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United States of America and
U.S. Department of the Interior,
Bureau of Indian Affairs

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

DENNIS ROBINSON, SPENCER
ROBINSON, JR., RICKE ROBINSON,
CYNTHIA ROBINSON, VICKIE
ROBINSON,

Plaintiffs,

v.

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.

2:04-CV-00734-RRB-KJM

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THE
FEDERAL DEFENDANTS' MOTION TO
DISMISS**

Date: TBA

Time: TBA

Judge: The Honorable Ralph R. Beistline

The United States of America, as Trustee for the Indians of the Mooretown Rancheria, a/k/a Maidu Indians of California, and the Department of the Interior (hereafter "Federal Defendants") offer the following points and authorities in support of their Motion to Dismiss filed contemporaneously herewith.

I. INTRODUCTION

Plaintiffs Dennis, Spencer, Ricke, Cynthia and Vickie Robinson (hereafter “the Robinsons”) have brought this suit against the Federal Defendants seeking relief for a variety of state statutory and common law causes of action related to an easement. According to the Complaint, filed on April 13, 2004, the Robinsons have a 60-foot road and public utility easement over land owned by the Indians of the Mooretown Rancheria, a/k/a the Maidu Indians of California (hereafter “Tribe”). The specific part of the easement concerned in the lawsuit is a stretch of Alverda Road, which is the access road to the entrance of the Rancheria’s casino.

In 1997, the Tribe requested that the United States place certain roads on their land into the Bureau of Indian Affairs’ (hereafter “BIA”) road system. The BIA agreed, and the portion of Alverda Road which is directly in front of the main entrance to the Tribe’s casino was included and is now held in trust for the Rancheria by the United States. Placing the road in the BIA’s road system resulted in the BIA agreeing to maintain that portion of the road which was held in trust, but that obligation extends only so far as necessary to preserve the roadway and to provide services for the safe use of the road.

The Robinsons allege that, over the years, the Tribe has built structures which encroach on their easement, and has caused a deterioration of the road which it has failed to repair or maintain. It is the Robinsons’ position that, as the BIA has placed part of Alverda Road in its road system, the Federal Defendants are responsible for the actions of the Tribe, and is liable to them for damages and injunctive relief under the FTCA. Specifically, the Robinsons seek an injunction prohibiting the Federal Defendants from further encroachment and requiring the Federal Defendants to remove all current encroachments and repair all damage, and additionally they seek an award of damages, including punitive damages and attorney’s fees.

The Federal Defendants state that this Court is without jurisdiction to hear the Robinson’s claims, and that the relief they seek is not available under the Federal Tort Claims Act.

II. PROCEDURAL HISTORY

This Court granted the Federal Defendants first Motion to Dismiss, or for Summary Judgment, on the basis of the Indian Lands exception to the Quiet Title Act. [Docket No.52] The Robinsons

1 appealed that decision and in November 2009.¹ The Ninth Circuit Court of Appeals vacated the District
 2 Court's Order dismissing the case, and remanded for the determination of whether subject matter
 3 jurisdiction exists under the Federal Tort Claims Act (hereafter "FTCA"), 28 U.S.C. §1346(b)(1).²
 4 [Docket No. 62] This Court thereafter entered its Order giving the parties until May 2, 2010, within
 5 which to file their dispositive motions. [Docket No. 69] This motion followed.

6 III. STATEMENT OF FACTS

7 The Federal Defendants adopt the facts stated in the Complaint solely for purposes of their Motion
 8 to Dismiss. They reserve the right to contest these facts at any other time during the proceedings.

9 A. THE SUBJECT EASEMENT

10 The Robinsons own a non-exclusive, 60-foot easement over property owned by the Tribe, only
 11 a portion of which property is held in trust for the Tribe by the United States. [Complaint ¶ 1; Patel Decl.
 12 ¶¶ 2, 5, attached hereto as Exhibit 1 and by this reference incorporated herein] This easement is located
 13 on Alverda Road, in Butte County, California. [Exhibit 1, ¶ 2] The Robinsons' easement lies on several
 14 servient tenements. Parcel 2 is held in trust for the Tribe by the United States, with the exception of
 15 approximately five acres including the parking lot site. [Exhibit 1, ¶ 5] The portion of Parcel 2 not held
 16 by the United States in trust for the Tribe includes the area containing the bullnose, curb and walkway
 17 described in the Complaint. [Exhibit 1, ¶5] The remaining, dominant tenement, consisting of 360 acres,
 18 is owned by the Robinsons. [Complaint ¶ 11]

19 Alverda Road crosses land that is owned outright by the Tribe, as well as land held in trust by the
 20 United States. The portion of the Road which is held in trust by the United States has been part of the
 21 BIA Road System since 1997. [Exhibit 1, ¶ 2] The BIA's responsibilities for Alverda Road are limited
 22 to doing what is necessary to preserve the roadway and to provide services for the satisfactory and safe
 23 use of the road. [Exhibit 1, ¶ 3] The Robinsons do not claim that the United States or its employees
 24 actually constructed any of the alleged encroachments on their easement, or physically damaged the

25
 26 ¹ *Robinson v. United States*, 586 F.3d 683 (9th Cir. 2009).

27 ² Although there is no explicit mention of the FTCA in the Complaint, in subsequent
 28 pleadings the Robinsons have conceded that their only vehicle for suing the Federal Defendants
 is the FTCA. .

1 easement. [Complaint] Rather, they allege that the United States allowed the Tribe to do so, and failed
2 to remove the Tribe's improvements to its property so as to protect the easement.

3 **B. THE COMPLAINED OF ENCROACHMENTS AND DAMAGE**

4 At some point during the years 2001 to 2004, the Complaint states, the Tribe constructed a
5 parking lot "adjacent to the south edge" of the Robinsons' easement. [Complaint ¶ 20] In doing so, the
6 Tribe allegedly created an encroachment into the easement by a curb (referred to by the Robinsons as a
7 "bullnose") and a concrete walkway. [Complaint ¶¶ 20, 55] The encroachment is said to be
8 approximately 15 feet. [Complaint ¶¶ 20, 55] This parking lot, including the bullnose curb and walkway,
9 are all on land held in fee by the Tribe, and not part of the property held in trust for the Tribe by the
10 United States. [Exhibit 1, ¶ 5]

11 During that same time period, the Tribe allegedly removed "an offending fountain within the
12 center/northwest side of the easement." [Complaint ¶ 22] According to the Complaint, however, the
13 Tribe then installed "water valves and a power facility within the easement in the same area." [Complaint
14 ¶¶ 22, 56] Also during the same time period the Tribe installed "wrought iron fencing imbedded [sic]
15 in concrete adjacent to parking lots." [Complaint ¶¶ 24, 57] The Robinsons additionally allege that the
16 Tribe installed a fire hydrant within the easement. [Complaint ¶¶ 27, 58] They do not identify any time
17 period for this installation.

18 Finally, the Robinsons complain that the Tribe's construction has "caused a slope/slump on the
19 north side of the easement," and that the Tribe, in grading both its own land "and within the easement,"
20 removed support for the easement, causing the soil within the easement to wash out, fall and otherwise
21 subside from the easement. [Complaint ¶¶ 33, 34, 42, 46, 51, 54] It is the Robinsons' contention that
22 because of the Tribe's activity, they cannot repair the existing damage or take effective measures to
23 prevent further subsidence. [Complaint ¶¶ 36, 43]

24 **C. RELIEF SOUGHT**

25 In their Prayer, the Robinsons seek an Order of this Court enjoining the Federal Defendants from
26 further encroaching on their property, mandating the removal of all current encroachments and the
27 construction of a retaining wall to shore up the road, and awarding damages including statutory damages,
28

1 general damages, special damages and punitive damages “in an amount sufficient to make an example
2 of defendants.” [Complaint, Prayer] In addition, they ask for attorneys’ fees, litigation expenses and
3 costs.

4 As discussed below, they are not entitled to any relief herein.

5 **IV. LEGAL ARGUMENT**

6 This Court does not have jurisdiction to hear the claims the Robinsons asserted in their
7 Complaint, and the Federal Defendants are entitled to dismissal under Rule 12(b)(1). The Federal
8 Defendants are also entitled to dismissal of the Complaint because the Tribe is a necessary and
9 indispensable party which cannot be joined in the action. F.R.Civ.P. 19.

10 **A. STANDARD OF REVIEW**

11 Federal Rule of Civil Procedure 12(b)(1) governs the dismissal of claims for lack of subject matter
12 jurisdiction. Jurisdiction is a threshold issue that must be addressed before considering the merits. *Steele*
13 *Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-96 (1998).

14 “Federal courts are courts of limited jurisdiction. They possess only that power authorized by
15 Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause
16 lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party
17 asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673,
18 128 L.Ed.2d 391 (1994)(citations omitted); *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1250 (9th Cir.
19 2006).

20 “[N]o presumptive truthfulness attaches to plaintiff’s allegations.” *Robinson v. United States*, 586
21 F.3d 683 (9th Cir. 2009), quoting *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1195
22 (9th Cir. 2008)(internal quotation marks omitted). This Court may hear evidence with regard to
23 jurisdiction, and resolve any necessary factual issues. *Robinson*, 586 F.3d at 685, quoting *Augustine v.*
24 *United States*, 704 F.2d 1074, 1077 (9th Cir. 2008).

25 “Once challenged, the party asserting subject matter jurisdiction has the burden of proving its
26 existence.” *Robinson*, 586 F.3d at 685, quoting *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102 n.1 (9th
27 Cir. 2007). When jurisdiction is predicated on the FTCA, this burden includes showing a “negligent or
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wrongful act or omission of any *employee* of the Government while acting within the scope of his office or employment.” 28 U.S.C. §1346(b)(1); *United States v. Becker*, 378 F.2d 319, 321 (9th Cir. 1967) (emphasis added).

Where a court concludes that it lacks jurisdiction, it must dismiss the action without reaching the merits of the complaint. *See High Country Res. v. FERC*, 255 F.3d 741, 747 (9th Cir. 2001). The Court lacks jurisdiction in this case.

B. THERE IS NO SUBJECT MATTER JURISDICTION BECAUSE THE FEDERAL DEFENDANTS HAVE NOT WAIVED SOVEREIGN IMMUNITY

Plaintiffs cannot establish subject matter jurisdiction, because the Federal Defendants have sovereign immunity from suit under the asserted causes of action in the Complaint, and the FTCA does not constitute a waiver of that immunity.

1. Principles of Sovereign Immunity

“Sovereign immunity is an important limitation on the subject matter jurisdiction of federal courts. The United States, as sovereign, can only be sued to the extent it has waived its sovereign immunity.” *Vacek*, 447 F.3d at 1250, citing *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). *See also, Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087 n.2 (9th Cir. 2007). The Supreme Court “has frequently held” that a waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *Blue Fox*, 525 U.S. at 261. Absent a statutory waiver of sovereign immunity, an action against the United States must be dismissed. *Elias v. Connect*, 908 F.2d 521, 527 (9th Cir. 1990). Waivers of sovereign immunity cannot be implied, but must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). “The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity.” *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983).

2. Trust Relationship Between the United States and the Tribe

It is undisputed that the United States holds a portion of the servient tenement in trust for the Tribe. However, that relationship does not serve to waive the Federal Defendants’ sovereign immunity in this case.

The relationship between the United States and Indian tribes was first described as a ward-guardian relationship by the Supreme Court in *Cherokee Nation v. Georgia*, 8 L.Ed. 25 (1831). See F. Cohen, Handbook of Federal Indian Law 650 (1982 ed.)(hereafter “Cohen”). Despite the Court’s use of traditional trust language, however, “the federal-Indian relationship is unique and differs in important ways from the common law of guardianship.” Cohen, at 650-51. As part of this unique guardian-ward relationship, the Secretary of the Interior may take tribal land into trust for a tribe. See e.g. 25 U.S.C. §465; 25 C.F.R. §151.4 (stating that “[unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status”). The “trust” that is created, unless stated otherwise in accompanying regulations, does not include a duty to manage the land itself. See *White Mountain Apache Tribe*, 537 U.S.465, 473-75 (2003). The courts have found that such trusts impose “only a duty on the United States to hold the acquired Indian lands so as to prevent continued alienation.” *Hydaburg Co-op. Ass’n. v. United States*, 667 F.2d 64, 68 (Ct.Cl. 1981)(emphasis added). In this case, there is no additional duty on the part of the United States as trustee, and certainly no duty that runs to the Robinsons.

3. The FTCA Does Not Provide Subject Matter Jurisdiction in This Case

Initially it should be noted again that the Complaint does not reference the FTCA, and no specific cause of action under that statute has been brought. However, given the direction of the Ninth Circuit’s opinion, the Federal Defendants will discuss the inapplicability of the FTCA in the instant case.

The FTCA provides a limited waiver of sovereign immunity for certain tort claims based on the alleged negligence or wrongful act of government employees. 28 U.S.C. §1346(b); *Logue v. United States*, 412 U.S. 521 (1973). The FTCA waives sovereign immunity only for those actions falling within its scope. See 28 U.S.C. § 1346(b)(1). That waiver is expressly limited and must be strictly construed. *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006); *Cadwalder v. United States*, 45 F.3d 297, 300 (9th Cir. 1995). The FTCA requires a negligent act or omission by an employee of the United States. 28 U.S.C. §§ 1346(b), 2675(a). As no negligent act or omission by a federal employee has been alleged in the Complaint, Plaintiffs have failed to meet their burden of establishing a waiver of sovereign immunity.

1 The determination of whether an actor is or is not a federal employee is a matter of federal law,
2 not state law. *Hines v. United States*, 60 F.3d 1442, 1447 (9th Cir. 1995). The FTCA itself defines
3 “employee” as one employed by any federal agency or military/naval force (including Federal public
4 defender organizations except in certain circumstances) and persons acting on behalf of a federal agency
5 in the service of the United States. 28 U.S.C. §2671. The Complaint in this case is very clear that the
6 actions complained of were not taken by any employee of the United States, but by the Tribe. Hence, the
7 FTCA does not apply. *See, e.g., United States v. Enas*, 225 F.3d 662, 667 (9th Cir. 2001)(tribes do not
8 act as arms of the federal government when acting within their inherent sovereignty).

9 Nor does the trust relationship between the United States and the Tribe suffice to confer
10 jurisdiction under the FTCA. As stated hereinabove, this trust relationship is unique and does not
11 impose traditional obligations on the trustee, the United States. The only obligation of the United States
12 is to protect the land held in trust from alienation. However, even if this case was analyzed under
13 traditional trust principles, the FTCA would not apply.

14 Under the FTCA, the United States is liable in tort in the same manner and to the same extent as
15 a private individual under like circumstances. 28 U.S.C. §2674 The law of the state where the alleged
16 negligent acts or omissions occurred governs the existence of the underlying cause of action. 28 U.S.C.
17 §1346(b); *Richards v. United States*, 369 U.S. 1, 6-10 (1962); *Yako v. United States*, 891 F.2d 738, 745
18 (9th Cir. 1989). Under California law, even if there were a traditional trust relationship between the
19 United States and the Tribe, there would be no duty running from the United States to these plaintiffs;
20 rather, as trustee the United States would have “a duty to administer the trust solely in the interest of the
21 beneficiaries.” Cal. Prob. Code §16002. More importantly, the “trustee is personally liable for torts
22 committed in the administration of the trust only if the trustee is personally at fault.” Cal. Prob. Code
23 § 18002. *See also* Cal. Prob. Code § 18001 (the trustee is personally liable for obligations arising from
24 ownership or control of trust property only if the trustee is personally at fault). “Personally at fault”
25 requires a showing of intentional or negligent conduct on the part of the trustee. *Hackett v. Villas at*
26 *Desert Falls*, 90 Cal. App.4th 864, 878,(Cal. App. 4 Dist. 2001) Nothing in the relevant California law
27 impose a duty on trustees to third parties for the acts of the trust’s beneficiaries. If the United States were
28

1 a private individual, it would not be liable to the Robinsons in tort, and therefore the FTCA does not
2 apply.

3
4 **C. THERE IS NO SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS
DID NOT EXHAUST ADMINISTRATIVE REMEDIES UNDER THE FTCA**

5 The Robinsons have failed to exhaust their administrative remedies as required by the FTCA, and
6 this Court therefore has no jurisdiction to hear their claims herein.

7 No suit may be maintained under the FTCA in the absence of filing an administrative claim. 28
8 U.S.C. §2675. This requirement is jurisdictional and cannot be waived by the Government. *Caton v.*
9 *U.S.*, 495 F.2d 635 (9th Cir. 1974). “With regard to the exhaustion requirement, the Supreme Court has
10 stated that ‘in the long run, experience teaches that strict adherence to the procedural requirements
11 specified by the legislature is the best guarantee of even-handed administration of the law.’” *Vacek v.*
12 *U.S. Postal Service*, 447 F.3d 1248, 1250-1251 (9th Cir. 2006), *quoting McNeil v. United States*, 508 U.S.
13 106, 113 (1993), *quoting Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

14 If there are multiple claimants in an FTCA action, “each claimant must individually satisfy the
15 jurisdictional prerequisite of filing a proper claim, unless another is legally entitled to assert such a claim
16 on their behalf.” *Muth v. U.S.*, 1 F.3d 246, 249 (4th Cir. 1993) (quotation omitted). A claim is deemed
17 presented for purposes of §2675(a) when a party files “(1) a written statement sufficiently describing the
18 injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.” *Blair*
19 *v. Internal Revenue Service*, 304 F.3d 861, 864 (9th Cir. 2002), citing *Warren v. United States Dep’t of*
20 *Interior Bureau of Land Mgmt.*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc).

21 In this case an Administrative claim was filed by Dennis Robinson. [Administrative Tort Claim
22 attached hereto as Exhibit 2 and by this reference incorporated herein] Thus, certainly with regard to any
23 Plaintiff other than Dennis Robinson, administrative remedies have not been exhausted.

24 With regard to Dennis Robinson’s claim, the Complaint does not make it clear that it was filed
25 in a timely fashion. There is a two-year statute of limitations for filing an administrative claim under the
26 FTCA which is jurisdictional and cannot be waived. *Kontrick v. Ryan*, 540 U.S. 443, 453 n.8 (2004);
27 *U.S. v. Kubrick*, 444 U.S. 111, 117-118 (1979). *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir.

1959). The administrative claim states that it was signed on June 23, 2003. There is no allegation in the Complaint from which we can derive the date on which it was filed with BIA. Even more problematic, the Robinsons have failed to set out in their Complaint the dates on which the acts and/or omissions complained of allegedly occurred. In paragraph 20 of the Complaint they state that the parking lot construction was built “within the last three years.” [Complaint, ¶ 20] The Complaint was filed on April 13, 2004. Any acts or omissions occurring prior to two years preceding the date of receipt of the Administrative Claim by the BIA (presumably after June 23, 2003) are time-barred. The plain language of the Complaint contemplates that, indeed, some or all of the encroachments and damage complained of could have occurred during that period.

It is the Robinsons burden to plead sufficient facts to enable the Court to determine there is subject matter jurisdiction. They have failed to do so. The Complaint should be dismissed.

D. THE TRIBE IS AN INDISPENSABLE PARTY

All of the allegations in the Complaint depend on the acts or omissions of the Tribe. Some of the encroachments and damage alleged by Plaintiffs have occurred on land held in fee by the Tribe, and not part of the trust property. It is clear that the Tribe is an indispensable party to this litigation, without whom the litigation cannot proceed.

Under Fed.R.Civ.P. 19 the Court conducts a two-step analysis to determine whether or not an absent party must be joined in an action, and whether the case must be dismissed if the party cannot be joined. *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996). First the Court determines if the absent party is “necessary.” If so, and if that party cannot be joined, the Court must then assess “whether the party is ‘indispensable’ so that in equity and good conscience the suit should be dismissed.” Fed.R.Civ.P. 19(b); *Kescoli, supra*; *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

1. The Tribe is a Necessary Party

To determine if an absent party is necessary, “[f]irst, the court must consider if complete relief is possible among those parties already in the action. Second, the court must consider whether the absent party has a legally protected interest in the outcome of the action.” *Confederated Tribes of Chehalis*

1 *Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); Fed. R.Civ.P. 19(a)(1) & (2). Meeting
 2 *either* of these two conditions satisfies Rule 19(a). Clearly in this case the Tribe is a necessary party to
 3 the suit. All of the actions complained of are attributed to the Tribe. Additionally, at least some of the
 4 relief sought is with regard to encroachments which are situated, in whole or in part, on land owned by
 5 the Tribe in fee, and not within the trust. Complete relief is not possible among those parties already in
 6 the action.

7 Secondly, the Tribe has a legally protected interest in the outcome of the suit. Plaintiffs demand
 8 the removal of structures on tribal land including walkways, fencing, curbs, a fire hydrant, and water
 9 valves and power boxes on which the Tribe relies for security and the delivery of utilities. Additionally,
 10 the outcome of this lawsuit may affect the Tribe's sovereignty, and its right to self-governance and self-
 11 determination – important legal interests. *See, Confederated Tribes, supra*, and *Pit River Home & Agr.*
 12 *Coop. Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994).

13 Federally recognized Indian tribes, as “quasi-sovereign nation[s],” are accorded sovereign
 14 immunity and cannot be sued absent tribal consent or congressional consent. *Lomayaktewa v. Hathaway*,
 15 520 F.2d 1324, 1326 (9th Cir. 1975). There is no allegation in the Complaint that the Tribe has consented
 16 to be sued, nor is there any statutory or other legal authority cited therein for that proposition.

17 The Tribe is a necessary party and cannot be joined in the lawsuit, so the Court must proceed to
 18 the second step in the analysis, whether or not the Tribe is an “indispensable” party.

19 **2. The Tribe is an Indispensable Party**

20 The Tribe is also an indispensable party to the suit. Courts apply Rule 19(b)'s four-part test to
 21 determine whether Indian tribes are indispensable parties. *Quileute Indian Tribe*, 18 F.3d at 1461;
 22 *Confederated Tribes*, 928 F.2d at 1499. That test requires the following factors to be considered: (1)
 23 prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen prejudice; (3)
 24 whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4)
 25 whether an alternative forum exists. When the first two factors heavily outweigh a finding of
 26 indispensability, they outweigh the third and fourth factors, and the Tribe may be found to be
 27 indispensable. *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992).

1 A party will suffer prejudice where that party has legal interests that render it a necessary party
 2 to the action. *Confederated Tribes*, 928 F.2d at 1499 (noting that the prejudice test is essentially the same
 3 as the legal interest test); *Quileute Indian Tribe*, 18 F.3d at 1460. As discussed above, the Tribe has
 4 important legal interests which would be affected by the outcome of this litigation. Nor is there any relief
 5 that can be shaped to lessen any prejudice to the Tribe. The relief sought by Plaintiffs would require
 6 removal of utility equipment, removal of safety structures, and alteration of land management techniques,
 7 all of which would impact tribal sovereignty.

8 No adequate remedy can be awarded without the Tribe, as many of the structures and damage
 9 complained of are not on trust property, and in any event any judgment would be unenforceable as against
 10 the Tribe due to tribal sovereign immunity. *Rosales v. United States*, 89 Fed.Cl. 565, 586 (2009)(Indian
 11 tribe an indispensable party who cannot be joined without its consent in a dispute concerning land held
 12 in trust by United States, and dismissal was appropriate).

13 Finally, although no alternative forum exists, the lack of an alternative forum is not determinative
 14 in the Rule 19(b) analysis. *See Shermoen*, 982 F.2d at 1319 (affirming the district court's finding of
 15 indispensable party even though it would leave the plaintiff without a forum).

16 The Tribe is a necessary and indispensable party without whom the lawsuit cannot go forward.
 17 Therefore, this action should be dismissed.

18 **E. THE DEPARTMENT OF THE INTERIOR IS AN IMPROPER PARTY**
 19 **DEFENDANT AND SHOULD BE DISMISSED**

20 Plaintiffs have named as a party herein the Department of the Interior, Bureau of Indian Affairs.
 21 Under the FTCA the only proper defendant is the United States. *Lance v. United States*, 70 F.3d 1093,
 22 1095 (9th Cir. 1995). Federal agencies cannot be sued in tort. *See FDIC v. Meyer*, 510 U.S. 471, 476
 23 (1994); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188 (9th Cir. 1998)
 24 (“Congress did not expressly authorize suits against federal agencies under the Federal Tort Claims Act”).
 25 The Department of the Interior, Bureau of Indian Affairs should be dismissed.

26 **F. THE RELIEF SOUGHT IS NOT AVAILABLE UNDER THE FTCA**

27 Even if this Court had jurisdiction, and Plaintiff had stated a cause of action in his Complaint, his
 28 damages claims must be limited by the remedies available under the FTCA. The Robinsons seek

injunctive relief and punitive damages. [Complaint, Prayer] This relief is not available under the FTCA. There is no liability under the FTCA for equitable relief, or for punitive damages. 28 U.S.C. §§ 1346(b), 2674.

IV. CONCLUSION

This action should be dismissed, in its entirety, with prejudice, as there is no subject matter jurisdiction to proceed, and the Tribe is an indispensable party that cannot be joined.

Dated: May 3, 2010

Respectfully submitted,
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United States Attorney

By: /s/ J. Earlene Gordon
J. EARLENE GORDON
Assistant U.S. Attorney