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 DISTRICT OF ARIZONA  
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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

MARILYN BRYANT, individually )  
 and on behalf of VINCENT JAY )  
 BRYANT; TOM BRYANT; JOSHUA )  
 HOMER BRYANT; SONNY BRYANT; )  
 and TEANCUM BRYANT, )  
 )  
 Plaintiffs, )  
 )  
 Vs. )  
 )  
 THE UNITED STATES OF AMERICA; )  
 BARBARA FRANC, )  
 )  
 Defendants. )  
 )

No. CIV 98-1495 PCT RCB  
 O R D E R

20 Plaintiffs have brought this action against the United  
 21 States pursuant to the Federal Tort Claims Act ("FTCA") based on  
 22 injuries sustained by Vincent Bryant during a dental procedure  
 23 performed at a federal hospital in Window Rock, New Mexico.  
 24 Plaintiffs have filed a motion requesting certification of  
 25 several questions of law to the Navajo Supreme Court or,  
 26 alternatively, a single question of law to the New Mexico Supreme  
 27 Court. The government has filed a memorandum in opposition to  
 28 this request and also a motion to dismiss the Plaintiffs' loss of

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1 consortium claims. Having carefully considered the arguments  
2 raised, the court will now rule on these matters.

3 I. BACKGROUND

4 On October 9, 1997, Vincent Bryant entered the Northern  
5 Navajo Medical Center ("Medical Center"), located in Shiprock,  
6 New Mexico, to have his wisdom teeth extracted. The Medical  
7 Center is a federal hospital operated by Indian Health Services  
8 ("IHS") and is located on the Navajo reservation. During the  
9 dental procedure, Vincent suffered irreversible brain damage,  
10 allegedly due to the negligence of the oral surgeon and the nurse  
11 anesthetist. He remains in a persistent vegetative state and  
12 currently resides in a long-term rehabilitation facility in St.  
13 George, Utah.

14 At the time of his injury, Vincent was nineteen-years, two-  
15 months old and lived with his parents and three brothers.  
16 Vincent's brothers were the following ages at the time of his  
17 injury: Sonny Bryant was fifteen-years, ten-months old; Teancum  
18 Bryant was thirteen-years, eight-months old; and Joshua Homer  
19 Bryant was eleven-years, ten-months old.

20 In their Complaint, Plaintiffs seek loss of consortium  
21 damages against the United States under their FTCA claim. Both  
22 Vincent's parents, Marilyn and Tom Bryant,<sup>1</sup> and his siblings seek  
23 such damages.

24 II. DISCUSSION

25 In their motion seeking certification of certain questions  
26 of law, Plaintiffs assert that this court must apply Navajo law  
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28 <sup>1</sup> Tom Bryant is Vincent's adoptive father.

1 in determining the United States' liability under the FTCA.  
2 Based on this assertion, they move the court to certify the  
3 following three questions of law to the Navajo Nation Supreme  
4 Court:

- 5 1. Under Navajo law, does the New Mexico Medical  
6 Malpractice Act, N.M. Stat. Ann. § 41-5-1 to 41-5-29,  
7 apply to a medical malpractice cause of action that  
8 occurred within the jurisdiction of the Navajo Nation?
- 9 2. Under Navajo law, may parents recover damages for loss  
10 of consortium resulting from catastrophic injuries to a  
11 nineteen-year-old child who lived with his parents  
12 since minority?
- 13 3. Under Navajo law, may minor siblings recover damages  
14 for loss of consortium resulting from catastrophic  
15 injuries to another sibling?

16 Alternatively, if this court determines that New Mexico state law  
17 and not Navajo law applies in this FTCA action, Plaintiffs ask  
18 the court to certify the following question to the New Mexico  
19 Supreme Court:

- 20 1. Under New Mexico law, may minor siblings recover  
21 damages for loss of consortium resulting from  
22 catastrophic injuries to another sibling?

23 In response, the government maintains that New Mexico state  
24 law, not Navajo law, governs its liability under the FTCA in this  
25 case. It further argues that certification to the New Mexico  
26 Supreme Court of the proposed question of law is improper because  
27 this court lacks jurisdiction over the siblings' loss of  
28 consortium claims due to their failure to exhaust administrative  
remedies and because New Mexico law gives ample indication  
regarding the propriety of loss of consortium claims brought by  
siblings of an adult. The government also moves to dismiss the  
siblings' loss of consortium claims due to their failure to  
exhaust administrative remedies and to dismiss all of the  
Plaintiffs' loss of consortium claims for failure to state a

1 claim upon which relief can be granted.

2 The first issue the court must resolve is the identity of  
3 the law governing the United States' liability in this action.  
4 Only after this question is resolved can the court properly  
5 address issues relating, first, to the propriety of certifying  
6 questions of law and, second, to the United States' motion to  
7 dismiss.

8 A. Law Governing Liability of United States under FTCA in  
9 this Action

10 Under the FTCA, the United States has waived its sovereign  
11 immunity to the following extent:

12 for injury or loss of property, or personal injury or death  
13 caused by the negligent or wrongful act or omission of any  
14 employee of the Government while acting within the scope of  
15 his office or employment, under circumstances where the  
United States, if a private person, would be liable to the  
claimant in accordance with the law of the place where the  
act or omission occurred.

16 28 U.S.C. § 1346(b)(1). Since the enactment of this provision in  
17 1948, courts have operated under the rule that the phrase the  
18 "law of the place" refers to the law of the state where the  
19 negligent act or omission occurred. See, e.g., F.D.I.C. v.  
20 Meyer, 510 U.S. 471, 478, 114 S. Ct. 996, 1001 (1994) ("[W]e have  
21 consistently held that § 1346(b)'s reference to the 'law of the  
22 place' means law of the State -- the source of substantive  
23 liability under the FTCA."); Miree v. DeKalb County, 433 U.S. 25,  
24 29 n.4, 97 S. Ct. 2490, 2494 n.4 (1977); Rayonier Inc. v. United  
25 States, 352 U.S. 315, 318-19, 77 S. Ct. 374, 376 (1957); Kruchten  
26 v. United States, 914 F.2d 1106, 1107 (8th Cir. 1990); Brown v.  
27 United States, 653 F.2d 196, 201 (5th Cir. 1981); United States  
28 v. English, 521 F.2d 63, 65 (9th Cir. 1975). Courts have

1 consistently reached this same conclusion even when the negligent  
2 act or omission occurred on Indian land located within a state.  
3 See Red Lake Band of Chippewa Indians v. United States, 936 F.2d  
4 1320 (D.C. Cir. 1991); Seyler v. United States, 832 F.2d 120 (9th  
5 Cir. 1987); Bryant v. United States, 565 F.2d 650 (9th Cir.  
6 1977). Consistent with this traditional rule regarding the  
7 meaning of the "law of the place," the parties agreed in the  
8 joint case management plan filed with the court that New Mexico  
9 substantive law applies in determining the United States'  
10 liability in this case. In their motion requesting certification  
11 of questions of law to the Navajo Supreme Court, however,  
12 Plaintiffs now assert that Navajo law applies because the alleged  
13 negligent acts or omissions occurred in a hospital located on  
14 Navajo tribal land. They base this new assertion on a recent  
15 case decided by the U.S. District Court for the District of New  
16 Mexico. Cheromiah v. United States, 55 F. Supp. 2d 1295 (D.N.M.  
17 1999).

18 In Cheromiah, the plaintiffs' son died due to complications  
19 arising from a bacterial infection. The plaintiffs brought an  
20 FTCA claim against the United States based on the alleged  
21 negligence of doctors at an IHS hospital in failing to diagnose  
22 and treat the infection. The hospital was located on Acoma  
23 tribal land within the State of New Mexico and was operated by  
24 IHS pursuant to a lease agreement with the Acoma Tribe. See id.  
25 at 1297.

26 The plaintiffs in Cheromiah sought a ruling from the  
27 district court that the New Mexico Medical Malpractice Cap  
28 ("NMMMC") did not protect the government because the law of the

1 Acoma Tribe and not New Mexico law governed the liability of the  
2 United States under the FTCA. The plaintiffs argued that because  
3 the alleged negligence occurred within the boundaries of the  
4 Acoma Tribe, its law was the "law of the place" where the  
5 negligent acts or omissions occurred. See id. at 1301. Finding  
6 the logic of the plaintiffs' argument "compelling," the district  
7 court ruled that the law of the Acoma Tribe was the applicable  
8 law under 28 U.S.C. § 1346(b) and that, therefore, the NMMMC did  
9 not apply. See id. at 1302, 1309.

10 In reaching its decision, the district court in Cheromiah  
11 first determined that courts had never held that the "law of the  
12 place" simply and always means the "law of the state." In  
13 support of this conclusion, the district court cited decisions  
14 holding that in the District of Columbia, the law of the District  
15 applies, and that in U.S. territories, such as Puerto Rico and  
16 Guam, the law of the territory applies. See id. at 1302. The  
17 primary support offered by the district court for its conclusion,  
18 though, was an analysis demonstrating that a private person in  
19 like circumstances to the United States would be subject to the  
20 jurisdiction of the Acoma Tribal Court. The court found that  
21 based on Supreme Court precedent a private individual would be  
22 subject to such jurisdiction because the United States had  
23 entered into a consensual relationship with the Acoma Tribe  
24 through the lease agreement and because the United States'  
25 conduct had a significant impact on the health and welfare of the  
26 tribe. See id. at 1303-05. From this conclusion, the court  
27 found that the Acoma Tribe was the relevant political entity that  
28 controlled the jurisdiction in which the alleged tort occurred.

1 See id. at 1305 (citing Hess v. United States, 361 U.S. 314, 319,  
2 80 S. Ct. 341, 345 (1960) (“[T]he term ‘place’ in the [FTCA]  
3 means the political entity . . . whose laws shall govern the  
4 action against the United States ‘in the same manner and to the  
5 same extent as a private individual under like  
6 circumstances.’”). The court determined that it was “therefore  
7 compelled to conclude that the law of the Acoma Tribe is the ‘law  
8 of the place’ within the meaning of the FTCA.” Id. After  
9 reaching this conclusion, the Cheromiah court noted that in none  
10 of the prior cases in which state law was applied for claims  
11 arising from conduct on Indian land was the potential application  
12 of tribal law as the “law of the place” raised as an issue. The  
13 court thus concluded that these cases only demonstrated that  
14 tribal law had never before been applied to an FTCA claim, not  
15 that such application was improper. See id. at 1306.

16 Plaintiffs rely solely on Cheromiah in arguing that Navajo  
17 law applies in this case. This court, however, does not find the  
18 reasoning of Cheromiah persuasive. To the extent the district  
19 court in Cheromiah relied on rulings in other cases that the “law  
20 of the place” includes the law of the District of Columbia and  
21 U.S. territories, this court does not find such cases supportive  
22 of a ruling that tribal law can constitute the “law of the  
23 place.” The court finds these cases distinguishable because they  
24 deal with situations in which the situs of the negligent act or  
25 omission was not located within the boundaries of any state. In  
26 contrast, the Navajo Nation and the Medical Center are located  
27 within the State of New Mexico. The court finds another line of  
28 cases more directly on point with the circumstances presented

1 here. Specifically, several courts have held that when the  
2 negligent act or omission occurred on a federal enclave within a  
3 state, that state's law and not federal law applies. See, e.g.,  
4 Shankle v. United States, 796 F.2d 742 (5th Cir. 1986) (acts  
5 occurred on federal military reservation); Lutz v. United States,  
6 685 F.2d 1178, 1184 (9th Cir. 1982) (acts occurred on air force  
7 base); see also Brock v. United States, 601 F.2d 976 (9th Cir.  
8 1979) (recognizing and relying on this line of cases).  
9 Similarly, because the acts here occurred on tribal land located  
10 within the State of New Mexico, the substantive law of New Mexico  
11 should apply.

12 The principal reason offered by the district court in  
13 Cheromiah in support of its conclusion regarding the "law of the  
14 place" was that a private person in like circumstances to the  
15 United States would have been subject to the jurisdiction of the  
16 Acoma Tribal Court. Based on this finding, the court determined  
17 that the Acoma Tribe was the political entity whose laws  
18 controlled the place where the alleged negligence occurred. See  
19 Cheromiah, 55 F. Supp. 2d at 1308. The Ninth Circuit, however,  
20 has rejected the application of such reasoning regarding "the law  
21 of the place," albeit in a slightly different context. See  
22 Brock, 601 F.2d at 980.

23 The plaintiffs in Brock sued the United States under the  
24 FTCA based on an accident that occurred during work on a dam in  
25 the Columbia River. See id. at 977. The issue before the Ninth  
26 Circuit was whether Oregon or Washington law applied as the "law  
27 of the place" under the FTCA. The United States' alleged  
28 negligence occurred in the State of Washington, but the

1 plaintiffs asserted that Oregon had jurisdiction of that  
2 geographic area pursuant to the Oregon Admission Act, which gave  
3 Oregon and Washington concurrent jurisdiction over the Columbia  
4 River. See id. The plaintiffs argued that "law of the place"  
5 should be interpreted to mean the law of the state that has  
6 jurisdiction over the place where the negligent act or omission  
7 occurred. The government, on the other hand, argued that the  
8 phrase means the law of the state in which the negligence  
9 occurred. The Ninth Circuit adopted the government's  
10 interpretation. See id. at 978.

11       Reviewing the legislative history of the FTCA, the court in  
12 Brock found that Congress intended "the law of the place" to mean  
13 the law of the state where the negligence occurred. Id. at 978.  
14 The court further determined that Supreme Court precedent  
15 supported a territorial, as opposed to a jurisdictional,  
16 interpretation of "law of the place." It cited Hess v. United  
17 States, 361 U.S. 314, 80 S. Ct. 341 (1960), and noted that in  
18 that case the Supreme Court concluded that when the wrongful act  
19 or omission occurred within "the territorial limits of the State  
20 of Oregon," "liability must . . . be determined in accordance  
21 with the law of that place." Hess, 361 U.S. at 315, 318, 80 S.  
22 Ct. at 345. The Ninth Circuit found that Hess stood for the  
23 proposition that "place" is equated "with the state as defined by  
24 its political or territorial boundaries." Brock, 601 F.2d at  
25 979.<sup>2</sup> In support of its conclusion that Washington law applied,

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27       <sup>2</sup> In contrast, the district court in Cheromiah found that  
28 Hess stood for the rule that "place" is equated to the political  
entity within whose jurisdiction the negligent act or omission

1 the Ninth Circuit next noted a line of cases relating to federal  
2 enclaves located within states. In these cited cases, while the  
3 negligent acts had occurred in areas subject to federal  
4 jurisdiction, such as military installations, the courts  
5 determined that "place" could not in such circumstances mean the  
6 law of the entity that had jurisdiction over the situs of the  
7 negligent act. The courts rather determined that because the  
8 negligent acts had occurred within the territorial boundaries of  
9 a state, that state's law was the "law of the place." See Brock,  
10 601 F.2d at 979. Finally, the Ninth Circuit rejected the  
11 specific reasoning relied upon by the district court in

12 Cheromiah:

13 The plaintiffs also contend that since a private person  
14 could be sued in Oregon court for negligence occurring  
15 within Washington's territorial limits, under § 1346(b) the  
16 United States should be treated likewise. This argument  
17 misconstrues the provision. The statute provides that  
18 "[t]he government shall be liable . . . if a private person  
19 would be liable to the claimant in accordance with the law  
20 of the place where the act or omission occurred." It is  
21 only after "the place" has been determined that the  
22 government shall become liable as a private claimant would  
23 become liable under that state's law.

19 Id. at 980.

20 In addition to the fact that the reasoning employed by the  
21 district court in Cheromiah is unpersuasive in light of Ninth  
22 Circuit precedent, the court finds compelling reasons for  
23 adhering to the traditional rule that when negligent acts or  
24 omissions occur within the boundaries of a state, the law of that  
25 state constitutes the "law of the place." These reasons were  
26 noted in another case emanating from the United States District

27 \_\_\_\_\_  
28 occurred. See Cheromiah, 55 F. Supp. 2d at 1302.

1 Court for the District of New Mexico. Louis v. United States, 54  
2 F. Supp. 2d 1207 (D.N.M. 1999). In Louis, the district court was  
3 presented with the same question as in Cheromiah, namely whether  
4 state or tribal law was the "law of the place" when the negligent  
5 acts occurred on tribal land located within the state. The  
6 district court in Louis reached the opposite conclusion as that  
7 reached by the court in Cheromiah, i.e., that state and not  
8 tribal law constitutes the "law of the place." In support of  
9 this conclusion, the Louis court first noted that in several  
10 decisions over the years other courts had assumed without  
11 discussion that in cases arising on Indian land within a state,  
12 the substantive law of the state is controlling in an FTCA  
13 action. See Louis, 54 F. Supp. 2d at 1209. The court then  
14 recognized problems that would arise if "law of the place" was  
15 interpreted to mean tribal law in such circumstances:

16 [I]t would subject the United States to varying and often  
17 unpredictable degrees of liability, depending on the  
18 reservation that was the site of the occurrence. In the  
19 District of New Mexico alone, for example, there are great  
20 differences between the many tribes and their approaches to  
21 legal issues. In some instances, the difficulty in proving  
22 the existence and substance of any tribal law on the subject  
23 of the tort would be considerable. The court does not  
24 believe Congress intended such a result when adopting the  
25 FTCA . . . .

26 Id. at 1210 n.5.

27 This court agrees with the Louis court that an abrupt  
28 judicial departure from the traditional rule of applying state  
29 law in FTCA cases is unwise in light of the potential  
30 difficulties application of tribal law would create. The court  
31 further finds that the Ninth Circuit's reasoning in Brock weighs  
32 against use of Navajo law in this case. Accordingly, the court

1 concludes that New Mexico and not Navajo law is the "law of the  
2 place" in this case and governs the United States' liability  
3 under the FTCA.

4 B. Certification of Question of Law to the New Mexico  
5 Supreme Court

6 Because the court has determined that New Mexico and not  
7 Navajo law applies in this case, it will consider only  
8 Plaintiffs' alternative request for certification of a single  
9 question of law to the New Mexico Supreme Court -- specifically,  
10 whether minor siblings can recover damages for loss of consortium  
11 resulting from catastrophic injuries to another sibling.  
12 According to New Mexico law, its supreme court "may answer a  
13 question of law certified to it by a court of the United States  
14 . . . if the answer may be determinative of an issue in pending  
15 litigation in the certifying court and there is no controlling  
16 appellate decision, constitutional provision or statute of [New  
17 Mexico]." N.M. Stat. Ann. § 39-7-4. The New Mexico Supreme  
18 Court has held that it "will only accept certified questions when  
19 [its] answer is determinative and 'either disposes of the entire  
20 case or controversy, or disposes of a pivotal issue that defines  
21 the future course of the case.'" City of Las Cruces v. El Paso  
22 Elec. Co., 954 P.2d 72, 77 (N.M. 1998) (quoting Schlieter v.  
23 Carlos, 775 P.2d 709, 710-11 (N.M. 1989)).

24 According to Plaintiffs, New Mexico law regarding loss of  
25 consortium claims has drastically evolved since 1994 and no  
26 published decision has been issued by a New Mexico court since  
27 that time regarding the ability of siblings to bring such claims.  
28 The government, on the other hand, argues that certification of

1 this question is improper for two reasons: (1) the court lacks  
2 subject matter jurisdiction over the loss of consortium claims  
3 brought by Vincent's siblings because they failed to exhaust  
4 their administrative remedies; and (2) controlling New Mexico  
5 precedent exists answering the question sought to be certified.  
6 The government also moves to dismiss the Plaintiffs' claims for  
7 loss of consortium based on these same two grounds.

8 1. Exhaustion of Administrative Remedies

9 The government initially argues that certification to the  
10 New Mexico Supreme Court of the legal question regarding loss of  
11 consortium claims by siblings would be improper because this  
12 court lacks jurisdiction over and cannot even consider these  
13 claims. Specifically, the government argues that Vincent  
14 Bryant's siblings did not comply with the jurisdictional  
15 prerequisite to filing an FTCA action of submitting an adequate  
16 administrative claim to the appropriate agency.

17 The FTCA sets forth the administrative procedure that a  
18 claimant must follow prior to filing suit against the United  
19 States:

20 An action shall not be instituted upon a claim against the  
21 United States for money damages for injury or loss of  
22 property or personal injury or death caused by the negligent  
23 or wrongful act or omission of any employee of the  
24 Government while acting within the scope of his office or  
25 employment, unless the claimant shall have first presented  
26 the claim to the appropriate Federal agency and his claim  
shall have been finally denied by the agency in writing and  
sent by certified or registered mail. The failure of an  
agency to make final disposition of a claim with six months  
after it is first filed shall, at the option of the claimant  
any time thereafter, be deemed a final denial of the claim  
for purposes of this section.

27 28 U.S.C. § 2675(a). The requirement of submitting an  
28

1 administrative claim is jurisdictional in nature.<sup>3</sup> Cadwalder v.  
2 United States, 45 F.3d 297, 300 (9th Cir. 1995). The Ninth  
3 Circuit has held that "section 2675(a) requires the claimant or  
4 his legal representative to file (1) a written statement  
5 sufficiently describing the injury to enable the agency to begin  
6 its own investigation, and (2) a sum certain damages claim."  
7 Warren v. United States Dep't of Interior Bureau of Land  
8 Management, 724 F.2d 776, 780 (9th Cir. 1984).

9 The government argues that the administrative claim form and  
10 related documentation submitted by the Bryants and their attorney  
11 to the federal government did not list loss of consortium as a  
12 claim or identify any of Vincent's siblings as claimants. It  
13 contends that to be entitled to sue in federal court, each and  
14 every claimant must exhaust his or her administrative remedies by  
15 presenting a claim describing his or her injury and stating a sum  
16 certain for his or her damages.

17 Plaintiffs argue that the administrative claim form and  
18 related documentation submitted to the federal government  
19 sufficiently identified the loss of consortium claim and  
20 identified Vincent's siblings as claimants. They argue that

21 \_\_\_\_\_  
22 <sup>3</sup> Plaintiffs argue that the United States did not raise in  
23 either its Answer or in the case management plan the siblings'  
24 alleged failure to exhaust their administrative remedies.  
25 Plaintiffs further point out that the deadline for dispositive  
26 motions was October 29, 1999, and the United States' motion to  
27 dismiss was filed November 18, 1999. However, because the issue  
28 regarding exhaustion of administrative remedies relates to this  
court's subject matter jurisdiction, the United States is  
permitted to raise it any time. See Fed. R. Civ. P. 12(h)(3);  
Rath Packing Co. v. Becker, 530 F.2d 1295, 1303 (9th Cir. 1975),  
aff'd, 430 U.S. 519, 97 S. Ct. 1305 (1977).

1 while the administrative claim form was signed only by Marilyn  
2 Bryant and the letter submitted by their attorney only listed  
3 Marilyn and Tom Bryant as clients, Marilyn Bryant was the proper  
4 party to raise the minor siblings' legal claims, as she is their  
5 mother.

6         The court finds that the documentation submitted by the  
7 Bryants to the federal government does identify loss of  
8 consortium as a claim. The letter submitted by the Bryants'  
9 attorney specifically states, "In addition to the extensive  
10 medical expenses and lost wages, the damages include claims by  
11 the Bryant family for loss of consortium." (Def.'s Ex. A, at 6.)  
12 Furthermore, the court finds that the letter identifies Sonny  
13 Bryant, Teancum Bryant, and Joshua Homer Bryant as claimants. In  
14 the paragraph describing the loss of consortium claim, the letter  
15 specifically refers to "Vincent's three brothers," and describes  
16 the effect Vincent's injury had on them. The court further finds  
17 irrelevant the fact that the claim form and documentation was  
18 submitted by Marilyn and Tom Bryant and their attorney. As the  
19 mother of these minor siblings, Marilyn Bryant had the legal  
20 authority to submit the administrative claim on their behalf.  
21 See Avila v. INS, 731 F.2d 616 (9th Cir. 1984) (holding that  
22 father's signature on claim brought on behalf of adult  
23 incompetent son was sufficient to fulfill the administrative  
24 claim prerequisite).

25         In conclusion, the court finds that the documentation  
26 submitted by Plaintiffs sufficiently described the injuries and  
27 identified the claimants so as to enable the federal agency to  
28 begin its own investigation and also contained a sum certain

1 damages claim of \$20 million. Accordingly, the court will not  
2 dismiss for lack of jurisdiction the loss of consortium claims  
3 brought by Vincent Bryant's sibilings.

4 2. New Mexico Law on Loss of Consortium Claims

5 Prior to 1994, the courts of New Mexico did not recognize a  
6 common law claim for loss of consortium. See Solon v. WEK  
7 Drilling Co., 829 P.2d 645, 650 (N.M. 1992). In Solon, the New  
8 Mexico Supreme Court noted it had not recognized "spousal,  
9 filial, parental, or other" loss of consortium claims. Id. In  
10 that case, the court said it was not inclined to reexamine the  
11 case law in New Mexico disallowing recovery for loss of  
12 consortium because the plaintiffs in that case were not  
13 foreseeable victims of the defendants' negligence. See id. The  
14 plaintiffs were the parents of the twenty-five year old victim of  
15 the negligence. The court held that it was not foreseeable that  
16 the victim would still be residing with his parents nor that  
17 there would be a close and loving relationship with them. See  
18 id. Accordingly, the court held that the parents could not  
19 recover for lost consortium because the defendant had owed them  
20 no duty of care.

21 In 1994, New Mexico law regarding loss of consortium changed  
22 with the New Mexico Supreme Court's decision in Romero v. Byers,  
23 872 P.2d 840 (N.M. 1994). In that case, the supreme court did  
24 what it was unwilling to do in Solon -- reexamine the case law in  
25 New Mexico regarding loss of consortium claims. The court  
26 overruled prior case law and held that spouses can bring common  
27 law claims for loss of consortium. See id. at 845. The court  
28 reached this conclusion because the justifications relied upon in

1 the past for denying spousal consortium claims no longer existed.  
2 See id. at 843-44. The court found that though New Mexico tort  
3 law may not have been well enough developed in the past, as it  
4 stood in 1994 it provided a sufficient basis for incorporating  
5 the claim of negligently caused loss of spousal consortium. See  
6 id. at 843. The court found that the issue under New Mexico tort  
7 law, as recognized in Solon, is whether the negligent actor owed  
8 a duty to the spouse who suffers the loss of consortium. See id.  
9 at 843-44. Upon its recognition of spousal claims for loss of  
10 consortium, the court also permitted a claim by a minor child for  
11 loss of a negligently killed parent's guidance and counseling, an  
12 action rooted in loss of consortium. See id. at 846.

13 Plaintiffs argue that Romero opened the door to loss of  
14 consortium claims and that no New Mexico court since that time  
15 has addressed the issue of a minor sibling's right to recover  
16 damages for loss of another sibling's consortium. Both parties,  
17 however, cite a subsequent New Mexico Supreme Court case that  
18 provides considerable guidance regarding lost consortium claims.  
19 See Fernandez v. Walgreen Hastings Co., 968 P.2d 774 (N.M. 1998).

20 In Fernandez, the plaintiff brought a claim for loss of  
21 consortium based on the defendant's alleged negligence in causing  
22 the death of the plaintiff's twenty-two-month-old granddaughter.  
23 Id. at 776. The plaintiff asserted that she was entitled to such  
24 damages because she was her granddaughter's "guardian, caretaker,  
25 and provider of parental affection." Id. The trial court  
26 dismissed the consortium claim on summary judgment on the grounds  
27 that New Mexico had not recognized loss of consortium outside the  
28 spousal relationship, but the New Mexico Supreme Court reversed

1 this decision on appeal and held that the plaintiff should be  
2 given the opportunity to prove that she uniquely suffered a loss  
3 of her grandchild's consortium. Id. at 782, 784.

4 In reaching its decision, the New Mexico Supreme Court  
5 stated that the plaintiff's "consortium injury arises from her  
6 unique relationship with the victim (and not her family title)."  
7 Id. at 782. Plaintiffs emphasize this language in their  
8 briefings to the court and argue that it opens the door for loss  
9 of consortium claims regardless of the plaintiff's family title.  
10 In the Fernandez decision, however, the New Mexico Supreme Court  
11 provided further guidance regarding the propriety of lost  
12 consortium claims brought by those other than a spouse:

13 In our state, it is not uncommon for several generations of  
14 a family to live in the same home, as in this case. We hold  
15 that such foreseeability can exist where: (1) the victim  
16 was a minor; (2) the plaintiff was a familial care-taker,  
17 such as a parent or grandparent, who lived with and cared  
18 for the child for a significant period of time prior to the  
19 injury or death; (3) the child was seriously physically  
20 injured or killed; and (4) the plaintiff suffered emotional  
21 injury as a result of the loss of the child's companionship,  
22 society, comfort, aid, and protection.

23 Id. at 784.

24 The government argues and the court agrees that the holding  
25 in Fernandez provides controlling precedent answering the  
26 question sought to be certified by the Plaintiffs. Specifically,  
27 the New Mexico Supreme Court held that claims for loss of  
28 consortium are permissible when the victim was a minor and the  
plaintiff was a familial caretaker who lived with and cared for  
the victim. In this case, the younger siblings' loss of  
consortium claims fail on both accounts. Vincent Bryant was not  
a minor at the time of his injury and his younger siblings do not

1 assert that they were his caretaker. In fact, despite  
2 Plaintiffs' arguments that a New Mexico court would clearly allow  
3 Vincent's parents to recover consortium damages, Fernandez  
4 forecloses such claims by Marilyn and Tom Bryant because Vincent  
5 was not a minor at the time of his injury.

6 In addition to the holding reached by the supreme court in  
7 Fernandez, the holding in Solon also remains good law in New  
8 Mexico. The supreme court in Romero did not question the holding  
9 of Solon that loss of consortium is not available to the parents  
10 of a twenty-five-year-old victim because they are not foreseeable  
11 victims of the alleged negligence and thus the defendant does not  
12 owe them a duty of care. Indeed, the court in Romero and  
13 Fernandez approved the use of such foreseeability and duty  
14 analysis in relation to loss of consortium claims. See Romero,  
15 872 P.2d at 843-44; Fernandez, 968 P.2d at 783. As the U.S.  
16 District Court for the District of New Mexico noted, "although  
17 New Mexico recognizes loss of consortium claims for the death of  
18 a minor child, [it] does not permit such claims for the parents  
19 of an adult child." Cheremiah, 55 F. Supp. 2d at 1309 (citing  
20 both Solon and Fernandez).

21 In conclusion, because controlling New Mexico Supreme Court  
22 decisions exist, namely Fernandez and Solon,<sup>4</sup> the court will deny  
23 Plaintiffs' motion to certify its proposed question of law to the  
24 New Mexico Supreme Court.

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26 <sup>4</sup> The government also relies on Chavez v. Sundt Corp., 920  
27 P.2d 1032 (N.M. 1996), but the court does not find that case  
28 instructive, as the New Mexico Supreme Court provided no  
discussion regarding loss of consortium.

1 C. Government's Motion to Dismiss Loss of Consortium  
2 Claims

3 Still pending before the court is the United States' motion  
4 to dismiss all of the Plaintiffs' loss of consortium claims based  
5 on the controlling New Mexico Supreme Court decisions in Solon  
6 and Fernandez. Aside from disputing the merits of this motion,  
7 which the court discussed in relation to Plaintiffs' motion to  
8 certify, Plaintiffs argue that the court should deny the motion  
9 as untimely and permit them to produce evidence at trial in  
10 support of their lost consortium claims. They contend that the  
11 motion to dismiss was not filed until November 18, 1999, while  
12 the deadline established by this court for filing dispositive  
13 motions was October 29, 1999. In reply, the United States does  
14 not dispute that it missed the court-imposed deadline, but  
15 instead argues that it can still raise the issue because it  
16 relates to this court's jurisdiction.

17 In its reply brief, the government argues that it is well  
18 settled that challenges to a federal court's subject matter  
19 jurisdiction may be raised at any time and that sovereign  
20 immunity is a question of subject matter jurisdiction. The  
21 government further asserts that it has waived its sovereign  
22 immunity under the FTCA only under specific and limited  
23 conditions, i.e., only in such "circumstances where [it], if a  
24 private person, would be liable to the claimant in accordance  
25 with the law of the place where the act or omission occurred."  
26 28 U.S.C. § 1346(b). The government argues that federal courts  
27 lack jurisdiction to entertain claims against it under the FTCA  
28 for which a private defendant in like circumstances could not be

1 held liable. See Midwest Knitting Mills, Inc. v. United States,  
2 950 F.2d 1295, 1296 (7th Cir. 1991) ("Because the FTCA  
3 incorporates the substantive law of the state where the tortious  
4 act or omission occurred, a plaintiff must state a claim under  
5 the substantive law in the state where the act or omission  
6 occurred. Therefore, if there is no cause of action under state  
7 law, the district court is without jurisdiction."); Dorking  
8 Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir. 1996)  
9 ("[A] claim which fails to state all six elements of § 1346(b) or  
10 which is otherwise excepted from § 1346(b), see 28 U.S.C. § 2680,  
11 must be dismissed for lack of subject matter jurisdiction.").  
12 Accordingly, the government maintains that this court lacks  
13 jurisdiction to consider Plaintiffs' lost consortium claims  
14 because a private defendant in like circumstances could not be  
15 liable for such claims under New Mexico law.

16       Though recognizing the logic behind the government's  
17 argument, the court is not prepared in this case to hold that in  
18 an FTCA action the United States is free to raise at any time  
19 issues relating to its liability under the governing law because  
20 these issues relate to its sovereign immunity and therefore to  
21 the court's subject matter jurisdiction. Under such logic, the  
22 United States could file dispositive motions going to the merits  
23 of a plaintiff's FTCA claim at any time, regardless of deadlines  
24 established by the court for filing such motions.<sup>5</sup> The court  
25

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26       <sup>5</sup> In relation to this problem, the court notes that the  
27 United States originally moved to dismiss the lost consortium  
28 claims for failure to state a claim. Under the government's  
logic, any motion to dismiss for failure to state a claim in an

1 need not determine the merits of this argument, however, because  
2 Ninth Circuit case law exists permitting district courts upon  
3 their own motion to dismiss complaints for failure to state a  
4 claim where the plaintiff could not possibly win relief. See  
5 Sparling v. Hoffman Constr. Co., 864 F.2d 635, 637-38 (9th Cir.  
6 1988); Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir.  
7 1987); Wong v. Bell, 642 F.2d 359, 361 (9th Cir. 1981).  
8 Plaintiffs had notice that this court was considering dismissal  
9 of their loss of consortium claims, and they had an opportunity  
10 to present arguments to the court regarding the propriety of such  
11 dismissal in light of New Mexico law. Plaintiffs, in fact, were  
12 the ones who initially raised issues relating to their loss of  
13 consortium claims when they filed their motion requesting  
14 certification.

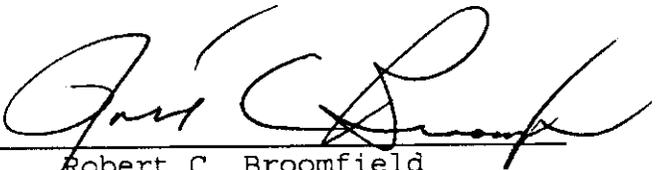
15 In ruling on the Plaintiffs' motion for certification, the  
16 court determined that New Mexico case law fails to recognize a  
17 claim for lost consortium by siblings or parents of a victim who  
18 was not a minor at the time he suffered the relevant injuries.  
19 See Fernandez, 968 P.2d at 784; Solon, 829 P.2d at 650.  
20 Accordingly, Plaintiffs cannot possibly win relief on their  
21 claims for lost consortium, and the court will dismiss these  
22 claims.

23 IT IS ORDERED denying Plaintiffs' Motion for Certification  
24 of Question of Law to Navajo Supreme Court or, Alternatively, New  
25 Mexico Supreme Court, filed October 29, 1999 (doc. 116).

26 \_\_\_\_\_  
27 FTCA action could be characterized as a motion to dismiss for  
28 lack of subject matter jurisdiction and be brought by the United  
States at any time.

1 IT IS FURTHER ORDERED grant Defendant's Motion to Dismiss  
2 Plaintiffs' Loss of Consortium Claims, filed November 18, 1999  
3 (doc. 124). Plaintiffs Marilyn Bryant's, Tom Bryant's, Joshua  
4 Homer Bryant's, Sonny Bryant's, and Teancum Bryant's loss of  
5 consortium claims are dismissed.

6 DATED this 7 day of January, 2000.

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10 Robert C. Broomfield  
United States District Judge

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12 Copies to counsel of record

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