BENJAMIN B. WAGNER
United States Attorney
J. EARLENE GORDON
Assistant U. S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2991

Attorneys for Defendants
United States of America

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,

Defendants.

2:11-cv-01227-MCE-CMK

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Date: August 25, 2011
Time: 2:00 p.m.
Judge: The Honorable Morrison C. England, Jr.
Courtroom: 7

The United States of America, as Trustee for the Indians of the Mooretown Rancheria, a/k/a Maidu Indians of California offers the following Reply to Plaintiffs' Memorandum of Points and Authorities in Opposition to the USA'S Motion to Dismiss (hereafter "Opposition").

I. THIS CASE IS DUPLICATIVE

This lawsuit is duplicative of the case currently pending before Judge Beistline. Plaintiffs could point to only four paragraphs in their Complaint which they allege differ in some respect from the already pending action, paragraphs 27 and 43 - 45. [Opposition, p. 7:9] They state that those

///

paragraphs mention the Tribe's addition of a hotel on the trust property, which have created new encroachments on the easement.

First, as the United States points out in its Memorandum of Points and Authorities in Support of its Motion to Dismiss (hereafter "Memorandum"), the hotel was included in Plaintiffs' Amended Complaint, filed in the Judge Beistline action, and further action with regard to the hotel could have been taken in that lawsuit. [*Dennis Robinson, et al. v. USA*, Case No. 2:04-CV-00734-RRB-DAD, filed on April 12, 2004 Doc. 85, ¶ 43(e)]

Second, if the Robinsons are pinning their argument to the paragraphs including the hotel, under California law their cause of action must be one for a permanent nuisance, not a continuing one. "Where a nuisance is of such a character that it will presumably continue indefinitely, it is considered permanent, and the limitations period runs from the time the nuisance is created. (*Phillips v. City of Pasadena*, (1945) 27 Cal.2d 104, 107, 162 P.2d 625.)" *Bookout v. State ex rel. Dept. Of Transp.*, (2010) 186 Cal. App. 4th 1478, 1489, 113 Cal. Rptr. 356, 364. In *Bookout* the Court found that the construction of a rail bed and culvert pipe was a permanent, not a continuing nuisance. "Our Supreme Court has stated, 'The cases finding the nuisance complained of to be unquestionably permanent in nature have involved solid structures, such as a building encroaching on plaintiff's land.' (*Baker v. Burbank - Glendale - Pasadena Airport Auth.*, (1985) 39 Cal.3d 862, 869, 218 Cal.Rptr. 293, 705 P.2d 866." The hotel referred to by Plaintiffs herein is just such a structure.

Third, the case law relied upon by Plaintiffs allows *successive* actions for a continuing nuisance, not multiple concurrent actions. [Opposition, p. 8:5-6] And even where successive actions may be allowed by California law for a continuing nuisance, "an action based on the original wrong may be barred." *Bookout*, 186 Cal. App.4th at 1489, citing *Phillips*, 27 Cal.2d at 107-108. As discussed in the USA's Memorandum, this lawsuit seeks redress for the same, or original, wrongs which are being addressed by Judge Beistline in the earlier action.

Plaintiffs have cited no authority for the proposition that they can bring the *same* claims in two concurrent lawsuits, whether or not they are filed in the same district court. The dangers of inconsistent rulings, the totally unnecessary time and expense incurred by both parties, and the

///

unnecessary burden on the Court's time and resources necessitates the dismissal of this duplicative action.

II. SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED

Plaintiffs make the same arguments in this lawsuit that they have raised in the Judge Beistline case. It is their position that under California trust law the United States has a duty to Plaintiffs which was breached when the Bureau of Land Management (hereafter "BLM") failed to stop the Indians of the Mooretown Rancheria, a/k/a Maidu Indians of California (hereafter "Tribe") from making improvements on trust property which encroached on the subject easement. As addressed at great length by Judge Beistline in the case pending before him, California trust law does not apply in this situation. In his Order dismissing the original complaint in the action before him, Judge Beistline stated, "Robinson's principal argument is based upon an allegation that the United States 'knowingly and intentionally approved or has since supported the Tribes construction of improvements and related activities that have damaged or interfered with the easement.'" [Doc. 84, p 9] After an extensive discussion of the nature of the trust relationship between the United States and the Tribe, he went on to state,

> To the extent that Robinson relies on the California Probate Code, that reliance is misplaced. Under the FTCA, California law defines what acts are tortious within the scope of the FTCA, i.e., those claims that are generally cognizable under the FTCA. In the sovereign immunity context, however, state law is inapposite. It is axiomatic that no state has the power to waive the sovereign immunity of the United States – only Congress has that authority. The trust relationship between the United States and Indian tribes was created, and is controlled, by federal law. Thus, the duties, responsibilities, and liabilities of the United States as the trustee of Indian lands are defined by federal, not state, law.

(internal cites omitted). [*Dennis Robinson, et al. v. USA*, Case No. 2:04-CV-00734-RRB-DAD, Doc. 84, p. 18] Judge Beistline went on to say,

> In this case, Robinson has not identified any specific statute or regulation that imposes a duty or liability on the United States in cases, such as this, where the management and use of the property constituting the corpus of the trust is vested in the Tribe, and the United States exercises solely supervisory authority. In the absence of such statutory or regulatory authority, it would be incongruous for the court to hold that the United States has a greater obligation to third parties than it does to the beneficiary, for those benefit the trust exists. It would also be incongruous for the court to hold that the United States has waived its sovereign immunity against suits brought by third parties in cases where, if the beneficiary were the plaintiff, sovereign immunity was not waived.

Dennis Robinson, et al. v. USA, Case No. 2:04-CV-00734-RRB-DAD, Doc. 84, p. 18]

Plaintiffs have still failed to cite to any regulation or statute compelling the government to approve the Tribe's construction plans, or giving them the authority to direct the Tribe's activities, or the power to halt any of the Tribe's activities.

It is clear that Plaintiffs are frustrated by Judge Beistline's ruling that they cannot rely on the California Probate Code to bring their cause of action under the FTCA in this case. The appropriate remedy, however, is not to attempt to find another district judge whose opinion will differ from Judge Beistline on this (and other) issue(s) in the case, but at the appropriate time to file their appeal with the Ninth Circuit Court of Appeals and have the matter determined there.

III. THE COMPLAINT DOES NOT PROPERLY ALLEGE EXHAUSTION

Plaintiffs again argue that they are suffering a continuing nuisance, and that this excuses them from two year limitations period for filing an administrative claim under the FTCA. And again, they argue that, because they can bring *successive* actions for a continuing nuisance, their administrative claim(s) were timely. As discussed above, under Plaintiffs own characterization of their "new" claims, they do not have a cause of action for "continuing" nuisance. Additionally, they have not brought a successive claim, they have brought a concurrent claim, and have cited no authority which would give them a right to do so.

IV. THE TRIBE IS AN INDISPENSABLE PARTY

Plaintiffs appear to concede that, with regard to any injunctive relief requested, e.g. the removal of the alleged encroachments, the Tribe is an indispensable party. The wording of the Complaint, however, demonstrates that it is clear the main thrust of the relief requested is the removal of the problem, and forward-looking injunctive and declaratory relief that impacts the sovereign rights of the Tribe. As long as any potential relief requested would result in such an impact, the Tribe is an indispensable party to this suit.

V. CONCLUSION

This suit is clearly duplicative of the one currently pending before Judge Beistline, and is a blatant attempt to "judge shop" in the hope of finding a district court judge whose opinions will differ from those of Judge Beistline. The facts and arguments raised by Plaintiffs mirror those raised in the other suit, all of which have already been addressed in that suit. This lawsuit should be dismissed,

and Plaintiffs should be compelled to proceed with their original case, and follow the procedures for relief from Judge Beistline's opinions and orders that are afforded under the Federal Rules of Civil and Appellate Procedure.

Respectfully submitted,

Dated: August 15, 2011

BENJAMIN B. WAGNER
United States Attorney

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