No. 17-35724

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE VERA,

Plaintiff-Appellant

v.

BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR; and UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Washington

APPELLEES' ANSWERING BRIEF

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I. STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

Jurisdiction existed in the district court pursuant to 28 U.S.C. §§ 1331 (federal question) and 1346 (United States as defendant).

B. Jurisdiction of the United States Court of Appeals.

Jurisdiction exists in this Court pursuant to 28 U.S.C. §§ 1291 and 1294(1).

C. Timeliness of the Appeal.

Appellant timely filed his appeal on September 8, 2017 pursuant to Federal Rule of Appellate Procedure 4(a)(1). CR 12.[1]

II. ISSUES PRESENTED FOR REVIEW

The United States restates the Issues Presented for Review as follows:

A. Was the district court correct when it held that Plaintiff failed to meet his burden of proving the district court's jurisdiction under the Federal Tort Claims Act?

[1] For purposes of Defendants/Appellees' Response, "CR" refers to the district court's docket number; "ER" refers to the page number of Appellant's Excerpts of Record; and "App.'s Brief" refers to Plaintiff/Appellant's Opening Brief. Defendants/Appellees are not submitting any Supplemental Excerpts of Record.

B. Did the district court rule appropriately within its broad discretion when it elected not to have oral argument on the jurisdictional issue?

C. Was the district court correct when it found that the Yakama Nation had complete control of the Signal Peak Road at the time of the subject accident?

D. Was the district court correct as a matter of law when it held that the United States, as the owner of Indian trust land, could not be held liable for the subject accident because the Yakama Nation exercised complete control over the Signal Peak Road?

III. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal of the district court's order granting the United States' Motion to Dismiss in a Federal Tort Claims Act (FTCA) case because the district court lacked subject matter jurisdiction. Plaintiff/Appellant Jose Vera (Plaintiff or "Mr. Vera") was driving a logging truck on the Signal Peak Road within the Closed Area of the Yakama Indian Reservation in central Washington. Mr. Vera failed to negotiate a curve and his truck went down an embankment, injuring Mr. Vera and killing his passenger.

B. Course of Proceedings and Disposition in the Court Below.

On January 6, 2017, Jose Vera filed his Complaint pursuant to the FTCA in the district court. ER 046 (CR 1). The United States was served on March 24, 2017.

CR 4. On May 23, 2017, the United States filed its Motion to Dismiss. CR 5. That motion to dismiss asked the district court to dismiss Mr. Vera's case based on Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). CR 5 at 1. On June 13, 2017, Plaintiff filed his response to that motion. ER 033 (CR 6). Although the United States did not request oral argument, Plaintiff suggested that he should have an opportunity to argue the jurisdictional issue. ER 40; 44. Also on that date, Plaintiff filed a Motion to Amend the Complaint accompanied by a Proposed Amended Complaint. CR 7 and 7-1. On June 26, 2017, the United States filed its Memorandum in Reply to Plaintiff's Response to Defendants' Motion to Dismiss. CR 8. The United States also filed its response to the Motion to Amend the Complaint arguing that amendment was futile. CR 9.

On August 16, 2017, the district court granted the United States' Motion to Dismiss and denied Plaintiff's Motion to Amend the Complaint. ER 004-014 (CR 10). In its written order, the district court first held that the Bureau of Indian Affairs (BIA) was not a proper defendant in a FTCA case. ER 009.

The district court then reviewed the three Tribal Resolutions submitted into evidence by the United States that showed that the Yakama Nation had disavowed federal funding for roads in the Closed Area of the Reservation. ER 007. The district court then found that the portion of the Signal Peak Road on which Mr. Vera's accident took place was within the Closed Area of the Yakama Indian

Reservation. ER 007[2]. The district court noted that Mr. Vera had not disputed that fact. ER 011-012. The district court also held that the United States' ownership and prior responsibilities for the Signal Peak Road in the distant past did not form a basis grounded in fact or law to deny the United States' motion to dismiss. ER 012.

The district court also noted that Mr. Vera had not disputed that the portion of the Signal Peak Road where the accident occurred was in the Closed Area of the Yakama Indian Reservation and not included in the Bureau of Indian Affairs, National Tribal Transportation Facilities Inventory (NTTFI). ER 012. The district court then noted that Mr. Vera had not disputed that only transportation facilities that appear on the NTTFI are eligible for assistance for construction or maintenance activities. ER 012. The district court held that ownership of the land under these circumstances does not amount to control or responsibility for the roadway or give rise to the duties alleged by Mr. Vera. ER 012.

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[2] The district court incorrectly reported that the subject accident occurred east of milepost 20. ER 007. In fact, the accident occurred west of milepost 20. ER 027. Engineer Fredenberg testified that the portion of BIA Road 140 east of milepost 20 is the portion where BIA funds can be expended. ER 027. However, Mr. Fredenberg clarified that the location of Mr. Vera's accident was in the Closed Area of the Reservation where no federal funds are expended. *Id.*; ER 026 (¶¶ 14-15). Mr. Vera did not dispute the location of the accident or that the location was in the Closed Area of the Yakama Indian Reservation.

The district court concluded that Plaintiff had not met his burden of demonstrating that the United States is subject to the FTCA. ER 013. The district court specifically held that Plaintiff did not respond to the United States' factual attack on subject matter jurisdiction with anything to persuade the court that the United States had waived immunity to suit. *Id.* Ultimately, the district court held that it lacked subject matter jurisdiction over the claims and dismissed the action. *Id.*

The district court also addressed Mr. Vera's motion to amend the complaint. ER 012-013. The district court found that the proposed Amended Complaint added specificity to the first cause of action by adding detail regarding establishment of a speed limit and marking with speed limit signs. ER 012-013. The district court found that similar detail was added to the second cause of action. ER 013. The district court then held that "the details that Plaintiff proposes to add through amendment of his complaint would not alter the lack of control by the United States and therefore would not create any basis in law or fact upon which to conclude that jurisdiction exists." *Id.* The district court then denied the motion to amend.[3] ER 014. The district court entered Judgment on August 16, 2017. ER 003 (CR 11). This appeal followed.

[3] The instant appeal does not challenge the district court's denial of the Plaintiff's Motion to Amend.

IV. STATEMENT OF FACTS

The Yakama Indian Reservation was established by the Treaty Between the United States and the Yakima[4] Nation of Indians. 12 Stat. 951 (June 9, 1855, ratified Mar. 8, 1859). Under the treaty, the Yakama Nation ceded land to the United States, but retained an area - the Yakima Indian Reservation - for "its exclusive use and benefit." *Brendale v. Confederated Tribes and Bands of the Yakama Indian Nation*, 492 U.S. 408, 414-15 (1989). Portions of the Reservation were allotted under the General Allotment Act. *Id.* at 422. Since 1972, the Closed Area of the Yakama Indian Reservation, which makes up about 2/3 of the 1.3 million acre Reservation, has been closed to the general public. *Id.* at 415.

In 1990, the Yakama Nation passed a tribal resolution that confirmed its prior closure of a large part of the Yakama Indian Reservation. ER 028-029 (Tribal Resolution T-166-90). In that resolution, the Yakama Nation took over access to the Closed Area and took control of roads within the Closed Area by placing a moratorium on "the use of BIA funds for construction, operation and maintenance of roads within the Closed Area of the Yakama Indian Reservation." *Id.*

[4] In 1994, the Yakama Nation passed resolution T-053-94, recognizing the spelling "Yakama" rather than "Yakima" in accordance with the wording in the Treaty of 1855, although the title to the treaty uses the name "Yakima."

The Signal Peak Road, also known as BIA Route 140, is a two-lane road located on the Yakama Indian Reservation. ER 025-026. That portion of Signal Peak Road where Plaintiff had his accident is within the Closed Area of the Yakama Indian Reservation. *Id.*

In 1991, the Yakama Nation passed another resolution (T-113-91) whereby the Yakama Nation accepted the BIA's relinquishment of all BIA rights-of-way and easements over roads and bridges in the Closed Area of the Yakama Indian Reservation. ER 026; 030. Thus, the portion of the Signal Peak Road where the subject accident occurred became the sole responsibility of the Yakama Nation. ER 026-027. The BIA then removed the roads in the Closed Area from the BIA's road inventory. *Id.* As a result, the BIA was no longer responsible for maintenance of roads in the Closed Area and that portion of the road became ineligible for expenditure of any federal funds by the BIA or Yakama Nation. *Id.* Funds that might typically be available to an Indian Tribe through the operation of a "Section 638"[5] contract were not available for roads in the Closed Area. *Id.*

[5]A Section 638 contract is one developed pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), Public Law 93-638, codified in Title 25 of the United States Code.

In 1996, the Yakama Nation passed another resolution (T-190-96) which stated that only non-federal, unrestricted Tribal funds were being expended on roads in the Closed Area. ER 031-032. That resolution allowed Federal BIA funds to be spent on the eastern portion of Signal Peak Road (approximately 12 miles) in the Open Area of the Reservation. ER 027. However, the area where the subject accident occurred is to the west of this segment of Signal Peak Road, in the Closed Area of the Reservation, and thus, Federal funds were not being used on the segment of road on which the subject accident occurred. ER 026-027.

On January 27, 2014, Plaintiff Jose Vera was driving a logging truck on the closed portion of the Signal Peak Road on the Yakama Indian Reservation and crashed. ER 047. Mr. Vera was injured and subsequently brought this action pursuant to the FTCA. ER 048.

V. SUMMARY OF ARGUMENT

The district court correctly found, based on the uncontested evidence, that the Yakama Nation exercised complete control over that portion of the Signal Peak Road within the Closed Area of the Yakama Indian Reservation where the subject accident occurred. The United States had relinquished control of any road maintenance, repair, design, or signage at least two decades prior to the subject accident. These uncontested findings support the district court's holding that it lacked subject matter

jurisdiction over Plaintiff's claims. The district court was not required to hold an evidentiary hearing where no factual issues were raised.

This Court may also affirm the district court's dismissal under several different bases. First, any claim related to the design of the Signal Peak Road was no longer actionable because of Washington's statute of repose. Second, Plaintiff/Appellant failed to properly plead a claim of negligence based on failure to maintain or repair the Signal Peak Road, requiring dismissal of those claims.

VI. ARGUMENT

A. The District Court Correctly Held That Plaintiff Had Not Met His Burden of Proving Subject Matter Jurisdiction.

1. Standard of Review.

The existence of subject matter jurisdiction is a question of law reviewed de novo. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008). Once questioned, Plaintiff bears the burden of demonstrating that subject matter jurisdiction exists. *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

2. The Jurisdictional Issue and Merits of the Action Are Not Intertwined.

Mr. Vera asserts that the district court erred in dismissing the case for lack of subject matter jurisdiction because the jurisdictional facts and the merits of the case are intertwined. Mr. Vera claims that the question of ownership or control of the Signal Peak Road is implicated in the question of negligence for his accident. Mr. Vera claims that "[t]he question of jurisdiction and merits of an action are considered

intertwined where the same statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *App.'s Brief* at 8-9 (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003)). Thus, Mr. Vera believes that an evidentiary hearing to resolve such questions was required. Mr. Vera also claims that any factual conflicts must be resolved in his favor. *Id.* at 8.

Federal courts are courts of limited jurisdiction; as such, they are only empowered to hear those cases that are authorized by the Constitution and enacted statutes. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The court presumes a lack of jurisdiction until the party asserting jurisdiction competently alleges and proves otherwise. *Id.* Where subject matter jurisdiction is lacking, the complaint must be dismissed. *Id.* "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Robinson*, 586 F.3d at 685 (*citing Rattlesnake Coal v. E.P.A.*, 509 F.3d 1095, 1102 n.2 (9th Cir. 2007)). The federal government's waiver of sovereign immunity must be unequivocally expressed, will not be implied, and will be strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted).

An attack on subject matter jurisdiction can be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack challenges the allegations of jurisdiction as found in the complaint. *Id.* In a factual attack, "the

challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* (*citing Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). This Court further explained that jurisdictional dismissals must meet the requirements specified in *Bell v. Hood*, 327 U.S. 678 (1946). *Id.* (*citing Sun Valley Gas, Inc. v. Ernst Enters.*, 711 F.2d 138, 140 (9th Cir. 1983)). In *Bell*, the Supreme Court held that jurisdictional dismissals are warranted where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly unsubstantiated and frivolous. *Safe Air*, 373 F.3d at 1039 (internal quotations omitted).

"When a defendant raises a factual attack, the plaintiff must support [his] jurisdictional allegations with 'competent proof' … under the same evidentiary standard that governs in the summary judgment context." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (internal citation omitted). "The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met." *Id.* "[I]f the existence of jurisdiction turns on disputed factual issues, the district court may resolve those factual disputes itself." *Id.* (*citing Safe Air*, 373 F.3d at 1039).

Plaintiff/Appellant's claims suffer from insurmountable flaws. First, in the instant case, the same statute does not give rise to both subject matter jurisdiction and the Plaintiff's substantive claim for relief. Plaintiff brings this action under the Federal Tort Claim Act (FTCA), 28 U.S.C. §§ 2671-80. ER 046-050. The FTCA is a limited waiver of the United States' sovereign immunity. *Chadd v. United States*, 794 F.3d 1104, 1108 (9th Cir. 2015). Sovereign immunity is an important limitation on subject matter jurisdiction. *Id.* The United States may only be sued if it has clearly waived its sovereign immunity. *Id.*

The FTCA requires that a claimant allege that the United States would be liable to the claimant to the same extent as a private person in accordance with the law of the place where the act or omission occurred. *F.D.I.C. v. Meyer*, 510 U.S. 471, 478 (1994). That term – *the law of the place where the act or omission occurred* – has been interpreted to mean the law of the state where such alleged negligence took place. *Id.* In FTCA cases, state law applies the substantive tort law in determining liability. *Bressi v. Ford*, 575 F.3d 891, 899 n.9 (9th Cir. 2009) (*citing Delta Sav. Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002)). Therefore, while the FTCA provides the limited waiver of sovereign immunity, Washington State's tort law provides the substantive state law that must be applied to determine liability. The jurisdictional issue is not intertwined with the merits of the claim.

Plaintiff's reliance on *Kern v. United States* (*App.'s Brief* at 9) is thus misplaced. In *Kern*, the Fourth Circuit denied a motion to dismiss for lack of jurisdiction where the jurisdictional issue depended on whether the federal actor was acting within the scope of her employment. But the question of whether a federal actor is within the scope of her employment, as in *Kern*, is a question that falls directly under the FTCA. That is because the FTCA's tort remedies are the exclusive remedies for injuries arising out of a federal employee's negligence or wrongful conduct committed while the employee was *acting within the scope of his/her employment*. 28 U.S.C. §§ 1346(b) (emphasis added); 2679(b)(1); *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000) (c*iting Valdez v. United States*, 56 F.3d 1177, 1179 (9th Cir. 1995)); *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 876 (9th Cir. 1992). It follows that if the federal employee was not within the scope of employment, there can be no FTCA jurisdiction. *Sharrock v. United States*, 2010 WL 2278580 (D. Guam 2010) ("The scope-of-employment issue is thus, on its face, a jurisdictional one - if Petty Officer McCoy was acting outside the scope of his employment with the Government, the district court lacks jurisdiction over the Plaintiffs' claims."); *Hallett v. United States,* 877 F.Supp. 1423, 1430 (D. Nev. 1995). Thus, the question in *Kern* involved the very question of whether the employee was acting within the scope of employment, a question that must be answered to determine if the case falls within the language of the FTCA. Those issues are thus intertwined.

That is not the circumstance in the instant case where the substantive law of liability under Washington law[6] is independent and not intertwined with the jurisdictional facts considered by the district court. The jurisdictional facts presented by the United States to the district court involved the United States' complete relinquishment of duties related to the Signal Peak Road and the Yakama Nation's complete assumption of duties with respect to that road.

The *Kern* court cited another Fourth Circuit case, *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995), distinguishing it from *Kern* because the alleged tortfeasor in *Williams* may have been an independent contractor and thus not a federal actor. *Kern*, 585 F.3d at 196. In *Williams*, the United States had contracted with a private company to clean and maintain a building leased by the United States. The *Kern* court identified the independent contractor inquiry as a threshold issue "wholly unrelated to the basis for liability under the FTCA." *Id.* The *Williams* court found that the non-federal actor was an independent contractor and therefore the United States could not be liable under the FTCA. *Williams*, 50 F.3d at 304.

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[6] In a FTCA case, the court is to apply the law of the state where the action giving rise to the claim arose. *Meyer,* 510 U.S. at 478. Here, under Washington law, to recover on a claim of negligence, a plaintiff must show (1) the existence of a duty to the plaintiff; (2) breach of that duty; (3) causation in fact; (4) legal causation; and (5) a resultant injury. *Lowman v. Wilbur*, 178 Wash. 2d 165, 169 (Wash. 2013).

The United States agrees that the issue of whether a person is an independent contractor is a threshold issue wholly unrelated to liability under the FTCA. The circumstances in the instant case are analogous to *Williams* – the threshold issue of who controlled the Signal Peak Road – is determinative of whether there is an FTCA case or a case that should be brought against another entity. Here, the jurisdictional facts, found in the three tribal resolutions, say nothing about whether a tort has been committed, but unequivocally demonstrate that the United States was not the proper defendant in Mr. Vera's Complaint because it did not control the Signal Peak Road. As in *Williams*, the jurisdictional facts are not intertwined with the merits issues and Mr. Vera's argument fails.

Second, Mr. Vera did not create any factual disputes regarding jurisdiction in the court below. As the district court noted, Mr. Vera did not challenge the evidence submitted by the United States and he did not introduce any evidence of his own. ER 011-013; *see also* ER 051-053 (Docket). The district court was free to weigh the evidence. In this case, the only evidence introduced into the record was that submitted by the United States. Mr. Vera did not create any factual issues and did not meet his burden of proving jurisdiction.

Furthermore, Mr. Vera's suggestion below that discovery might be needed was insufficient to grant any delay to conduct discovery. A request for discovery is properly denied where it is "based on little more than a hunch that it might help yield

jurisdictionally relevant facts." *Broschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Here, Mr. Vera did not identify facts that might go to the jurisdiction question; he simply suggested that discovery might be needed.

Third, Mr. Vera is incorrect that all factual disputes must be resolved in his favor. That statement is only true where a defendant mounts a facial attack on jurisdiction. "Faced with a factual attack on subject matter jurisdiction, the trial court may proceed as it never could under rule 12(b)(6) or Fed. R. Civ. P. 56 … [N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Pub. Co., Inc. v. General Tel. & Electronics Corp.*, 594 F. 2d 730, 733 (9th Cir. 1979); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (same). Mr. Vera misunderstands the law in this area.

Lastly, even if this Court believes the jurisdictional issues are so intertwined with the substantive issues that resolution of the jurisdictional question is dependent on factual issues going to the merits, the court should dismiss for lack of jurisdiction only if the material facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (if the jurisdictional issue is dependent upon resolution of factual issues going to the merits, courts should treat a motion to dismiss as motion for summary judgment; the moving party should prevail only if the material jurisdictional facts are not in dispute

and the moving party is entitled to prevail as a matter of law); *Rosales v. United States*, 824 F.2d 799, 802-03 (9th Cir. 1987).

As has already been shown, Mr. Vera did not contest the content of the Tribal Resolutions, he did not introduce any evidence of his own, and did not present any expert testimony to support his response or to attack the United States' positions. In failing to challenge any facts introduced by the United States, Mr. Vera did not demonstrate any material facts in dispute. Thus, Mr. Vera did not meet his burden of proving jurisdiction in the district court. The United States showed that it was not the proper defendant in this case because it was the Yakama Nation that controlled all aspects of the Signal Peak Road and the district court agreed. Thus, dismissal for lack of subject matter jurisdiction was proper and the district court should be affirmed.

B. The District Court Acted Within Its Broad Discretion in Not Conducting a Hearing Pursuant to Federal Rule of Civil Procedure 12(i).

1. Standard of Review.

A trial court has discretion on whether to hold an evidentiary hearing on a Rule 12(b) motion. *Murphy v. Schneider National, Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2004); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *Madsen v. Buffum*, 2013 WL 12139139 (C.D. Cal. 2013) at *4 (*citing* 5C Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice & Procedures,* § 1373 (3d ed. 2013)).

2. Mr. Vera Had Ample Opportunity to be Heard and Oral Argument Was Not Required.

Mr. Vera complains that the district court should have conducted a hearing so that he could argue the jurisdictional issue. *App.'s Brief* at 7.

This claim also has no merit. Rule 12(i) has been interpreted to mean that a party must be given a chance to be heard, but that oral argument is not mandated by the Rule. *Thomas v. United States*, 245 Fed. Appx. 18, 19 (Fed. Cir. 2007); *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir. 1998) ("Every circuit to consider the issue has determined that the 'hearing' requirements of Rule 12 … do not mean that an oral hearing is necessary, but only require that the party be given the opportunity to present its view to the court"); *Pueschel v. United States*, 369 F.3d 345, 354 (4th Cir. 2004); *Dougherty v. Harper's Magazine Co.*, 537 F.2d 758, 761 (3d Cir. 1976) (hearing not required for Rule 12(b)(6) motion); *Denari v. U.S. Dry Cleaning Services Corp.*, 2017 WL 2779051 (E.D. Cal. 2017) at *4 n.2 (*citing Gallo-Rodriguez v. United States*, 513 Fed. Appx. 971, 973-74 (Fed. Cir. 2013)); *Skechers USA, Inc. v. Echo Direct LLC*, 2012 WL 12951743 (C.D. Cal. 2012) at *2 (if parties raise genuine issues of fact, the court may stay the motion and hold a hearing, indicating discretion to conduct a hearing).

Here, oral argument was not required. Mr. Vera was given the opportunity to present evidence and argument to counter the United States' motion to dismiss. Mr. Vera did provide a brief, arguing his case. However, he did not make any evidentiary objections to evidence submitted by the United States, did not contest any facts

asserted by the United States, did not introduce any facts, and thus did not create any factual disputes. Mr. Vera was given an opportunity to be heard, he was heard, and the district court correctly ruled that he failed to raise any facts to support his claim that the district court had jurisdiction over his claims. ER 004-14; 033-045. The district court did not abuse its broad discretion where Mr. Vera did not raise any jurisdictional facts and did not dispute the United States' facts.

C. The District Court Correctly Found That the Yakama Nation Had Complete Control Over the Signal Peak Road Where the Accident Occurred and the United States Had no Liability.

1. Standard of Review.

Findings of facts are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). "Review under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *McMillan v. United States*, 112 F.3d 1040, 1044 (9th Cir. 1997) (*quoting Concrete Pipe & Prods. Of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623 (1993). Conclusions of law are reviewed *de novo*. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). Mixed questions of law and fact are reviewed *de novo*. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). A mixed question of law and facts exists when there is no dispute as to the facts or the rule of law and the only question is whether the facts satisfy the legal rule. *Id.*

2. Undisputed Evidence Showed That the Yakama Nation Exercised Complete Control Over the Signal Peak Road Where the Accident Occurred.

The United States submitted substantial and undisputed evidence to the district court that the Yakama Nation had, since the mid-1990s, exercised complete control of the Signal Peak Road where Plaintiff's accident occurred. Plaintiff, below, neither challenged the evidence submitted by the United States nor offered any evidence in opposition to that evidence. The district court noted, "Plaintiff did not counter Defendant's factual attack that the relevant portion of the Signal Peak Road was solely in the Yakama Tribe's control with any factual showing of his own." ER 11-12. The district court also noted, "Plaintiff does not dispute Defendant's account of the location at which Plaintiff's accident occurred or the status of that portion of Signal Peak Road as being within a closed area of the reservation, and, therefore, not included in the [National Tribal Transportation Facilities Inventory]." ER 12. The United States' evidence was undisputed.

Kurt Fredenberg, the Regional Road Engineer for the Branch of Transportation within the Northwest Region Office of the BIA testified regarding the manner in which the Yakama Nation took control of all roads in the Closed Area of the Yakama Indian Reservation. ER 020-027. Mr. Fredenberg testified that he reviewed the police reports of Mr. Vera's logging truck accident, that he was familiar

with that portion of the Signal Peak Road on which the accident occurred, and that the accident occurred in the Closed Area of the Yakama Indian Reservation. ER 026.

Exhibit 2 (submitted below) is the 1990 Yakama Tribal Council Resolution T-166-90 wherein the Yakama Nation confirmed the Yakama Nation's decision to close a large portion of the reservation to the public. ER 028-029. Exhibit 3 (submitted below) is the 1991 Tribal Council Resolution T-113-91 whereby the Yakama Nation accepted the BIA's relinquishment of all BIA rights-of-way and easement for all roads and bridges in the Closed Area of the Yakama Indian Reservation. ER 030. Mr. Fredenberg explained that because of those Resolutions, the BIA was no longer considered the owner of those roads and bridges within the Closed Area. ER 026. Mr. Fredenberg then explained that the BIA then removed the roads in the Closed Area from the BIA's road inventory. ER 027. Those roads then became ineligible for expenditure of any federal funds by the BIA or the Yakama Nation. *Id.* While such funding may be available to Indian tribes through a Section 638 contract, no such Section 638 funds could be spent on roads in the Closed Area. ER 027.

The United States also submitted the 1996 Yakama Tribal Council Resolution T-190-96, which stated that only non-Federal, unrestricted Yakama funds were being expended on roads in the Closed Area. ER 031-032. While that resolution did allow federal funds to be spent on that portion of the Signal Peak Road east of where Mr.

Vera's accident occurred, it did not change the inability to expend federal funds on roads in the Closed Area of the Reservation.

The district court correctly found, based on the undisputed evidence submitted by the United States and Mr. Vera's failure to challenge that evidence or submit any evidence of his own, that the Yakama Nation controlled the Signal Peak Road where the accident occurred.

3. The United States Has Not Waived Sovereign Immunity for an Accident That Occurred on Trust Land but Where it Does Not Manage or Control That Land.

Mr. Vera provided only a legal argument below - that because the United States owns the land on the Yakama Indian Reservation in trust, it is thus responsible for the design, maintenance, and signing of the Signal Peak Road. ER 036-037. Plaintiff's briefing to the district court was completely devoid of any authority for this proposition. *Id.* Plaintiff suggested that discovery was needed to shed light on whether the United States was liable. However, the issue of the United States' obligations and duties on Indian trust land is a legal question that could not be resolved through discovery. The question of whether the United States even had a duty under the FTCA implicates the United States' sovereign immunity.

In one of the few reported cases analyzing whether the United States, as the trustee holding Indian lands, has waived its sovereign immunity to be sued by a third party under the FTCA for acts attributed to the beneficiary tribe, the district court for

the Eastern District of California held that sovereign immunity had not been waived under those circumstances. *Robinson v. United States*, 2011 WL 302784 (E.D. Cal. 2011) at *3. In that case, a property owner (Robinson) sued the United States claiming that the United States approved construction of homes and a casino on land held in trust for the benefit of the Maidu Indians of California that encroached on an easement over that plaintiff's property. Robinson sued alleging disruption of lateral and subadjacent support, negligence, and nuisance. After this Court remanded the case back to the district court, holding that the Quiet Title Act did not apply (586 F.3d 683) , the district court addressed the United States' motion to dismiss claiming that the United States had not waived sovereign immunity under the FTCA for such a suit.

The *Robinson* court began by pointing out that the Maidu Tribe is neither a federal agency nor are its employees and agents employees of the United States. *Id.* at 4. The court then held that the Tribe was an independent contractor and thus the actions of the Tribe could not be attributed to the United States. *Id.*

The *Robinson* court then determined that the claims brought were against the United States in its individual capacity as a trustee for an independent duty owed to Robinson, the property owner. The court noted that apparently no court had addressed this issue before. *Id.* at 6. The *Robinson* court then described the trust relationship between the United States and Indian tribes. In its well-reasoned analysis, the *Robinson* court recounted that the Supreme Court's jurisprudence had

found the United States as having a "bare trust" responsibility, which was different from full responsibility for management of such Indian land. *Id.* at 6-7. The court noted that the cases analyzed jurisdiction under the Indian Tucker Act, but that they provided an appropriate backdrop by which to analyze the United States' waiver of sovereign immunity under the FTCA. *Id.* at 7. Ultimately, the *Robinson* court concluded that Mr. Robinson failed to carry his burden of establishing that the United States waived its sovereign immunity. *Id.* at 9.

Indeed, the numerous cases describing this "bare trust" responsibility strongly supports application in the FTCA arena. The Supreme Court has long held that the United States' "legal title", when it holds land in trust for Indians, is akin to a "naked fee," with the Tribe itself retaining all beneficial rights and ownership. *See United States v. Shoshone Tribe,* 304 U.S. 111, 115-18 (1938) ("the United States granted and assured to the tribe peaceable and unqualified possession of the land in perpetuity … For all practical purposes, the tribe owned the land.").

More recently, the Supreme Court reiterated that lands acquired under the General Allotment Act, such as those in the Closed Area, conferred upon the United States nothing more than the obligation to "hold the land ... in trust not because it wished the Government to control the use of the land ..., but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *United States v. Navajo Nation,* 537 U.S. 488, 504 (2003) (*Navajo I*)

(*quoting United States v. Mitchell*, 445 U.S. 535, 544 (1980) (*Mitchell I*)); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003) (same). Thus, the United States' legal title over Indian land, without more, is ordinarily a "bare trust"" in which the United States retains no functional obligations to manage, control, or otherwise possess and use the land. *See United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*) (recognizing "bare trust" created by General Allotment Act); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (same); *White Mountain Apache,* 537 U.S.at 473 (distinguishing between "bare trust" relationships and full fiduciary trust relationships); *see also Marceau v. Blackfeet Housing Authority,* 540 F.3d 916, 922-23 (9th Cir. 2008) (when the United States holds land "in trust," for an Indian tribe, the United States is merely required to prevent alienation of the land). All these cases strongly support the analysis conducted by the *Robinson* court and strongly support the conclusion that the United States had no duties regarding the Signal Peak Road and has not waived its sovereign immunity with respect to the FTCA.

In addition, there is no dispute that the Yakama Nation can control the Reservation in this manner. *Brendale*, 492 U.S. at 431-433 (Yakama Nation has authority to control development on fee land owned by non-Indian through zoning in Closed Area of the Reservation). "Indian tribes retain the powers of a sovereign nation in the limited realm of internal affairs, subject to Congress's power completely to divest the tribes of such sovereignty." *United States v. Long*, 324 F.3d 475, 479 (7th

Cir. 2003). The United States policy has been to further Indian self-governance. *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2472 (1974). "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

Tribal sovereignty has been retained with respect to the exercise of tribal power in a number of areas. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) (tribes retain power to tax activities on the reservation); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (tribes retain power to exercise criminal jurisdiction over tribal members); *Fisher v. District Court of Sixteenth Judicial Dist. Of Mont.*, 424 U.S. 382 (1976) (tribes retain power to regulate domestic relations among members); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes are a "separate people" possessing the power of regulating their internal and social relations), (*citing United States v. Kagama*, 118 U.S. 375, 381-82 (1886)); *Brendale*, 492 U.S. at 443-444 (tribe can impose zoning regulations on fee land); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (tribe has taxing authority over tribal lands leased by nonmembers); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-59 (9th Cir. 1975) (county is without jurisdiction to enforce zoning ordinance on Indian Rancheria). In general, Indian tribes retain the right to make their own laws and be governed by them. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Here, the Yakama Nation had the power to take complete control of roads in the Closed Area of the Yakama Indian Reservation.

Neither the Yakama Nation nor its road maintenance department are an arm of the federal government. *See*, e.g., *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080 (9th Cir. 2001) (tribal housing authority functions as an arm of tribal government and occupies a role quintessentially related to self-governance); *United States v. Enas*, 255 F.3d 662,664 (9th Cir. 2001) (tribal court was not acting as an arm of the federal government in prosecuting non-member Indian); *Wheeler*, 435 U.S. at 322 (Navajo Tribe that punished its own member does so as part of its retained sovereignty, not as an arm of the Federal Government); *United States v. Elk*, 561 F.2d 133, 135 (8th Cir. 1977) (tribal court exercising residual jurisdiction not acting as an arm of the federal government); *United States v. Karlen*, 476 F.Supp. 306, 310 (D.S.D. 1979) (in civil action, counterclaim against Indian tribe not allowed where actions of tribe were not actions of the United States). The Yakama Nation's inherent sovereignty is also a reflection of Congress's intent to make Indian tribes more independent through the passage of the Indian Reorganization Act of 1934 (IRA) (codified at 25 U.S.C. § 5101 et. seq.). That Act allowed Indian tribes to organize and adopt tribal constitutions and by-laws. Indian tribes today, including the Yakama Nation, have their own independent government that controls the internal affairs of the Tribes, and the United States operates in a government-to-government relationship with Indian tribes. Not only was the United States no longer involved in the design, maintenance, or repair of the Signal Peak Road, the Yakama Nation, which is not an agency of the United States, had the authority to take control of the road.

4. Mere Ownership of Tribal Land Held in Trust Does Not Subject the United States to Liability Under the FTCA.

Plaintiff's conclusory statement that the United States holding land in trust for Indians is liable for a tort on trust land is not supported in the law. Mere ownership of federal land does not automatically subject the United States to tort liability. This Court, in *Borquez v. United States*, 773 F.2d 1050, 1052 (9th Cir. 1985), held the United States not liable for death and injuries after maintenance and operation of a dam were transferred to a water users' association. In 1904, the United States and the Salt River Valley Water Users Association, entered into an agreement whereby the United States, through the Bureau of Reclamation, would design and construct a large irrigation project. *Id.* at 1051. Once construction was completed, care, operation and maintenance of the project was transferred to the Association. *Id.* The land on which the diversion dam was constructed was owned by the United States and managed by the Tonto National Forest, a component of the U.S. Forest Service in the Department of Agriculture. *Id.*

In 1979, two boys drowned and another injured when they attempted to walk across the top of the dam. In affirming the district court's dismissal of lawsuits brought under the FTCA, this Court held that the duties of care, operation, and maintenance of the dam and other improvements were transferred to the Association, thus relieving the United States of any liability under the FTCA. *Id.* at 1052; *see also*

Miller v. United States, 945 F.2d 1464, 1468 (9th Cir. 1991) (recognizing that in *Borquez*, the transfer of responsibility for care, operation and maintenance of the dam did not reserve any duties to the government regarding posting of warning signs).

As in *Borquez*, the United States in the instant case did not reserve any duties regarding the design, maintenance, repair, or signing of the Signal Peak Road and thus cannot be held liable for Mr. Vera's accident. *See also, Aldrich Enterprises, Inc. v. United State*s, 938 F.2d 1134, 1138-39 (10th Cir. 1991) (United States not liable under FTCA for property damage after dam located in National Park collapsed where United States did not exercise sufficient control over operation of the dam); *Roditis v. United States*, 122 F.3d 108 (2d Cir. 1997), *cert. denied* 523 U.S. 1095 (1998) (United States not liable for slip and fall at post office where contractor hired by Postal Service assumed control of area where fall occurred).

In the only other case to address the issue of the United States' responsibility on Indian trust land, the district court for the Western District of Washington held that the United States, as trustee of reservation land, owed no duty to maintain road on land held in trust for Indian tribe where the United States did not control the road. In *Tolliver v. United States*, 957 F.Supp.2d 1236, 1247 (W.D. Wa. 2012), two teenagers were killed in a car accident after a night of partying on the Lower Elwha Indian Reservation. The car was driven on the Lower Elwha Road onto a gravel section of the road, which ended at the Lower Elwha River. Lawsuits alleged that the teens'

deaths were caused by a lack of signs and lighting on a dangerous road, in violation of the Manual on Uniform Traffic Control Devices. *Id.* at 1238. Portions of the road were owned by the county and portions were owned by the United States, although the county and United States both disclaimed ownership of the section of road that led to the river. The court held that the land was held in trust by the United States for the benefit of the tribe. *Id.* at 1246-47.

In holding that the United States was not liable, the *Tolliver* court relied on *Robinson*, which held "there is a distinct difference between the Government's potential liability under a 'bare trust' and those where the government has assumed 'full responsibility for management.'" *Id.* at 1247. The *Robinson* court had stated, "the trust relationship, standing alone, is insufficient to trigger liability for damages on the part of the United States." *Id.* (*citing United States v. Navajo Nation*, 556 U.S. 287, 294 (2009) (*Navajo II*)). The *Tolliver* court also held that the United States never controlled any portion of the Lower Elwha Road and that the plaintiffs' argument "rests solely on the faulty assumption that United States' position as trustee created a general duty to maintain roads on trust lands." *Id.*

That is exactly the faulty position taken by Plaintiff in the instant case. Plaintiff merely claims, without any evidence or legal authority, that the United States' role as trustee of Indian land makes the United States responsible for Mr. Vera's accident. But the facts and judicial decisions cited above demonstrate that the United

States, holding the land of the Yakama Indian Reservation in 'bare trust' is insufficient to hold it responsible for a road that has been controlled by the Yakama Nation for almost three decades.

The district court noted Plaintiff's lack of evidence and concluded "[c]onsequently, ownership of the land under the circumstances present here does not amount to control or any responsibility for the relevant roadway, or give rise to the duties that Plaintiff alleges." ER 12. The United States had no actionable duty regarding the Signal Peak Road, and thus had not waived sovereign immunity over any claims related to the accident on that road. In the absence of a legal duty, the district court lacked jurisdiction over any such claims. *Irish v. United States*, 2015 WL 4622743 (D. Nev. 2015) at *2 (no jurisdiction in FTCA case where the United States had no legal duty); *Dugard v. United States*, 2013 WL 6228625 (N.D. Cal. 2013) at *11 (same); *Fullmer v. United States*, 34 F.Supp.2d 1325, 1328 (D. Utah 1997) (same); *Butt v. United States*, 714 F.Supp.2d 217, 218-19 (D. Mass. 2010) (same). This Court should affirm the district court.

5. Once the Yakama Nation Took Control of the Signal Peak Road, It Became Liable for Any Accidents on That Road.

The district court did not address the application of Washington premises liability law, which Defendants raised below. *See generally* ER 3-14. Under the FTCA, liability is to be determined in accordance with the law of the place where the alleged negligent act occurred. *Taylor v. United States*, 821 F.2d 1428, 1430 (9th Cir.

1987), *cert. denied*, 485 U.S. 992 (1988). This Court can affirm the district court's dismissal on any ground supported by the record. *ASARCO, LLC v. Union Pac. R.R.*, 765 F.3d 999, 1004 (9th Cir. 2014).

The United States had no duty regarding maintenance, repair, or placement of warning or speed limit signs once the Yakama Nation took control of the subject road in the Closed Area, which has not been disputed. Under Washington law, a person who undertakes a duty is liable for the negligent performance of that duty. *Folsom v. Burger King*, 135 Wash.2d 658, 676 (Wash. 1998); *Steadman v. Okanogan County*, 134 Wash.App. 1049, 2006 WL 2413691 (Wash. Ct. App. 2006) at *4. Here, the Yakama Nation undisputedly took control over the operation and maintenance of the Signal Peak Road since the mid-1990s. Any duty regarding the maintenance, repair, or signing on the Signal Peak Road falls completely on the Yakama Nation. Given the undisputed evidence that the Yakama Nation controlled the Signal Peak Road, application of Washington law places responsibility for maintenance, repair, and signing of the road on the Yakama Nation.

D. The United States is Not Liable for Any Act Beyond the Statute of Repose.

1. Standard of Review

Conclusions of law are reviewed *de novo*. *Husain*, 316 F.3d at 835.

2. The District Court Correctly Held That Past Control of the Roadway Did Not Provide a Reason to Deny Defendants' Motion to Dismiss.

Mr. Vera also suggested, here and below, that the BIA was *presumably responsible* for "creating, designing and maintaining BIA 140 between the time period of approximately 1940 to 1990." ER 35 (emphasis added). Mr. Vera did not provide any authority for this statement. These *presumed* facts are incompetent and/or irrelevant for several reasons. First, *presumed* actions by the BIA between 1940 and 1990 inform nothing about the design, maintenance and/or signing of the subject road in January of 2014 when Plaintiff had his accident.

Second, any alleged negligence that Plaintiff *presumes* occurred between 1940 and 1990 is long past the statute of repose, which controls when a claim can accrue from construction. "A statute of repose terminates a potential claim after a specified time, even if an injury has not yet occurred." *Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wash.App 359, 366 (Wash. Ct. App. 2015) (*citing Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wash.2d 502, 511 (Wash. 2013)); *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182 (2014) ("A statute of repose bars any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product."); *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1049 (9th Cir. 2008) (statute of repose cuts off a cause of action at a certain time irrespective of the time of accrual of the cause of action). Washington State treats statutes of repose as part of the body of state substantive law. *Brewer v. Dodson*

Aviation, 447 F.Supp.2d 1166, 1177 (W.D. Wa. 2006) (*citing Rice v. Dow Chemical Co.*, 124 Wash.2d 205, 212 (Wash. 1994)). Washington's Statute of Repose (RCW 4.16.310) bars an action for construction defects that do not accrue six (6) years from the time of substantial completion of construction or termination of services, whichever is later. *Id.* (*citing Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wash.2d 475, 485 (Wash. 2009)). Thus, any claim of *presumed* negligence by the BIA between 1940 and 1990 for constructing or improving the road during that term is no longer actionable. *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1112 (9th Cir. 2002) (statute of repose bars plaintiff's claim); *Carlson v. Green*, 446 U.S. 14, 23 (1980) ("an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward"); 28 U.S.C. §§ 1346(b); 2674.

The district court held that "Plaintiff's emphasis of ownership of the land and responsibilities that the United States may have had in the past regarding the roadway, but which ended more than 23 years before Plaintiff's accident, do not form a basis grounded in fact or law to deny Defendant's motion to dismiss." ER 12. Although the district court did not specifically mention the statute of repose, its holding is clearly based on the Washington law regarding the statute of repose argued by Defendants below. This Court should affirm the district court with regard to any claim originating after the statute of repose.

E. Plaintiff Failed to State a Claim of Negligence for Failure to Maintain or Repair, Which Was Not Remedied Before the District Court.

Mr. Vera had alleged below that the BIA and United States had failed to maintain or repair the Signal Peak Road. ER 48-49. However, those allegations, as recited in the Complaint, were insufficient to state a claim. The United States challenged the failure to maintain and repair claim because it did not meet the pleading requirement established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Souter, J., dissenting). The Complaint failed to allege any specific act or omission related to either maintenance or repair of BIA Road 140, and therefore, does not state a valid cause of action. The Complaint also fails to identify a federal actor who was allegedly negligent. The district court did not address this issue, but it is a separate and alternative basis by which this Court may affirm the district court's dismissal.

While notice pleading only requires a plaintiff to provide a "short and plain statement of the claiming showing that the pleader is entitled to relief," Plaintiff's Complaint failed to meet that burden. "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior error, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft* 556 U.S. at 678. However, "[a] pleading that offers labels and conclusions and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal quotations and citation omitted). "Nor does a complaint suffice if

it tenders "naked assertions" devoid of "further factual enhancement."" *Id.* (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678 (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). "The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant acted unlawfully. *Id.* (internal citations and quotations omitted).

This Court, in discussing the pleading requirements established in *Iqbal* reiterated, "… the facts alleged in a complaint must state a claim that is plausible on its face." *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678.

Here, Mr. Vera has done nothing more than *allude* to a cause of action (failure to maintain or repair) without providing any factual enhancement that would make such a claim plausible on its face. *Iqbal*, 556 U.S. at 678. Under Washington law, to recover on a claim of negligence, a plaintiff must show (1) the existence of a duty to the plaintiff; (2) breach of that duty; (3) causation in fact; (4) legal causation; and (5) a resultant injury. *Lowman v. Wilbur*, 178 Wash. 2d 165, 169 (Wash. 2013). Here, Plaintiff has failed to allege all the elements of a tort regarding maintenance or repair.

Plaintiff has not provided any factual statement regarding how an alleged duty to maintain or repair was breached, and how any such breach was both a cause in fact and legal cause of the accident. Nowhere does the Complaint mention any acts or omissions of improper maintenance, improper repair, any obstruction on the road surface, or any other facts indicating what act or omission by the United States breached a duty to maintain or repair the road on which the accident occurred. Here, Plaintiff had not even provided a "formulaic recitation of the elements of a cause of action" (*Iqbal*, 556 U.S. at 678) or even "facts that are merely consistent with a defendant's liability" (*Moss*, 572 F.3d at 972). Any cause of action based on a failure to maintain or repair must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff's response to the United States' Motion to Dismiss did not address the issue at all. *See generally*, ER 33-45. Plaintiff's Motion to Amend the Complaint and Proposed Amended Complaint (CR 7 and 7-1) did not address this claim nor did Plaintiff correct this failure to properly allege a maintenance or repair claims. Based on Plaintiff's failure to address the issue and failure to provide any more detail regarding an alleged failure to maintain or repair the Signal Peak Road, those claims should be dismissed.

VII. CONCLUSION

For the foregoing reasons, Defendants/Appellees respectfully request that the Court affirm the district court.

Dated: January 5, 2018.

JOSEPH H. HARRINGTON
United States Attorney

s/Rudy J. Verschoor
RUDY J. VERSCHOOR
Assistant U.S. Attorney
Attorney for Defendants/Appellees

VIII. STATEMENT OF RELATED CASES

Counsel for the Defendants/Appellees certifies that no cases are pending in this Court that are deemed related to the issues presented in the instant appeal.

s/*Rudy J. Verschoor*
RUDY J. VERSCHOOR
Assistant U.S. Attorney

IX. CERTIFICATE OF SERVICE

It is hereby certified that on January 5, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participates who are registered EM/ECF users will be served by the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the forgoing documents by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

N/A

s/*Rudy J. Verschoor*
RUDY J. VERSCHOOR
Assistant U.S. Attorney

X. Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35724

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is 9,125 _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is _____ words or _____ pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

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Signature of Attorney or Unrepresented Litigant: s/ *Rudy J. Verschoor*

Date: January 5, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev.12/1/16)