

District Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MARLA TOLLIVER, individually and as  
Personal Representative of the ESTATE OF  
RONALD L. SCROGGINS; and LARRY  
SCROGGINS,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

ROBERT AND JONI FRANCIS, as Personal  
Representatives of the ESTATE OF VANNA K  
FRANCIS; and ROBERT AND JONI  
FRANCIS, husband and wife, the marital  
community thereof,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Case No. 10-cv-5056-RBL

UNITED STATES' MOTION TO  
DISMISS OR, IN THE  
ALTERNATIVE, FOR SUMMARY  
JUDGMENT

**(Please note on motion calendar for:  
November 26, 2010)**

Pursuant to Fed. R. Civ. P. 12(b) and 56 respectively, Defendant, the United States of  
America, by and through its undersigned counsel, respectfully moves this Court for dismissal or,  
in the alternative, for summary judgment on all claims.

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## **I. INTRODUCTION**

In the early hours of March 18, 2007, Ronnie Scroggins and Vanna Francis were passengers in a car traveling on the Lower Elwha Road, which ends at the banks of the Lower Elwha River, in Clallam County Washington. The driver, who was intoxicated, drove the car into the River. While the driver and four other passengers survived, Mr. Scroggins and Ms. Francis tragically drown.

Pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671 *et seq.* & 1346(b), Plaintiffs, as representatives of the respective estates, bring suit against the United States for the death of Mr. Scroggins and Ms. Francis, claiming that the United States negligently “built and/or maintained the Lower Elwha Road in Clallam County, Washington” and that this negligence caused the deaths of their children.

As the present Motion will establish as a matter of law, however, the United States did not build or own the Lower Elwha Road and, therefore, had no duty to maintain it. Specifically, almost a century ago, private individuals conveyed most of the relevant portion of the Lower Elwha Road to Clallam County. Since then, Clallam County has extended, taken prescriptive rights, and exerted its ownership over the Road repeatedly by, among other things, expending County funds to maintain the Road. There is no evidence in possession of the County, the United States or elsewhere to suggest otherwise. Thus, the United States does not owe a duty of care to the Plaintiffs in regards to the maintenance of the Road.

Because Plaintiffs cannot establish this basic element of a negligence claim under Washington State law, and because there has been no other waiver of sovereign immunity that would permit a claim under the FTCA, the Court lacks jurisdiction over the United States. Accordingly, this case should be dismissed.

## **FACTS**

### **A. The Accident.**

Shortly after 3:00 am on March 18, 2007, Sela Kalama drove a sedan carrying six other teenagers, including decedents Scoggins and Francis, from a party at a house near the Lower Elwha Reservation Tribal Center to their stated destination of “the river.” *See* Francis Dkt. No. 1

¶ 3.1 (Francis Complaint); Tolliver Dkt. No. 2 ¶¶ 2.1-2.2 (Tolliver Amended Complaint); *see also Sela Anne Kalama*, No. 07-CR-5259-BHS WDWA Case , Dkt. No. 103 at 5 (Plea Agreement).<sup>1</sup> Multiple observers at the party reported that Kalama had been drinking beer for several hours. *See Sela Anne Kalama*, Dkt. No. 103 at 5. Kalama herself had texted a friend approximately 90 minutes before the accident that she was “drunk” and admitted to a Clallam County Sheriff that she drank 12-16 beers and “knew she was ‘impaired’” when she left the party. *Id.* at pp. 5-6.

As Kalama drove from the party on the Lower Elwha Road and towards the Lower Elwha River, she was text-messaging on her cell phone. *Id.* at p. 5. Right before the accident, Kalama’s front-seated passenger told her to hang up her phone and slow down. *Id.* at pp. 5-6. However, given her condition, speed and trajectory, she could not stop in time before crashing the car into the River. *Id.* at p. 6. She and four of the six passengers survived; however, Scoggins and Francis tragically drowned in the accident. *See* Tolliver Dkt. No. 2 ¶ 2.3; Francis Dkt. No. 1 ¶ 3.1. On December 11, 2007, Kalama pleaded guilty to two counts of Involuntary Manslaughter and was sentenced to 26 months of incarceration, three years probation, fines and restitution. *See Sela Anne Kalama*, at Dkt. Nos. 103, 118 and 123.

#### **B. Ownership and Maintenance of the Lower Elwha Road.**

The pertinent portion of the Lower Elwha Road (the “Road”) stretches approximately one mile (approximately 4000 feet) from its intersection with Stratton Road (near the party location and the Tribal Center) and terminates at the banks of the Lower Elwha River (the “River”). *See* Francis Dkt. No. 1 ¶ 3.2; Declaration of David Ironmonger (“Ironmonger Dec.”) ¶ 4. The Road is 30 feet wide and paved until approximately 93 feet prior to the River’s edge, where it becomes hard-packed dirt and river rock. Ironmonger Dec. ¶¶ 4 & 10. The Road is a straight, two-lane roadway until approximately 0.5 miles from the River, where it narrows to 1.5 lanes. *Id.* ¶ 4.

Plaintiffs claim that the United States “built and/or maintained the Lower Elwha River Road.” *See* Tolliver Dkt. No. 2 ¶ 1.5; Francis Dkt. No. 1 ¶ 3.2 (“The road is maintained and/or

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<sup>1</sup> The above-captioned *Tolliver* and *Francis* matters were consolidated on April 21, 2010. *See* Dkt. 18. Until that date, two separate dockets were maintained.

1 serviced by the Defendants. Defendants provided and/or maintained the road signs and lighting  
2 on the Lower Elwha Road leading to the Elwha River.”).

3 In fact, for the reasons below, and based largely upon documents obtained from the  
4 Clallam County Roads Division, the United States does not and has not ever owned or  
5 maintained the Road. Rather, private parties conveyed most of the Road to Clallam County  
6 almost a century ago and, since then, Clallam County has extended, taken prescriptive rights, and  
7 exerted its ownership over the entire Road repeatedly, by *inter alia* expending County funds to  
8 maintain the Road.

### 9 **1. The Legal Description of the Road**

10 The Road is legally defined as the border (the “common line”) of Sections 27 and 34 in  
11 Township 31 North, Range 7 West, of the Willamette Meridian. Ironmonger Dec. ¶ 6. For ease  
12 of reference, attached as Exhibit M to the Ironmonger Declaration is Clallam County’s own  
13 scaled drawing of the roads in the pertinent portion of Township 31. *Id.*; Exhibit M thereto. The  
14 Lower Elwha Road is identified in Exhibit M as number “241.” The road identified in Exhibit M  
15 as number “269” is Stratton Road. *Id.* Thus, the pertinent portion of the Road (which, again, is  
16 the border or “common line” of Sections 27 and 34) begins at the intersection of Stratton Road  
17 (269) and Lower Elwha River Road (241), and extends westerly to the east bank of the River, a  
18 distance of approximately 4,000 feet (or one mile). Ironmonger Dec. ¶¶ 4 & 6.

19 Additionally, the “Section Corner” on Exhibit M is identified by the number  
20 “27/26/34/35,” which is also the intersection of Stratton Road (269) and Lower Elwha River  
21 Road (241). Ironmonger Dec. ¶ 6. The “Quarter Corner” on Exhibit M is identified by the  
22 number “[2]7/34.” *Id.*<sup>2</sup>

### 23 **2. Conveyances of the Lower Elwha Road to Clallam County**

24 On March 3 and April 3, 1914 respectively, private landowners Clyde Goodwin and  
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26 <sup>2</sup> Defendant believes that the legal issues herein can be decided on the written record and, thus,  
27 has not requested oral argument. However, Defendant appreciates that some matters are more easily  
28 described orally than in writing; particularly descriptions of maps and plats, etc., such as those herein.  
Thus, if the Court would find it remotely helpful, Defendant is more than willing to orally present some  
or all of its Motion to the Court.

1 Norman Sturdivant conveyed by quit claim deeds a portion of their property to Clallam County  
 2 “for the use of the public forever as a public road and highway.” Ironmonger Dec. ¶ 12; Exhibits  
 3 A-A1 (Goodwin conveyance) & B-B1 (Sturdivant conveyance) thereto. Each conveyance was  
 4 30 feet deep and encompassed that portion of the land on which that part of the Road rests. *Id.*  
 5 Together, the conveyances ran west from the Section Corner (intersection of Stratton Road (269)  
 6 and Lower Elwha River Road (241)) nearly to the Quarter Corner. *Id.*

7 On November 17, 1916, by warranty deed, John Hickok sold to Clallam County for \$100  
 8 a portion of his property. Ironmonger Dec. ¶ 12; Exhibit D (Hickok conveyance) thereto. This  
 9 conveyance was also 30 feet deep, extended west from the Sturdivant property to the Quarter  
 10 Corner, and encompassed that portion of the land on which the Road rests. *Id.*

11 Thus, since 1916, the majority of the Lower Elwha Road in question (*i.e.*, that lying west  
 12 of the Section Corner to the Quarter Corner) is a deeded right-of-way, owned by Clallam  
 13 County. Ironmonger Dec. ¶ 10.

### 14 **3. The County Extends the Road to River, Taking Prescriptive Rights**

15 Contemporaneous with the conveyances described above, on October 7, 1916, the  
 16 Clallam County Commissioner’s Journal reported receiving and referring to County engineers a  
 17 petition to extend the Road from the Quarter Corner (the westerly point of the Hickok  
 18 conveyance) to the River. *See* Ironmonger Dec. ¶ 13; Exhibits C (Commissioner’s Journal) & E  
 19 (Road Docket, entitled, “In the Matter of the Petition to Extend County Road) thereto. The  
 20 request was then submitted to County surveyors and engineers for execution. *Id.* The Road was  
 21 surveyed by Clallam County on December 30, 1916 and “established” as a road 30 feet wide and  
 22 lying south of and coincident with the section line and running “due west to the Elwha River.”  
 23 *See id.*; Exhibits E & E-1 thereto. These actions indicate the County’s intent to extend its  
 24 “County Road” to the River and, consequently, take prescriptive rights to that which was not  
 25 already conveyed. Ironmonger Dec. ¶ 11; Exhibits E & Exhibit L (Subordination Agreement,  
 26 recognizing a “prescriptive easement for Lower Elwha Road”).

### 27 **4. Subsequent Additional Events Confirm the County’s Ownership**

28 After the Road was conveyed to the County and the County extended it, subsequent

1 events and evidence confirm that the County owned the Road. As will be shown, there is no  
 2 evidence in possession of the County, the United States or elsewhere to suggest otherwise.

3 First, by warranty deeds dated March and April of 1936, private landowners conveyed  
 4 real property to the Trustee of the United States of America, but expressly excepted (carved out)  
 5 “the country Road” previously conveyed to Clallam County. Ironmonger Dec.¶ 14; Exhibit F-  
 6 F1(Beech conveyance) & G -G1 (Johnson conveyance) thereto. These deeds reflect the  
 7 continued recognition of Clallam County’s ownership of the Road in question, even in  
 8 conveyances to the United States. *Id.*

9 Second, the Department of the Interior’s Bureau of Indian Affairs (“BIA”), who manages  
 10 Lower Elwha Klallam Tribal land held in trust near the Road, has no record in its systems of the  
 11 United States’ ownership of this Road. *See* Declaration of Richard De Clerck (“De Clerck  
 12 Dec.”) ¶ 4. On the contrary, as in the conveyances described above, BIA’s Title Status Report  
 13 on the Tribal land describes an exception for a “County Road right-of-way” in a letter  
 14 confirming the 1976 purchase in trust of the land near the Road. *Id.*; Exhibit 2 thereto. The Title  
 15 Status Report further makes reference to a “County road right of way by direct line to the water”  
 16 in an agreement for an easement, which was executed by the Tribe and private individuals “for  
 17 water purposes” shortly after this purchase. *Id.* These references in the Title Status Report to  
 18 recognized “County Roads” appear to be references to the Road at issue herein. *Id.* BIA,  
 19 otherwise, has no documents in its possession related to the Road. *Id.*

## 20 **5. The County Maintained the Road**

21 It is equally clear that the County exerted its ownership over the Road by expending its  
 22 funds to maintain the Road. As will be shown, abundant evidence in the County’s records  
 23 supports this conclusion, and there is no evidence in the United States’ possession to the  
 24 contrary.

25 First, in approximately July 1957, the Board of Clallam County Commissioner’s ordered  
 26 its County Road Engineer to spend approximately \$3,500 to “oil the above road with a  
 27 penetration coat, 0.8 miles on road #269, and 0.6 on 241.” Ironmonger Dec.¶ 15 (noting that 0.6  
 28 mile is nearly the entire paved section of the Road); Exhibit G2 (Commissioner’s Record)

thereto; Exhibit I (list of road improvements including the oiling). Again, “road #269” is Stratton Road and “road . . . 241” is the Lower Elwha Road. *See* Exhibit M of Ironmonger Dec. The Commissioners further declared that this maintenance was for “**proper county road purposes**” and “to be a public necessity.” *Id.* (emphasis added).

Second, a Clallam County Engineer’s drawing, dated December 9, 1965, shows existing culverts, a bridge and the design of two new culverts intended for the pertinent portion of the Road. Ironmonger Dec. ¶ 16; Exhibits H and H-1 thereto. In fact, the County did tear down the old culverts and built two new ones identified in the drawing. *Id.*

Third, the County surveyed the Road in 1974 and 1993. Ironmonger Dec. ¶ 17; Exhibits I-2, J, & K thereto. It is customary only for the owner to survey a road, and normally for maintenance purposes. *Id.* Indeed, a 1984 Clallam County Road Docket Log Book flatly states that the Road is “maintained” by the County. Ironmonger Dec. ¶ 17; Exhibit I-3 thereto.

Finally, there is no evidence in the United States’ possession that the BIA performed any maintenance work on the Road. De Clerck Dec. ¶ 3. On the contrary, the Road is listed in the Official Indian Reservation Roads Program (“IRR”) Inventory as a County-owned road and, pursuant to regulation, the BIA can only expend maintenance funds on BIA-owned roads. *Id.*; Exhibit 1 thereto. Additionally, the Lower Elwha Tribe’s Article 628 Self-Governance and Road Maintenance Contracts were not effective until September 3, 2008, so the Tribe itself could not have expended Office of Self-Governance funds on the maintenance of the Road. *Id.*

## 6. Summary

The Lower Elwha Road is not and has not ever been the property of the United States. Ironmonger Dec. ¶ 9. Instead, the Lower Elwha Road was established as a County road beginning in the early 1900’s and continues to belong to and be maintained by Clallam County to the present. *Id.*

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## II. ARGUMENT AND AUTHORITY

### A. LEGAL STANDARDS

#### 1. Standards of Review

For purposes of deciding a motion to dismiss based upon either lack of subject matter jurisdiction or failure to state a claim, the allegations of the complaint are normally taken as true and all reasonable inferences are drawn in the plaintiff's favor. *Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Walleri v. Fed. Home Loan Bank*, 83 F.3d 1575, 1580 (9th Cir. 1996). The motion will be granted if it appears that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. *Hughes*, 449 U.S. at 10.

Under Fed. R. Civ. P. 12(b)(1), subject matter jurisdiction may be challenged at any time by the parties, by the Court *sua sponte*, or on appeal. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (court's power to hear a case can never be forfeited or waived). A federal court is presumed to lack subject matter jurisdiction until a plaintiff establishes otherwise. *Kikkonen v. Guardian Life Ins. Co. Of America*, 51 U.S. 375 (1994); *Stock West, inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Once jurisdiction is challenged, the plaintiff bears the burden of establishing jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Thornhill Publishing Co., Inc. v. Gen'l Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Furthermore, a plaintiff must establish jurisdiction by a preponderance of evidence and cannot rely merely upon allegations in the complaint, but must instead bring forth relevant competent proof to establish jurisdiction. *McNutt*, 298 U.S. at 189; *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-404 (9th Cir. 1996).

Specifically, claims must be dismissed under Rule 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the claims: (1) do not arise under the federal Constitution, law or treaties, or fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) do not constitute a "case or controversy" within the meaning of that section; or (3) are not claims described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F. Supp. 1062, 1063 (W.D. Wash. 1986).



1 When considering a motion to dismiss for lack of jurisdiction, the Court is not restricted  
 2 to the face of the pleadings, but may review any evidence to resolve factual disputes concerning  
 3 the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988, *cert.*  
 4 *denied*, 489 U.S. 1052 (1989); *Biotics Research Corp v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.  
 5 1983). Indeed, the Court may receive competent evidence such as declarations to determine  
 6 jurisdiction and, under Rule 12(b)(1), the receipt of such evidence does not convert a motion to  
 7 dismiss into one for summary judgment. *Kamen v. American Tele. & Telegraph Co.*, 791 F.2d  
 8 1006, 1010 (2d Cir. 1986).

9 Under Fed. R. Civ. P. 12(b)(6), a motion to dismiss should be granted if, after reviewing  
 10 the complaint in the light most favorable to the plaintiff, it appears that he or she can prove no  
 11 set of facts in support of the claims that would entitle him or her to relief. *SmileCare Dental*  
 12 *Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996); *Conley v.*  
 13 *Gibson*, 355 U.S. 41, 45-46 (1957); *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).  
 14 Furthermore, courts need not accept the truth of the inferences or conclusions that are  
 15 unsupported by allegations of specific facts. *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir.  
 16 1996).

## 17 2. Sovereign immunity under the FTCA.

18 The United States of America can be sued only to the extent that it has waived its  
 19 sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 813-814 (1976); *see also Valdez v.*  
 20 *United States*, 56 F.3d 1177, 1179 (9th Cir.1995). The FTCA's limited waiver of sovereign  
 21 immunity renders the United States vicariously liable to the same extent as a private party for  
 22 certain torts of federal employees acting within the scope of their employment, but expressly  
 23 restricts liability to "the law of the place where the act or omission occurred." 28 U.S.C. §§  
 24 2674, 1346(b). If no cause of action exists against private parties at common law, sovereign  
 25 immunity has not been waived and the case must be dismissed for lack of subject matter  
 26 jurisdiction. *See United States v. Olson*, 546 U.S. 43, 46-47 (2005) (allegations of negligence by  
 27 a private person must be analogous before duty may be imputed to government).

28 Under Washington State law, a plaintiff alleging negligence must prove (1) the existence

1 of a duty owed; (2) breach of duty; (3) causation; and (4) injury and/or damages. *Keller v. City*  
 2 *of Spokane*, 146 Wn.2d 237, 243 (2002); *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d  
 3 121 (1994). “Duty” is defined as “an obligation, to which the law will give recognition and  
 4 effect, to conform to a particular standard of conduct toward another.” *Transamerica Title Ins.*  
 5 *Co. v. Johnson*, 103 Wn.2d 409, 413 (1985) (citing *Prosser on Torts*, sec. 53, at p. 311 (3d. ed.  
 6 1964)). **The existence of a duty owed to a plaintiff is a question of law.** *Hertog v. City of*  
 7 *Seattle*, 138 Wn.2d 265, 275 (1999). A court lacks subject matter jurisdiction over a defendant if  
 8 a plaintiff fails to establish a defendant owed him or her a duty of care. *McCluskey v. Handorff-*  
 9 *Sherman*, 125 Wn.2d 1, 6 (1994) (action for negligence does not lie unless defendant owes a  
 10 duty of care to the plaintiff).

11 The ownership of roadways in Washington State and the duties that stem therefrom are  
 12 generally established through the possession and control of property. *See Gildon Simon*  
 13 *Property Group, Inc.*, 158 Wn.2d 483, 496 (2006) (citing Restatement (Second) of Torts, § 328E  
 14 (1965)). Once ownership is established, a landowner, in this case, a governmental entity, has a  
 15 legal duty “to build and maintain its roadways in a condition that is reasonably safe for ordinary  
 16 travel.” *Keller*, 146 Wn.2d at 249.

17 Here, the narrow legal issue to be decided is whether the United States owned or  
 18 maintained the Road and, thereby, owed Plaintiffs a duty to “build and/or maintain[] the Lower  
 19 Elwha River Road in Clallam County, Washington.” Tolliver Dkt. No. 2 at p. 2. As explained  
 20 below, the United States did not and, thus, does not.

21 **B. The United States Owes No Actionable Duty To Plaintiffs and, Thus, There**  
 22 **Is No Subject Matter Jurisdiction Under The FTCA.**

23 The United States neither owned nor maintained the relevant portion of the Lower Elwha  
 24 Road and, therefore, owed Plaintiffs no duty to make the Road “reasonably safe for ordinary  
 25 travel.” *Keller*, 146 Wn.2d at 249.

26 As reviewed in detail above, private landowners conveyed the majority of the Road to  
 27 Clallam County in 1914 and 1916 “for the use of the public forever,” as a public road and  
 28 highway. Ironmonger Dec. at ¶ 12; *see also* Exhibits A-A1, B-B1, & D thereto. Thereafter,

1 Clallam County, as the Road's new owner, petitioned to extend the Road the remaining way to  
 2 the River and, at a minimum, "established" prescriptive rights thereto. *See* Ironmonger Dec. at ¶  
 3 13; Exhibit C, E, & L. Moreover, all the evidence shows that the County's assertion of  
 4 ownership of the Road was recognized in future conveyances, from the 1930's to 1970's.  
 5 Ironmonger Dec. at ¶ 14; Exhibit F-F1 & G-G1 thereto; De Clerck Dec. ¶ 4; Exhibit 2 thereto.  
 6 Finally, Clallam County maintained the road beginning as early as the 1950's and continued to  
 7 do so through the 1990's. Ironmonger Dec. at ¶ 15; Exhibits G-2, H-H1, I2, J, & K thereto.  
 8 Indeed, a Clallam County document establishes that the Road is "maintained" by the County.  
 9 Ironmonger Dec. ¶ 17; Exhibit I-3 thereto.

10 Conversely, there is no evidence that the United States owned the Road and no evidence it  
 11 ever expended funds to maintain it. De Clerck Dec. ¶¶ 3-4. Indeed, there is every reason to  
 12 believe the United States' agency, the BIA, was prohibited from doing so. *Id.* ¶ 3.

13 Defendant respectfully submits that this evidence should compel this Court to find that,  
 14 as a matter of law, Clallam County, not the United States, owned and maintained the Lower  
 15 Elwha Road. In turn, the United States owed no duty to Plaintiffs to make the road safe for  
 16 travel in the first place. *See Gildon Simon Property Group, Inc.*, 158 Wn.2d at 496.  
 17 Accordingly, Defendant respectfully submits that this Court lacks jurisdiction to impose liability  
 18 on the United States for the accident that took the lives of Plaintiffs' decedents. *McCluskey*, 125  
 19 Wn.2d at 6.

### 20 **III. CONCLUSION**

21 For the foregoing reasons, the United States respectfully requests that the Court grant its  
 22 Motion and dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction over the United  
 23 States.

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1 DATED this 4th day of November, 2010.

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3 Respectfully submitted,

4 JENNY A. DURKAN  
5 United States Attorney

6 /s/ J. Michael Diaz

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

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I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via USPS mail, postage pre-paid.

- 0 -

DATED this 4th day of November, 2010.

/s/ Tina Litkie

TINA LITKIE

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