

1 Plaintiff Quechan Indian Tribe (“Plaintiff” or “Tribe”) sues the United States for alleged
2 impacts to cultural sites during a transmission line pole replacement project in 1998 and 1999 by
3 the Department of Energy’s Western Area Power Administration (“Western”). The sites at issue
4 are located within and outside the boundaries of a 100 foot transmission line right-of-way and a
5 50 foot access road right-of-way that transects the Fort Yuma (Quechan) reservation. *Quechan*
6 *Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1083 (S.D. Cal. 2008) (the “Order”).

7 **I. This Court Has Jurisdiction Over Plaintiff’s Claims Solely Under the Federal Tort**
8 **Claims Act.**

9 This Court has acknowledged that federal courts are of “limited jurisdiction,” and that a
10 “federal court cannot reach the merits of any dispute until it confirms its own subject matter
11 jurisdiction.” (Dk. no. 261 (Order Denying Motion to Dismiss and Denying Motion for
12 Clarification, Construed as a Motion for Reconsideration (“Sept. 29, 2010 Order”), at 3:4-7,
13 citing *Gould v. Mutual Life Ins. Co. v. New York*, 790 F.2d 769, 774 (9th Cir. 1986) and *Steel Co.*
14 *v. Citizens for a Better Environ.*, 523 U.S. 83, 93 (1998).). The Court stated:

15 Under the Federal Tort Claims Act (“FTCA”), the United States may be sued in a
16 tort action for injury or loss of property caused by a government employee “if a
17 private person would be liable to the claimant in accordance with the law of the
18 place where the act or omission occurred.” 28 U.S.C. § 1346(b).
19 (Sept. 29, 2010 Order at 3:7-10; *see also* Order at 1083 (Plaintiff’s claims arise under 28 U.S.C.
20 § 2674 (liability of the United States under the FTCA); Order at 1087 (“Plaintiff maintains this
21 action is not a breach of trust case brought in the Court of Federal Claims, but is an action
22 brought pursuant to the FTCA for negligence.”) The only basis for jurisdiction over Plaintiff’s
23 claims is under the FTCA. The FTCA jurisdictional provision limits a federal court’s
24 jurisdiction against the United States to tort claims “for injury or loss of property.”¹ *Idaho v.*
25 *United States Dept. of Army*, 666 F.2d 444, 446 (9th Cir. 1982) (Because there was no “injury or
26 loss of property,” the “district court lacked subject matter jurisdiction.”); *California v. United*

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28 ¹ The FTCA also includes a waiver of sovereign immunity for claims of personal injury or death, which are not issue in this case. *See* 28 U.S.C. § 1346(b)(1).

1 *States*, 307 F.2d 941, 944 (9th Cir. 1962) (liability under the FTCA “must be restricted to the
2 jurisdictional provisions of the statute”); *Charles Burton Builders, Inc. v. United States*, 789 F.
3 Supp. 160, 162 (D. Md. 1991) (“The parties, and the Court, have found only a few precedents
4 defining the term ‘injury or loss of property.’ While none is precisely on point, all indicate that
5 in order to be covered by the FTCA there must have been a physical impact of some type on the
6 plaintiff or its property.”).²

7 The Tribe, however, continues to assert subject matter jurisdiction under 28 U.S.C.
8 §§ 1331 and 1362 “because this is an action brought by an Indian tribe with a governing body
9 recognized by the Secretary of the Interior wherein the matter in controversy arises under the
10 federal laws of the United States.” (See dk. no. 285 (Pretrial Order at 2:24-27).) A party
11 asserting a claim against the United States has the burden of “demonstrating an unequivocal
12 waiver of immunity.” *United States v. Park Place Associates, Ltd.* 563 F.3d 907 (9th Cir. 2009);
13 *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir.1986). Here, the Tribe fails to meet
14 that burden.

15 Neither § 1331 nor § 1362 constitute a waiver of sovereign immunity. (See Order at
16 1101 (the United States is immune from suit absent any waiver).) As to § 1331, the Ninth
17 Circuit has explained that “28 U.S.C. § 1331 grants district courts original jurisdiction over ‘all
18 civil actions arising under the Constitution, laws or treaties of the United States,’ **but it does not**
19 **waive sovereign immunity.**” *Park Place Associates, Ltd.*, 563 F.3d at 924 (emphasis added).
20 Similarly, the Ninth Circuit recognizes that § 1362 does not include a waiver of sovereign
21 immunity. *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970) (“Nothing on the face
22 of section 1362 indicates an intention by Congress to waive sovereign immunity, and we know
23 nothing in its legislative history to suggest such a purpose.”); *Rosebud Sioux Tribe v. United*
24 *States*, 714 F. Supp. 1546, 1553 (D. S.D. 1989) (“Section 1362, however, is not a waiver of
25 sovereign immunity for money damages in a suit against the United States.”); see also *Moe v.*
26 *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-73 (1976) (purpose of § 1362 was
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28 ² During the discovery phase, the Tribe voluntarily dismissed its intentional infliction of
emotional distress claim. (See dk. no. 40.) Therefore, only property issues remain.

1 to open federal courts to the kind of claims which could have been brought by the United States
2 as a trustee on behalf of Indian tribes but which, for whatever reason, were not brought).

3 The only basis for federal jurisdiction over Plaintiff's claims is under 28 U.S.C.
4 § 1346(b), which confers "exclusive jurisdiction of civil actions on claims against the United
5 States, for money damages" due to alleged "injury or loss of property." *F.D.I.C. v. Meyer*, 510
6 U.S. 471, 476 (1994) (money damages under § 1346(b) "shall be exclusive"); *DSI Corp. v.*
7 *Secretary of Housing and Urban Development*, 594 F.2d 177, 180 (9th Cir. 1979) ("Tort claims
8 against the United States are exclusively cognizable under the Federal Tort Claims Act, 28
9 U.S.C. §§ 1346(b), 2679(a)."). The United States, therefore, respectfully requests that the Court
10 rule that the only jurisdictional basis for the Tribe's claims is the FTCA.³

11 **II. Because Jurisdiction is Exclusive Under the FTCA, Plaintiff Must Prove that the**
12 **United States is Liable for Damage to Tribal Land.**

13 In its Order, the Court unequivocally held that the United States owned title to the right-
14 of-way lands in fee simple absolute, not held in trust for the Tribe. (Order at 1091-92.) The
15 Court also ruled that Plaintiff did not have a right to "use or access cultural property held in fee
16 by the federal government." (*Id.* at 1099-1100.) The Court has since reiterated its ruling that
17 "the government owned the land in fee simple and Plaintiff had no proprietary interest in the
18 right-of-way lands." (Sept. 29, 2010 Order at 3:23-25.) The Court nevertheless denied the

19 ³ The misrepresentation and deceit exception to the FTCA deprives federal courts of
20 jurisdiction over tort claims against the United States based on alleged reliance on governmental
21 misinformation or failure to communicate correct information. 28 U.S.C. § 2680(h); *United*
22 *States v. Neustadt*, 366 U.S. 696, 705-06 (1961); *Block v. Neal*, 460 U.S. 289, 297 (1983). The
23 exception encompasses negligent as well as deliberate misrepresentation. *Neustadt*, 366 U.S. at
24 702, 704. It applies equally to affirmative or implied misstatements and negligent omissions.
25 *Green v. United States*, 629 F.2d 581, 584 (9th Cir. 1980); *City and County of San Francisco v.*
26 *United States*, 615 F.2d 498, 504-05 (9th Cir. 1980). The fact that federal employees may be
27 under a specific statutory or regulatory duty to provide the information does not render the
28 exception inapplicable. *Neustadt*, 366 U.S. at 710-11; *Green*, 629 F.2d at 584. To the extent that
Plaintiff's claims against the United States are based on Western's alleged failure to comply with
its representations, these claims are barred under the misrepresentation exception to the FTCA.
See Dalehite v. United States, 346 U.S. 15, 24 (1953); *Jablonski v. United States*, 712 F.2d 391,
395 (9th Cir. 1983). This defense is jurisdictional and can be raised at any point in the
proceedings. *Jablonski*, 712 F.2d at 395.

1 United States' motion that it could not be held liable for alleged impacts to the right-of-way
2 lands, ruling that resolution of this issue must await trial and the presentation of evidence. (*Id.* at
3 n. 1.) In opposing the United States' motion, Plaintiff maintained that "it will establish, through
4 evidence and expert testimony, the tortious acts within the right-of-way damaged the cultural
5 resources as a whole, that is, both inside and outside the right-of-way lands within the
6 Reservation." (*Id.* at 3:15-19.) The Court held that, at trial, Plaintiff must prove that "the
7 government's conduct within the right-of-way lands impacted its property rights to lands outside
8 the right-of-way."⁴ (*Id.* at 3:28-4:2.)

9 Therefore, liability against the United States turns first on whether Western was
10 responsible for the alleged impact and second on whether the alleged impact is within or outside
11 of Western's right-of-way lands. If Plaintiff is attempting to recover for impacts within
12 Western's right-of-way lands, liability turns on a third test: whether Plaintiff can prove that
13 Western's impacts within Western's right-of-law lands affected the Tribe's own property. These
14 tests provide the context for the following more specific points.

15 **A. To Prevail On Its Trespass Claim, Plaintiff Must Show Western Impacts Outside**
16 **of the United States' Right-of-Way Lands.**

17 Under trespass, the Tribe must prove that impacts on its lands outside of the United
18 States' right-of-way lands were created by Western during the pole replacement project. (*See*
19 *Order* at 1123 ("The Court has dismissed the trespass claims as to lands within the right-of-way.
20 Accordingly, only the trespass claims as to the land outside the right-of-ways remain.")). The
21 report commissioned by Western in 1994 prior to the commencement of the pole replacement
22 project, known as the WCRM Report, found that there were already numerous impacts to the
23 sites:

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25 ⁴ Plaintiff has previously argued that its claim for damages includes those portions that fall
26 within the right-of-way lands because they have cultural, religious, and spiritual significance to
27 the Tribe. (Dk. no. 249 (Opp. at 11:6-16).) This argument has been rejected by the United
28 States Supreme Court, and cannot be a basis for conferring liability against the United States.
Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 453 (1988) ("Whatever
rights the Indians may have to the use of the area, however, those rights do not divest the
Government of its right to use what is, after all, *its* land.") (emphasis in original).

1 Potential project-related impacts to archaeological sites along the transmission
2 line are from structure replacement, road blading, or other maintenance-related
3 activities. There are also a number of other, non-Western, causes of impact to
4 these sites. Easy access to sites by off-road vehicles (ORV) and others presents
5 more than a potential threat to site preservation and account for a great deal of the
6 ground disturbance observed west of the All-American Canal.

7 Given that there had been significant disturbances to the area before Western even began
8 its pole replacement project and that other disturbances appear not to have been Western's, the
9 Tribe may not be able to meet its burden of proof. Although Western alerted the Tribe promptly
10 in early 1999 when a Western employee discovered the damage, the Tribe relies on field visits
11 by experts who did not visit the sites until four and ten years thereafter.

12 **B. The United States Is Liable Only as to Sites 7140, 7147, 7138 and 689 Outside of**
13 **the Right-of-Way Lands.**

14 As the Court has found, Western discovered damage to a lithic scatter and two sleeping
15 circles during the pole replacement project on February 22, 1999, and notified the Tribe on
16 March 2, 1999. (Order at 1119.) Western thereafter retained URS to conduct a field evaluation
17 of the 10 sites eligible for inclusion in the National Register. (*Id.*) The URS report found
18 “significant impact to site 7140 and small impacts to 7147, 7138, and 689.” (*Id.*) Based on the
19 URS’ findings, the Court found the United States negligent as to these sites. (*Id.* at 1120.) In the
20 Court’s ruling, however, the Court did not make a determination of whether the impacts were
21 within or outside the United States’ right-of-way lands, leaving that determination for trial. The
22 United States maintains that under the FTCA, it can only be liable for those impacts outside of
23 the right-of-way lands if Plaintiff can prove that impacts within the right-of-way affected its
24 property. Plaintiff cannot meet this burden under a nuisance theory.

25 **C. Plaintiff Cannot Maintain Its Nuisance Claim as to Impacts Within the United**
26 **States’ Right-of-Way Lands.**

27 The only harm Plaintiff alleges is of “disturbances” to the ground under the transmission
28 lines, both inside and outside of the right-of-way lands. (*See* SAC at ¶ 109a-h; Order at 1083

1 (“Specifically, Plaintiff alleges Western employees knowingly drove vehicles over and
2 permanently scarred numerous cultural sites . . . along the Gila-Knob powerline.”). The United
3 States maintains that Plaintiff cannot maintain its nuisance claim as to the lands within the right-
4 of-way lands because Plaintiff cannot prove that the United States physically interfered with its
5 property or its use and enjoyment of its property.

6 First, Plaintiff cannot prove that any alleged impacts on the United States’ lands caused
7 an actual physical interference with Plaintiff’s property. See *Lane v. San Diego Elec. Ry. Co.*,
8 208 Cal. 29, 33-34 (1929) (obstruction abutting owner’s access to street); *Turlock v. Bristow*, 103
9 Cal. App. 750, 755 (1930) (pollution of water in stream or irrigation ditch); *Ambrosini v. Alisal*
10 *Sanitary Dist.*, 154 Cal. App. 2d 720, 725-26 (1957) (overflow of sewage); *KFC Western v.*
11 *Meghrig*, 23 Cal. App. 4th 1167, 1181 (1994) (soil contamination from operation of gas station);
12 *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, 100 Cal. App. 4th 550, 559 (2002) (failure to
13 contain irrigation); *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 911 (1996)
14 (“high and unreasonably dangerous levels of electromagnetic radiation” were emitted onto
15 plaintiff’s property); *Eaton v. Klimm*, 217 Cal. 362, 368 (1933) (smoke from asphalt mixing
16 plant); *Varjadbedian v. Madera*, 20 Cal. 3d 285, 293 (1977) (odor from sewage plant); *Miles v.*
17 *A. Arena & Co.*, 23 Cal. App. 2d 680, 684-85 (1937) (poisonous dust floating from melon field
18 to nearby apiary killing bees); *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 232 (1982) (noise
19 from field plant).

20 Further, where the damage is contained on the owner’s land, it cannot create a nuisance
21 to an adjoining property owner. *Beck Dev. Co. v. Southern Pac. Trans. Co.*, 44 Cal. App. 4th
22 1160, 1214 (1996) (oil contamination beneath developer’s property was not a public nuisance
23 because it did not invade other properties). The land and cultural features at issue in this case are
24 static. They cannot encroach upon another’s land. Even if the Tribe objected to the physical
25 appearance of the alleged impacts on the United States’ land, such objection cannot form the
26 basis of a nuisance claim. *Oliver v. AT&T Wireless Services*, 76 Cal. App. 4th 521, 534-35
27 (1999) (landowner’s allegation that an otherwise legal cellular telephone transmission line,
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1 erected on adjacent property, had a displeasing appearance could not be the basis of a valid
2 nuisance claim).

3 Second, the Tribe will also be unable to establish that the alleged impacts interfered with
4 the use and enjoyment of the Tribe's property. The Tribe will be unable to prove that its
5 members visited or utilized the sites. Rather, the Tribe has made excuses why its members had
6 not used or even visited the sites: "the damaged sites are remote, the number of Quechans that
7 practice traditional religion is likely small; visiting the sites is not critical to practicing traditional
8 Quechan ways, most Quechans are unaware of site boundaries and numbers and thus probably
9 could not accurately tell counsel for the United States exactly which 'sites,' if any, they had
10 visited, and Quechan testimony about site visits may be unreliable because Quechan are by
11 nature extremely reluctant to freely share traditional practices with non-members." (Order at
12 1099.) The Tribe sued the United States for \$9.4 million. (SAC at ¶ 156.a.) The Tribe must
13 meet its burden of proof that the alleged impacts attributed to Western interfered with its
14 enjoyment of its property in order to prevail on a nuisance claim.

15 Dated: August 14, 2012.

16 Respectfully Submitted,

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22 /s/ Chung H. Han

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27
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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012, which is the city, county and state where the e-filing described below took place.

I hereby certify that on **August 14, 2012**, I caused the attached **DEFENDANT UNITED STATES OF AMERICA’S TRIAL BRIEF** to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following recipients:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: **August 14, 2012** at Los Angeles, California

/s/ _____
Lillian D. Arratia