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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DENNIS ROBINSON, SPENCER
ROBINSON, Jr., RICKIE ROBINSON
CYNTHIA ROBINSON, VICKIE
ROBINSON,

No. 2:04-cv-00734-MCE-CMK

Plaintiffs,

v.

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA, as
Trustee for the Indians of the
Mooretown Rancheria, aka MAIDU
INDIANS OF CALIFORNIA,

Defendant.

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This matter comes before the Court on Defendant United States of America's ("United States") Motion to Dismiss Plaintiffs Dennis, Spencer, Rickie, Cynthia and Vickie Robinson's (collectively, "Plaintiffs") First Amended Complaint ("FAC").¹

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¹ Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

1 Plaintiffs oppose the motion. For the reasons set forth below,
2 the United States' motion is granted without leave to amend.

3
4 **BACKGROUND**

5 **A. Factual Background**

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7 The factual background of this action has been recounted in
8 detail by this Court and Ninth Circuit² on three separate
9 occasions. To this end, and in the interest of concision, the
10 Court only discusses those facts necessary to the understanding
11 of this Order.

12 The focus of this lawsuit is land held in trust by the
13 United States for the benefit of the Indians of the Mooretown
14 Rancheria, also known as the Maidu Indians of California
15 ("Tribe"). Plaintiffs' complaint alleges that the Tribe's
16 construction of a casino and other facilities on the land has
17 encroached upon, and interfered with, Plaintiffs' rights to a
18 sixty foot, non-exclusive road and utility easement Plaintiffs
19 allege they own. (Pl.'s First Am. Compl. ["FAC"], filed Feb. 25,
20 2011, [ECF No. 85], ¶¶ 1, 17.)

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25 ² The Ninth Circuit, on appeal from this Court's first
26 dismissal of Plaintiffs' complaint, set forth in detail the
27 factual background underlying Plaintiffs' claims. See
28 Robinson v. United States, 586 F.3d 683 (9th Cir. 2009). This
Court also set forth the factual predicate for Plaintiffs' claims
in its first order dismissing Plaintiffs' complaint. See
Robinson v. United States, Civ. No. S-04-0734, 2011 WL 2580612
(E.D. Cal. 2007).

1 Specifically, Plaintiffs allege that the "subject easement has
2 been damaged and its integrity threatened in that it has had
3 lateral and/or subjacent support removed causing or potentially
4 causing erosion among other damage" because of the Tribe's
5 construction activity on the land the United States holds in
6 trust. (Id. ¶¶ 17, 29.)

7 Plaintiffs' first claim for relief seeks damages for loss of
8 lateral support; Plaintiffs' second claim seeks damages for loss
9 of subjacent support; the third claim seeks damages under a
10 strict liability theory for loss of subjacent support;
11 Plaintiffs' fourth claim seeks damages under a negligence theory
12 for loss of lateral support; the fifth claim also seeks damages
13 under a negligence theory for property damages caused to the
14 subject easement; Plaintiffs' sixth claim alleges a continuing
15 nuisance; the seventh claim rests on a nuisance theory for the
16 alleged encroachment upon Plaintiffs' property.³

17 The gravamen of Plaintiffs' complaint is that The United
18 States "took no steps to warn or give notice to the [Tribe] that
19 the planned activities would" interfere with Plaintiffs' use of
20 the easement, refused to take steps to rectify the damage, and
21 violated its duty to maintain the subject easement.

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27 ³ The Court notes that it already dismissed Plaintiffs'
28 nuisance claim without leave to amend. According to Plaintiffs,
however, they reallege their nuisance claim in the FAC for
purposes of reserving those claims on appeal.

1 **B. Procedural Posture**

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3 Plaintiffs filed this case on April 12, 2004. (Pl.'s
4 Compl., [ECF No.1].) After limited discovery, the United States
5 filed a motion to dismiss under Federal Rule of Civil
6 Procedure 122(b)(1) for lack of jurisdiction, arguing that the
7 Court lacks subject matter jurisdiction over Plaintiffs' claims
8 because the Quiet Title Act bars Plaintiffs from proceeding
9 against the United States and because the Tribe is a necessary
10 and indispensable party. Judge Ralph Beistline,⁴ acting by
11 designation to serve in the Eastern District, granted the United
12 States' motion, holding that "[b]ecause the disputed title is for
13 Indian land held in trust by the government, the [Quiet Title]
14 Act's Indian Land Exception applies and this Court lacks
15 jurisdiction to hear [Plaintiffs'] claims." (Order, filed
16 Sept. 5, 2007 [ECF No. 52], at 8:11-13.) Plaintiffs appealed the
17 dismissal to the Ninth Circuit. The Ninth circuit vacated the
18 order dismissing Plaintiffs' complaint and remanded "so that the
19 district court may consider whether jurisdiction over this claim
20 lies under the" Federal Tort Claims Act ("FTCA"). Robinson,
21 586 F.3d at 688.

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25 ⁴ On May 6, 2011, Plaintiffs filed a separate action in this
26 Court, labeled No. 2:11-cv-01227-MCE-CMK, alleging essentially
27 the same claims and supported by essentially the same predicate
28 facts. (See Pls.' Compl., filed May 6, 2011 [ECF No. 1].) Given
the duplicative nature of the actions, the Court issued a related
case order, reassigning both cases to Judge England for all
further proceedings, including the United States' motion to
dismiss that is the subject of this Order.

1 On May 3, 2010, the United States filed its second motion to
2 dismiss, arguing that the case should be dismissed under Federal
3 Rule of Civil Procedure 12(b)(1) because the United States did
4 not waive sovereign immunity, and thus, the Court lacked subject
5 matter jurisdiction over Plaintiffs' claims (Defs.' Mot. to
6 Dismiss, filed May 3, 2010 [ECF No. 70], at 6:8-10.) On
7 January 27, 2011, Judge Beistline issued an order granting the
8 United States' motion to dismiss. (Order, filed Jan. 27, 2010
9 [ECF No. 84].)⁵ Judge Beistline held that Plaintiffs "failed to
10 carry the burden of establishing that the United States had
11 waived its sovereign immunity." (Id. at 8.)

12 On February 25, 2011, Plaintiffs filed their FAC, which
13 contains essentially the same claims set forth in the original
14 complaint but adds certain factual allegations Plaintiffs
15 maintain establish that their claims lie under the FTCA. The
16 United States filed its third motion to dismiss — the motion
17 that is subject of this Order — asserting that Plaintiffs failed
18 to amend their complaint in compliance with Judge Beistline's
19 specific instruction to plead with particularity the manner in
20 which the United States has waived its sovereign immunity. (See
21 Def.'s Mot. to Dismiss, filed Mar. 11, 2011 [ECF No. 85].)⁶

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26 ⁵ Any subsequent citation to an order of the court refers to
this Order dismissing Plaintiffs' complaint with leave to amend.

27 ⁶ Hereinafter, where the Court refers to the United States'
28 motion to dismiss, this is the relevant motion, filed March 11,
2011.

STANDARD

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3 The Eleventh Amendment limits the subject matter
4 jurisdiction of the federal courts. See Seminole Tribe of
5 Fla. v. Florida, 517 U.S. 44, 53-54 (1996). Lack of subject
6 matter jurisdiction may be asserted by either party or the court,
7 sua sponte, at any time during the course of an action.
8 Fed. R. Civ. P. 12(b)(1). Once challenged, the burden of
9 establishing a federal court's jurisdiction rests on the party
10 asserting the jurisdiction. See Farmers Ins. Exch. v. Portage La
11 Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990). The
12 court presumes a lack of subject matter jurisdiction until it is
13 proved otherwise. See Kokkonen v. Guardian Life Ins. Co. of
14 America, 511 U.S. 375, 377 (1994); Stock West, Inc. v.
15 Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). "It is
16 a long-settled principle that standing cannot be inferred
17 argumentatively from averments in the pleadings, but rather must
18 affirmatively appear in the record." FW/PBS, Inc. v. City of
19 Dallas, 493 U.S. 215, 231 (1990) (internal citations and
20 quotations omitted).

21 The FTCA contains a limited waiver of sovereign immunity,
22 and, thus, a specified grant of federal subject matter
23 jurisdiction over certain civil tort suits for money damages
24 against the U.S. government. See Vacek v. United States Postal
25 Serv., 447 F.3d 1248, 1250 (9th Cir. 2006).

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1 Specifically, the FTCA grants federal courts jurisdiction to hear
2 claims for damages for injury or loss of property that is caused
3 by the negligent or wrongful act or omission of any federal
4 employee while acting within the scope of his office or
5 employment, under circumstances where the United States, if a
6 private person, would be liable to the claimant according to the
7 law of the place where the act or omission occurred. 28 U.S.C.
8 § 1346(b).

9
10 **ANALYSIS**
11

12 The Ninth Circuit remanded with specific instructions to
13 determine whether the court has jurisdiction over Plaintiffs'
14 claims against the United States under the FTCA. Plaintiffs'
15 contention that this Court has jurisdiction over these particular
16 claims because the United States has waived sovereign immunity
17 under the FTCA rests on two propositions: (1) the United States,
18 as trustee, breached a duty owed to Plaintiffs for its knowing
19 failure to either prevent the Tribe from implementing planned
20 construction activities or to warn the tribe that those
21 activities would burden Plaintiffs' easement (Pl.'s Opp'n [ECF
22 No. 93] at 5:8-11; FAC ¶ 16.); and (2) the United States breached
23 its duty to "maintain" the portion of the road that is burdened
24 by the easement and is part of the Bureau of Indian Affairs
25 ("BIA") road system. (Id. at 8:1-9.)

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1 The United States maintains that Plaintiffs' FAC should be
2 dismissed because it is essentially a reproduction of the
3 complaint previously dismissed. Specifically, the United States
4 asserts that Plaintiffs failed to comply with Judge Beistline's
5 specific instruction that Plaintiffs amend their complaint to
6 "plead with specificity the statutory or regulatory provision
7 creating the duty owed to Plaintiffs by the United States that
8 was violated intentionally or negligently by an employee of the
9 United States."⁷ (Order at 22.)

10 "Sovereign immunity is an important limitation on the
11 subject matter jurisdiction of the federal courts. The United
12 States, as sovereign, can only be sued to the extent it has
13 waived its sovereign immunity." Vacek v. U.S. Postal Service,
14 447 U.S. F.3d 1248, 1250 (9th Cir. 2006).

16 ⁷ Defendants also contend that Plaintiffs' complaint should
17 be dismissed because they failed to exhaust their administrative
18 remedies and because the tribe is a necessary and indispensable
19 party in accordance with Federal Rule of Civil Procedure 19.
20 Since the Court finds that the United States has not waived
sovereign immunity, it is unnecessary to address the United
States' contentions in this regard; nevertheless, in the interest
of completeness, the Court briefly addresses these issues.

21 First, Plaintiffs have made clear that they are not suing
the United States in their representative capacity, but
22 individually. (Pls.' Opp'n at 7:1-4.) As this Court already
held, "[t]o the extent that Robinson is suing the United States
23 for monetary damages for a breach of a duty owed by the United
States to Robinson, not in its representative capacity as
24 trustee, the Tribe is neither a necessary nor an indispensable
party. (Order at 21.)

25 Second, paragraph 15 of Plaintiffs' FAC clearly alleges that
26 "[m]ore than six months before this action was instituted,
Robinson presented a claim to the United States pursuant to
27 28 U.S.C. § 2675(a)." Since, on a motion to dismiss, the Court
must accept as true the allegations of Plaintiffs' complaint, the
28 Court cannot conclude, at this time, the Plaintiffs have failed
to exhaust their administrative remedies.

1 It is axiomatic that a waiver of sovereign immunity is strictly
2 construed in favor of the sovereign. Dep't of the Army v. Blue
3 Fox, Inc., 525 U.S. 225, 261 (1999). A waiver of sovereign
4 immunity cannot be found implication — it must be expressed
5 unequivocally by Congress. Lane v. Pena, 518 U.S. 187, 192
6 (1996).

7 As Judge Belstein stated, “[s]trictly speaking, the question
8 is not whether a claim is cognizable under the FTCA generally,
9 but whether the claim is cognizable under § 1346(b)” of the FTCA.
10 (Order at 7 (citing Federal Deposit Ins. Corp. v. Meyer, 510 U.S.
11 471, 477 n.5 (1994).) Section 1346(b) grants the district courts
12 jurisdiction to hear claims against the United States for money
13 damages and/or injury to property caused by a negligent or
14 intentional act of any employee of the United States acting
15 within the scope of his employment. Meyer, 510 U.S. at 477.
16 “Jurisdiction is conferred in this case only if the United
17 States, as the trustee holding Indian lands, has waived its
18 sovereign immunity to be sued by a third party under the FTCA for
19 acts committed by the beneficiary tribe.” (Order at 8.)

20 In its previous order, the Court held that Plaintiffs
21 failed to demonstrate a waiver of sovereign immunity “[b]ecause
22 the tribe is neither a Federal agency, nor are its employees and
23 agents employees of the United States.” (Id.)

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1 Moreover, the Court held that, even if the United States has the
2 capacity to approve the Tribe's construction plans and monitor
3 their implementation, there would be no waiver of sovereign
4 immunity "unless the United States actually supervised and
5 controlled the day-to-day operations of the construction
6 project," which they did not. (Id. at 9 (citing United States v.
7 Orleans, 425 U.S. 807, 814 (1971).) The court explained that
8 "the trust relationship, standing alone, is insufficient to
9 trigger liability for damages of the part of the United States;
10 in other words, "there must also be some statute or regulation
11 (or combination thereof) that can fairly be interpreted as
12 mandating compensation by the Government." (Id. at 14 (quoting
13 United States v. Navajo Nation, 537 U.S. 488, 506 (2003).)
14 Plaintiffs' original complaint failed to point to any statute or
15 regulation requiring the United States to either approve, or
16 monitor implementations of the tribe's construction plans. (Id.
17 at 16.)

18 Based on the foregoing analysis, the Court granted the
19 United States' motion to dismiss with leave to amend. The Court
20 provided Plaintiffs specific instructions that the amended
21 complaint must:

22 (1) seek solely relief that is cognizable under the
23 Federal Tort Claims Act; (2) plead with specificity the
24 statutory or regulatory provisions creating the duty
25 owed to Plaintiffs by the United States that was
26 violated intentionally or negligently by an employee of
27 the United States; (3) identify the acts or actions of
28 an employee of the United States, acting in his or her
official capacity, that violated that duty; and (4) set
forth the dates on which those acts or actions
occurred, or that harm resulted to Plaintiffs as a
result of those acts or actions.

(Order at 22) (emphasis added.)

1 The Court is in agreement with the United States that
2 Plaintiffs have failed to comply with Judge Beistline's order
3 requiring Plaintiffs to plead with particularity a statute or
4 regulation creating a duty on behalf of the United States, as
5 trustee, to third parties for the Tribe's conduct. Indeed, as
6 set forth above, Plaintiffs' "principal argument" is that the
7 "United States knowing and intentionally approved . . . the
8 Tribe's construction" and that the "United States has failed
9 . . . to take any steps toward rectifying the problems." (Order
10 at 9.) These are the same two arguments that Plaintiffs relied
11 on in opposing the first motion to dismiss. (See Id.)

12 First, Plaintiffs failed to rectify the flaw in their
13 position that they stated a claim against the United States under
14 the FTCA for approving the Tribe's construction plans.
15 Specifically, Plaintiffs failed to point to a statute or
16 regulation that expressly creates a duty on behalf of the United
17 States, as trustee over Indian land, to prevent the beneficiary
18 tribe from encroaching upon a third parties' land. See Lane,
19 518 U.S. at 192. Moreover, even if, as Plaintiffs submit, the
20 United States has the power to approve of the Tribe's
21 construction plans, that is not sufficient to constitute a waiver
22 of the United States' sovereign immunity under the FTCA. This is
23 because Plaintiffs have failed to demonstrate that the United
24 States had the power "to control the detailed physical
25 performance of the" Tribe. Logue v. United States, 412 U.S. 521,
26 528 (1973)

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1 Logue, provides particularly useful guidance in this
2 regard.

3 In Logue [the Supreme] Court held that employees of a
4 county jail that housed federal prisoners pursuant to a
5 contract with the Federal Bureau of Prisons were not
6 federal employees or employees of a federal agency;
7 thus, the United States was not liable for their torts.
8 Although the contract required the county jail to
9 comply with Bureau of Prisons' rules and regulations
10 prescribing standards of treatment, and although the
11 United States reserved rights of inspection to enter
12 the jail to determine its compliance with the contract,
13 the contract did not authorize the United States to
14 physically supervise the jail's employees. In short it
15 could take action to compel compliance with federal
16 standards, but it did not supervise operations.

17 Orleans, 425 U.S. at 814-815 (citing Logue, 412 U.S. at 528).

18 Similarly here, even if the United States had the power to
19 approve of the Tribe's construction plans, it did not have direct
20 day-to-day supervisory control over the construction
21 activities. Thus, Plaintiffs have failed to identify a federal
22 employee or agency that acted negligently, as expressly required
23 by 23 U.S.C. § 1346(b)

24 The short of it is that Plaintiffs have failed to point to
25 any statute or regulation requiring the United States to take
26 "steps to warn or give notice to the [Tribe] that the planned
27 activities would have th[e] illegal effect" of encroaching upon
28 Plaintiffs' easement." (FAC ¶ 17.) Nor have Plaintiffs set
forth the dates upon which, or identified a United States
employee or agency who, violated any alleged duty.

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1 Thus, Plaintiffs have failed to sufficiently amend their
2 complaint in accordance with the Court's explicit instruction to
3 demonstrate that the United States has waived its sovereign
4 immunity from suits by third parties against the United States
5 acting in its capacity as trustee holding legal title to Indian
6 lands.

7 Plaintiffs' claim that the United States is not immune to
8 suit for failure to maintain the roadway is similarly misplaced.
9 First, Plaintiffs reiterate the same argument previously rejected
10 by the Court that the BIA guidelines and regulations create a
11 duty on behalf of the United States to rectify existing problems
12 relating to the roadway. Specifically, the Court held that
13 "[n]othing in the . . . regulations regarding BIA roads impose[]
14 a duty on the United States to take steps toward rectifying the
15 existing problems affecting the easement." (Order at 18.)

16 Plaintiffs did, however, amend their complaint to cite to
17 specific statutes for their contention that the United States
18 breached a duty to Plaintiffs by failing to "maintain" the
19 roadway. Plaintiffs' reliance on those statutes, however, is
20 misplaced. First, the FAC cites to 23 U.S.C. § 116. That
21 provision of the United States code requires the State
22 transportation department to maintain federal-aid highways; it
23 says nothing about any duty on behalf of the United States as
24 trustee of Indian land. Second, Plaintiffs cite to 25 C.F.R.
25 §§ 170.2, 170.5.

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1 Section 170.5 is merely a definitional provision, defining
2 maintenance as "the preservation of the entire highway, including
3 surface, shoulders, roadsides structures and such traffic-control
4 devices as are necessary for safe and efficient utilization of
5 the highway." Section 170.2 simply describes "[w]hat is the IRR
6 Program and BIA Road Maintenance Program policy." Neither
7 provision imposes a duty on the United States, as trustee, to
8 third parties holding an easement abutting the land held in
9 trust. This authority, at most, and by a lengthy stretch of
10 logic, establishes a duty on behalf of the United States by
11 implication; however, a waiver of sovereign immunity cannot be
12 found by implication — it must be expressed unequivocally by
13 Congress. Lane, 518 U.S. 187, 192 (1996). Thus, Plaintiffs have
14 failed to carry their burden of demonstrating that the United
15 States has waived sovereign immunity in this regard.

16 Given the particular circumstances of this case, and that
17 the Court must strictly construe any waiver of sovereign immunity
18 in favor of the United States, the Court finds that Plaintiffs
19 have failed to meet their heavy burden of demonstrating that the
20 United States, under the FTCA, has waived its sovereign immunity.
21 Thus, the Court has no subject matter jurisdiction over this case
22 and the FAC must be dismissed.

23 Moreover, Plaintiffs have twice failed to set forth
24 adequate allegations that the United States has waived its
25 sovereign immunity under the FTCA. A complaint should not be
26 dismissed for lack of subject matter without leave to amend
27 unless the complaint cannot be amended to cure the jurisdictional
28 defect. Harris v. Amgen, 573 F.3d 728, 736 (9th Cir. 2009).

1 In this case, Plaintiffs have not and cannot cure the
2 jurisdictional defect because it cannot point to any federal
3 employee or agency that acted negligently in causing the alleged
4 damage to Plaintiffs' easement, as required by the FTCA.
5 Therefore, the United States' motion to dismiss is GRANTED
6 without leave to amend.

7
8 **CONCLUSION**
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10 For the foregoing reasons, the United States' motion to
11 dismiss is GRANTED. The clerk of this Court is hereby ordered to
12 close this case.

13 IT IS SO ORDERED.

14 Dated: November 16, 2011

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17 MORRISON C. ENGLAND, JR.
18 UNITED STATES DISTRICT JUDGE
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