is generally north of Alverda Drive and Parcels 2 and 3 are generally south of Alverda Drive, that road and its easement being generally east to west, abutting Robinson's property on the east and a county road, Lower Wyandotte, on the west.

Since the conveyances from Tribe to United States in trust, the easement has fallen into

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[1] Amended Statement of Undisputed Facts (UF) is in Request for Judicial Notice (RFJN), Exhibit 1; see also Robinson Declaration RFJN, Ex. 2, doc. #29.

disrepair. United States has permitted several encroachments and obstructions into both sides of the easement, that, at times, prevent travel entirely and pose an undue burden on the road. They include, but are not limited to: (1) A 2,000 square foot encroachment identified as a slope that extends 20 feet into the north side of the right-of-way/easement and runs over 100 feet east/west in length. (UF ¶20). (2) A bullnose curb and adjacent concrete walkway rising above the street level encroaching approximately 15 feet into the south side of the easement. (UF ¶23). (3) A wrought iron fence embedded in concrete on the south side of the easement adjacent to a parking lot constructed by Tribe located on Parcel 2 and Parcel 4 on the north side of the easement, encroaching into the easement by approximately 15 feet on each side. (4) A hydrant located in the easement on the north side which obstructs travel on that portion of the roadway.

Robinson owns more than 300 acres east of the easement accessed by several locations, including a gate at the eastern juncture with Alverda Drive. (UF ¶39). They hold the dominant tenement while United States holds the serviant tenement in trust. (UF ¶34).

Robinson alleges "[c]ontinuously during the last several years, defendants knowingly and intentionally permitted, allowed, sponsored, supported, advised, approved and conspired with Rancheria to engage in certain acts of construction/destructions on and of the easement to Robinson's detriment and over Robinson's objections to United States and Rancheria."

The Complaint incorporates by reference a litigation guarantee setting forth transactions referenced above (Robinsons are joint owners), Parcel Maps and refers to the claim filed pursuant to 28 U.S.C. § 2675(a). (RFJN, Ex. 6; doc. #1). Causes of action include injury and damage to property which are continuing.

Encroachments are a particular problem because Robinson has long intended to develop their land. (UF ¶¶55-56). Development requires ability to use all of the 60 foot easement for access and utility purposes. (UF ¶56). The existing, unlawful encroachments block development plans.

Robinson's efforts toward informal resolution of easement interference and encroachment proved and continue to prove futile. (Gilmore Decl. ¶2.) In April 2004, Robinson filed the Complaint based on the Federal Tort Claims Act that alleged continuing tort claims for disruption

of lateral and subadjacent support, negligence and nuisance.

United States responded to the Complaint with motion to dismiss or for summary judgment, arguing, in part, that its status as trustee did not require it to perform any acts that could give rise to tort liability, in effect Robinson had no remedy.

Robinson demonstrates the Complaint properly alleges tort claims because under applicable California law, a trustee such as the United States has the duty to prevent or remedy interference with and encroachments onto the easement. (RFJN, Ex. 6, 7; doc. #1) Also, aside from the required initial disclosures, the Court stayed discovery pending ruling on the United States' motion. (doc. #27)

Remand from the Ninth Circuit in effect demands full, complete discovery be afforded Robinson.[2]

III. LAW OF THE CASE SETS GROUND RULES

Law of the case designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. The appellate court's determination on a legal issue is binding on the trial court on remand and on appellate court on a subsequent appeal given the same case and substantially the same facts. *Black's Law Dictionary*, Abridged Sixth Edition, West Publishing Co., St. Paul, MN, 1991.

There is no dispute United States holds land in trust for Tribe. *Robinson v. United States,* 586 F.3d 683, 686 (9th Cir.). This action involves use of land as to which title is not disputed. *Id.*, at 688. There is no dispute the trust property is subject to a 60 foot easement for specified purposes. The parties agree to that much. *Id.*, at 688. United States does not disagree with Robinson about

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[2] Following Rule 26 productions, with supplemental production by United States, Robinson filed notice of motion to compel further discovery responses. United States filed its motion to dismiss/for summary judgment and to stay discovery. The Magistrate granted motion to stay discovery in part pending resolution of motion to dismiss. As part of that order, the United States was required to produce documents supporting declaration of Bureau of Indian Affairs (BIA) employee Kanu Patel. Motion to compel was denied without prejudice. (doc. #27)

the land area or intended use of the easement. *Id.*, at 688. The Complaint properly sounds in tort. *Id.*, at 688. These four points equal the law of the case.

Also, the applicable law includes that relating to easements. An easement conveys rights in or over the land of another. *Camp Meeker Water System, Inc. v. Public Utilities Comm.* 51 Cal.3d 845, 865 (1990). Existence of an easement creates two tenements: the dominant tenement is held by one who holds the right to go over another's land (Robinson); the serviant tenement is held by one whose land is traversed (United States). Cal.Civ.Code §803; *Camp Meeker Water System, Inc. v. Public Utilities Comm.*, 51 Cal.3d at 865. The easement here was created by express grant. *Wolford v. Thomas*, 190 Cal.App.3d 347, 354 (1987).

Damages awardable for obstructing an easement are those that compensate plaintiff for loss of use of the easement, diminished value of the lot if it benefitted, and costs of abating or removing a continuing encroachment. See *Kazi v. State Farm Fire & Cas. Co.*, 24 Cal.4th 871, 103 Cal.Rptr.2d 1, (2001).

Damages to real property as alleged in the Complaint are continuing. Where a continuing tort/nuisance is abatable, it is continuing. Persons harmed by that, therefore, may bring successive actions for damages until the nuisance is abated or removed. *Jordan v. City of Santa Barbara*, 46 Cal.App.4th 1245, 1258, rev. den. (1996) (nuisance includes an obstruction to the free use of property and it is continuing if it can be removed or abated); *Capojeannis v. Superior Court*, 12 Cal.App.4th 668, 676 (1993) (every repetition of a continuing nuisance is a separate wrong); *Mangini v. Aerojet - General Corp.*, 230 Cal.App.3d 1125, 1142-3, rev. den. (1991) (continuing damage); *People v. Kinder - Morgan Energy Partners LP*, 569 F.Supp.2d 1073, 1085-6 (S.D. Cal. 2008) (definition); *Arcade Water Dist. v. United States,* 940 F.2d 1265, 1268 (9th Cir. 1991) (when not abated, a continuing nuisance - *such as we have here* - can support successive actions for damages under FTCA); see also California Civil Code §§ 3479 (nuisance), 3450 (public nuisance), 3483 (continuing nuisance). Robinson has asserted these causes of action in the Complaint and the Court should hold they are cognizable under FTCA. *Robinson v. United States*, 586 F.3d 683, 688 (9th Cir. 2009).

Injunctive relief may be available to persons having an ownership interest in the dominant tenement where an easement has been obstructed in whole or in part. See *Hartsif v. Wuann*, 139 Cal.App.2d 119 (1956); see also *Laine v. Weinberger*, 541 F. Supp. 599, 603 (C.D. Cal. 1982) (criteria for possible relief under FTCA).

IV. NO RELIANCE SHOULD BE PLACED ON THE PATEL DECLARATION

The United States places reliance on a flawed declaration of Kanu Patel, Regional Road Engineer for the Pacific Regional Office of the Bureau of Indian Affairs (BIA) (doc. #16). That declaration, executed April 15, 2005, is deficient. In significant part it comprises unsupported, contradictory rhetoric.

In paragraph 2 Mr. Patel states Alverda Road [sic] "... lies *partially* on land held by the United States in trust ...." (Emphasis added). There is no evidence a portion of the easement on its south side on Parcel 2 to a Tribe parking lot was reconveyed by United States to Tribe. The underlying fee may have been, however, the easement was not according to Mr. Patel's records produced per court order. In that paragraph he concludes, "The portion of the road over which the Robinson's easement lies and which is now in BIA's road system is directly in front of the main entrance to the Tribe's casino." In fact the easement extends over the entire distance of Alverda Drive. Documents produced by the United States indicate the BIA road system portion of Alverda Drive extends from Lower Wyandotte Road to Lorene Court which is east of the casino, the north side slope and 15 foot fence encroachment into a 60 foot easement which reduces its width to 45 feet at that point (also reduced to the same width by a similar fence arrangement 15 feet into the easement on the south side adjacent to the parking lot and to the west by the bullnose encroachment).

In paragraph 3, Mr. Patel states road maintenance is limited to what is necessary to preserve the roadway and provide services for the satisfactory and safe use of such roads. Because of that, he claims, there has been no necessity of doing any maintenance whatsoever on the road. That is contrary to the facts and terms and conditions of the Road Maintenance Agreement, a covenant running with the land binding successors in interest, requiring the existing road be maintained in

"good repair." Robinson, as majority owner as described in the Road Maintenance Agreement, have the right to control what maintenance is done on the road. Existence of an agreement between United States through BIA and Tribe to place Alverda Drive in the BIA road system cannot change the rights of Robinson as a third party joint easement owner or otherwise change United States' duties to third parties as a trustee for Tribe.

Paragraph 4 misstates facts and questions what documents Mr. Patel has reviewed. (See RFJN, Ex. 4, pp. 256-306). Whether he has inspected the scene at any time after 1997 (as shown in the United States' initial disclosures) is not addressed.

Paragraph 5 demonstrates Mr. Patel negligently or intentionally makes the following mistakes: the easement was part of a transfer by United States back to Tribe, which was not shown in Butte County records at the time of filing this action or in United States' disclosures; indicating the five plus acre area, "... which includes the 'slump' area ...." is wrong; the "slump" is on the north, not south side of Alverda Drive. It is east of the location of the encroachments on the south side adjacent to the Tribe's parking lot. There is no evidence presented by United States or contained in property information supplied by Robinson indicating Mr. Patel is correct.[3]

V. FTCA ENCOMPASSES TORT ACTIONS RELATED TO A LAND OWNER'S FAILURE TO MAINTAIN AN EASEMENT.

The FTCA provides in pertinent part 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. A remedy is provided by FTCA 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 FTCA hinges on "like," rather than

[3] At hearing on the original motion to dismiss/motion for summary judgment June 22, 2005 before Judge David Levi, United States had to "apologize" to the Court because Mr. Patel gave the impression United States had the duty and responsibility to maintain the surface of Alverda Drive which admittedly contradicted the United States' position. (RFJN, Ex. 9, pp. 17:18-18:25).

"identical," circumstances. See *Indian Towing Co.*, 350 U.S. at 64-65.

Therefore, the relevant inquiry here is: whether United States as trustee, would face liability under California law for 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 that 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 a holder of legal title to commercial property).

The Complaint alleges facts that establish the requisite trustee's "fault." Each of Robinson's causes of action is premised on factual allegations that United States knowingly and intentionally approved or has since supported Tribe's construction of improvements and related activities that have damaged or interfered with the easement. (doc. #1) This supports those regarding (1) the "slope/slump" problem that has damaged the easement's lateral and subadjacent support; (2) the bullnose curb and sidewalk that encroach into the easement by approximately 15 feet on the south side of Alverda Drive (thereby narrowing it to 45 feet); and (3) water valves, other equipment and a wrought iron fence on the north side of Alverda Drive (also an approximate 15 foot narrowing of the easement east of the other fence) that also encroach into the easement. Despite its awareness of the "slope/slump" problem and encroachment, plus their implications for Robinson's ability to make full use of the easement, necessary to have a 60 foot easement in order to develop the property, United States has failed and refused to take any steps toward rectifying the problems existing on land it owns and is subject to the easement.

Even without benefit of discovery, other information available to Robinson supports these allegations. Tribe requested BIA accept into BIA's road system Alverda Drive, the road affected by the easement and provided BIA employees with project plans. (RFJN, Ex. 4, pp. 256-306).

Although BIA was not directly involved in construction, United States as trustee and legal owner of the property, should have made sure that construction and planned use was consistent with any restrictions on title including the easement. See *Kapner v. Meadowlark Ranch Ass'n.*, 116 Cal.App.4th 1182, 1187, 11 Cal.Rptr.3d 138 (2004) (holding a party with a duty to maintain/repair an easement may not permit obstructions on it); *Healey v. Onstott*, 192 Cal.App.3d 612, 617, 237 Cal.Rptr. 540 (1987) (California law recognizes a duty to maintain and repair a nonexclusive 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 it could be found liable for an injury that occurred on the property where it arranged for elevator inspections and the like).

The United States concedes, and the Ninth Circuit held, Robinson has alleged the types of tort claims, including negligence and nuisance that have long been cognizable under FTCA. See, e.g. *Walsh v. United States*, 672 F.2d 746, 750 (9th Cir. 1982) (holding FTCA encompasses an action for negligent maintenance of an easement); *Bartelson v. United States*, 96 F.3d 1270 (9th Cir. 1996) (FTCA encompasses nuisance claims); *Arcade Water Dist. v. United States*.940 F.2d 1265, 1268 (9th Cir. 1991) (holding that when not abated, a continuing nuisance - *such as we have here* - can support successive actions for damages under FTCA); *Robinson v. United States,* 586 F.3d 683, 688 (9th Cir. 2009).

VI. THERE IS NO MERIT TO UNITED STATES' ARGUMENT IT IS A "BARE TRUSTEE" OWING NO DUTIES TO ROBINSON

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

The "bare trustee" line of cases does not address FTCA or the Government's liability to non-Native American persons. In *United States v. Mitchell*, 455 U.S. 535 (*Mitchell I*), a Native American tribe sued United States, alleging it mismanaged timber resources on the tribe's reservation. Rejecting that claim, the Supreme Court held the Indian General Allotment Act, which authorized the land grants at issue, did not impose on United States 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, *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 GAA. The court held that certain timber management statutes and regulations gave 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 rationale of *Mitchell I* and *Mitchell II*).

Given that, United States' reliance on its supposed "bare trustee" status here erroneously combines two distinct concepts. The *Mitchell* cases and similar decisions concern circumstances in which United States may have a fiduciary or quasi-fiduciary duty to Native American tribes to manage tribal resources. It is one thing for United States to say it may not have a fiduciary duty to a Native American tribe to manage its resources for their benefit. It is, however, something else entirely for United States to claim 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 parties's legitimate complaints. "Pound sand" doesn't work.

Robinson's ability to recover damages under FTCA does not turn on whether United States has a duty to Tribe to take affirmative steps to manage its real property resources. As we explained, the gist of the Robinson's claim is that, under applicable California law, United States, through BIA, either had the opportunity to determine 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 commencing in 2000.

The"bare trustee" argument is immaterial because 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). The pivotal question is what duties United States owes to third parties. The answer to that question cannot be found in case law devoted to the unique relationship United States has with Native American tribes. United States, however, ignores this argument.

Also erroneously, United States maintains that Robinson seeks to impute to it Tribe's actions that have interfered with the easement. The Complaint's causes of action are premised on factual allegations that United States knowingly and intentionally approved or has since supported Tribe's construction of improvements and related activities that have damaged and interfered with the easement. The mere fact that Tribe actually committed the acts does not insulate 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); *Healey 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 title, the court held it could be found liable for an injury that occurred on the property where it had arranged for elevator inspections and the like). California law trumps the "bare trustee' argument.

VII. ROBINSON NEEDS DISCOVERY TO DETERMINE WHO ARE VIABLE UNITED STATES' EMPLOYEE DEFENDANTS

Robinson acknowledges they must prove they were damaged by 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 was denied the opportunity to conduct appropriate discovery on this question. By agreeing that the Ninth Circuit remand rather than

decide the FTCA issues, United States impliedly agreed Robinson is entitled to that discovery. United States did not challenge on appeal the record supported inferences that BIA employees approved the Tribe's construction plans for the trust property with actual or constructive knowledge that they would interfere with Robinson's easement rights. (Answering Brief of the Federal Defendants - Appellees). Who these responsible BIA employees are is unknown at this point. Robinson is entitled to remedies 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 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).

VIII. ROBINSON CAN OBTAIN COMPLETE RELIEF ABSENT TRIBE

Rule 19 of the Federal Rules of Civil Procedure governs compulsory party joinder. Fed. R. Civ. Proc. R. 19. The Ninth Circuit instructs that District Courts conduct a three part inquiry to determine whether an action should be dismissed for failure to join a purportedly indispensable party. *EEOC v. Peabody Western Coal Co.*, 400 F.2d 774, 778 (9th Cir. 2005) (citing *United States v. Bowen*, 172 F.3d 682, 688 [9th Cir. 1999]). District Courts must determine whether the nonparty is "necessary" under subdivision (a). Fed. R. Civ. Proc. R. 19(a). If the nonparty is necessary, the Court must determine whether joinder is "feasible." *EEOC v. Peabody Western Coal Co.*, 400 F.3d at 778. Joinder is not feasible in three circumstances: (1) when venue is improper, (2) when the nonparty is not subject to personal jurisdiction, and (3) when joinder would destroy subject matter jurisdiction. Fed. R. Civ. Proc. R. 19(a); *EEOC v. Peabody Western Coal Co.*, 400 F.3d at 778. If joinder is "not feasible," the Court must determine whether the nonparty is "indispensable" under subdivision (b). Fed. R. Civ. Proc. R. 19(b); *EEOC v. Peabody Western Coal. Co.*, 400 F.3d at 778.

A. Tribe Is Not A "Necessary" Party As Defined By Rule 19(a)

"Complete relief" refers to relief between the persons already parties, not as between a party and the nonparty whose joinder is sought. *David Co. v. Emerald Casino Inc.*, 268 F.3d 477, 484 (7th Cir. 2001) quoting *Perrian v. O'Grady*, 958 F.3d 192, 196 [7th Cir. 1992]); *Confederated Tribes of Chehellas Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

Whether complete relief can be afforded involves the court considering the type of relief sought by the parties. *Wyandotte Nation v. City of Kansas City*, 200 F.Supp.2d 1279, 1293 (10th Cir. 2001); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). The Court must determine whether it can adjudicate the duty to maintain the 60 foot easement as prescribed by the restrictive covenant imposed upon the United States in the absence of Tribe. *Id.*; *Kansas v. United States*, 249 F.3d 1213, 1226 (10th Cir. 2001).

Robinson can obtain complete relief absent Tribe because the causes of action against United States focus solely on BIA negligence and wrongful conduct continuing to date in maintaining the 60 foot easement, with its continuing, public nuisances and reparable encroachments.

Despite contrary assertions, prospective injunctive relief does not preclude the grant of complete relief between the parties. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

When the trustee represents a beneficiary's interests fully and without conflict, joinder of the beneficiary is not necessary as defined by Rule 19(a). *Wyandotte Nation v. City of Kansas City*, 200 F.Supp.2d 1279, 1293 (10th Cir. 2001) ("as a practical matter the Secretary's [Interior] interest in defending her determinations is 'virtually identical to the interests of the Wyandotte Tribe'"); *Markahm v. Fay*, 74 F.3d 1347, 1355 (1st Cir. 1996). The United States asserts "plaintiffs will be unable to cite any means by which the United States can compel the Tribe to provide the relief sought by plaintiffs."

To the contrary, United States' argues the guardian - ward relationship which imposes upon it an obligation to "control and manage property and affairs of Tribe in good faith and for their welfare." See also *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir., 1992). United States as trustee may adequately represent an Indian tribe. California law empowers United States to control management and administration of the trust. Cal. Prob. Code §18001; Law Revision Comm'n. Comment thereto; *Beverly Hills Savings & Loan Ass'n. v. Webb*, 406 F.2d 1275, 1279 (9th Cir. 1969) (trustee was joined "*for the sole purpose* of 'facilitating' the enforcement of any

orders that might be made by the court with respect to the trust or the trust property"). Thus the special relationship (whether trustee, beneficiary or guardian - ward) obviates any potential for multiple suits or conflicting interests.

IX. CONTINUING WRONGS BLOCK JURISDICTION ARGUMENT; ROBINSON IS PROPERLY BEFORE THE COURT

Without revealing its information when the subject events occurred on its trust property, United States argues Robinson's Federal Tort Claims Act claim signed by Dennis Robinson possibly is time barred. That argument does not address whether a statute of limitations becomes jurisdictional under the circumstances as presented here. Where the wrongs are removable or abatable as Robinson contends, they are continuing wrongs and United States' jurisdictional argument fails. See II, III and V, infra.

Robinson's claim, made on behalf of Dennis Robinson as a private party joint owner of the subject easement which benefits dominant tenements jointly owned by Dennis Robinson and his brothers, Spencer Robinson, Jr., Ricke Robinson, sister Vickie Robinson and sister-in-law Cynthia Robinson as undivided interests when viewed in light of the litigation guarantee attached to the Complaint demonstrates why Dennis Robinson is the appropriate signatory on the claim. (RFJN 6, Ex. 6, Ex. 7, Ex. 8.)[4]

X. CONCLUSION

At hearing on the original motion to dismiss/motion for summary judgment June 22, 2005, Judge Levi commented to the Assistant U. S. Attorney:

> "That's why I say your position is that people should engage in self help, which could lead to violence, and I think that's a totally unacceptable position." (RFJN, Ex. 8, p. 7:22-24.)

There is no dispute United States holds land in trust for Tribe and this action involves use of that land to which title is not disputed. There is no dispute the trust property is subject to a 60 foot non-exclusive easement for specified purposes. United States does not disagree with Robinson

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[4] Because of additional wrongful acts causing damage to Robinson that have occurred since this action was filed, an additional claim will be served upon BIA within approximately 60 days. 27 U.S.C. §2675(b). (Gilmore Decl., ¶3.)

about the land area or intended use of the easement and Robinson's Complaint properly sounds in tort.

The Complaint alleges wrongs to real property which are continuing as they are abatable/removable. These claims are cognizable under FTCA.

Respectfully submitted,

DATED: May 25, 2010

RANDOLPH CREGGER & CHALFANT LLP

By: /s/ John S. Gilmore
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