Date and Time: Monday, April 12, 2021 2:15:00 AM EDT

Job Number: 141165814

Documents (19)

1. *Boney v. Valline, 597 F. Supp. 2d 1167*

   Client/Matter: -None-

   Search Terms: FTCA claim AND Tribe AND indian self-determination

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

2. *Shirk v. United States, 773 F.3d 999*

   Client/Matter: -None-

   Search Terms: FTCA claim AND Tribe AND indian self-determination

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

3. *Mizner v. United States, 2003 U.S. Dist. LEXIS 26862*

   Client/Matter: -None-

   Search Terms: FTCA claim AND Tribe AND indian self-determination

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

4. *Farmer v. United States, 2014 U.S. Dist. LEXIS 150018*

   Client/Matter: -None-

   Search Terms: FTCA claim AND Tribe AND indian self-determination

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	Narrowed by
Cases	-None-

5. *Dinger v. United States, 2013 U.S. Dist. LEXIS 34518*

   Client/Matter: -None-

   Search Terms: FTCA claim AND Tribe AND indian self-determination

   Search Type: Terms and Connectors

   Narrowed by:

Content Type	Narrowed by

Cases	-None-

6. *Manuel v. United States, 2014 U.S. Dist. LEXIS 160537*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

7. *Beetus v. United States, 2021 U.S. Dist. LEXIS 53705*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

8. *Hinsley v. Standing Rock Child Protective Servs., 516 F.3d 668*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

9. *McLaughlin v. United States, 2010 U.S. Dist. LEXIS 163573*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

10. *Anthony v. United States, 2020 U.S. Dist. LEXIS 187378*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

11. *Hebert v. United States, 438 F.3d 483*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

12. *After v. United States, 2012 U.S. Dist. LEXIS 100265*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

13. *Stago v. Wide Ruins Cmty. Sch., Inc., 2001 Navajo Sup. LEXIS 5*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

14. *Perry v. Seminole Tribe of Fla., 2009 U.S. Dist. LEXIS 66150*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

15. *Emm v. Yerington Paiute Tribe, 2018 U.S. Dist. LEXIS 65269*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

16. *Trujillo v. United States, 313 F. Supp. 2d 1146*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

17. *Roemen v. United States, 463 F. Supp. 3d 990*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

18. *Lee v. United States, 2020 U.S. Dist. LEXIS 211198*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

19. *Ruchert v. Williamson, 2017 U.S. Dist. LEXIS 114461*

Client/Matter: -None-

Search Terms: FTCA claim AND Tribe AND indian self-determination

Search Type: Terms and Connectors

Narrowed by:

Content Type	Narrowed by
Cases	-None-

Boney v. Valline

United States District Court for the District of Nevada

January 22, 2009, Decided; January 22, 2009, Filed

3:05-cv-00683-RCJ-VPC

Reporter
597 F. Supp. 2d 1167 *; 2009 U.S. Dist. LEXIS 13851 **

GAYLEEN BONEY, Plaintiff, vs. WALTER VALLINE, Defendant.

Prior History: Boney v. United States, 2008 U.S. Dist. LEXIS 117027 (D. Nev., July 15, 2008)

Core Terms

tribal, ***tribe***, federal government, law enforcement officer, tribal law, federal law, cause of action, Reservation, enforcing, symbiotic, purposes, rights, arrested, self-determination, sovereignty, federal employee, federal official, non-Indians, arrived, courts, color, self-government, personnel, funding, district court, police officer, tribal court, commissioned, private entity, regulations

Case Summary

Procedural Posture

Plaintiff mother filed a lawsuit against defendant tribal police officer, seeking damages for the officer's violation of her First Amendment rights by retaliating against her by shooting her son in response to her complaints about the officer's conduct and for the officer's violation of her Fourth Amendment rights by unlawfully arresting her. The officer filed a motion for summary judgment after his motion to dismiss was denied.

Overview

The mother alleged that while she was trying to assist her wounded son, the officer unlawfully restrained and arrested her. The officer was employed by the Walker River Paiute ***Tribe***'s Police Department. The mother argued that the officer acted as a federal actor or under the color of federal law when he shot her son because of the ***Tribe***'s contractual relationship with the federal government. The ***Tribe*** provided law enforcement on the Reservation under a self-determination contract under the ***Indian Self-Determination*** and Education Assistance Act of 1975, 25 U.S.C.S. §§ 450-450n. The officer was not acting under the color of federal law at the time that he used deadly force against the son because although the ***Tribe*** received funding for its law enforcement activities and was required to comply with certain recordkeeping and certification requirements, these factors were not sufficient to impute federal government action to the conduct of the officer. The officer was responding to a report of a ***Tribe*** member's drunk driving, a violation of Tribal law, not federal law. There was no evidence that the federal government profited from the ***Tribe***'s provision of law enforcement.

Outcome
The tribal police officer's motion for summary judgment was granted.

LexisNexis® Headnotes

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Movant Persuasion & Proof

HN1[] Summary Judgment, Entitlement as Matter of Law

The court should grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. A fact is material if it might affect the outcome of the suit under the governing law. In support of its motion for summary judgment, the moving party need not negate the opponent's claim. The moving party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict in favor of the opponent.

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] Burdens of Proof, Nonmovant Persuasion & Proof

When a properly supported motion for summary judgment has been presented, the adverse party may not rely merely on allegations or denials in its own pleading. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must set forth specific facts demonstrating the existence of a genuine issue for trial. A party cannot create a genuine issue for trial by asserting some metaphysical doubt as to the material facts. Nor can a party create a genuine issue of material fact by merely discrediting the testimony proffered by the moving party, which does not usually constitute a sufficient response to a motion for summary judgment.

Civil Procedure > ... > Summary
Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary
Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN3[] Evidentiary Considerations, Absence of Essential Element

To survive a motion for summary judgment, the adverse party must present affirmative evidence, which is to be believed and from which all justifiable inferences are to be favorably drawn. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, summary judgment is warranted. Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Rights Law > Protection of Rights > Implied Causes of Action

HN4[] Protection of Rights, Implied Causes of Action

A plaintiff alleging a constitutional violation by a federal actor has a right of action under Bivens v. Six Unknown Fed. Narcotic Agents. Federal officers who act under color of law are liable for damages caused by their violation of a plaintiff's Fourth Amendment rights. Under Bivens, a plaintiff may sue a federal officer in his or her individual capacity for damages for violation of the plaintiff's constitutional rights. To state a claim under Bivens, the plaintiff must allege: (1) that a right secured by the Constitution of the United States was violated, and (2) that the alleged violation was committed by a federal actor. 42 U.S.C.S. § 1983 and Bivens actions are identical save for replacement of state actor under § 1983 by federal actor under Bivens.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN5[] Fundamental Freedoms, Freedom of Speech

The First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. Government officials may not punish a

person or deprive him or her of a benefit on the basis of his or her constitutionally protected speech.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN6[] Search & Seizure, Scope of Protection

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. The fundamental principle of the Fourth Amendment is reasonableness. The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure.

Civil Rights Law > Protection of Rights > Implied Causes of Action

HN7[] Protection of Rights, Implied Causes of Action

In the Ninth Circuit, the private status of the defendant will not serve to defeat a Bivens claim, provided that the defendant engaged in federal action. Private status is not alone sufficient to counsel hesitation in implying damages remedy when private party defendants jointly participate with government to sufficient extent to be characterized as federal actors. In other words, Bivens liability may be applicable to constitutional violations committed by private individuals, but only if they act under color of federal law, or are federal actors.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN8[] Burdens of Proof, Nonmovant Persuasion & Proof

A nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment, but must set forth by affidavit or other appropriate evidence specific facts showing there is a genuine issue for trial. The nonmoving party may not simply state that it will discredit the moving party's evidence at trial; it must produce at least some significant probative evidence tending to support the complaint.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN9[] Native Americans, Indian Self-Determination & Education Assistance Act

The ***Indian Self-Determination*** and Education Assistance Act of 1975 (ISDEAA), 25 U.S.C.S. §§ 450-450n, authorizes federal agencies to contract with Indian ***tribes*** to provide services on the reservation. Such a contract is commonly referred to as a "self-determination contract" or "638 contract." A "self-determination contract" is a contract between a tribal organization and the federal government for the planning, conduct and administration of programs or services which are otherwise provided to Indian ***tribes*** and their members pursuant to federal law. 25 U.S.C.S. § 450b(j). Congress enacted the ISDEAA to encourage ***Indian self-determination*** and tribal control over administration of federal programs for the benefit of Indians, by authorizing self-determination contracts between the United States, through the Secretaries of the Interior and of Health and Human Services, and Indian ***tribes***. There are several categories of contractible services or programs called out by the statute, one of which concerns the provision of a police force and related law enforcement functions on Indian lands. 25 U.S.C.S. § 450f(a)(1)(B). Congress thus recognized that one of the ways to further ***Indian self-determination*** was to allow a ***tribe*** to contract for law enforcement services so the ***tribe*** could maintain a tribal police force on the reservation capable of effectively enforcing criminal laws.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN10[] Native Americans, Indian Self-Determination & Education Assistance Act

A private actor's conduct may be considered that of the federal government where the private actor and federal government enjoyed a symbiotic relationship. A symbiotic relationship occurs when the government has so far insinuated itself into a position of interdependence with a private entity that it must be recognized as a joint participant in the challenged activity.

Civil Rights Law > Protection of Rights > Implied Causes of Action

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN11[] **Protection of Rights, Implied Causes of Action**

Although the enforcement of federal law may traditionally be the exclusive prerogative of the federal government, the enforcement of a ***tribe***'s own tribal laws against members of the ***tribe*** is certainly within the scope of the ***tribe***'s inherent sovereignty.

Governments > Native Americans > Authority & Jurisdiction

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN12[] **Native Americans, Authority & Jurisdiction**

Indian ***tribes*** retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty. The powers of self-government include the power to prescribe and enforce internal criminal laws. To that end, Indian ***tribes*** unquestionably have power to enforce their criminal laws against ***tribe*** members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain a separate people, with the power of regulating their internal and social relations. Their right of internal self-government includes the right to prescribe laws applicable to ***tribe*** members and to enforce those laws by criminal sanctions.

Civil Rights Law > Protection of Rights > Implied Causes of Action

HN13[] **Protection of Rights, Implied Causes of Action**

A symbiotic relationship may arise by virtue of the government's exercise of plenary control over the private party's actions.

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN14[] **Native Americans, Indian Self-Determination & Education Assistance Act**

25 C.F.R. § 12.21(b) states that tribal law enforcement officers operating under a Bureau of Indian Affairs (BIA) contract or compact are not automatically commissioned as Federal officers; however, they may be commissioned on a case-by-case basis. Under a 638 contract, the BIA is authorized to delegate the responsibility of enforcing federal law on Indian lands to tribal police. However, to do so, the BIA must approve and issue federal commissions called "special law enforcement commissions" or "SLECs" to individual tribal officers determined to be qualified on a case-by-case basis.

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN15[] **Native Americans, Indian Self-Determination & Education Assistance Act**

The ***Indian*** ***Self-Determination*** and Education Assistance Act of 1975 (ISDEAA), *25 U.S.C.S. §§ 450-450n*, allows recovery under the Federal Tort Claims Act (FTCA) for certain claims arising out of the performance of self-determination contracts. Tribal governments, when carrying out self-determination contracts, are performing a federal function and a unique legal trust relationship exists between the tribal government and the federal government in these agreements. Because of this relationship, the federal government must provide liability insurance to the tribal government for self-determination contracts.

Civil Rights Law > Protection of Rights > Implied Causes of Action

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN16[] **Protection of Rights, Implied Causes of Action**

A Bivens cause of action is not a Federal Tort Claims Act (FTCA) cause of action. Hence, the FTCA's definition of tribal officers as federal employees does not automatically qualify tribal officers as federal employees or actors for purposes of Bivens.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN17[] **Native Americans, Indian Self-Determination & Education Assistance Act**

Although Congress amended the ***Indian Self-Determination*** and Education Assistance Act of 1975 (ISDEAA), *25 U.S.C.S. §§ 450-450n*, to allow recovery under the Federal Tort Claims Act (FTCA) for certain claims arising out of performance of self-determination contracts, courts have held that the qualification of a tribal employee as a federal employee or actor under the FTCA is limited. The FTCA allows injured persons to sue for certain torts committed by federal employees while acting within the scope of their office or employment. *28 U.S.C.S. § 1346*. The FTCA contains some exceptions to the waiver of sovereign immunity. *28 U.S.C.S. § 2680*. Under the intentional torts exception, the FTCA bars any claim arising out of assault, battery, false imprisonment, or false arrest. However, there is an exception to the exception. The FTCA does not bar a claim against the United States for intentional torts such as assault and battery where the perpetrator is an investigative or law enforcement officer. Thus, under the intentional torts exception to the FTCA, the general waiver of sovereign immunity effected by the FTCA only extends to suits for intentional torts such as assault and battery, false imprisonment, false arrest, malicious prosecution, and abuse of process if the conduct of investigative or law enforcement officers of the United States Government is involved. *28 U.S.C.S. § 2680(h)*.

Governments > Native Americans > General Overview

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN18[] **Governments, Native Americans**

If an intentional tort is committed by one who is not an investigative or law enforcement officer, then sovereign immunity is not waived under the Federal Tort Claims Act (FTCA). An investigative or law enforcement officer is defined as any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. *28 U.S.C.S. § 2680(h)*. Tribal defendants who are acting under authority inherent to the ***Tribe***'s sovereignty (i.e., enforcing tribal criminal laws against tribal members), are not investigative or law enforcement officers for purposes of the FTCA.

Governments > Native Americans > General Overview

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN19[] **Governments, Native Americans**

A two-part legal analysis may be used to evaluate whether a tribal officer constitutes a federal law enforcement officer under the Federal Tort Claims Act. First, the tribal police officer must be certified as a federal law enforcement officer for that officer to come under *28 U.S.C.S. § 2680(h)*. Second, the tribal officer must have acted under color of federal law at the time of the alleged tort.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN20[] **Native Americans, Indian Self-Determination & Education Assistance Act**

A tribal officer is only considered to be a federal employee for Federal Tort Claims Act purposes while acting under authority granted by the Secretary of the Interior, *25 U.S.C.S. § 2804(f)*, and a tribal officer is not acting in such capacity when he is enforcing tribal (not federal) law and is doing so without having received a special law enforcement commission from the Bureau of Indian Affairs.

Civil Rights Law > Protection of Rights > Implied

Causes of Action

HN21[] **Protection of Rights, Implied Causes of Action**

The U.S. Supreme Court's position is to respond cautiously to suggestions that Bivens remedies be extended into new contexts. Such caution is prudent considering that a Bivens cause of action is implied without any express congressional authority whatsoever. Since Bivens, the Supreme Court has recognized the existence of an implied damages remedy in only two other circumstances. The first extended Bivens to a plaintiff's claim for money damages against a former employer (member of U.S. Congress) for violations of the Due Process clause where there were no alternative forms of judicial relief. The second circumstance is that federal prison officials may be sued for violations of the Eighth Amendment's prohibition on cruel and unusual punishment, notwithstanding the availability of a claim under the Federal Tort Claims Act against the United States because the threat of suit against the United States is insufficient to deter the unconstitutional acts of individuals. Since these two extensions, however, the Supreme Court consistently has declined to extend Bivens liability to new contexts or new categories of defendants.

Civil Rights Law > Protection of Rights > Implied Causes of Action

HN22[] **Protection of Rights, Implied Causes of Action**

A Bivens remedy will not lie in the presence of special factors which militate against a direct recovery remedy. For example, the presence of a deliberately crafted statutory remedial system is one special factor that precludes a Bivens remedy. Also, the unique nature and structure of the military has been determined to be a special factor prohibiting a Bivens action by military personnel for constitutional violations committed by their superiors.

Civil Rights Law > Protection of Rights > Implied Causes of Action

Constitutional Law > Separation of Powers

HN23[] **Protection of Rights, Implied Causes of Action**

A decision to create a private right of action is one better left to legislative judgment in the great majority of cases.

Governments > Native Americans > Indian Civil Rights Act

HN24[] **Native Americans, Indian Civil Rights Act**

The Indian Civil Rights Act (ICRA) was passed with the declared purpose to secure for the American Indian the broad constitutional rights afforded to other Americans. The ICRA imposes restrictions upon tribal governments similar, but not identical, to those embodied in the Bill of Rights and the Fourteenth Amendment. Section 1302 of the ICRA, 25 U.S.C.S. § 1302, incorporates many of the same rights as found in the Bill of Rights, including the First and Fourth Amendment rights.

Governments > Native Americans > Indian Civil Rights Act

HN25[] **Native Americans, Indian Civil Rights Act**

See 25 U.S.C.S. § 1302(1) and (2).

Governments > Native Americans > Indian Civil Rights Act

HN26[] **Native Americans, Indian Civil Rights Act**

Tribal forums are available to vindicate rights created by the Indian Civil Rights Act; tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Governments > Native Americans > Authority & Jurisdiction

HN27[] **Native Americans, Authority & Jurisdiction**

Tribal courts play a vital role in tribal self-government. A federal court's exercise of jurisdiction over matters

relating to reservation affairs can also impair the authority of tribal courts.

Governments > Native Americans > Authority & Jurisdiction

HN28[] **Native Americans, Authority & Jurisdiction**

The inherent sovereign powers of an Indian ***tribe*** do not extend to the activities of nonmembers of the ***tribe***. Nonetheless, Indian ***tribes*** do retain inherent sovereign authority to exercise some forms of civil jurisdiction over non-Indians on their reservations. This jurisdiction arises: (1) when nonmembers enter consensual relationships with the ***tribe*** or its members, through commercial dealing, contracts, leases, or other arrangements or (2) when a nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the ***tribe***.

Governments > Native Americans > Authority & Jurisdiction

HN29[] **Native Americans, Authority & Jurisdiction**

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and that civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Such language stands for nothing more than the unremarkable proposition that, where ***tribes*** possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts. Thus, to the extent there is a tribal interest at issue, a tribal court can and probably should exercise jurisdiction over the non-Indian parties.

Governments > Native Americans > Authority & Jurisdiction

HN30[] **Native Americans, Authority & Jurisdiction**

A ***tribe*** arguably possesses authority to regulate the activities of nonmembers who are employed by a ***tribe***'s law enforcement department and who are charged with enforcing the ***tribe***'s laws against tribal members.

Civil Rights Law > Protection of Rights > Implied Causes of Action

HN31[] **Protection of Rights, Implied Causes of Action**

The absence of statutory relief for a constitutional violation does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.

Governments > Native Americans > General Overview

HN32[] **Governments, Native Americans**

Sovereign immunity may leave a party with no forum for its claims.

Counsel: **[**1]** For GAYLEEN BONEY, Plaintiff: Mitchell C Wright, LEAD ATTORNEY, Wright Law Offices, Reno, NV; Paul J. Malikowski, LEAD ATTORNEY, Paul Joseph Malikowski, Law Office Of, Reno, NV.

For Walter Valline, Defendant: Charles R. Zeh, LEAD ATTORNEY, Zeh Saint-Aubin Spoo, Reno, NV.

Judges: Robert C. Jones, United States District Judge.

Opinion by: Robert C. Jones

Opinion

[*1168] ORDER

Before the Court is Defendant Officer Walter Valline's Motion for Summary Judgment. (# 52). Plaintiff Gayleen Boney **[*1169]** filed the present lawsuit against Defendant, seeking damages for Defendant's alleged violation of her *First* and *Fourth Amendment* rights in connection with her arrest and son's death, which occurred on July 15, 2004. Having considered the parties' papers, relevant legal authority, and the record in this case, the Court GRANTS Defendant's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2004, Defendant began employment as a Walker River Tribal Police Officer, which provides law enforcement services on the Walker River Paiute Tribal Reservation (the "Reservation"). (# 53, Ex. 8, Valline Aff. P 2). The Walker River Paiute ***Tribe*** (the "***Tribe***") is a federally recognized ***tribe***. (# 52, Ex. 8, Reymus Aff. P 2). Within the first few months of **[**2]** Defendant's employment, Defendant had several encounters with Plaintiff's family.

On April 21, 2004, Defendant and Chief Dean Pennock, who was Police Chief of the ***Tribe*** at that time, were summoned to apprehend Plaintiff's ex-husband, Norman Boney, Sr., who was drunk and belligerent. (# 52, Ex. 6, Pennock Aff. P 6). Although Boney, Sr. was ultimately apprehended, during that encounter, Boney, Sr. tried to escape the officers' custody and punched Defendant in the nose. (*See id.*). On May 30, 2004, Plaintiff submitted a letter to Chief Pennock, alleging that Defendant employed excessive force against her ex-husband on April 20, 2004. (# 19, Ex. E). Chief Pennock determined that during the April 20, 2004 incident, Defendant had conducted himself properly and that the force Defendant had used was warranted under the circumstances. (Pennock Aff. P 7; # 19, Ex. F). As a result, Defendant was not disciplined for this incident. (Pennock Aff. P 10).

On May 29, 2004, Defendant was summoned because Boney, Sr. was reportedly driving drunk around the Reservation. (Valline Aff. PP 4-5). Defendant found Boney, Sr. driving with two teenage girls, who were later released to their parents. (*See id.*). Defendant, **[**3]** who was accompanied by Officer Elliot, apprehended Boney, Sr. for suspicion of drunk driving. (*See id.*). The officers discovered drug paraphernalia and empty beer bottles in Boney, Sr.'s vehicle. (*See id.*). As a result, Officer Elliot, as the senior officer, determined that the vehicle needed to be impounded. (Valline Depo., 10/25/07, at 199:21-23; 201:15-18).

Melissa Boney, Plaintiff's daughter, telephoned Defendant to request that she be able to pick up the vehicle and that the vehicle not be impounded. (*See id.* at 198-204). Because drug paraphernalia was discovered in the vehicle, however, her request was denied. (*See id.* at 198:5-18). Defendant told Melissa Boney that the vehicle was going to be impounded and that if she showed up at the police station to pick up the car, she would be arrested. (*See id.* at 202-03). Plaintiff's son, Norman "Manny" Boney, Jr., was also on the telephone call. When Defendant warned Melissa Boney to not come down to the station, Manny jumped into the conversation and told Defendant that Manny "would come down [to the police station] and kick [his] fucking ass if [Defendant] didn't give her the truck." (*See id.* at 204:9-19). Defendant later had a 3-way **[**4]** telephone conversation with Plaintiff, Melissa Boney, and Manny. (Valline Depo., 12/11/07, at 94-95). According to Plaintiff, Defendant threatened Manny during the second telephone conversation by telling Manny, "I'll come and drug test you right now!" (# 19, Ex. E). In her May 30, 2004 letter, Plaintiff also complained about the manner in which Defendant handled himself in his telephone conversations with herself and her children. (*See id.*). Chief Pennock found Plaintiff's complaint about **[*1170]** the telephone calls to be "wanting" and that it did not warrant any discipline. (Pennock Aff. PP 9-10).

On June 10, 2004, Defendant was dispatched to the residence of Boney, Sr. (Valline Aff. P 6). Boney, Sr. was found unconscious and was taken away by medical personnel. Medical records revealed that Boney, Sr. had passed out from alcohol consumption. (# 52, Ex. 2). During this incident, Plaintiff arrived at Boney, Sr.'s residence. Because there was a restraining order between Plaintiff and her ex-husband, Defendant warned Plaintiff that she would violate the restraining order if she approached Boney, Sr. and that he would have to arrest her. (Gayleen Boney Depo., 9/17/07, at 149:17-151:2). Plaintiff **[**5]** became upset and told Defendant to go ahead and do it. (*See id.*). As a result, Defendant handcuffed Plaintiff and placed her in the back of his squad car for approximately twenty minutes. (*See id.*). Plaintiff did not submit a complaint about this incident. (*See id.* at 154:23-25; 155:1-16).

On July 15, 2004, Defendant responded to a call from Plaintiff in which Plaintiff expressed concern that Boney, Sr. was driving drunk on the Reservation and that she did not want the vehicle to be impounded if Boney, Sr.

was arrested. (*See id.* at 140:20-142:2). Chief Pennock sent Plaintiff to address the matter, as driving intoxicated on the Reservation was a violation of tribal law. (Pennock Aff. P 17). Defendant contacted Officer Yocum for assistance. (Valline Depo., 12/11/07, 122:3-20). Besides Chief Pennock, Defendant and Officer Yocum were the only officers on duty at that time. (Yocum Aff. P 3; Pennock Depo. at 183-84; Valline Depo, 12/11/07 at 111:16-20).

Upon arriving at the residence, Defendant observed that both Boney, Sr. and Manny were present. (Valline Depo, 12/11/07, 123:25-125:5). Boney, Sr. appeared to be intoxicated. Upon Defendant's arrival, Manny became angry and started yelling **[**6]** at Defendant. Melissa Boney and a friend, Charissa Dunnett, also arrived at the residence shortly after Defendant's arrival. (Dunnett Depo. at 35-36). The details of what happened are in dispute, but soon after Defendant arrived at the scene, Defendant employed deadly force against Manny, shooting Manny multiple times. (Dunnett Depo. at 55-65; Valline Depo, 12/11/07 at 123-35).

Shortly after Defendant employed deadly force against Manny, Plaintiff arrived upon the scene. Upon seeing her son injured and on the ground, she became emotional and angry. (Valline Depo., 12/11/07, at 135). Plaintiff began to berate Defendant while at the same time trying to tend to her son. Defendant pointed his gun at Plaintiff and told her to get back. (Valline Depo., 12/11/07, at 135). Officer Yocum and Chief Pennock then arrived. (*See id.* at 135-36). Plaintiff was yelling at Plaintiff, calling the officers killers, and threatening the officers. (Yocum Aff. at P 12). To prevent the escalation of a conflict between Plaintiff and Defendant and to calm down Plaintiff, Chief Pennock, with the assistance of Officer Yocum, restrained Plaintiff and placed her in the rear of Defendant's squad car. (*See id.* at 140:3-7, **[**7]** 141, 142:1-8). Because of her anger at Defendant, Pennock ordered Defendant to stay away from Plaintiff. (Pennock Depo. at 201:1-12).

On December 19, 2005, Plaintiff filed her Complaint against Defendant (# 1), which she subsequently amended (# 19). Plaintiff has brought two claims against Defendant. First, Plaintiff has alleged that Defendant violated her *First Amendment* rights by retaliating against her by shooting her son Manny in response to her complaints about Defendant's conduct. Second, Plaintiff alleges that Defendant **[*1171]** violated her *Fourth Amendment* rights by unlawfully arresting her. On January 18, 2007, the Court denied Defendant's Motion to Dismiss (# 27). On March 11, 2008, Defendant filed his Motion for Summary Judgment. (# 52).

II. MOTION FOR SUMMARY JUDGMENT STANDARD

HN1[↑] The Court should grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. A fact is material if it might affect the outcome of the suit under the governing **[**8]** law. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. In support of its motion for summary judgment, the moving party need not negate the opponent's claim. *See Celotex, 477 U.S. at 323*. The moving party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict in favor of the opponent. *See Anderson, 477 U.S. at 249*.

HN2[↑] When a properly supported motion for summary judgment has been presented, the adverse party "may not rely merely on allegations or denials in its own pleading." *Fed. R. Civ. P. 56(e)*. Rather, the nonmoving party must set forth "specific facts" demonstrating the existence of a genuine issue for trial. *Id.; Anderson, 477 U.S. at 256*. A party cannot create a genuine issue for trial by asserting "some metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Nor can a party create a genuine issue of material fact by merely discrediting the testimony proffered by the moving party, which does not usually constitute a sufficient response to a motion for summary judgment. *See Anderson, 477 U.S. at 256-57*.

HN3[↑] To survive a motion for summary judgment, the adverse party must **[**9]** present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. *Id. at 255, 257*. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, summary judgment is warranted. *See Miller v. Glenn Miller Prod., Inc., 454 F.3d 975, 988 (9th Cir. 2006)*; *see also Beard v.. Banks, 548 U.S. 521, 529, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006)* ("*Rule 56(c)* 'mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial.'" (quoting Celotex, 477 U.S. at 322)).

III. ANALYSIS

This case asks the Court to determine whether a tribal officer who violates the constitutional rights of a tribal member in the course of enforcing tribal law can be subject to liability under Bivens, which is a case of first impression in this Circuit.

A. Federal Actor Status Under Self-Determination Contract

HN4[] A plaintiff alleging a constitutional violation by a federal actor has a right of action under Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). **[**10]** In *Bivens,* the Supreme Court held that federal officers who acted under color of law were liable for damages caused by their violation **[*1172]** of the plaintiff's Fourth Amendment rights. *See* id. at 389. Under *Bivens,* a plaintiff may sue a federal officer in his or her individual capacity for damages for violation of the plaintiff's constitutional rights. *See* id. at 397. To state a claim under *Bivens,* Plaintiff must allege: (1) that a right secured by the Constitution of the United States was violated, and (2) that the alleged violation was committed by a federal actor. *See* Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991) (42 U.S.C. § 1983 and *Bivens* actions are identical save for replacement of state actor under § 1983 by federal actor under *Bivens*).

Plaintiff has alleged that Defendant violated her First Amendment and Fourth Amendment rights. It is long settled "that as a general matter HN5[] the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." Hartman v., Moore, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006); Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (government officials may not punish a person or deprive him or her of a benefit on the **[**11]** basis of his or her "constitutionally protected speech"). Plaintiff alleges that in response to Plaintiff's expression of her dissatisfaction with Defendant's conduct, Defendant retaliated against her by killing her son. HN6[] The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. *See* U.S. Const. Amend. IV. "The fundamental principle 'of the Fourth Amendment is reasonableness.'" Morgan v. U.S., 323 F.3d 776, 780 (9th Cir. 2003). "The Fourth Amendment insists that an unreasonable search or seizure is, constitutionally speaking, an illegal search or seizure." Hudson v. Michigan, 547 U.S. 586, 608, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006). Plaintiff alleges that while she was trying to assist her wounded son, Defendant unlawfully restrained and arrested Plaintiff.

However, for Defendant to be liable under Bivens, Plaintiff must prove that Defendant was a federal actor at the time of the disputed events that occurred on July 15, 2004. Defendant was not a federal government employee at the time of the disputed incident. On July 15, 2004, Defendant was employed by the Walker River Paiute ***Tribe***'s Police Department. (Valline Aff. PP 1-2).

Nonetheless, even if Defendant was not directly **[**12]** employed by the federal government, Defendant may still qualify as a federal actor for purposes of *Bivens* liability. HN7[] In the Ninth Circuit, "the private status of the defendant will not serve to defeat a *Bivens* claim, provided that the defendant engaged in federal action." Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1337-38 (9th Cir. 1987) (private status is not alone sufficient to counsel hesitation in implying damages remedy when private party defendants jointly participate with government to sufficient extent to be characterized as federal actors). In other words, *Bivens* liability may be applicable to constitutional violations committed by private individuals, but only if they act "under color of federal law," or are "federal actors." Sarro v. Cornell Corrections, Inc., 248 F.Supp.2d 52, 59 (D.R.I. 2003).

Plaintiff argues that Defendant acted as a federal actor or under the color of federal law when he shot Plaintiff's son because of the ***Tribe***'s contractual relationship with the federal government. Earlier in this case, the Court denied Defendant's Motion to Dismiss on this issue and held that Plaintiff had made sufficient allegations of Defendant's status as a federal **[**13]** actor. However, what suffices as an *allegation* to withstand a motion to dismiss does not necessarily suffice as *evidence* to withstand **[*1173]** a motion for summary judgment. Plaintiff, HN8[] as the nonmoving party, "may not rely on the mere allegations in the pleadings in order to preclude summary judgment," but must set forth by affidavit or other appropriate evidence "specific facts showing there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The nonmoving party may not simply state that it will discredit the moving party's

evidence at trial; it must produce at least some "significant probative evidence tending to support the complaint." *Id.*

HN9[] The ***Indian Self-Determination*** and Education Assistance Act of 1975 ("ISDEAA"), Public Law 93-638, authorizes federal agencies to contract with Indian ***tribes*** to provide services on the reservation. *See* 25 U.S.C. §§ 450-450n. Such a contract is commonly referred to as a "self-determination contract" or "638 contract." A "self-determination contract" is a contract "between a tribal organization and the [Federal Government] for the planning, conduct and administration of programs or services **[**14]** which are otherwise provided to Indian ***tribes*** and their members pursuant to Federal law." 25 U.S.C. § 450b(j). "Congress enacted the ISDEAA to encourage ***Indian self-determination*** and tribal control over administration of federal programs for the benefit of Indians, by authorizing self-determination contracts between the United States, through the Secretaries of the Interior and of Health and Human Services, and Indian ***tribes***." Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs, 255 F.3d 801, 806 (9th Cir. 2001). There are several categories of contractible services or programs called out by the statute, one of which concerns the provision of a police force and related law enforcement functions on Indian lands. 25 U.S.C. § 450f(a)(1)(B). Congress thus recognized that one of the ways to further ***Indian self-determination*** was to allow a ***tribe*** to contract for law enforcement services so the ***tribe*** could maintain a tribal police force on the reservation capable of effectively enforcing criminal laws.

On July 15, 2004, the ***Tribe*** was in a contract with the Bureau of Indian Affairs ("BIA") to provide law enforcement on the Reservation under a self-determination contract **[**15]** or 638 contract. (# 15, Ex. A). Courts have held that HN10[] a private actor's conduct may be considered that of the federal government where the private actor and federal government enjoyed "a symbiotic relationship." A symbiotic relationship occurs when the government has "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961). In *Burton,* the Supreme Court considered whether a restaurant's refusal to serve the plaintiff because of his race could fairly be attributed to the public entity that owned the building that housed the restaurant. 365 U.S. at 723. In finding state action, the Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the public building. *See id.* Also, "[u]pkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds." Id. at 724. The Court was further convinced of state action by the argument that the restaurant's profits, and hence the state's **[**16]** financial position, would suffer if it did not discriminate based on race. *See id.*

Similarly, in Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982), the Ninth Circuit found sufficient evidence of state action where the county leased land to a private **[*1174]** entity who owned and operated an apartment complex on the land. 672 F.2d at 1310. The Ninth Circuit found a symbiotic relationship between the county and the owner based on the fact that the county owned the land and had developed it using public funds, the county leased the land to the owner for the benefit of providing housing to the public, and the county controlled the use and purpose of the apartment, as well as the rent the owner could charge, a percentage of which was paid to the county. *See id.*

Subsequent courts that have considered the definition of a symbiotic relationship, however, have narrowed the scope and application of *Burton.* In Rendell-Baker v. Kohn, 457 U.S. 830, 842, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982), the Supreme Court rejected a symbiotic relationship argument because, although the state and private school were in a mutually beneficial relationship, there was no showing that the state derived any benefit from the challenged activity (*i.e.,* the **[**17]** termination of school personnel). 457 U.S. at 842-43. In distinguishing *Burton,* the Court emphasized that there was evidence that the state in *Burton* actually "profited from the restaurant's discriminatory conduct." Id. at 843. The *Rendell-Baker* court found no such connection between the benefit conferred to the state by the school and the challenged activity, and thus no symbiotic relationship. *See id.*

In *Morse v. N. Coast Opportunities, Inc.,* the Ninth Circuit adopted and expounded on the Supreme Court's decision in *Rendell-Baker,* finding "that governmental funding and extensive regulation without more will not suffice to establish governmental involvement in the actions of a private entity." 118 F.3d 1338, 1341 (9th Cir. 1997) (citing *Rendell-Baker*). The *Morse* court noted that *Burton's* symbiotic relationship test requires additional evidence of interdependence, such as "the

physical location of the private entity in a building owned and operated by the State, and a showing that the State profited from the private entity's discriminatory conduct." *Morse, 118 F.3d at 1341*.

In *Morse,* the Ninth Circuit held that a Head Start parents' council was not liable for alleged federal constitutional **[**18]** violations in approving an employee's termination because the actions were not fairly attributable to the federal government. *See id. at 1342-43*. Although the federal government was involved in the Head Start program through significant funding and regulations governing the operation of the program, according to the Ninth Circuit, governmental funding and extensive regulation, without more, was not sufficient to establish governmental involvement in the actions of a private agency. *See id.* The Court arrived at its decision by applying the analysis articulated by the *Rendell-Baker* court, which considered four factors to determine whether government action was implicated in the private conduct of the school council:

> (1) the source of the school's funds; (2) the impact of governmental regulations on the conduct of the private employer; (3) whether the private actor was performing a function that is traditionally the exclusive prerogative of the government; and (4) whether a symbiotic relationship existed between the private actor and the government.

Id. at 1342.

Applying the *Rendell-Baker* factors to the evidence presented to the Court, the Court holds that Defendant was not acting under **[**19]** the color of federal law at the time that he used deadly force against Plaintiff's son. Under its 638 contract, the ***Tribe*** received funding for its law enforcement activities, and the Department of Interior or "DOI" (through the BIA) required **[*1175]** that the ***Tribe*** comply with certain recordkeeping and certification requirements. Nonetheless, the Supreme Court and the Ninth Circuit have made clear, in *Rendell-Baker* and *Morse,* that a combination of these two factors is not sufficient to impute federal government action to the conduct of a private or non-federal actor. In *Morse,* the Ninth Circuit observed that the Head Start program was "funded almost exclusively by the federal government," yet the Ninth Circuit found no governmental action. *Id. at 1342*. Similarly, in *Morse,* the existence of considerable federal regulations touching upon the conduct of the Head Start council did not preclude the Ninth Circuit from finding no governmental action. *Id. See also, Mathis v. Pacific Gas and Elec. Co., 75 F.3d 498, 501 (9th Cir. 1996)* (requiring a showing that federal regulations created the "standard of decision" for the personnel decision of a private entity to be considered governmental action); *Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1486 (9th Cir. 1995)* **[**20]** (finding that actions of a private entity were not governmental action where no State regulation or policy compelled the offensive action).

The Court in *Rendell-Baker* also considered whether the private entity was performing a function that was "traditionally the exclusive prerogative" of the government. *See Rendell-Baker, 457 U.S. at 842*. In *Morse,* the Ninth Circuit noted that the Head Start program was educating pre-school children and determined that pre-school education is not a function that is normally carried out by the federal government and as a result, there was no governmental action. *118 F.3d at 1343*. ***HN11***[⬆] Although the enforcement of federal law may "traditionally [be] the exclusive prerogative" of the federal government, the enforcement of a ***tribe***'s own tribal laws against members of the ***tribe*** is certainly within the scope of the ***tribe***'s inherent sovereignty.

The Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)*. "This policy reflects the fact that ***HN12***[⬆] Indian ***tribes*** retain 'attributes of sovereignty over both their members and their territory,' to the **[**21]** extent that sovereignty has not been withdrawn by federal statute or treaty." *Id.* (internal citation omitted). The Supreme Court has recognized that "the powers of self-government" include "the power to prescribe and enforce internal criminal laws." *Nevada v. Hicks, 533 U.S. 353, 378, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)* (citation omitted). *See also, United States v. Wheeler, 435 U.S. 313, 326, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)* (recognizing that the power to make and enforce criminal laws has been recognized as an exercise of the inherent sovereign powers retained by Indian ***tribes*** because the exercise of criminal jurisdiction over ***tribe*** members on tribal lands "involve[s] only the relations among members of a ***tribe*** [and these] are not such powers as would necessarily be lost by virtue of a ***tribe***'s dependent status."). To that end, Indian ***tribes*** unquestionably have power to enforce their criminal laws against ***tribe*** members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations." *United*

States v. Kagama, 118 U.S. 375, 381-382, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). Their right of internal self-government includes the **[**22]** right to prescribe laws applicable to ***tribe*** members and to enforce those laws by criminal sanctions. United States v. Antelope, 430 U.S. 641, 643 n. 2, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977).

In the present case, Defendant was called to the scene to address Norman **[*1176]** Boney, Sr.'s reported violation of the ***Tribe***'s Constitution and Law and Order Code. (*See* Pennock Aff. P 12). Under tribal law, it was illegal to drive on Reservation roads while intoxicated. (*See id.; see also,* Reymus Aff. P 5). Defendant went to the scene in response to a report that Norman Boney, Sr. was driving drunk around the Reservation, in violation of tribal law. (*See* id. at P 16). This law was put into place by the ***Tribe***'s Tribal Council to govern the relations among the ***Tribe***'s members and to ensure their safety. If Defendant had arrived at the scene to enforce federal law, then there might be an argument that his conduct was in the exclusive prerogative of the federal government. *See* 18 USC § 1153 (provides for federal jurisdiction over 14 enumerated crimes committed by "Indians" within "the Indian country" and commonly referred to as the Major Crimes Act). However, Defendant went to the scene to enforce tribal law against a member of the ***Tribe***, **[**23]** which constitutes conduct within the ***Tribe***'s inherent sovereignty. In sum, Defendant was not performing a function that was traditionally the exclusive prerogative of the federal government.

Finally, in *Morse,* the Ninth Circuit looked to whether there was a "symbiotic relationship" between the school council and the government. Because there was no evidence that the federal government actually profited from the council's decision to terminate the employee, the Ninth Circuit concluded that there was no "symbiotic relationship." Id. at 1343. "Often significant financial integration indicates a symbiotic relationship." Brunette v. Humane Society of Ventura County, 294 F.3d 1205, 1213 (9th Cir. 2002) (citations omitted). "For example, if a private entity, like the restaurant in *Burton,* confers significant financial benefits indispensable to the government's 'financial success,' then a symbiotic relationship may exist." *Id.* That is clearly not the case here. There is no evidence that the DOI was profiting from the ***Tribe***'s provision of law enforcement on the Reservation.

Alternatively, ***HN13***[↑] "[a] symbiotic relationship may also arise by virtue of the government's exercise of plenary control over **[**24]** the private party's actions." *Id.* (citing Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1226-27 (5th Cir. 1982) (finding symbiotic relationship where the government controlled a private peacekeeping force engaged in a government-directed field mission in the Sinai Peninsula). Such control of the law enforcement activities on the Reservation does not exist here. Under the ***Tribe***'s 638 contract, the ***Tribe*** was "responsible for managing the day-to-day operations" of the law enforcement activities performed pursuant to the 638 contract. (# 15, Ex. A at 5, P 7(c)). The ***Tribe*** provided "all necessary qualified and licensed personnel, equipment, materials and services to perform all tribal law services on the Walker River Paiute ***Tribe***, with the exception of federal violation (major crimes)." (*See id.* at Section C at 12). The ***Tribe*** was "responsible for the investigation of all offenses enumerated in the Tribal Law and Order Code, United States Code or 25 CFR as applicable." (*See id.* at Section C at 13). The uniforms donned by tribal officers bore a "tribal patch." (*See id.* at Section C at 12). The ***Tribe*** recruited and employed its police officers, who were subjected to Tribal personnel policies and **[**25]** procedures. (*See* Pennock Aff. P 12). Except as specifically agreed between the ***Tribe*** and the Secretary of Interior, the ***Tribe*** was "not required to abide by [Federal] program guidelines, manuals, or policy directives . . . ." in carrying out law enforcement activities pursuant to the 638 Contract. (# 15, Ex. A at 11, P 11). In short, by no means did the federal government exercise plenary control over the ***Tribe***'s law enforcement activities **[*1177]** and certainly had no intervention with the specific incident that occurred on July 15, 2004 on the Reservation.

Therefore, although the ***Tribe*** received considerable funds from the federal government and was required to comply with certain guidelines provided by the federal government in carrying out its responsibilities under the 638 contract, this evidence is insufficient to establish that the federal government and the ***Tribe*** had a symbiotic relationship. Furthermore, Plaintiff presented no evidence that Defendant was commissioned as a federal officer. ***HN14***[↑] 25 C.F.R. § 12.21(b) states that "[t]ribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers; however, they may be commissioned **[**26]** on a case-by-case basis." Under a 638 contract, the BIA is authorized to delegate the responsibility of enforcing federal law on Indian lands to tribal police. *See* Hopland Band of Pomo Indians v. Norton, 324 F.Supp.2d 1067, 1068 (N.D. Cal. 2004). However, to do so, the BIA must approve and

issue federal commissions called "special law enforcement commissions" or "SLECs" to individual tribal officers determined to be qualified on a case-by-case basis. *Id.*

At the time that Defendant was involved with the incident on July 15, 2004, he had only been employed with the ***Tribe***'s police force for three months. (*See* Valline Aff. P 2). Plaintiff has presented no evidence that Chief Pennock submitted an application to the BIA for a SLEC for Defendant or that the BIA approved or issued a SLEC for Defendant. According to the Chairman of the Walker River Paiute ***Tribe***, the ***Tribe***'s police officers were not cross-deputized by the federal government. (Reymus Aff., P 14). Because *25 C.F.R. § 12.21(b)* makes a distinction between tribal law enforcement officers who are commissioned as federal officers and those who are not, the Court is persuaded that noncommissioned tribal officers such as Defendant, especially **[**27]** when such officers are purely enforcing tribal law, are not acting under the color of federal law.

Additionally, nothing in the ISDEAA, or in relevant case law, suggests that the mere existence of a 638 contract between the BIA and a ***tribe*** for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments. The overwhelming weight of the evidence presented establishes that Defendant was a tribal police officer. Defendant was attempting to enforce tribal law when his encounter with Plaintiff's son took place. Plaintiff has presented no evidence to establish that Defendant was commissioned as a federal officer or that Defendant routinely, or even sporadically, acted to enforce federal law. In sum, Defendant does not qualify as a federal actor for liability under *Bivens.*

At least one circuit agrees with this result. In *Dry v. United States, 235 F.3d 1249 (10th Cir. 2000)*, Choctaw Nation Tribal officers arrested Native Americans on Choctaw land and charged them with numerous offenses in tribal court. *See id. at 1251*. The tribal members then filed suit against certain law enforcement personnel and asserted constitutional **[**28]** violations under *Bivens* in concert with ***FTCA claims***. *See id.* The district court dismissed all claims against the tribal defendants, including their Bivens claims. *See id. at 1255*. On appeal, the Tenth Circuit affirmed the dismissal of the *Bivens* claims. The Tenth Circuit stressed that under *Bivens,* an individual has "a cause of action against a *federal official* in his individual capacity for damages arising out of the official's violation of the United States Constitution *under color of federal law or authority.*" *Id.* (emphasis in original). **[*1178]** The Tenth Circuit held that "the tribal defendants did not act as federal employees or agents, nor did they act under color of federal law." *Id.* Instead, the court concluded they were acting under the ***Tribe***'s inherent tribal sovereignty over its own members and stated that "Indian ***tribes*** have power to enforce their criminal laws against ***tribe*** members." *Id. at 1254*.

B. Federal Actor Under The Federal Tort Claims Act

Plaintiff argues that because a tribal officer can qualify as a federal employee for purposes of the Federal Tort Claims Act ("FTCA"), then a tribal officer must qualify as a federal employee or actor for all purposes, including for purposes **[**29]** of liability in a *Bivens* cause of action. In 1988, Congress amended ***HN15***[⬆] the ISDEAA to allow recovery under the FTCA for certain claims arising out of the performance of self-determination contracts. "Congress acknowledged that the tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in these agreements. Because of this relationship, Congress concluded that the federal government must provide liability insurance to the tribal government for self-determination contracts." *FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1995)*.

Nonetheless, the Ninth Circuit has rejected Plaintiff's argument. In *Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004)*, law enforcement officers of the Navajo Nation Division of Public Safety filed actions against both the Navajo Nation and the United States claiming violations of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. §§ 201-219*. *See id. at 894*. The Court of Appeals upheld the dismissal of the FLSA cause of action on the ground that the plaintiffs' cause of action was against the Navajo **[**30]** Nation, not the United States. *See id. at 896*. The plaintiffs argued that they were employees of the federal government, and could appropriately bring an FLSA claim against the United States, because they were considered employees for purposes of the FTCA. The Ninth Circuit rejected their argument that the FTCA's qualification of them as federal employees "means they are employees of the BIA for all purposes," including for purposes of the FLSA. *Id. at 897*. The Ninth Circuit concluded that Congress "did not intend section 314 to provide a

remedy against the United States in civil actions unrelated to the FTCA." *Id.* Similarly, ***HN16***[↑] a *Bivens* cause of action is not an FTCA cause of action. Hence, the FTCA's definition of tribal officers as federal employees does not automatically qualify tribal officers as federal employees or actors for purposes of *Bivens.*

Plaintiff's argument must fail for another reason. ***HN17***[↑] Although Congress amended ISDEAA to allow recovery under the FTCA for certain claims arising out of performance of self-determination contracts, courts have held that the qualification of a tribal employee as a federal employee or actor under the FTCA is limited. In *Dry,* the Tenth Circuit **[**31]** also held that the United States could not be liable for the tribal defendants' actions under the FTCA. The FTCA allows injured persons to sue for certain torts committed by federal employees while acting within the scope of their office or employment. *See* *28 U.S.C. § 1346*. "The purpose of the [FTCA] is to provide a remedy to citizens injured by governmental negligence in circumstances in which the same act of negligence would impose liability under state law, but for governmental immunity." *Kearney v. United States, 815 F.2d 535, 536 (9th Cir. 1986)*. The FTCA contains **[*1179]** some exceptions to the waiver of sovereign immunity. *28 U.S.C. § 2680*. Under the intentional torts exception, the FTCA bars any claim arising out of assault, battery, false imprisonment, or false arrest.

However, there is an "exception to the exception." *Tekle v. U.S., 511 F.3d 839, 851 n.9 (9th Cir. 2007)*. The FTCA does not bar a claim against the United States for intentional torts such as assault and battery where the perpetrator is an investigative or law enforcement officer. Thus, under the intentional torts exception to the FTCA, the general waiver of sovereign immunity effected by the Act only extends to suits **[**32]** for intentional torts such as "assault [and] battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process" if the conduct of "investigative or law enforcement officers of the United States Government" is involved. *28 U.S.C. § 2680(h)*. ***HN18***[↑] If an intentional tort is committed by one who is not an investigative or law enforcement officer, then sovereign immunity is not waived. An "investigative or law enforcement officer" is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *28 U.S.C. § 2680(h)*. In *Dry,* the Tenth Circuit held that because the tribal defendants were acting under authority inherent to the ***Tribe***'s sovereignty (*i.e.,* enforcing tribal criminal laws against tribal members), they were not investigative or law enforcement officers for purposes of the FTCA. *235 F.3d at 1258*.

The district courts of the Tenth Circuit have followed *Dry.* In *Trujillo v. United States, 313 F.Supp.2d 1146 (D.N.M. 2003)*, three Isleta Tribal Police officers responded to a call from the plaintiff Erlinda Trujillo, the estranged spouse of Robert Trujillo, Sr., requesting that **[**33]** law enforcement officers come to her residence located on the Pueblo because she believed that her ex-spouse was intoxicated and should not have the children. *See id. at 1148*. The officers took custody of the two minor children and attempted to arrest Mr. Trujillo. The Trujillos later filed an ***FTCA claim***, alleging that the three officers physically attacked and beat Mr. Trujillo.

Despite the existence of a 638 contract with the BIA, the district court concluded that the tribal officers were not "law enforcement officers" of the United States for purposes of the FTCA. *See id. at 1151*. The district court noted that "[n]othing in the ISDEAA, or in relevant case law, suggests that the mere existence of a Public Law 93-638 contract between BIA and a ***tribe*** for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments." *Id.* It further determined that "[a]bsent the power to enforce federal law, tribal officers are not federal investigative or law enforcement officers." *Id.* To determine whether the tribal officers were United States law enforcement officers for purposes of the FTCA, the court noted that the **[**34]** answer depended on "the particular contract under which the services are carried out." *Id.* In particular, the court observed that under the '638 contract, only tribal officers who received special law enforcement commissions could assist the BIA in enforcing applicable federal criminal statutes and that none of the tribal defendants had received such commissions. *See id. at 1151*. *See also, Vallo v. United States, 298 F.Supp.2d 1231 (D.N.M. 2003)* (finding that officer was not a federal officer and that the *Dry* decision compelled dismissal).

The Fifth Circuit has agreed with the status of tribal officers under the FTCA. In *Hebert v. U.S., 438 F.3d 483 (5th Cir. 2006)*, a tribal police officer, Wirick, responded to a domestic dispute between two non-Indians at a casino on tribal land. *See id. at 484*. **[*1180]** One of the non-Indians, Hebert, failed to comply with the officer's instruction and a confrontation occurred that resulted in Hebert being injured. *See id.*

Hebert filed a FTCA cause of action. In *Hebert,* the ***Tribe*** had a 638 contract with the BIA. In fact, in *Hebert,* unlike the present case, the Fifth Circuit observed that the BIA had signed a Deputation Agreement with the Chitimacha Police **[**35]** Department in which the BIA agreed to and did issue a SLEC to Wirick, one of the tribal defendants, cross-deputizing him as a BIA law enforcement officer. *See id. at 483*.

Nonetheless, the Fifth Circuit concluded that neither Wirick nor his chief acted within the scope of federal employment in order for FTCA coverage to attach to Hebert's ***FTCA claim*** because "[n]either Wirick nor Vidallia were employed as Bureau of Indian Affairs law enforcement officers or special agents, nor were they acting in accordance with any special commission to assist the Bureau of Indian Affairs with providing law enforcement services." *Id. at 487*. In sum, the record failed to show that the defendants were actually enforcing federal law when they arrested the plaintiff. *See id.* As a result, the Fifth Circuit held that the tribal officers were not acting under the color of federal law, could not be considered "investigative or law enforcement officers of the United States government" for purposes of the FTCA, and the United States had not waived sovereign immunity to be sued for indemnification under the FTCA for the plaintiff's assault and battery claim.

District courts of the Eighth Circuit have arrived at **[**36]** a similar conclusion. In *LaVallie v. U.S., 396 F.Supp.2d 1082 (D.N.D. 2005)*, the plaintiff LaVallie filed an FTCA suit against tribal officer William Ebarb for Ebarb's alleged use of excessive force when arresting LaVallie. *See id. at 1083*. In *LaVallie,* the ***Tribe*** had a 638 contract with the BIA, which the district court did not find sufficient. *See id. at 1085*. In fact, the United States acknowledged that tribal officers and the BIA worked closely together and that the BIA even provided "direct supervision" for tribal officers and that tribal officers would be trained at the BIA Police Academy. *See id. at 1086*. However, at the time of the alleged assault, Officer Ebarb was attempting to enforce tribal law and LaVallie was ultimately arrested and charged with a variety of tribal offenses. *See id.* As a result, the district court concluded that Officer Ebarb was acting as a tribal police officer and that he did not qualify as a federal officer under the FTCA. *See id. See also, Locke v. United States, 2002 DSD 22, 215 F.Supp.2d 1033(D.S.D. 2002)* (concluding that despite federal funding to ***tribe*** under 638 contract, the tribal officer was not a "federal law enforcement officer" for purposes of the FTCA), **[**37]** aff'd, *Locke v. United States, 63 Fed.Appx. 971, 2003 WL 21212167 (8th Cir. 2003)* (unpublished, per curiam opinion affirming a lower court finding that the officer in question was not acting as a federal law enforcement officer).

One district court in the Ninth Circuit agrees with the courts of the Fifth, Eighth, and Tenth Circuits. In *Washakie v. U.S., No. CV-05-462, 2006 U.S. Dist. LEXIS 75110, 2006 WL 2938854 (D.Idaho Oct. 13, 2006)*, the plaintiff Oren Washakie filed an FTCA suit, alleging that he was assaulted while in the Fort Hall Jail by officers of the Fort Hall Police Department. Relying upon *Dry* and *Hebert,* the court used ***HN19***[↑] a two-part legal analysis to evaluate whether a tribal officer constitutes a federal law enforcement officer under the FTCA: "First, a tribal police officer must be certified as a federal law enforcement officer for that officer to come under *§ 2680(h)*. Second, the tribal officer must have acted under color of federal law at the time of the alleged tort." *2006 U.S. Dist. LEXIS 75110, [WL] at *4*. Because the evidence demonstrated that **[*1181]** the tribal officers had not been certified by the BIA, the district court held that they were not "investigative or law enforcement officers of the United Stated Government" under *28 U.S.C. § 2680(h)*. **[**38]** *Id. See also, Cabazon Band of Mission Indians v. Smith, 388 F.3d 691, 695-96 (9th Cir. 2004)* (observing that tribal police officers who have received SLECs from the BIA pursuant to a Deputation Agreement with the BIA "are treated as federal employees under the Federal Tort Claims Act.").

Similarly, in the present case, there is no evidence that Defendant was certified or had received a special commission from the BIA. Evidently, not all tribal officers working for a ***tribe*** with a 638 contract are required to have SLECs. *See Bob v. U.S., No. Civ. 07-5068, 2008 U.S. Dist. LEXIS 31933, 2008 WL 818499, at *2 (D.S.D. Mar. 26, 2008)* (holding that even though tribal defendants may be considered federal employees under the FTCA, they were not federal "investigative or law enforcement officers" in light of government's affidavit stating that none of the tribal officers involved in the disputed incident had held the special law enforcement commission from the BIA pursuant to *25 C.F.R. § 12.21(b)*). Additionally, Defendant was enforcing the ***Tribe***'s laws against the ***Tribe***'s members. As a result, Defendant would not qualify as an investigative or law enforcement officer of the United States Government under *28 U.S.C. § 2680(h)*.

HN20[↑] A **[**39]** tribal officer is only considered to be a federal employee for FTCA purposes "[w]hile acting

under authority granted by the Secretary [of the Interior]" (*see* 25 U.S.C. § 2804(f)) and a tribal officer is not acting in such capacity when he is enforcing tribal (not federal) law and is doing so without having received a SLEC from the BIA. Thus, Plaintiff's argument fails. In fact, the considerable case law declining to find a tribal officer to be a federal investigative or law enforcement officer under 28 U.S.C. § 2680(h) further bolsters the Court's position that such a tribal officer (at least a tribal officer who does not have a SLEC and is enforcing tribal law) cannot be considered a federal actor for purposes of *Bivens.* The Court's position is also strengthened by Congress's instruction that courts interpret self-determination contracts liberally to benefit Indian contractors. *See* 25 U.S.C. § 450l (c) (Section 1 "Purpose"). (*See also,* # 15, Ex. A at 5).

C. Extension of *Bivens*

The Court's holding is buttressed by **HN21**[↑] the U.S. Supreme Court's position to "respond[] cautiously to suggestions that *Bivens* remedies be extended into new contexts." Correctional Services Corp. v. Malesko, 534 U.S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). **[**40]** Such caution is prudent considering that "[a] *Bivens* cause of action is implied without any express congressional authority whatsoever." Holly v. Scott, 434 F.3d 287, 289 (4th Cir. 2006). Since *Bivens,* the Supreme Court has recognized the existence of an implied damages remedy in only two other circumstances. *See* Malesko, 534 U.S. at 61 ("In [over] 30 years of *Bivens* jurisprudence [the Court has] extended its holding only twice."). The Court noted that it first extended *Bivens* to a plaintiff's claim for money damages against a former employer (member of U.S. Congress) for violations of the Due Process clause in Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979). The Court emphasized that there were no alternative forms of judicial relief for *Davis,* who, like *Bivens,* was limited to "damages or nothing." *Id. at 245* Approximately one year later, in Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), the Supreme Court held that federal prison officials could be sued for violations of the Eighth Amendment's prohibition on cruel and un **[*1182]** usual punishment, notwithstanding the availability of a claim under the FTCA against the United States. The Court reasoned that the threat of suit against the United States was insufficient **[**41]** to deter the unconstitutional acts of individuals. *See* id. at 21.

Since *Davis* and *Carlson,* however, the Supreme Court consistently has declined to extend *Bivens* liability "to new contexts or new categories of defendants." Malesko, 534 U.S. at 68. For example, in Bush v. Lucas, 462 U.S. 367, 390, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983), the Supreme Court refused to create an implied *Bivens* remedy against government officials for a First Amendment violation in the federal employment context, holding that the "administrative review mechanisms crafted by Congress provided meaningful redress," foreclosing "the need to fashion a new, judicially crafted cause of action." *Id.* (recognizing in *Bush* Congress's institutional competence in crafting appropriate relief as special factor counseling hesitation). *See also,* Malesko, 122 S. Ct. at 524 (Scalia, J., concurring) (stating that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action-decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition" and that he would "limit *Bivens* and its two follow-on cases [*Davis v. Passman* and *Carlson v. Green*] **[**42]** to the precise circumstances that they involved.").

In Holly v. Scott, 434 F.3d 287 (4th Cir. 2006), cert. denied, *547 U.S. 1168, 126 S. Ct. 2333, 164 L. Ed. 2d 849 (2006)*, a federal inmate filed a *Bivens* action alleging that prison officials, who were employees of a privately run facility in North Carolina operated by GEO Group, Inc. under contract with the federal Bureau of Prisons, did not properly treat his diabetes and that he was punished when he attempted to obtain medical treatment. *See* id. at 288-89. The Fourth Circuit held that the purpose of *Bivens* was to deter individual "federal officers" from committing constitutional violations and that employees of a private corporation under contract with the federal government were not "federal officials, federal employees, or even independent contractors in the service of the federal government. Instead, they are employed by GEO, a private corporation." Id. at 292. The Court emphasized that in the context of constitutional claims raised under 42 U.S.C. § 1983, courts have insisted that as a prerequisite to liability, the "conduct allegedly causing the deprivation of a federal right be fairly attributable to the state." *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). **[**43]** There was no suggestion in Holly, however, "that the federal government [had] any stake, financial or otherwise, in GEO. Nor [was] there any suggestion that federal policy played in a part in defendants alleged failure to provide adequate medical care, or that defendants colluded with federal officials in making the relevant decisions." *Id.*

The Fourth Circuit expressed its reluctance to extend

Bivens on the basis that "*Bivens* . . . is a judicial creation" without legislative sanction. *Id.* As such, the Court noted that the "danger of federal court's failing to 'respect the limits of their own power' [ ] increases exponentially" with the extension of *Bivens* to such circumstances. *Id.* The Court also recognized the availability of superior causes of action available to plaintiff under the state law of negligence and concluded that the extension of a judicially implied remedy was therefore inappropriate. *See id. at 295-296*.

The Ninth Circuit has similarly recognized *Bivens* to be a limited remedy. *Castaneda v. U.S., 546 F.3d 682, 688 [*1183] (9th Cir. 2008)*. ***HN22***[↑] A *Bivens* remedy will not lie "in the presence of 'special factors' which militate against a direct recovery remedy." *Id.* For example, "[t]he **[**44]** presence of a deliberately crafted statutory remedial system is one 'special factor' that precludes a *Bivens* remedy." *Id. at 700* (quoting *Moore v. Glickman, 113 F.3d 988, 991 (9th Cir. 1997)*). Also, the unique nature and structure of the military has been determined to be a special factor prohibiting a *Bivens* action by military personnel for constitutional violations committed by their superiors. *See Chappell v. Wallace, 462 U.S. 296, 304, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983)*.

Similarly, in the present case, the Court finds that allowing a *Bivens* action against a tribal law enforcement officer solely on the basis of the an Indian ***tribe*** having a 638 contract with the BIA implicates the ***tribe***'s inherent sovereignty, which constitutes a special factor militating against extending *Bivens* to this new context. As explained above, the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co., 480 U.S. at 14*. Given the facts of the present case--a tribal law enforcement officer enforcing tribal law against a ***tribe*** member on tribal territory--the extension of *Bivens* to this particular context has dangerous implications for disrupting the **[**45]** long-recognized boundaries between the sovereignty of the United States and that of Indian ***tribes*** and disregarding Indian ***tribes***' inherent right of self-government. In light of these special considerations touching upon an Indian's ***tribe***'s sovereignty, the creation of a private right of action against tribal law enforcement officers for civil rights violations committed in the course of conducting tribal business is a decision more appropriately left to legislative judgment. *See Sosa v. Alvarez-Machain, 542 U.S. 692, 727, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)* (The Supreme Court "has recently and repeatedly said that ***HN23***[↑] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." (citations omitted)).

A related factor that causes this Court pause in extending *Bivens* to this context is the possibility of an alternate remedial system in the tribal courts. ***HN24***[↑] The Indian Civil Rights Act ("ICRA) was passed with the declared purpose "to secur[e] for the American Indian the broad constitutional rights afforded to other Americans." *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*. The ICRA imposes "restrictions upon tribal governments similar, but not identical, **[**46]** to those embodied in the *Bill of Rights* and the *Fourteenth Amendment*." *Id. at 57*. *Section 1302* of the ICRA incorporates many of the same rights as found in the *Bill of Rights*, including the *First* and *Fourth Amendment* rights. Specifically, *section 1302* states the following:

HN25[↑] No Indian ***tribe*** in exercising powers of self-government shall--

> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

25 U.S.C. § 1302(1) and *(2)*. ***HN26***[↑] "Tribal forums are available to vindicate rights created by the ICRA . . . tribal courts have repeatedly been recognized as appropriate **[*1184]** forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo, 436 U.S. at 65*.

The Court **[**47]** is not in a position to determine the remedies available to Plaintiff in the Walker River Paiute ***Tribe***'s courts. Nonetheless, the ICRA does provide protections analogous to the *First* and *Fourth Amendments*, and Plaintiff could possibly have a private cause of action against Defendant for violating these provisions. *See, e.g., Gourd v. Robertson,* 28 Indian L. Rep. 6047, 6048 (Spirit Lake Tribal Ct. 2001) (holding that plaintiff could recover damages on ICRA claim against general manager of tribal casino if plaintiff showed that the defendant "violated a clearly-

established right of the plaintiff"); *Johnson v. Navajo Nation,* 14 Indian L. Rep. 6037, 6040 (Nav. Sup. Ct. 1987) (stating that "[t]he Navajo courts have always been available for the enforcement of civil rights created by the ICRA and the Navajo Bill of Rights" and noting that the Navajo Nation has enacted laws permitting suit against tribal officials for acting outside the scope of their authority). The availability of obtaining relief in a tribal court clearly does not constitute an alternative remedy that Congress has explicitly declared to be a substitute for recovery under *Bivens* and that is equally effective (*see* Castaneda, 546 F.3d at 688), **[**48]** but the possibility of seeking relief in a matter over which the tribal courts may have jurisdiction goes to the ***Tribe***'s sovereignty, a factor that causes the Court hesitation in extending *Bivens* here. *See* Iowa Mut. Ins. Co., 480 U.S. at 15 (stating that ***HN27***[⬆] "[t]ribal courts play a vital role in tribal self-government" and that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.").

During oral argument, Plaintiff's attorney, without citing any authority, instructed the Court that Plaintiff filed her cause of action against Defendant in the first instance in federal court because Defendant, being a non-Indian, would certainly have been able to dismiss any cause of action on personal jurisdiction grounds. It is not entirely clear, however, that the ***Tribe***'s courts could not exercise jurisdiction over an ICRA or tort cause of action against Defendant, even if a non-Indian.

"[T]he leading case on tribal civil jurisdiction over non-Indians" is Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). FMC v. Shoshone-Bannock ***Tribes***, 905 F.2d 1311, 1314 (9th Cir. 1990). In *Montana,* the Supreme Court rejected tribal authority **[**49]** to regulate nonmembers' activities on land over which the ***tribe*** could not assert a landowner's right to occupy and exclude. *See* Montana, 450 U.S. at 557, 564. In *Montana,* the Supreme Court specifically addressed the reach of tribal civil jurisdiction over non-Indian parties and found that:

> the Indian ***tribes*** retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the ***tribes***, and so cannot survive without express congressional delegation.

Id. at 564 (citations omitted). The Court then announced the general principle that ***HN28***[⬆] "the inherent sovereign powers of an Indian ***tribe*** do not extend to the activities of nonmembers of the ***tribe***." Id. at 565. Nonetheless, the Court decided that Indian ***tribes*** do "retain inherent sovereign authority to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Id.* **[*1185]** This jurisdiction arises: (1) when nonmembers "enter consensual relationships with the ***tribe*** or its members, **[**50]** through commercial dealing, contracts, leases, or other arrangements" or (2) when a nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the ***tribe***." Id. at 565-66 (citations omitted).

In *Iowa Mutual,* the Supreme Court stated that ***HN29***[⬆] "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. The Supreme Court has squared this language with *Montana* and related cases, explaining that such language "stands for nothing more than the unremarkable proposition that, where ***tribes*** possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" Strate v. A-1 Contractors, 520 U.S. 438, 453, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). Thus, to the extent there is a tribal interest at issue (as defined in the *Montana* exceptions), a tribal court can and probably should exercise jurisdiction over the non-Indian **[**51]** parties.

This Court renders no holding on the issue of the ***Tribe***'s courts' exercise of jurisdiction over this matter, but merely notes the possibility that the ***Tribe*** could conclude that it has an interest in and jurisdiction over the adjudication of a tribal member's cause of action against a tribal law enforcement officer (even if a non-Indian) for a violation of her rights that the tribal officer committed against her on Indian land in the course of enforcing tribal laws. *See* Nevada v. Hicks, 533 U.S. 353, 358 n.2, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (noting that the Court's "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law" and that the Court was leaving "open the question of tribal-court jurisdiction over nonmember defendants in general.").

HN30[⬆] A ***tribe*** arguably "possess[es] authority to

regulate the activities of nonmembers" who are employed by a ***tribe***'s law enforcement department and who are charged with enforcing the ***tribe***'s laws against tribal members. *Montana* did recognize that "the power to punish tribal offenders" and "to regulate domestic relations among members" are part of a ***tribe***'s retained inherent powers necessary for self-government, **[**52]** which powers were arguably being exercised when Defendant was dispatched to Boney, Sr.'s residence on July 15, 2004. *Montana, 450 U.S. at 564*. There has been no challenge of jurisdiction here, but these considerations demonstrate why the Court is hesitant to extend *Bivens* to this new context.

Although the denial of Plaintiff's *Bivens* cause of action may leave Plaintiff without redress against Defendant in his personal capacity, at least in a federal court, such ground does not justify the extension of *Bivens* where special factors exist. ***HN31***[⬆] "The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker v. Chilicky, 487 U.S. 412, 421-22, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)*. In *Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586, (1983)*, for example, the Supreme Court unanimously refused "to create a *Bivens* action for enlisted military personnel who alleged that they had been injured by the unconstitutional actions of their superior officers," despite the fact that the personnel had no remedy against the government. *Schweiker, **[*1186]** 487 U.S. at 422*. The Court noted that "the unique disciplinary **[**53]** structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens-type* remedy against their superior officers." *Chappell, 462 U.S. at 304*. *See also, Makah Indian **Tribe** v. Verity, 910 F.2d 555, 560 (9th Cir. 1990)* (***HN32***[⬆] "Sovereign immunity may leave a party with no forum for its claims."). Similarly, the Court is persuaded that the unique and delicate nature of the relationship between the sovereignty of the United States and that of Indian ***tribes*** is a special factor counseling against extension of *Bivens* to this particular context.

The Court's holding is limited to the particular context now before it. That is, the Court's denial of a *Bivens-type* remedy is limited to a tribal officer who violates a tribal member's rights on tribal lands in the course of enforcing tribal law. The only two instances since *Bivens* in which the Supreme Court has cautiously permitted the extension of *Bivens* involved defendants who were unquestionably federal actors--*Davis v. Passman* involved a United States Congressman and *Carlson v. Green* involved federal prison officials. Based **[**54]** upon the facts of the present case and for the reasons previously explained, the Court cannot conclude that Defendant was a federal actor or acting under the color of federal law during the July 15, 2004 incident. Plaintiff has merely pointed to the existence of the ***Tribe***'s 638 contract with the BIA, which contract alone is insufficient to create a genuine issue of material fact that Defendant was acting under the color of federal law on July 15, 2004. In light of this finding and the concerns related to the ***Tribe***'s sovereignty and self-government, the Court holds that Plaintiff's *First* and *Fourth Amendment* claims cannot be brought against Defendant under *Bivens.*

CONCLUSION

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (# 52) is GRANTED.

DATED: January 22, 2009

/s/ Robert C. Jones

Robert C. Jones

United States District Judge

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Shirk v. United States

United States Court of Appeals for the Ninth Circuit

June 12, 2014, Argued and Submitted, San Francisco, California; December 8, 2014, Filed

No. 10-17443

Reporter
773 F.3d 999 *; 2014 U.S. App. LEXIS 23090 **

LOREN R. SHIRK; JENNIFER ROSE, individually and as husband and wife, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, on behalf of its agency, Department of Interior, Bureau of Indian Affairs, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the District of Arizona. D.C. No. 2:09-cv-01786-NVW. Neil V. Wake, District Judge, Presiding.

Shirk v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs, 2010 U.S. Dist. LEXIS 89687 (D. Ariz., Aug. 26, 2010)

Core Terms

district court, ***tribe***, tribal, Compact, carrying, employees, scope of employment, state law, programs, certification, courts, federal contract, peace officer, contractual, limitations, contracts, immunity, mechanic, purposes, tortious, powers, subject matter jurisdiction, law enforcement, contractor, provisions, terms

Case Summary

Overview

HOLDINGS: [1]-An employee's conduct would be covered by the FTCA pursuant to *25 U.S.C.S. § 450f* note if, while executing his contractual obligations under a federal contract authorized by the ***Indian Self-Determination*** and Education Assistance Act of 1975, the employee's allegedly tortious conduct fell within the scope of employment as defined by state law; [2]-In determining whether subject matter jurisdiction existed pursuant to *§ 450f* note, a two-step analysis was necessary. The court had to determine whether the alleged activity was encompassed by the relevant federal contract or agreement and whether the allegedly tortious action fell within the scope of the tortfeasor's employment under state law; [3]-Remand was necessary so that the district court could apply the two-step framework to ***FTCA claims*** arising from a police pursuit involving tribal police officers.

Outcome
Judgment vacated, and case remanded.

LexisNexis® Headnotes

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN1[] **Native Americans, Indian Self-Determination & Education Assistance Act**

The ***Indian Self-Determination*** and Education Assistance Act of 1975 (ISDEAA) created a system by which ***tribes*** could take over the administration of programs operated by the Bureau of Indian Affairs (BIA). A ***tribe*** receiving a particular service from the BIA

may submit a contract proposal to the BIA to take over the program and operate it as a contractor and receive the money that the BIA would have otherwise spent on the program. The Department of Interior, in which the BIA is housed, is required to enter into such contracts upon the request of a ***tribe*** unless one of five exceptions applies. 25 U.S.C.S. § 450f(a)(2). These contracts are commonly called "638 contracts," in reference to the public law number of the ISDEAA. ***Indian Self-Determination*** and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (Jan. 4, 1975).

Governments > Native Americans > Authority & Jurisdiction

HN2 **Native Americans, Authority & Jurisdiction**

The Tribal Self-Governance Act of 1994 allows certain ***tribes*** to enter into self-governance compacts. 25 U.S.C.S. § 458bb. Such compacts become the basis for annual funding agreements that give the ***tribes*** a block of funding that they can allocate as they see fit, thus ensuring greater tribal control over the design and implementation of compact programs. 25 U.S.C.S. § 458cc(b)(1)-(2) authorizes ***tribes*** to plan, conduct, consolidate, and administer certain programs, services, functions, and activities, or portions thereof.

Governments > Federal Government > Claims By & Against

Torts > ... > Liability > Federal Tort Claims Act > Elements

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN3 **Federal Government, Claims By & Against**

As a sovereign, the United States is immune from suit unless it waives its immunity. The United States has waived its sovereign immunity, of course, with regard to tort liability under the Federal Tort Claims Act 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. 28 U.S.C.S. § 1346(b)(1).

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN4 **Native Americans, Indian Self-Determination & Education Assistance Act**

In 1990, after it enacted the ***Indian Self-Determination*** and Education Assistance Act of 1975 (ISDEAA), Congress extended the Federal Tort Claims Act's waiver of sovereign immunity to claims resulting from the performance of functions under a contract, grant agreement, or cooperative agreement authorized by the ISDEAA of 1975, as amended. 25 U.S.C.S. § 450f note. This provision is commonly referred to as § 314, an allusion to its location within the Act. Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990). However, the waiver of sovereign immunity is limited: An Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs while carrying out any such contract or agreement and its employees are deemed employees of the Bureau while acting within the scope of their employment in carrying out the contract or agreement. § 314 (§ 450f note).

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN5 **Native Americans, Indian Self-Determination & Education Assistance Act**

25 U.S.C.S. § 450f note states that employees of a ***tribe***, tribal organization, or Indian contractor are deemed employees of the Bureau of Indian Affairs while acting within the scope of their employment in carrying out the contract or agreement. 25 U.S.C.S. § 450f note. The clause is naturally divided into three parts. The first part tells one the subject of the rule announced in the clause: "employees" of a ***tribe***, tribal organization, or Indian contractor. § 450f note. The second part contains the action of the sentence, instructing that such

employees are deemed employees of the Bureau. § 450f note. Finally, the end of the clause limits the class of employees included within the "deeming" language to those acting within the scope of their employment in carrying out the contract or agreement. § 450f note. The key to understanding the clause, then, is determining whether an employee is acting within the scope of their employment in carrying out the contract or agreement. § 450f note. Only then can a court know which class of "employees" are deemed employees of the Bureau of Indian Affairs. § 450f note.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN6 **Native Americans, Indian Self-Determination & Education Assistance Act**

Under 25 U.S.C.S. § 450f note, "acting within the scope of their employment in carrying out the contract or agreement" is a limitation on the part of the clause that comes before it because of the word "while." In the preceding clause "deeming" an Indian ***tribe***, tribal organization, or Indian contractor as part of the Bureau of Indian Affairs or the Indian Health Service, the word "while" introduces the limitation that such ***tribes***, organizations, or contractors must be carrying out any such contract or agreement in order to be so "deemed." 25 U.S.C.S. § 450f note. The similar structure between the two clauses strongly suggests that the term "while" is used in both to indicate that what follows that term is a limitation on what precedes it.

Governments > Legislation > Interpretation

HN7 **Legislation, Interpretation**

It is a normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN8 **Native Americans, Indian Self-Determination & Education Assistance Act**

Federal district courts have jurisdiction over Federal Tort Claims Act claims on the basis of 28 U.S.C.S. § 1346(b)(1). In examining the language of § 1346(b)(1), one is struck by the remarkable similarity between its language and that of Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (25 U.S.C.S. § 450f note). Section 1346(b)(1) states that district courts have jurisdiction over claims against the United States for injury or loss of property, or personal injury or death caused by the tortious actions of any employee of the Government while acting within the scope of his office or employment. Section 314's language refers to employees of the Bureau of Indian Affairs while acting within the scope of their employment. Both statutes refer to the scope of employment in almost identical language. A basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise. None of the differences between the two phrases suggest that a court should treat them differently. Section 1346(b)(1) requires courts to determine whether, under state law, an employee was acting within the scope of employment when the alleged tort occurred. Given the similarity between § 1346(b)(1) and § 314, § 314 requires the same inquiry.

Governments > Legislation > Interpretation

HN9 **Legislation, Interpretation**

It is well established that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. If a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims

Act > Scope of Employment

HN10 **Native Americans, Indian Self-Determination & Education Assistance Act**

Congress's intent to incorporate the agency law definition is suggested by the use of the term, "scope of employment," a widely used term of art in agency law. Thus, Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (25 U.S.C.S. § 450f note) requires courts to determine whether, under state law, an employee's allegedly tortious action falls within the scope of his employment.

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN11 **Native Americans, Indian Self-Determination & Education Assistance Act**

Under Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (25 U.S.C.S. § 450f note), employees must be carrying out the contract or agreement. 25 U.S.C.S. § 450f note. A proper understanding of the statute would give the term "carrying out" its ordinary meaning. A court consults dictionaries for the ordinary meaning of a term at the time of a statute's enactment. "To carry out" means to put into execution or to bring to a successful issue; to conduct duly to completion or conclusion; to carry into practice or to logical consequences or inferences. Thus, to "carry out" a contract or agreement is to put it into execution.

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN12 **Native Americans, Indian Self-Determination & Education Assistance Act**

With regard to the relationship between the "scope of employment" requirement and the "carrying out" requirement of Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (25 U.S.C.S. § 450f note), examining the syntax of the sentence, the "carrying out" language modifies "scope of their employment." This is made clear from the placement of the word "in" between the two requirements. Because "in carrying out the contract or agreement" modifies "scope of their employment," the natural reading of the text is that the relevant "employment" for purposes of determining the scope of employment is "carrying out the contract or agreement." An employee's conduct is covered by the Federal Tort Claims Act if, while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law. Thus, the federal contract defines the nature and contours of an employee's official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities.

Governments > Legislation > Interpretation

HN13 **Legislation, Interpretation**

No canon of statutory interpretation is absolute. Each can be overcome by the strength of differing principles that point in other directions.

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN14 **Native Americans, Indian Self-Determination & Education Assistance Act**

Because Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (25 U.S.C.S. § 450f note) only covers employment under the federal contracts, such contracts define the "employment" for purposes of the "scope of employment" analysis.

Evidence > Burdens of Proof > Allocation

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN15[] **Burdens of Proof, Allocation**

Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (*25 U.S.C.S. § 450f* note) requires a two-step approach. Because the party asserting jurisdiction bears the burden of establishing subject matter jurisdiction, a plaintiff in a Federal Tort Claims Act (FTCA) suit must identify which contractual provisions the alleged tortfeasor was carrying out at the time of the tort. At the first step of the § 314 inquiry, courts must determine whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement. The scope of the agreement defines the relevant "employment" for purposes of the scope of employment analysis at step two. Second, courts must decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law. If both of these prongs are met, the employee's actions are covered by the FTCA.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN16[] **Native Americans, Indian Self-Determination & Education Assistance Act**

As the two-part test for jurisdiction under *25 U.S.C.S. § 450f* note makes clear, a plaintiff's failure at either step is sufficient to defeat subject matter jurisdiction. If a court determines that the relevant federal contract does not encompass the activity that the plaintiff ascribes to the employee, or if the agreement covers that conduct, but not with respect to the employee in question, there is no subject matter jurisdiction. Likewise, if a court decides that the employee's allegedly tortious action does not fall within the scope of employment, the employee's conduct does not come within the Federal Tort Claims Act. When a court determines that there is no subject matter jurisdiction, it may choose to decide the case at either step of the inquiry.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > ... > Liability > Federal Tort Claims Act > Employees

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN17[] **Native Americans, Indian Self-Determination & Education Assistance Act**

Only where a court decides that an employee's actions are covered by the Federal Tort Claims Act under Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990) (*25 U.S.C.S. § 450f* note) does the court need to go through both steps of the analysis, since there are some actions that, although not enforcing a contract directly, might come within the terms of § 314 by virtue of state scope-of-employment law.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN18[] **Reviewability of Lower Court Decisions, Preservation for Review**

A federal court of appeals must always be mindful that it is a court of review, not first view. Where an argument has been briefed only cursorily before the court of appeals and was not ruled on by the district court, it is normally inappropriate for the court of appeals to evaluate the argument in the first instance. This practice is rooted in the general assumption that the court of appeals operates more effectively as a reviewing court than as a court of first instance.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > Appeals > Remands

HN19[] **Reviewability of Lower Court Decisions,**

Preservation for Review

Where both the district court record and the briefing before the court of appeals is substantially incomplete on state law issues that might be important to the court of appeals' resolution of a case, the proper course of action is to remand to the district court so that it can consider the argument in the first instance with the benefit of full briefing.

Civil Procedure > Appeals > Amicus Curiae

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

HN20[] **Appeals, Amicus Curiae**

Generally, a court of appeals does not consider on appeal an issue raised only by an amicus. However, the U.S. Court of Appeals for the Ninth Circuit has considered arguments of a jurisdictional nature raised only by amici.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

Civil Procedure > Appeals > Remands

HN21[] **Appeals, Reviewability of Lower Court Decisions**

The proper recourse for courts of appeals confronted with district court findings of questionable sufficiency is ordinarily to remand for proper first instance factfinding. Such a situation is more likely to occur where the district court was never presented with an argument for which additional factfinding was relevant.

Summary:

SUMMARY[**]

Federal Tort Claims Act

The panel vacated the district court's dismissal for lack of subject matter jurisdiction of a Federal Tort Claims Act action brought against the United States after Jennifer Rose was injured in a traffic accident following a police pursuit involving two tribal police officers employed by the Gila River Indian Community.

Loren Shirk, along with his wife, Jennifer Rose, alleged negligence by the tribal officers and loss of consortium under the FTCA. Congress extended the FTCA's waiver of the United States' sovereign immunity to claims resulting from the performance of functions authorized by the ***Indian Self-Determination*** and Education Assistance Act of 1975, commonly referred to as § 314.

To decide whether the tribal officers' conduct was covered by § 314, thereby subjecting the United States to potential tort liability, the panel held as an issue of first impression, that it was first necessary to **[**2]** set out the analysis that courts should undertake when confronted with a § 314 claim where the alleged tortfeasors are employees of a ***tribe***, tribal organization, or Indian contractor. The panel held at the first step of the § 314 inquiry, courts must determine whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement. At the second step, courts must decide whether the allegedly tortious action fell within the scope of the tortfeasor's employment under state law. The panel held that if both of these prongs were met, the employee's actions were covered by the FTCA; but a plaintiff's failure at either step was sufficient to defeat subject matter jurisdiction. The panel remanded so that the parties could fully brief the issue and the district court could conduct a new analysis of its subject matter jurisdiction using this two-step framework.

Second Circuit Judge Sack concurred, and wrote only to register his doubts as to one of the district court's conclusions which the panel's opinion properly did not reach. If the panel were squarely presented with the issue, Judge Sack would conclude that the relevant agreements between the federal government and the ***tribe*** **[**3]** authorized the enforcement of Arizona state law by tribal police officers.

Judge Bea concurred in part, and dissented in part. Judge Bea agreed with the new two-part test articulated by the majority opinion, but he would not remand because there are no issues of fact that require remand.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Counsel: Bradley M. Rose, Kaye, Rose & Partners, LLP, Los Angeles, CA., argued the cause for the plaintiffs-appellants. Trinette S. Sachrison, Kaye, Rose & Partners, LLP, San Diego, CA, filed the briefs for the plaintiffs-appellants. With her on the briefs was Bradley M. Rose, Kaye, Rose & Partners, LLP, Los Angeles, CA.

Jeffrica Jenkins Lee, U.S. Department of Justice Civil Division, Washington, DC, argued the cause and filed the brief for defendant-appellee. With her on the brief were Stuart F. Delery, Assistant Attorney General, U.S. Department of Justice Civil Division, Washington, DC; John S. Leonardo, United States Attorney, Phoenix, AZ; and Barbara C. Biddle, U.S. Department of Justice Civil Division, Washington, DC.

Thomas L. Murphy, Deputy General Counsel, Gila River Indian Community, Sacaton, AZ, argued the cause and filed the brief on behalf of amicus curiae Gila River Indian Community in support of **[**4]** plaintiffs-appellants. With him on the brief was Linus Everling, General Counsel, Gila River Indian Community, Sacaton, AZ.

Judges: Before: Diarmuid F. O'Scannlain, Robert D. Sack*, and Carlos T. Bea, Circuit Judges. Opinion by Judge O'Scannlain; Concurrence by Judge Sack; Partial Concurrence and Partial Dissent by Judge Bea.

Opinion by: Diarmuid F. O'Scannlain

Opinion

[*1000] O'SCANNLAIN, Circuit Judge:

We are asked to decide whether the United States may be held liable under the Federal Tort Claims Act for the off-reservation actions of two tribal police officers.

I

A

On October 19, 2006, at approximately 5:00 p.m., Detective Michael Lancaster and **[*1001]** Sergeant Hilario Tanakeyowma (the "Officers"), two tribal police officers employed by the Gila River Indian Community ("GRIC" or the "Community"), were traveling northbound on State Route 587 in a GRIC Police Department vehicle.[1] They had attended a mandatory police counter-terrorism training class in Tucson, Arizona, and were returning to Sergeant Tanakeyowma's residence in Chandler, Arizona.

As the Officers approached the intersection of Chandler Heights Road and State Route 87/Arizona Avenue, outside the boundaries of the GRIC reservation, they observed a white compact vehicle driving erratically. The driver of the vehicle was later determined to be Leshedrick Sanford, a paroled felon. The Officers began to pursue Sanford. When Sanford came to a stop at a red light at the intersection of Ocotillo Road and State Route 87/Arizona Avenue, the Officers pulled up behind him. As described by the Officers, Detective Lancaster exited the police vehicle to "make contact" with Sanford, but Sanford accelerated and drove through the red light into the intersection. Sanford collided with Loren Shirk, who was traveling eastbound on Ocotillo Road on a motorcycle. Shirk was thrown from his motorcycle and sustained serious physical injuries as a result of the collision.

Sanford, who was under the influence of alcohol, immediately fled the scene on foot, but he was apprehended and arrested by the Officers shortly thereafter. He subsequently pleaded guilty to one count of aggravated assault with prior felony convictions and one count of leaving the **[**6]** scene of a serious injury accident, both in violation of Arizona law. Sanford was sentenced to eighteen years in prison.

B

Shirk, along with his wife, Jennifer Rose (together, "Shirk"), filed suit against the United States, alleging negligence by the Officers and loss of consortium under the Federal Tort Claims Act (FTCA). Shirk claimed that the Officers were employees of the Bureau of Indian Affairs (BIA) for purposes of the FTCA and, as such,

* The Honorable Robert D. Sack, Senior Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

[1] We take the facts verbatim from the district court's order, with **[**5]** only slight additions and modifications.

that the United States was liable for the Officers' purported negligence. The United States moved to dismiss the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). On August 27, 2010, the district court issued an order granting the government's motion to dismiss and entered judgment for the United States. Shirk timely appealed.

II

Shirk alleges that the Officers acted negligently when they encountered Sanford and that such negligence resulted in Shirk's injuries. According to Shirk, the United States is liable for the Officers' negligence because they were "acting within the scope of their employment in carrying out" various contracts and agreements between the United States and the GRIC. 25 U.S.C. § 450f (note). We begin our analysis of Shirk's allegations **[**7]** by explaining the statutes and agreements at issue.

A

The federal government has long provided a series of services to Indian ***tribes***. Philip P. Frickey et al., *Cohen's Handbook of Federal Indian Law* § 22.01[1] (2012 ed.). The New Deal began a period in which, with some "fluctuations in policy," **[*1002]** there has been a "continuous decentralization of government services to Indians." *Id*.

This decentralizing trend accelerated dramatically with the passage of the ***Indian Self-Determination*** and Education Assistance Act of 1975 ("ISDEAA"). *Id*. ***HN1***[] The ISDEAA "created a system by which ***tribes*** could take over the administration of programs operated by the [Bureau of Indian Affairs]." Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1033 (9th Cir. 2013). A ***tribe*** "receiving a particular service from the BIA may submit a contract proposal to the BIA to take over the program and operate it as a contractor and receive the money that the BIA would have otherwise spent on the program." *Id*. The Department of Interior, in which the BIA is housed, is required to enter into such contracts upon the request of a ***tribe*** unless one of five exceptions applies. *Id*.; 25 U.S.C. § 450f(a)(2). These contracts are commonly called "638 contracts," in reference to the public law number of the ISDEAA. *See* ***Indian Self-Determination*** **[**8]** and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1975).

Congress permitted even greater decentralization when it enacted the Tribal Self-Governance Act of 1994 as an amendment to the ISDEAA. ***HN2***[] The Act allows certain ***tribes*** to enter into self-governance compacts. 25 U.S.C. § 458bb. Such compacts become the basis for annual funding agreements that "give the ***tribes*** a block of funding that they can allocate as they see fit," Los Coyotes Band of Cahuilla & Cupeño Indians, 729 F.3d at 1031 n.3, thus ensuring greater tribal control over the design and implementation of compact programs. *See* 25 U.S.C. § 458cc(b)(1)-(2) (authorizing ***tribes*** to "plan, conduct, consolidate, and administer [certain] programs, services, functions, and activities, or portions thereof").

These statutes are the source of the agreements at issue in this case, and it is those agreements which allegedly give rise to FTCA liability.

B

Pursuant to the ISDEAA, the GRIC and the United States entered into a 638 contract in 1998. The purpose of the contract was "to provide Law Enforcement Services for the Gila River Indian Community." Such services were to be provided "in accordance with [the] attached Statement of Work." *Id*. § (b)(3). The Statement of Work, in turn, describes four distinct law enforcement programs covered by the contract: Uniformed Police, Detention **[**9]** Services, Communications, and Criminal Investigations. The contract enumerates specific duties and limitations that attach to each program. For instance, the uniformed police are charged with the "enforcement of Federal laws and [the] laws of the [GRIC]," and this includes "[p]atrol services on and off roadways and in the communities within the boundaries of the Reservation."

In 2003, the GRIC decided to take advantage of the increased tribal authority that comes with agreements negotiated under the Tribal Self-Governance Act. It entered into a compact with the United States that enabled the GRIC to "design those programs, functions, services and activities listed in the Annual Funding Agreement and reallocate funds according to the priorities of the Community." The Compact merely authorizes a transfer of authority and contains few substantive limitations on the programs that it governs. Indeed, it does not refer to any specific programs. Those details are left to the 2007-2011 Multi-Year Funding Agreement (MYFA), a contract between the GRIC **[*1003]** and the United States "for the assumption of responsibilities by the Community for the various programs, functions, and activities specified in [the MYFA]." **[**10]**

The MYFA lists the programs included within the Compact. The list includes the law enforcement program and its four component parts ("Uniform Police," "Adult Detention," etc.). With few exceptions, the MYFA does not contain any restrictions specific to the law enforcement program. Thus, unlike the 638 Contract's Statement of Work, the MYFA does not supply much detail about the law enforcement program.

C

For our purposes, these agreements are only relevant insofar as the United States can be sued. ***HN3***[↑] As a sovereign, the United States is immune from suit unless it waives its immunity. *FDIC v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994)*. The United States has waived its sovereign immunity, of course, with regard to tort liability under the Federal Tort Claims Act "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." *28 U.S.C. § 1346(b)(1)*.

HN4[↑] In 1990, after it enacted the ISDEAA, Congress extended the FTCA's waiver of sovereign immunity to claims "resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA] of 1975, as amended." *25 U.S.C. § 450f* (note). This provision is commonly referred **[**11]** to as § 314, an allusion to its location within the Act. *See* Department of Interior and Related Agencies Appropriation Act, *Pub. L. 101-512, § 314, 104 Stat 1915 (1990)*. However, the waiver of sovereign immunity is limited:

> [A]n Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract or agreement.

Id.

The threshold question in this litigation thus becomes whether the actions of the Officers come within the ambit of § 314, thereby subjecting the United States to potential tort liability.

III

To decide whether the Officers' conduct is covered by § 314, it is first necessary to set out the analysis that courts should undertake when confronted with a § 314 claim, where the alleged tortfeasors are employees of a "***tribe***, tribal organization, or Indian contractor." *Id*. As no federal appellate court appears to have done so, this case presents a question of first impression.

A

HN5[↑] The clause at issue states that "employees [of a ***tribe***, tribal organization, or Indian contractor] are deemed employees of the Bureau . . **[**12]** . while acting within the scope of their employment in carrying out the contract or agreement." *25 U.S.C. § 450f* (note). We immediately notice that the clause is naturally divided into three parts. The first part tells us the subject of the rule announced in the clause: "employees" of a ***tribe***, tribal organization, or Indian contractor. *Id*. The second part contains the action of the sentence, instructing that such employees are "deemed employees of the Bureau." *Id*. Finally, the end of the clause limits the class of employees **[*1004]** included within the "deem[ing]" language to those "acting within the scope of their employment in carrying out the contract or agreement."[2] *Id*. The key to understanding the clause, then, is determining whether an employee is "acting within the scope of their employment in carrying out the contract or agreement." *Id*. Only then can we know which class of "employees" are "deemed employees of the Bureau [of Indian Affairs]." *Id*.

1

HN8[↑] Federal district courts have jurisdiction over ***FTCA claims*** on the basis of *28 U.S.C. § 1346(b)(1)*. In examining the language of *§ 1346(b)(1)*, one is struck by the remarkable similarity between its language and that of § 314. *Section 1346(b)(1)* states that district

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[2] We know that ***HN6***[↑] "acting within the scope of their employment in carrying out the contract or agreement" is a limitation on the part of the clause that comes before it because of the word "while." In the preceding clause "deem[ing]" an "Indian ***tribe***, tribal organization, or Indian **[**13]** contractor" as "part of the Bureau of Indian Affairs" or the "Indian Health Service," the word "while" introduces the limitation that such ***tribes***, organizations, or contractors must be "carrying out any such contract or agreement" in order to be so "deemed." *25 U.S.C. § 450f* (note). The similar structure between the two clauses strongly suggests that the term "while" is used in both to indicate that what follows that term is a limitation on what precedes it. *See IBP, Inc. v. Alvarez, 546 U.S. 21, 34, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005)* (stating ***HN7***[↑] the "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning").

courts have jurisdiction over "claims against the United States" for "injury or loss of property, or personal injury or death" caused by the tortious actions of "any employee of the Government while acting within the scope of his office or employment." Section 314's language refers to "employees of the Bureau . . . while acting within the scope of their employment." Both statutes **[**14]** refer to the scope of employment in almost identical language.

A basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise. *Cf.* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007) (stating that "identical words and phrases within the same statute should normally be given the same meaning"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170-73 (2012). None of the differences between the two phrases suggest that we should treat them differently. Section 1346(b)(1) requires courts to determine whether, under state law, an employee was acting within the scope of employment when the alleged tort occurred. *See, e.g.,* Lawrence v. Dunbar, 919 F.2d 1525, 1528 (11th Cir. 1990) (per curiam). Given the similarity between § 1346(b)(1) and § 314, we are satisfied that § 314 requires the same inquiry.

That "scope of employment" is a term of art further supports our interpretation. **HN9**[↑] "It is . . . well established that [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989) (alteration in original) (internal quotation marks omitted); Felix Frankfurter, **[**15]** *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or **[*1005]** other legislation, it brings the old soil with it."). As the Supreme Court has said in another context, **HN10**[↑] "Congress' intent to incorporate the agency law definition is suggested by [the] use of the term, 'scope of employment,' a widely used term of art in agency law." Cmty. for Creative Non-Violence, 490 U.S. at 740. Thus, § 314 requires courts to determine whether, under state law, an employee's allegedly tortious action falls within the scope of his employment.

2

HN11[↑] Section 314's limitation extends further: employees must be "carrying out the contract or agreement." 25 U.S.C. § 450f (note). A proper understanding of the statute would give the term "carrying out" its ordinary meaning. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225-28, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994) (consulting dictionaries for the ordinary meaning of a term at the time of a statute's enactment); *see also* Scalia & Garner, *supra*, at 69-77. "To carry out" means "to put into execution" or "to bring to a successful issue." *Merriam-Webster's Collegiate Dictionary* 176 (10th ed. 1993); *see also* 2 *The Oxford English Dictionary* 922 (2d ed. 1989) ("To conduct duly to completion or conclusion; to carry into practice or to logical consequences or inferences."). Thus, to "carr[y] out" a "contract **[**16]** or agreement" is to "to put [it] into execution."

3

HN12[↑] It remains for us to describe the relationship between the "scope of employment" requirement and the "carrying out" requirement of § 314. Examining the syntax of the sentence, the "carrying out" language modifies "scope of their employment." This is made clear from the placement of the word "in" between the two requirements. Because "in carrying out the contract or agreement" modifies "scope of their employment," the natural reading of the text is that the relevant "employment" for purposes of determining the scope of employment is "carrying out the contract or agreement." An employee's conduct is covered by the FTCA if, while executing his contractual obligations under the relevant federal contract, his allegedly tortious conduct falls within the scope of employment as defined by state law.[3] Thus, the federal contract "defines **[*1006]** the

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[3] We acknowledge that our interpretation of § 314 makes the scope of employment analysis in § 1346(b)(1) redundant, **[**17]** since satisfying the § 314 test necessarily satisfies the scope of employment test in § 1346(b)(1). One might argue that this violates the canon that "[s]tatutes must be interpreted, if possible, to give each word some operative effect." Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997). However, **HN13**[↑] "[n]o canon of interpretation is absolute. Each can be overcome by the strength of differing principles that point in other directions." Scalia & Garner, supra, at 59; *see also* Chickasaw Nation v. United States, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

nature and contours of [an employee's] official responsibilities; but the law of the state in which the tortious act allegedly occurred determines whether the employee was acting within the scope of those responsibilities." *Lyons v. Brown, 158 F.3d 605, 609 (1st Cir. 1998)*.

An example illuminates the relationship between the two requirements. Suppose an auto mechanic is employed by an Indian ***tribe***. In that capacity, the mechanic maintains two flights of vehicles: those used exclusively for carrying out the ***tribe***'s contractual obligations under an ISDEAA contract, and those used by the ***tribe*** exclusively for non-contractual purposes. The contract requires the ***tribe*** to maintain the ISDEAA vehicles. One day, the mechanic negligently installs brakes in one of the vehicles, and, shortly thereafter, the vehicle is involved in an accident caused by the faulty brakes. A person injured by the accident brings suit against the United States under § 314 for the negligence of the mechanic.

In determining whether the mechanic's tort is encompassed by the scope of his employment, a court would need to know what the relevant "employment" was: was the mechanic engaged in his employment under the ISDEAA or in his employment exclusively for the ***tribe***? The answer might depend on whether the defective vehicle was an ISDEAA vehicle. The point, however, is that the court could not determine the "scope of employment" for the **[**19]** mechanic without first identifying the relevant "employment" at issue, and ***HN14***[] because § 314 only covers employment under the federal contracts, such contracts define the "employment" for purposes of the "scope of employment" analysis.

B

These conclusions show that ***HN15***[] § 314 requires a two-step approach.[4] Because "[t]he party asserting jurisdiction bears the burden of establishing subject matter jurisdiction," *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984 (9th Cir. 2008)*, a plaintiff in an FTCA suit must identify which contractual provisions the alleged tortfeasor was carrying out at the time of the tort.[5] At the first step of the § 314 inquiry, courts must determine whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement. The scope of the agreement defines the relevant "employment" for purposes of the scope of employment analysis at step two. Second, courts must decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law. If both of these prongs are met, the employee's actions are covered by the FTCA.

HN16[] As this two-part test makes clear, however, a plaintiff's failure at either step is sufficient to defeat subject matter jurisdiction. **[*1007]** If a court determines that the relevant federal contract does not encompass the activity that the plaintiff ascribes to the employee, or if the agreement covers that conduct, but not with respect to the employee in question, there is no subject matter jurisdiction. Likewise, if a court decides that the employee's allegedly tortious action does not fall within the scope of employment, the employee's conduct does not come within the FTCA.

In this context, any potential concerns about superfluity are more than overcome by countervailing interpretive principles. As we have shown, our interpretation is supported by the canon of consistent usage, since the word "while" signals a limiting condition in both of the § 314 clauses that we have discussed. *See supra* note 2. Our interpretation also accords with the canon that common law terms are to be given their common law meaning. *See supra* Part III.A.1; Scalia & Garner, *supra*, at 320-21. Finally, the scope of employment test is part of a conventional FTCA analysis, *see, e.g., CNA v. United States, 535 F.3d 132, 146 (3d Cir. 2008)*, and Congress mentioned the test in both *§ 1346(b)(1)* and § 314, stressing its importance. It seems clear, then, that federal courts are to conduct a traditional scope of employment analysis.

Any alternative interpretation of § 314 would violate these and other principles. Accordingly, we are satisfied **[**18]** that our interpretation is the best reading of the statute.

[4] Although no federal appellate court has described the relevant analysis for a § 314 claim, several federal courts have implied that a two-step approach might be appropriate. *See Hinsley v. Standing Rock Child Protective Servs., 516 F.3d 668, 672 (8th Cir. 2008)*; *Strei v. Blaine, No. CIV. 12-1095 JRT/LIB, 2013 U.S. Dist. LEXIS 169996, 2013 WL 6243881, at *5 (D. Minn. Dec. 3, 2013)* **[**20]** ; *Dinger v. United States, No. 12-4002-EFM, 2013 U.S. Dist. LEXIS 34518, 2013 WL 1001444, at *2 (D. Kan. Mar. 13, 2013)*; *Garcia v. United States, No. CIV 08-0295 JB/WDS, 2010 U.S. Dist. LEXIS 71306, 2010 WL 2977611, at *3 (D.N.M. June 15, 2010)*; *Allender v. Scott, 379 F. Supp. 2d 1206, 1211 (D. N.M. 2005)*. Section 314's plain meaning is, therefore, supported by what little precedent exists on the matter.

[5] We need not resolve whether an employee's conduct must be *required* by the contract or may be merely *authorized* by the contract in order for the employee to be "carrying out the contract or agreement." *25 U.S.C. § 450f* (note).

When a court determines that there is no subject matter jurisdiction, it may choose to decide the case at either step of the inquiry. If, for instance, an employee drinks at a local bar after work, becomes inebriated, and gets **[**21]** into a bar fight, the employee's actions are almost certainly so far removed from the scope of his employment as to defeat liability for the employer. Thus, a court could decide such a case at step two by stating that there is no plausible argument that the employee's actions fall within the scope of his employment, where such employment is defined as carrying out a federal contract. In this way, the § 314 analysis is similar to a qualified-immunity analysis under 42 U.S.C. § 1983. *See* Pearson v. Callahan, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). ***HN17***[] Only where a court decides that an employee's actions are covered by the FTCA under § 314 does the court need to go through both steps of the analysis, since there are some actions that, although not enforcing a contract directly, might come within the terms of § 314 by virtue of state scope-of-employment law.

IV

HN18[] As a federal court of appeals, we must always be mindful that "we are a court of review, not first view." Maronyan v. Toyota Motor Sales, U.S.A., Inc., 658 F.3d 1038, 1043 n.4 (9th Cir. 2011) (quoting Cutter v. Wilkinson, 544 U.S. 709, 719 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)). Where an argument has been "briefed **[**22]** only cursorily before this Court and [was] not ruled on by the district court," it is normally inappropriate for us to evaluate the argument in the first instance. Bigio v. Coca-Cola Co., 239 F.3d 440, 455 (2d Cir. 2000). This practice is rooted in "our general assumption . . . that we operate more effectively as a reviewing court than as a court of first instance." Detrich v. Ryan, 740 F.3d 1237, 1248-49 (9th Cir. 2013) (en banc).

Because this is a case of first impression among federal appellate courts, neither the district court nor the parties conducted their analysis using the framework we have described. As such, we are without the benefit of the district court's analysis of this case using the proper two-step approach. That is particularly significant because of the critical importance of state law to the second step of the § 314 analysis. Although we do not imply that we would reach the second step of the § 314 inquiry, ***HN19***[] "where both the district court record and the briefing before us is substantially incomplete on [] state law issues" that might be important to our resolution of a case, the proper course of action is to remand to the district court so that it can consider the argument in the first instance with the benefit of full briefing. In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 60, 70 (1st Cir. 2013). Because neither the district court nor any of the parties **[**23]** provided us with an analysis of Arizona scope-of-employment law, we follow our standard practice and remand to **[*1008]** the district court.[6]

Even if we wanted to resolve this case at the first **[**24]** step of the § 314 inquiry, we would be wise not to do so on the record before us. That is because of another issue lurking in the background of this appeal: the uncertainty about which contractual obligations were in force between the United States and the GRIC at the time of Shirk's accident. In the district court, neither party disputed that the 2003 Compact incorporated the restrictions of the 638 Contract and its Statement of Work. For that reason, the district court assumed that the 638 Contract's limitations on the authority of tribal officers applied to the 2003 Compact, and the district court's decision was largely based on this assumption. On appeal, however, the GRIC has argued that the 638 Contract expired before the enactment of the 2003 Compact, that the 2003 Compact superseded the terms of the 638 Contract, and that the provisions of the 638 Contract no longer apply. Thus, it is uncertain which contractual provisions govern the actions of the Officers

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[6] In the district court, the United States conceded that the Officers were acting within the scope of their employment *as tribal police officers*. Defendants' Reply in Support of Motion to Dismiss at 2, Shirk v. U.S. ex rel. Dep't of Interior, No. CV-09-1786-PHX-NVW, 2010 U.S. Dist. LEXIS 89687 (D. Ariz. August 27, 2010) ("The United States agrees that the officers were acting within the scope of their employment as Tribal officers, which is determined by Arizona law of respondeat superior, but the issue here is one of statutory application, not common law scope of employment."). The government has not conceded, however, that the Officers were acting within the scope of their employment where the relevant "employment" is "carrying out the contract or agreement." Indeed, the government has always maintained that the Officers were not carrying out the relevant contracts. Thus, the government's concession below does not prevent it from arguing on remand that the Officers were acting outside the scope of their employment for purposes of § 314.

in this case.[7]

The relevance of the 638 Contract is, in part, a factual question, since it is possible that the parties entered into an indefinite, mature version of the contract after three years. *See* 25 U.S.C. § 450j(c)(1)(B); *id*. § 450b(h). We cannot know whether that occurred from the record before us because the district court never made findings on the issue. ***HN21***[↑] "[T]he proper recourse for courts of appeals confronted with district court findings of questionable sufficiency is ordinarily to remand for proper first instance factfinding." *Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 577 (4th Cir. 1985)*. Such a situation is more likely to occur where, as here, the district court was never presented with an argument for which additional factfinding was relevant. *See Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989, 1000 (9th Cir. 2011)*. Because the district court had no opportunity to analyze whether the 638 Contract provisions applied at the time of Shirk's accident, and because it made no factual findings in that regard, we believe the proper course is **[**26]** to remand. *See Ariz. Libertarian Party, Inc. v. Bayless, 351 F.3d 1277, 1282-83 (9th Cir. 2003)*.

V

We vacate the district court's order dismissing this case for lack of subject matter **[*1009]** jurisdiction and remand for further proceedings consistent with this opinion. On remand, and with the benefit of full briefing by the parties, the district court should conduct a new analysis of its subject matter jurisdiction using the two-step framework we have described. The district court should find whatever facts are necessary to that end.

VACATED AND REMANDED for proceedings consistent with this opinion. Each party shall bear its own costs.

Concur by: Robert D. Sack; Carlos T. Bea (In Part)

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[7] ***HN20***[↑] "Generally, we do not consider on appeal an issue raised only by an amicus." *Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993)*. We could, therefore, hold as waived the GRIC's argument concerning the applicability of the 638 Contract's obligations. However, in the **[**25]** past, we have "considered arguments of a jurisdictional nature raised only by amici." United *States v. Gementera, 379 F.3d 596, 607 (9th Cir. 2004)*. Because the applicability of the 638 Contract might affect our analysis at both steps of the § 314 analysis, the GRIC's argument potentially implicates our subject matter jurisdiction, and we exercise our discretion to consider it.

Concur

SACK, Senior Circuit Judge, concurring:

I am in full agreement with the judgment of the Court. I write only to register my doubts as to one of the district court's conclusions, which the panel's opinion need not and, properly in my view, does not reach in the course of its remand. Were we squarely presented with the issue, I would conclude that the relevant agreements between the federal government and the ***tribe*** authorize, indeed perhaps require, the enforcement of Arizona state law by tribal police officers.

The Multi-Year Financing Agreement, as the panel opinion notes, requires the ***tribe*** to ensure that **[**27]** all its uniformed officers and criminal investigators maintain state "peace officer certification," and it specifically mentions "AZPOST" certification. MYFA § 2(L). In Arizona, AZPOST certification supplies the necessary *and* sufficient condition for Indian tribal officers engaged in the conduct of their employment to possess the legal powers and duties of state peace officers. *See Ariz. Rev. Stat. §§ 13-3874(A)*, *41-1823(B)*. These powers and duties include the authority to enforce state law and the duty to protect the public order and make arrests. *Id*. *§§ 13-3874(A)* (providing that certified tribal officers "shall possess *and exercise*" the powers of peace officers (emphasis added)); *id*. *§ 13-105(25)* (defining "peace officer" as "any person vested by law with a *duty* to maintain public order and make arrests" (emphasis added)). Furthermore, these powers and duties extend outside the officer's home jurisdiction under circumstances that, while limited, would include the tribal officers on the facts of this case. *See id*. *§ 13-3871(2)* (empowering peace officers to enforce the law outside their home jurisdictions in circumstances enumerated in *§ 13-3883*, which include an "actual or suspected violation of any traffic law committed in the officer's presence"); *State v. Nelson, 208 Ariz. 5, 8-9, 90 P.3d 206, 209-10 (Ct. App. 2004)*.

In light of this certification **[**28]** regime, I think it apparent that the federal government and the ***tribe*** intended that tribal law-enforcement officers possess and exercise the power to enforce state law, both on the reservation and, in some cases, outside of it. The district court, to the contrary, concluded that the reference to peace officer certification is "no more than a training

requirement, imposed to ensure than all tribal officers are sufficiently qualified to meet the demands of their positions." *Shirk v. United States, No. CV-09-1786, 2010 U.S. Dist. LEXIS 89687, at *15, 2010 WL 3419757, at *6 (Aug. 27, 2010)*.

It is with that proposition that I disagree. AZPOST certification is more than a confirmation that the recipient has been adequately and appropriately trained — it confers specified powers and imposes specified duties on all officers so certified. Inasmuch as the ***tribe*** and the government have explicitly referenced AZPOST in their agreement, I cannot but conclude that they intended that officers of the ***tribe***'s law enforcement program possess these legally defined powers and duties.

The district court's contrary interpretation was premised on its assumption that the 638 Contract of 1998 sets outer limits **[*1010]** of the ***tribe***'s duties and authority under the relevant agreements. *See id*. On remand, as the Court's opinion makes **[**29]** clear, the district court should consider whether the 638 Contract even applied at the time of the conduct giving rise to this claim. Panel Op., at 18-20. Even if the 638 Contract did apply, the district court should consider whether the later Compact and funding agreement, by specifically referring to peace-officer certification, effectively amended and expanded the earlier contract with respect to the enforcement of state law.

I think these considerations may have substantial impact on the district court's analysis under the two-step approach established by the Court's opinion today. We cannot decide how this analysis should be conducted, however, without first knowing which of the federal-tribal agreements submitted in this case were in force at the time of the accident, and how these agreements relate to each other. For this reason, I fully concur in the panel's opinion and decision to vacate and remand for further factfinding.

Dissent by: Carlos T. Bea (In Part)

Dissent

BEA, Circuit Judge, concurring in part, dissenting in part:

This court need not remand. I disagree that "uncertainty about which contractual obligations were in force between the United States and the GRIC at the time of Shirk's accident" **[**30]** compels remand. Slip op. at 20.[1] According to the majority, the district court "assumed that the 638 Contract's limitations on the authority of tribal officers applied to the 2003 Compact." Slip op. at 20 (citation omitted). "On appeal, however, the GRIC has argued that the 638 Contract expired before the enactment of the 2003 Compact, that the 2003 Compact superseded the terms of the 638 Contract, and that the provisions of the 638 Contract no longer apply." Slip op. at 20 (citation omitted). All this court need do, however, is to look within the four corners of the contracts in the record: if the 638 Contract contains an expiration provision, it expired pursuant to that provision; if the 2003 Compact contains a provision superseding the 638 Contract, then it supercedes the 638 Contract.[2] There are no issues of fact that require remand. Therefore, even though the district court did not employ the new two-part test we hand down today, and "[t]ypically, a federal appellate court does not consider an issue not passed upon below," *Davis v. Nordstrom, Inc., 755 F.3d 1089, 1094 (9th Cir. 2014)* (internal quotations and citation omitted), we have the "discretion to decide whether **[*1011]** to reach such an issue . . . where the issue presented is a purely legal one and the record below has been fully

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[1] The majority accurately summarizes the facts and the legal issues relevant to this case. I adopt them here. In short: plaintiffs' ***FTCA claim*** survives *FRCP 12(b)(1)* dismissal if the actions of the GRIC officers fall under the scope of the FTCA's waiver of sovereign immunity. "Section 314" extended the FTCA's waiver of sovereign immunity to claims "resulting from the performance of functions . . . under . . . [certain] contract[s], grant agreement[s], or cooperative agreement[s] . . . ." Slip op at. 8 (citations and internal quotations omitted). Here, GRIC entered into certain contracts that allowed them some autonomy over various tribal law enforcement responsibilities. Slip op. at 6-10. Therefore, the plaintiffs' ***FTCA claim*** falls under the FTCA's waiver of sovereign immunity if the GRIC officers were carrying out the obligations of the operative agreement between GRIC and the United States. There are two possible operative agreements: (1) the "638 Contract," slip op. at 8, and (2) the "2003 Compact," slip op. at 9.

[2] Furthermore, "[a] question of fact concerning the interpretation of a contract does not arise unless the contract is ambiguous." *Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement, Inc., 840 F.2d 1394, 1401 (9th Cir. 1987)* (citation omitted). No party has claimed there were ambiguities in the contracts before the court here.

developed," **[**31]** *id. at 1094-95* (citation omitted).

The district courts of this circuit **[**32]** would have benefitted from a precedential opinion that applied the new two-part test. The majority opinion has sidestepped this opportunity. I do not see much point to writing a non-precedential, one-judge analysis of the merits. Therefore, I agree with the new two-part test articulated here, but I would not remand. I respectfully concur in part, and dissent in part.

Mizner v. United States

United States District Court for the District of South Dakota, Central Division

December 4, 2003, Decided ; December 5, 2003, Filed

CIV 02-3015

Reporter
2003 U.S. Dist. LEXIS 26862 *

STEVEN MIZNER, Plaintiff, -vs.- UNITED STATES OF AMERICA, Defendant.

Core Terms

tribal, training, intentional torts, arrest, ***Tribe***, assault, federal law enforcement officer, law enforcement officer, false imprisonment, employees, cause of action, intentional infliction of emotional distress, battery, federal law enforcement, arresting officer, motion to dismiss, sovereign immunity, law enforcement, tort claim, deposition, alleges, federal law, charges, torture

Case Summary

Procedural Posture

Defendant United States filed a motion pursuant to *Fed. R. Civ. P. 12(b)(1)* to dismiss for lack of jurisdiction plaintiff arrestee's action under the Federal Tort Claims Act, *28 U.S.C.S. § 2671 et seq.*, which alleged that Rosebud Sioux ***Tribe*** officers, while acting within the scope of their employment, committed the intentional torts of assault, false imprisonment, torture, and intentional infliction of emotional distress on the arrestee.

Overview

The arrestee was a passenger in a car being driven within the boundaries of the reservation of the Rosebud Sioux ***Tribe***. The car was stopped by two ***Tribe*** officers for failure to stop at a stop sign. The arrestee, who was arrested on tribal charges of resisting arrest, disorderly conduct, open container, and two counts of assaulting an officer, which charges were later dismissed, claimed that the officers committed several intentional torts against him. In granting the government's motion to dismiss, the court held that the officers were not federal law enforcement officers, within the meaning of *28 U.S.C.S. § 2680(h)*, enforcing federal law at the time that the alleged intentional torts were committed. The court held that the officers were employees of the ***Tribe*** pursuant to a 638 contract with the Bureau of Indian Affairs under the ***Indian*** ***Self-Determination*** Education Assistance Act, as authorized by *25 U.S.C.S. § 450f*. The court held that the language of a 638 contract did not, in and of itself, transform a tribal officer into a federal law enforcement officer. The court also held that the record was devoid of evidence that the officers received federal law enforcement training.

Outcome
The court granted the government's motion to dismiss.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

HN1 **Preliminary Considerations, Jurisdiction**

Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the U.S. Constitution and statutes enacted by Congress pursuant thereto. The threshold inquiry in every federal case is whether the court has jurisdiction and district judges have to be attentive to a satisfaction of jurisdictional requirements in all cases.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2 **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss for lack of subject matter jurisdiction challenges the district court's power to hear the case. Jurisdictional issues are for the district court to decide and the district court has broad power to decide its own right to hear a case. Because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the onset.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3 **Defenses, Demurrers & Objections, Motions to Dismiss**

In order to properly dismiss for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, the complaint must be successfully challenged on its face or on the factual truthfulness of its averments.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4 **Defenses, Demurrers & Objections, Motions to Dismiss**

The district court has the authority to consider matters outside the pleadings on a motion challenging subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5 **Defenses, Demurrers & Objections, Motions to Dismiss**

The standard of review for motions to dismiss under *Fed. R. Civ. P. 12(b)(1)* is as follows: the district court may proceed as it never could under *Fed. R. Civ. P. 12(b)(6)* or *Fed. R. Civ. P. 56*. Because at issue in a factual *Fed. R. Civ. P. 12(b)(1)* motion is the district court's jurisdiction, its very power to hear the case, there is substantial authority that the district court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the district court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist. However, the jurisdictional issue and substantive issues can be so intertwined that a full trial on the merits may be necessary to resolve the issue.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN6 **Native Americans, Indian Self-Determination & Education Assistance Act**

See *25 U.S.C.S. § 450f* note.

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN7 **Liability, Federal Tort Claims Act**

The Federal Tort Claims Act (FTCA), *28 U.S.C.S. § 2671 et seq.*, is a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. Under the FTCA, the United States may be sued for damages arising from the negligent or wrongful acts or omissions of an employee of the government. *28 U.S.C.S. § 1346(b)(1)*.

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Intentional Torts

HN8 **Exclusions From Liability, Intentional Torts**

See 28 U.S.C.S. § 2680(h).

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Intentional Torts

HN9 **Exclusions From Liability, Intentional Torts**

The proviso in 28 U.S.C.S. § 2680(h) which subjects the federal government to intentional tort liability applies only to statutorily defined federal law enforcement officers, not mere Bureau of Indian Affairs employees or federal employees.

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN10 **Immunities, Sovereign Immunity**

Waivers of sovereign immunity are to be strictly construed.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN11 **Native Americans, Indian Self-Determination & Education Assistance Act**

State, federal, and tribal officers assist each other on occasion and it is likely that there exists some overlap in the standards and requirements applicable to each. However, the language of a 638 contract does not, in and of itself, transform a tribal officer into a federal law enforcement officer any more than it would transform him into a state law enforcement officer.

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Intentional Torts

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN12 **Exclusions From Liability, Intentional Torts**

The Federal Tort Claims Act, 28 U.S.C.S. § 2671 et seq., provides only a limited waiver of sovereign immunity. In order for a court to maintain jurisdiction over a tort action against the United States, the plaintiff must prove facts which demonstrate a waiver of sovereign immunity. Generally, the United States is not liable for the intentional torts of its employees.

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For City of Mission, Interested Party: Paul E. Jensen, Jensen & Massa, Winner, SD.

For Murdo, City of, Interested Party: Thomas Henley Harmon, Tieszen Law Office, Pierre, SD.

Judges: CHARLES B. KORNMANN, United States District Judge.

Opinion by: CHARLES B. KORNMANN

Opinion

MEMORANDUM DECISION AND ORDER

Plaintiff brought this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et seq. Jurisdiction is alleged to exist pursuant to the Federal Court to Claim Act of 1948, 62 Stat 982, 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1367(a), 2671 et seq. and *Public Law 101-512*. Plaintiff alleges in his complaint that Rosebud Sioux Tribal officers Steven Roether ("Roether"), John Siedschlaw ("Siedschlaw") and Florentine Black Bear ("Black Bear"), while acting within the scope of their employment, committed the intentional torts of assault, false imprisonment, **[*2]** torture, and intentional infliction of emotional distress on

plaintiff. Defendant has moved to dismiss this action based on lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and has moved for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth herein, the court need not reach the merits of the motion for summary judgment.

FACTUAL BACKGROUND

On or about October 7, 2000, plaintiff was a passenger in a motor vehicle driven by Ira Young ("Young"). The vehicle was traveling on BIA Route 1, a road within the boundaries of the reservation of the Rosebud Sioux ***Tribe*** ("***Tribe***"). Both plaintiff and Young are Native Americans. Although plaintiff owned the motor vehicle, it was being driven by Young because Young believed plaintiff was too intoxicated to drive. While Young was transporting plaintiff, they stopped and purchased a 12-pack of beer. Some time thereafter, plaintiff's vehicle was stopped by ***Tribe*** officers Roether and Siedschlaw for failure to stop at a stop sign. Roether is a Native American but Siedschlaw is not. The arresting officers were in a tribal **[*3]** police vehicle with takedown lights and a light bar on the vehicle.

Upon approaching the vehicle, Roether proceeded by conducting a field sobriety test on Young. At that point, Siedschlaw approached the passenger side of the vehicle in order to speak with plaintiff. Siedschlaw noted that there were open beer cans on the passenger side floor of plaintiff's vehicle and a 12-pack of beer in the back of the vehicle. Siedschlaw asked for the 12-pack of beer, at which point plaintiff exited the vehicle to retrieve it from the back seat. Plaintiff then made a comment about a "white guy" stopping Indians on the reservation.

The facts surrounding the altercation between plaintiff and Siedschlaw are disputed. Plaintiff asserts that he went back into his vehicle and Siedschlaw pulled him out of the vehicle by his hair. Siedschlaw claims that he was on the radio in the squad car when plaintiff began swearing and started to approach the police vehicle. Siedschlaw states that he got out of the police vehicle and tried to stop plaintiff from approaching, and plaintiff refused to get back in his own vehicle and struck Siedschlaw in the head. At some point, Officer Black Bear was called for assistance.

[*4] After this initial altercation, plaintiff was taken to the ground and handcuffed. A short time later, Black Bear arrived on the scene. Black Bear provided leg cuffs, and plaintiff was further restrained in a hog-tie fashion, with his handcuffs and leg cuffs linked together. Plaintiff was arrested on tribal counts of resisting arrest, disorderly conduct, open container and two counts of assaulting an officer. Young was arrested on tribal charges of driving under the influence, open container, disorderly conduct, action required at a stop sign and no driver's license. An intoxilizer showed that Young had a blood alcohol level of 111.

Plaintiff was then placed into custody and transported to the tribal jail in the back seat of Black Bear's tribal police vehicle. Young was also placed into custody and taken in by Siedschlaw and Roether, who followed Black Bear to the jail. Upon arriving at the jail, which was less than 1.5 miles from the place of arrest, the officers carried plaintiff into the police station booking area where he was searched and his personal effects were removed. Plaintiff alleges that he was picked up and carried into the police station by the handcuffs which restrained **[*5]** him. After being searched, plaintiff was placed in a cell by himself and was strapped into a restraint chair. Beyond that point, the arresting officers had no further contact with plaintiff. Plaintiff alleges that he was placed in a room with an air conditioner placed directly on him for six hours and was denied medical attention. Plaintiff was released the next day and the charges against him were subsequently dismissed by the tribal court.

The characterization of the arresting officers is the primary dispute at this stage. Defendant asserts that neither Siedschlaw nor Roether have had any federal law enforcement training and neither have worked for federal law enforcement agencies. Siedschlaw was trained as a law enforcement officer and certified by the state of South Dakota at the time he was hired by the Rosebud Sioux ***Tribe***. Siedschlaw was never issued a commission card by the tribal police. Plaintiff claims that Roether had training in the form of riding along with Black Bear, detention training from Officer Amos Prue, and some training during employment from Leon Romero, who plaintiff presumes to be a Bureau of Indian Affairs ("BIA") officer, as to restraining and handcuffs. **[*6]** Defendant disputes this and claims that there is no support for plaintiff's presumption. Defendant also asserts that neither Siedschlaw nor Roether attended the BIA Indian Law Enforcement Academy prior to the incident in this case. Plaintiff asserts that this fact is not known with certainty because Roether was not asked any questions to this effect during his deposition. [1] Plaintiff fails to take into account that

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[1] Defendant has submitted a letter of termination from the ***tribe***, which states that Roether was not eligible to attend the

plaintiff has the burden of proof as to jurisdiction. Finally, both parties seem to agree that the ***Tribe*** has a 638 law enforcement contract. [2]

[*7] Prior to filing this action, plaintiff filed an administrative complaint stating the reasons for his claim. Plaintiff did not raise the intentional tort of false imprisonment in his administrative claim. Plaintiff's complaint under the FTCA alleges that the officers committed the intentional torts of false imprisonment, assault, torture, and intentional infliction of emotional distress. Plaintiff also claims vicarious liability against the United States for the actions of Siedschlaw, Roether, and Black Bear.

DISCUSSION

I. MOTION TO DISMISS

HN1[⬆] "Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution and statutes enacted by Congress pursuant thereto." *Marine Equipment Management Co. v. U.S., 4 F.3d 643, 646 (8th Cir. 1993)* (citing *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501*, *reh'g denied 476 U.S. 1132, 106 S. Ct. 2003, 90 L. Ed. 2d 682 (1986)*, (citing in turn *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)*)). "The threshold inquiry in every federal case is whether **[*8]** the court has jurisdiction" and the Eighth Circuit has "admonished district judges to be attentive to a satisfaction of jurisdictional requirements in all cases." *Rock Island Millwork Co. v. Hedges-Gough Lumber Co., 337 F.2d 24, 26-27 (8th Cir. 1964)*, and *Sanders v. Clemco Industries, 823 F.2d 214, 216 (8th Cir. 1987)*.

HN2[⬆] A motion to dismiss for lack of subject matter jurisdiction challenges the court's power to hear the case. *Mortensen v. First Savings and Loan Association, 549 F.2d 884, 891 (3rd Cir. 1977)*. Jurisdictional issues are for the court to decide and the court has broad power to decide its own right to hear a case. *Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)* (quoting *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)*). Because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the onset. *Osborn, 918 F.2d at 729*.

HN3[⬆] "In order to properly dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1)*, the complaint must be successfully challenged on its face or on the factual truthfulness of its averments." **[*9]** *Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993)*. Defendant presents at least one factual challenge to this court's jurisdiction, specifically, that the arresting officers here are not federal law enforcement officers for the purpose of the intentional torts exception in the FTCA. ***HN4***[⬆] "The district court has the authority to consider matters outside the pleadings on a motion challenging subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*." *Drevlow v. Lutheran Church, Mo. Synod, 991 F.2d 468, 470 (8th Cir. 1993)*. *See also Osborn v. United States, 918 F.2d at 729, n. 4* (citing *Land v. Dollar, 330 U.S. 731, 735, 67 S. Ct. 1009, 91 L. Ed. 1209* & n. 4, *330 U.S. 731, 67 S.Ct. 1009, 1011, 91 L. Ed. 1209* & n. 4, *330 U.S. 731, 67 S. Ct. 1009, 91 L.Ed. 1209 (1947)* and Satz v. ITT Fin. Corp., 619, F.2d 738, 742 (8th Cir. 1980)).

The Eighth Circuit, in Osborn v. United States, delineated ***HN5***[⬆] the standard of review for motions to dismiss under *Fed. R. Civ. P. 12(b)(1)*:

> Here the trial court may proceed as it never could under *12(b)(6)* or *Fed. R. Civ. P. 56*. Because **[*10]** at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the 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. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Osborn v. United States, 918 F.2d at 730 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d at 891*). However, courts have also recognized that the jurisdictional issue and substantive issues can be so intertwined that a full trial on the merits may be

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academy. This letter was provided to defense counsel during Roether's deposition.

[2] Law enforcement functions of the ***tribe*** are funded pursuant to a contract with the BIA. This contract is known as a 638 contract because it is authorized by *Pub. L. 93-638*. The contract provides in Section 11(1) that for purposes of the FTCA, contractor and its employees are deemed to be employees of the federal government while performing work under the contract.

necessary to resolve the issue. *Id.* (quoting Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986)). *See also* Whalen v. United States, 1998 DSD 20, 29 F. Supp. 2d 1093, 1095-96 (D.S.D. 1998). The parties have submitted affidavits and depositions in support of and in resistance to the **[*11]** motion to dismiss and the court will consider such evidence as it relates to the jurisdictional challenge.

A. Intentional Tort Exception to Federal Tort Claim Act Liability.

Defendant's first jurisdictional challenge is based upon the contention that the arresting officers, Black Bear, Siedschlaw and Roether, were not federal law enforcement officers at the time of the alleged assaults. The law enforcement functions of the ***Tribe*** are funded pursuant to a 638 contract with the BIA under the ***Indian Self-Determination*** Education Assistance Act ("ISDEAA") as authorized by 25 U.S.C. § 450f. The ISDEAA promotes the long-standing federal policy of encouraging ***Indian self-determination***, giving Indian ***tribes*** control over the administration of federal programs benefitting Indians. Under a self-determination contract, the federal government supplies funding to a tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly. A November 5, 1990, amendment to that Act provides:

> HN6[] With respect to claims resulting from the performance of functions **[*12]** . . . under a contract, grant agreement, or cooperative agreement authorized by the ***Indian Self-Determination*** and Education Assistance Act . . . an Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract or agreement: Provided, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any ***tribe***, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act . . .

Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C. § 450f notes). The defendant essentially agrees that, under the ISDEAA, Black Bear, Roether and Siedschlaw were employees of the ***tribe*** under the 638 contract and were therefore **[*13]** BIA employees at the time of the acts which form the basis of plaintiff's complaint.

It is clear that, under certain circumstances, the actions of Black Bear, Roether and Siedschlaw may subject the United States to FTCA liability. HN7[] "The [FTCA] is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." United States v. Orleans, 425 U.S. 807, 813, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976). Under the FTCA, the United States may be sued for damages arising from the negligent or wrongful acts or omissions of "an employee of the government." 28 U.S.C. § 1346(b)(1).

In the context of this case, which involves alleged intentional torts, the more appropriate question is whether Black Bear, Roether and Siedschlaw were "law enforcement officers" under the FTCA. The law enforcement proviso of the FTCA speaks specifically to "law enforcement officers," not "employees." The FTCA excepts from tort claim liability

> HN8[] Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, **[*14]** libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C. §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. § 2680(h).

As provided above, in 1974 Congress amended § 2680(h) of the Tort Claims Act so as to make the United States liable for certain of the intentional torts of its

investigative and law enforcement officers. The amendment grew out of widespread publicity given to several incidents in which federal narcotics agents engaged in what a Senate Committee described as "abusive, **[*15]** illegal and unconstitutional 'no-knock raids.'" S. Rep. No. 93-588, 93d Cong., 1st Session, p. 2 (1974). Clearly, ***HN9***[⬆] the proviso which subjects the federal government to intentional tort liability applies only to statutorily defined federal law enforcement officers, not mere BIA employees or federal employees. *See* *Dry v. United States, 235 F.3d 1249 (10th Cir. 2000)* ("The general waiver of sovereign immunity effected by the Act only extends to suits for intentional torts such as 'assault [and] battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process' if the conduct of 'investigative or law enforcement officers of the United States Government' is involved."); *Solomon v. United States, 559 F.2d 309 (5th Cir. 1977)* ("The proviso to *28 U.S.C. § 2680(h)* waives the defense of sovereign immunity for suits brought against the United States for certain intentional torts committed by its law enforcement officers acting with the scope of their employment."). ***HN10***[⬆] "Waivers of sovereign immunity are to be strictly construed." *Bates v. United States, 517 F.Supp. 1350, 1356 (W.D.Mo. 1981),* **[*16]** *aff'd, 701 F.2d 737 (8th Cir. 1983)*.

Plaintiff argues that the language of the 638 contract indicates that tribal officers employed by the ***Tribe*** are also federal law enforcement officers. Essentially, the plaintiff contends that the 638 contract incorporates federal requirements and binds tribal officers to federal standards along with incorporating the Rosebud Police Manual. This "merger," as plaintiff refers to it, in turn transforms the tribal law enforcement officer into a federal law enforcement officer. Plaintiff fails to cite any specific language in the 638 contract and does not offer any substantive legal support for this framework of analysis. A similar argument was rejected by this court's earlier decision in *Locke v. United States, 2002 DSD 22, 215 F.Supp.2d 1033, 1038 (D.S.D. 2002)*, *aff'd, 63 Fed. Appx. 971 (8th Cir. 2003)*. [3] Clearly, ***HN11***[⬆] state, federal, and tribal officers assist each other on occasion and it is likely that there exists some overlap in the standards and requirements applicable to each. However, as this court has previously noted, the language of a 638 contract "does not, in and of itself, transform [a tribal officer] **[*17]** into a federal law enforcement officer any more than it would transform him into a state law enforcement officer." *Id. at 1038*. The argument of plaintiff is rejected just as it was in Locke.

Nonetheless, plaintiff continues by suggesting that the 638 contract be viewed along with other factors, such as the training, rights, privileges, and duties which qualify each of the arresting officers as federal law enforcement officers. Siedschlaw was trained as a law enforcement officer and certified by the State of South Dakota at the time he was hired by the ***Tribe***. At the time of the alleged incident, he had neither received federal law **[*18]** enforcement training nor worked for a federal law enforcement agency. Also, he was never issued a commission card by the tribal police, although the possession of a tribal commission card is certainly not dispositive of the issue of whether one is a federal law enforcement officer. More importantly, there is no evidence that he was even issued a federal law enforcement Deputy Special Officer ("DSO") by the BIA. This was referred to in Locke as a "necessary certification." *Id. at 1038*. While Siedschlaw testified in his deposition that he believed he had arrest powers, his belief is irrelevant. The tribal court obviously disagreed with Siedschlaw, finding that he lacked authority to arrest the plaintiff in this case.

Roether was a commissioned law enforcement officer of the ***Tribe*** at the time of the incident, and plaintiff submitted a tribal commission card as evidence. Again, being a commissioned officer of the Rosebud Sioux ***Tribe*** is no evidence that one is a federal law enforcement officer. Rather, this merely indicates that, as a commissioned officer, the officer has authority to enforce Rosebud Sioux ***Tribe*** Law and Order Code. The extent and nature of his law **[*19]** enforcement training is disputed. Roether's deposition testimony indicates that he had training in the form of riding along with Black Bear, detention training from Officer Amos Prue, and some training from Leon Romero as to restraining prisoners and handcuffs. Roether was not eligible to attend the BIA Indian Law Enforcement Academy, and was terminated after this incident. [4] Essentially,

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[3] In Locke, the plaintiff argued that the 638 contract obligated the ***tribe*** to "provide enforcement of all Federal, State, Tribal and local Government laws . . . in accordance with the Contractor's area of jurisdiction . . ." As such, plaintiff argued that this language transformed the officer into a federal law enforcement officer. This notion was rejected.

[4] In a letter dated February 1, 2001, Roether was notified that he was being terminated due to an unsatisfactory background check. According to the letter, which was provided during Roether's deposition, both the Indian Police Academy in

therefore, the record is devoid of evidence that Roether or Siedschlaw received federal law enforcement training.

Black Bear received training at the BIA Police Academy in Artesia, New Mexico. At his deposition, the training he described was general law enforcement training, including **[*20]** training on report writing, first aid, patrol, firearms, physical efficiency battery test, CPR, handcuffing, night shooting and macing. While Black Bear received this training, plaintiff offers no suggestion of how exactly any of this training transforms a tribal officer into a federal law enforcement officer. This general law enforcement training that Black Bear has received does next to nothing to demonstrate that he is an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *28 U.S.C. § 2680(h)*. Plaintiff does not cite any specific statutory language vesting these officers with search or arrest powers vis-a-vis federal law. Like Siedschlaw, Roether and Black Bear do not have a federal law enforcement DSO commission, a necessity for plaintiff to proceed.

Plaintiff's argument seems to miss the mark in terms of the power that is granted to Indian ***tribes*** in this country. ***Tribes*** are regarded as separate governments in their own right, possessing attributes of sovereignty. It is undisputed that the charges involved in this case were tribal charges. Plaintiff was arrested **[*21]** on tribal charges of resisting arrest, disorderly conduct, open container and two counts of assaulting an officer. He was not charged in federal court with assaulting a federal officer. These charges were dismissed by a tribal court. Young was arrested on tribal charges of driving under the influence, open container, disorderly conduct, action required at a stop sign and no driver's license. As the Supreme Court has noted:

> It is undisputed that Indian ***tribes*** have power to enforce their criminal laws against ***tribe*** members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people, with the power of regulating their internal and social relations."

United States v. Wheeler, 435 U.S. 313, 322, 98 S. Ct. 1079, 1085, 55 L. Ed. 2d 303 (1978) (quoting *United States v. Kagama, 118 U.S. 375, 381-82, 6 S. Ct. 1109, 1113, 30 L. Ed. 228 (1886)*). In *Dry, supra*, the Tenth Circuit affirmed a United States District Court decision that granted the United States' motion to dismiss. Dry is analogous to the instant case in that the plaintiffs, three members of the Choctaw Nation, **[*22]** claimed the arresting tribal officers committed intentional torts, including assault and battery, unlawful detention, false imprisonment, and wrongful arrest. The court recognized that the accused tribal officers were acting under authority inherent in the Choctaw Nation's sovereignty and were not federal officers. As a result, the court found that the United States was immune from the plaintiffs' ***FTCA claims***. The United States District Court for the District of South Dakota has cited this decision and found its reasoning persuasive. *See Locke, 215 F.Supp.2d at 1038*, and Gibbons v. United States, 2001 DSD 18 P 14.

In Gibbons, the plaintiff brought numerous causes of action against tribal officers and the government after he was arrested for his involvement in a scuffle. The plaintiff alleged the following causes of action under the FTCA: assault, battery, false imprisonment, abuse of process, false arrest, intentional infliction of emotional distress, negligent training of employees, and negligent supervision by the United States. Further, the plaintiff alleged that the tribal officers were acting as federal agents pursuant to a self-determination **[*23]** contract authorized under *25 U.S.C. § 450f*. The court held that, as in Dry, the tribal defendants were acting pursuant to tribal criminal jurisdiction and were not acting as federal officers or otherwise under color of federal law. As such, the district court dismissed the action against the United States. In the instant case, nothing set forth compels or permits this court to recognize these tribal officers as federal law enforcement officers.

HN12[↑] The FTCA provides only a limited waiver of sovereign immunity. In order for this court to maintain jurisdiction over a tort action against the United States, the plaintiff must prove facts which demonstrate a waiver of sovereign immunity. Generally, the United States is not liable for the intentional torts of its employees. Plaintiff has submitted very little evidence to corroborate his assertion that Roether, Siedschlaw and Black Bear are federal law enforcement officers and therefore capable of subjecting the United States to tort liability through their intentional torts. In his brief opposing defendant's motion to dismiss, plaintiff seemingly concedes his lack of evidence, stating that "each of the aforementioned **[*24]** police officers received training and completed training courses presumably from the BIA or BIA officers. Should this

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Artesia, New Mexico, and the South Dakota State Academy refused to accept Roether for police officer training.

court find the depositions and documentation do not clearly indicate the exact status of the officers, this case should not be dismissed." (plaintiff's reply brief, page 4). This is a strange argument offered by plaintiff, considering that it is plaintiff's burden to demonstrate that jurisdiction exists. In short, plaintiff has not met his burden in establishing the jurisdictional facts to survive a motion to dismiss under *Rule 12(b)(1)*. Plaintiff has not proved that the tribal officers and jailers were federal law enforcement officers enforcing federal law during the time that the alleged intentional torts were committed.

B. Intentional Infliction of Emotional Distress and Torture Claims.

The plaintiff also alleges that the actions of the arresting officers amounted to torture and intentional infliction of emotional distress. The Eighth Circuit has held that the so-called intentional torts exception does not preclude a suit for intentional infliction of emotional distress where the claimed underlying tortious conduct involved intentional interference with **[*25]** contract rights, misrepresentation, malicious prosecution, and abuse of process. *Gross v. United States, 676 F.2d 295, 304 (8th Cir. 1982)*.

> The Government mistakes particular items of damage to Gross' well-being for the tortious wrongs alleged in his complaint. Because the Federal Tort Claims Act does not give immunity for the type of activity in which the Government was here alleged to be involved, we hold that Gross' claim for damages is not barred by the intentional torts exception.

Id. (citations omitted). The underlying acts here, namely the officers' alleged assault and battery and false imprisonment of plaintiff, clearly fall within the ambit of intentional torts. However, the Eighth Circuit's holding in Gross, if still legally correct, may, in a proper case, require that a cause of action for intentional infliction of emotional distress not be defeated since it is not specifically listed in *§ 2680(h)*. It is not listed and Congress has done nothing to change the law since Gross.

The Eighth Circuit's holding in Gross has been specifically rejected by the Tenth Circuit in *Metz v. United States, 788 F.2d 1528, 1534 (10th Cir. 1986)* **[*26]** ("a cause of action which is distinct from one of those excepted under *§ 2680(h)* will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiffs claim"). *See also Williamson v. United States Dep't of Agriculture, 815 F.2d 368, 377 (5th Cir. 1987)*. The Ninth Circuit has agreed with Metz:

> This circuit looks beyond the labels used to determine whether a proposed claim is barred. In this case, the claim for negligent infliction of emotional distress is nothing more than a restatement of the slander claim, which is barred by *section 2680(h)*. Put another way, the Government's actions that constitute a claim for slander are essential to Thomas-Lazear's claim for negligent infliction of emotional distress.

Thomas-Lazear v. F.B.I., 851 F.2d 1202, 1207 (9th Cir. 1988) (citations omitted).

Metz relied upon the United States Supreme Court's post-Gross decisions in *Block v. Neal, 460 U.S. 289, 297, 103 S.Ct. 1089, 1094, 75 L.Ed.2d 67 (1993)* (holding that *§ 2680(h)* does not bar negligence claims **[*27]** where the government's intentional conduct is not essential to what the plaintiff claims is negligence), and *United States v. Shearer, 473 U.S. 52, 57, 105 S.Ct. 3039, 3042, 87 L.Ed.2d 38 (1985)* (claims "arising out of" the intentional torts of assault and battery are barred by *§ 2680(h)*). The Metz court concluded:

> The meaning which we derive from the foregoing Supreme Court cases is that a cause of action which is distinct from one of those excepted under *§ 2680(h)* will nevertheless be deemed to "arise out of" an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is "essential" to plaintiff's claim.

Metz, 788 F.2d at 1534.

Although this court is bound, of course, by Eighth Circuit precedent, *Gross* has essentially been overruled by later Supreme Court cases. It is clear that plaintiff's intentional infliction of emotional distress and torture claims arise out of the tribal officers' alleged assault and false imprisonment and are thus subject to the intentional torts exception of *§ 2680(h)*. There is no other underlying conduct to support such claims. These claims **[*28]** are therefore subject to dismissal because this court has no jurisdiction over these intentional torts since Siedschlaw, Roether, and Black Bear are not

federal officers.

ORDER

Now, therefore, based on the foregoing,

IT IS ORDERED that the defendant's motion to dismiss, Doc. 27, is granted.

Dated this 4th day of December, 2003.

BY THE COURT:

CHARLES B. KORNMANN

United States District Judge

Farmer v. United States

United States District Court for the Eastern District of Washington

October 22, 2014, Decided; October 22, 2014, Filed

NO. CV-13-0251-LRS

Reporter
2014 U.S. Dist. LEXIS 150018 *; 2014 WL 5419637

DANIEL R. FARMER, a married person, Plaintiff, v. UNITED STATES OF AMERICA, and RON SHAFFER and REBECCA SHAFFER, husband and wife, Defendants.

Core Terms

Tribes, self-determination, functions, tribal, tort claim, carrying

Counsel: [*1] For Daniel R Farmer, a married person, Plaintiff: Rodney Kenneth Nelson, LEAD ATTORNEY, Abeyta Nelson, Yakima, WA.

For United States of America, Defendant: Timothy Michael Durkin, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA.

Judges: LONNY R. SUKO, Senior United States District Judge.

Opinion by: LONNY R. SUKO

Opinion

ORDER DENYING MOTION TO DISMISS, *INTER ALIA*

BEFORE THE COURT is the Motion To Dismiss (ECF No. 14) filed by Defendant United States Of America. This motion was heard with oral argument on October 16, 2014.

I. BACKGROUND

Plaintiff seeks to recover damages for injuries sustained as a result of alleged negligence by Defendant Ron Shaffer. According to Plaintiff's First Amended Complaint (ECF No.20), he was working for Jones Brothers Construction in Inchelium, Washington on October 25, 2011. Plaintiff was part of a construction crew that was building a pole-style structure for the local Fire Hall/EMT Unit. The structure was being constructed pursuant to a contract between Confederated ***Tribes*** Of The Colville Indian Reservation and Jones Brothers Construction. Plaintiff alleges that on that day, "[a]n EMT on duty for the Colville Confederated ***Tribes*** EMT Unit, Ronald L. Shaffer, took it upon himself to **[*2]** help the construction crew." According to the First Amended Complaint, while Plaintiff was on a ladder setting girder trusses, "Mr. Shaffer negligently swung a sledge hammer and struck [Plaintiff's] left hand with the sledge hammer causing [a] fracture to his long finger and other injuries."

Plaintiff sues the United States under the Federal Tort Claims Act (FTCA), *28 U.S.C. §2674*. He sues Mr. Shaffer and his wife, presumably, for common law negligence under this court's supplemental jurisdiction, *28 U.S.C. §1367(a)*. Pursuant to *Fed. R. Civ. P. 12(b)(1)*, the United States now moves to dismiss the ***FTCA claim*** against it, asserting there is no subject matter jurisdiction because Mr. Shaffer was not acting pursuant to the contract between the U.S. Department of Health and Human Services (HHS) and the Colville Confederated ***Tribes***, and furthermore, was not acting within the scope of his employment with the ***Tribes***.

II. DISCUSSION

A. 12(b)(1) Motions

There are two types of 12(b)(1) motions. A "facial attack" attacks subject matter jurisdiction solely on the basis of the allegations in the complaint, together with documents attached to the complaint, judicially noticed facts, and any undisputed facts evidenced in the record. All of these are construed **[*3]** in a light most favorable to the plaintiff. A "factual attack" attacks subject matter jurisdiction as a matter of fact based on extrinsic evidence apart from the pleadings. The primary difference between the two types of attack is that whereas under a facial attack, the court must consider the allegations of the complaint as true, under a factual attack, the court determines the facts for itself. *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. Where extrinsic evidence is disputed, the court may weigh the evidence and determine the facts in order to satisfy itself that it has power to hear the case. *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)*. The burden of proof is on the plaintiff as the party who invoked federal jurisdiction. *Stock West, Inc. v. Confederated **Tribes** of Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989)*. Where the facts are controverted or credibility issues are raised, the court, in its discretion, can order an evidentiary hearing to determine its own jurisdiction. *Rosales v. United States, 824 F.2d 799, 803 (9th Cir. 1987)*.

For reasons discussed *infra*, the court finds it can treat and resolve the United States' 12(b)(1) motion as a "facial attack" based on the allegations in the Plaintiff's First Amended Complaint, together with certain undisputed facts evidenced in the record.

B. ISDEAA

The ***Indian*** ***Self-Determination*** and Education Assistance Act of 1975 ("ISDEAA"), Public Law 93-368, authorizes federal agencies to contract **[*4]** with Indian ***tribes*** to provide services on the reservation. *Snyder v. Navajo Nation, 382 F.3d 892, 896 (9th Cir. 2004)*. "The purpose of the ISDEAA is to increase tribal participation in the management of programs and activities on the reservation." *Id. at 896-97*. In order to "limit the liability of ***tribes*** that agreed to these arrangements, Congress [ ] provided that the United States would subject itself to suit under the Federal Tort Claims Act . . . for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA." *Id. at 897*. "The FTCA provides a waiver of the United States government's sovereign immunity for tort claims arising out of the conduct of government employees acting within the scope of their employment." *Adams v. United States, 420 F.3d 1049, 1051 (9th Cir. 2005)*(citing *28 U.S.C. §1346(b)(1)*). "The FTCA provides that the government 'shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . .'" *Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987)*(quoting *28 U.S.C. §2674*).

A two-part analysis is used when determining whether the actions or omissions of a tribal employee are covered under the FTCA. The first inquiry is whether the tribal employee is a federal employee and focuses primarily on the scope of the ISDEAA contract and whether the contract authorized the acts or omissions forming **[*5]** the basis of the underlying claim. *Allender v. Scott, 379 F.Supp.2d 1206, 1211 (D. N.M. 2005)*. If the court concludes that the claim at issue resulted from the performance of functions under the ISDEAA contract and that the tribal employee should be deemed a federal employee, the second inquiry examines whether the tribal employee was acting within the scope of his employment. *Id. at 1211, 1218*.

The scope of the employment is determined according to the principles of respondeat superior of the state in which the tort occurred, in this case, Washington. *Lutz v. Secretary of the Air Force, 944 F.2d 1477, 1488 (9th Cir. 1991)*. Under Washington law, the test for determining whether an employee acted within the scope of his employment is:

> Whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or . . . whether he was engaged at the time in the furtherance of the employer's interest*.

Dickinson v. Edwards, 105 Wn.2d. 457, 716 P.2d 814, 819 (Wash. 1986)(emphasis in original). The Washington Supreme Court has emphasized the importance of the benefit to the employer in applying this test. The emphasis is on the benefit to the employer rather than the control or involvement of the employer. *Id*. "[I]f the purpose of serving the employer's business 'actuates the servant to any appreciable extent,'" the **[*6]** employer is liable for the conduct of the

employee, even if the employee's predominant motive is to benefit himself. *Vollendorff v. United States, 951 F.2d 215, 218 (9th Cir. 1991)*(quoting *Leuthold v. Goodman, 22 Wn.2d 583, 157 P.2d 326, 330 (Wash. 1945)*).

1. Scope Of Contract

The "***Indian*** ***Self-Determination*** Agreement" between The Colville Confederated ***Tribes*** and the Department of Health and Human Services Indian Health Services (IHS Contract Number 248-96-0001), effective October 1, 1995, states at Paragraph (a)(2) that the purpose of the agreement is "to transfer the funding and the following related functions, services, activities, and programs . . ., including all related administrative functions, from the Federal Government to the Contractor." The following are listed: Health Administration; Community Health Representative; Maternal Child Health; Community Health Nurse; Nutrition; Mental Health; Alcohol and Substance Abuse; Youth Rehabilitation and Aftercare; Environmental Health Services; Health Education; Engineering Technician; Emergency Medical Services; and Inchelium Ambulatory Clinic. (ECF No. 15-1 at p. 6).

IHS Contract Number 248-96-0001 is funded by annual funding agreements between the ***Tribes*** and the United States. An Annual Funding Agreement (AFA) covering the fiscal year October 1, 2011 through September 30, 2012, **[*7]** which encompasses the date of the accident in question, provides at Section 6 that the ***Tribes*** agrees to perform the following "Programs, Functions, Services and Activities [PFSAs]:" Alcohol and Substance Abuse; Community Health Nursing; Community Health Representative; Emergency Medical Services; Environmental Health Services; Health Administration; Health Education; Maternal Child Health; Mental Health; Nutrition; and Sanitation Facility Construction. (ECF No. 15-2 at p. 22). Section 10 of the AFA states:

> For purposes of Federal Tort Claims Act (FTCA) coverage, FTCA applies to all PFSAs referenced in this AFA to the extent provided in Section 102(c) and 102(d) of the ISDEAA and as set forth in *25 C.F.R. §§900.180-210*.

Section 102(c) of the ISDEAA, *25 U.S.C. §450f(c)*, requires the Secretary of Health and Human Services or the Secretary of the Interior, or both, to obtain or provide liability insurance or equivalent coverage for Indian ***tribes*** carrying out agreements pursuant to the ISDEAA.[1] Section 102(d), *25 U.S.C. §450f(d)*, provides that with respect to any claims by any person for personal injury, including death, resulting from the performance of "medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations," or with respect to any such claims by any person resulting from the operation of an **[*8]** emergency motor vehicle, an Indian ***tribe*** carrying out a self-determination agreement "is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees . . . are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement."

The scope of the aforementioned IHS Contract and AFA is broad enough that this court concludes they authorized the act of Mr. Shaffer which forms the basis of the tort claim. Mr. Shaffer's act falls within the broad purview of "Emergency Medical Services" listed in IHS Contract Number 248-96-0001 and listed as one of the PFSAs in the accompanying AFA.[2] Therefore, Mr. Shaffer is deemed a federal employee for FTCA purposes. The IHS Contract and AFA are not specifically limited to strictly medical-related functions. While it is true that Section 102(d) of the ISDEAA appears to limit itself to medical-related claims, the applicable regulations found in *25 C.F.R. §§900.180-210*, and referenced in the AFA, do not. Those regulations recognize that medical-related claims and non-medical-related claims may arise from the performance **[*9]** of functions under self-determination contracts, including those with the Department of Health and Human Services.

Consistent with Section 102(d), *25 C.F.R. §900.190* provides:

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[1] See definition of "Secretary" at *25 U.S.C. §450b(i)*.

[2] The same is true with regard to what apparently was a predecessor contract between the Colville ***Tribe*** and the United States, No. 248-89-0008. This contract was modified in September 1990. One of the modifications pertained to the scope of work for "Ambulance Services." (ECF No. 15-3 at pp. 30-31). It was specified that this scope of work included providing and managing "the personnel, materials and equipment required for the **total program operation**." (*Id*. at p. 37)(emphasis added). The record suggests this scope of work may have also been incorporated into the 1995 contract. (*Id*. at pp. 39-41).

> [N]o claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the [ISDEAA]. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. All such claims **[*10]** shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

But there is also *25 C.F.R. §900.204*, recognizing that the scope of self-determination contracts is broad enough to encompass non-medical-related functions:

> [N]o claim may be filed against a self-determination contractor or employee based upon performance of non-medical-related functions under a self-determination contract. Claims of this type must be filed against the United States under the FTCA.

The negligence claim at issue in this case resulted from the performance of a non-medical-related function authorized under the ISDEAA contract. Therefore, Mr. Shaffer is deemed a federal employee and an ***FTCA claim*** against the United States is the exclusive means by which Plaintiff can seek to recover damages for alleged negligence. The next question is whether at the time of the alleged act of negligence, Mr. Shaffer was acting within the scope of his employment with the ***Tribes*** such that the United States can be held liable under the FTCA.

2. Scope Of Employment

It appears that at the time of the accident, Mr. Shaffer was not engaged in the performance of the duties required of him by "his contract," assuming **[*11]** there was such a contract distinct from the self-determination agreement between the ***Tribes*** and the United States. It further appears that at the time of the accident, Mr. Shaffer was not acting at the specific direction of his employer (the ***Tribes***). Nevertheless, there simply is no question that Mr. Shaffer was engaged in the furtherance of his employer's (the ***Tribes***') interest. It is undisputed that completion of the pole-style structure for the local Fire Hall/EMT Unit had fallen behind schedule and prompt completion of the same would allow emergency personnel to be housed in the same unit as their emergency vehicles, improving emergency response times.

III. CONCLUSION

The Motion To Dismiss (ECF No. 14) filed by Defendant United States Of America is **DENIED**. The ***FTCA claim*** against the United States may proceed. Pursuant to *28 U.S.C. §2679(b)(1)*, this is the exclusive remedy and no claims may be maintained against Mr. Shaffer individually. Accordingly, named Defendants Ron and Rebecca Shaffer are **DISMISSED with prejudice** as are any claims asserted against them under the FTCA or common law. The dismissal of the Shaffers from this action eliminates that as a basis for the parties' "Joint Expedited Motion **[*12]** To Vacate Current Case Schedule Order" (ECF No. 32). For the other reasons stated by counsel during the oral argument, however, the court **GRANTS** the "Joint Expedited Motion To Vacate Current Case Schedule Order" (ECF No. 32). The current Scheduling Order (ECF No. 9) is **VACATED**. Within ten (10) days of the date of this order, counsel shall jointly propose new trial dates for the court's consideration.

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

DATED this 22nd of October, 2014.

/s/ Lonny R. Suko

LONNY R. SUKO

Senior United States District Judge

Dinger v. United States

United States District Court for the District of Kansas

March 13, 2013, Filed

Case No. 12-4002-EFM

Reporter
2013 U.S. Dist. LEXIS 34518 *; 2013 WL 1001444

TAMMY DINGER, surviving spouse and heir-at-law for Darren Scott Dinger; and TAMMY DINGER, as Administratrix of the estate of Darren Scott Dinger, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.

Core Terms

Tribe, self-determination, time of an accident, summary judgment motion, federal government, sovereign immunity, motion to dismiss, lack of subject matter jurisdiction, tort claim, tribal

Counsel: **[*1]** For Tammy Dinger, Surviving Spouse and heir-at-law and Administratrix of the estate of Darren Scott Dinger, Plaintiff: Rodney C. Olsen, Morrison, Frost, Olsen, Irvine, Jackson & Schartz, LLP, Manhattan, KS.

For United States, Defendant: Thomas G. Luedke, LEAD ATTORNEY, Office of United States Attorney - Topeka, Topeka, KS.

Judges: ERIC F. MELGREN, UNITED STATES DISTRICT JUDGE.

Opinion by: ERIC F. MELGREN

Opinion

MEMORANDUM AND ORDER

Plaintiff Tammy Dinger brought suit under the Federal Tort Claims Act,[1] alleging that her husband's death was the result of the negligent operation of a motor vehicle by a tribal employee who was allegedly working under a grant from the federal government at the time of the accident. Defendant United States of America requests that the Court either dismiss the suit for lack of subject matter jurisdiction (Doc. 8), or in the alternative, grant summary judgment in its favor (Doc. 15).

I. Factual and Procedural Background

Darren Scott Dinger ("Mr. Dinger") was driving his motorcycle on Kansas Highway 18 on July 23, 2009, when Candace Wishkeno negligently drove her 2001 Dodge Durango into the pathway of Mr. Dinger's motorcycle. Mr. Dinger crashed into the Durango, suffering **[*2]** fatal injuries. Plaintiff Tammy Dinger ("Dinger") brings this suit in her capacity as the surviving spouse and heir-at-law of Mr. Dinger, and in her capacity as the administratrix of Mr. Dinger's estate.

Wishkeno is a member of the Kickapoo ***Tribe*** in Kansas ("the ***Tribe***"). At the time of the accident, Wishkeno was employed by the ***Tribe*** as the Kickapoo Child Care Services Program Coordinator and Native Employment Program Coordinator.[2] Dinger alleges that Wishkeno's employment was pursuant to the ***Indian Self-Determination*** and Education Assistance Act

[1] *28 U.S.C. §§ 2671 et seq.*

[2] Pl.'s Mem. in Opposition to Mot. to Dismiss (Exhibit 6), Doc. 11-6, at 2.

("ISDEAA").[3] When the accident occurred, Wishkeno was transporting tribal youth to the Flint Hills Job Corps Center in Manhattan, Kansas, for a tour of the facility. Wishkeno and her mother personally own the Dodge Durango that was involved in the accident. Although the ***Tribe*** leases five vehicles from the General Services Administration ("GSA"), Wishkeno used her own SUV rather than waiting for one of the GSA vehicles that was being shared among tribal programs.

Dinger alleges that, at the time of the accident, the ***Tribe*** had entered into self-determination **[*3]** contracts with the Secretary of the Interior to plan, conduct, and administer programs for the benefit of Indians pursuant to the ISDEAA.[4] On July 23, 2009, the ***Tribe*** allegedly had a liability insurance policy that was issued in accordance with the ISDEAA,[5] and included a provision waiving the ***Tribe***'s right, as a federal entity, to sovereign immunity within the limits and coverage of the policy. Dinger asserts that Wishkeno and her SUV were covered by that insurance policy at the time of the accident.

Dinger brought a claim for monetary damages against Defendant United States of America ("the Government") under the Federal Tort Claims Act ("FTCA"), alleging that Wishkeno caused Mr. Dinger's death while acting negligently and on behalf of the ***Tribe*** in furtherance of the ***tribe***'s ISDEAA programs. Dinger's complaint did not identify an ISDEAA contract that Wishkeno was allegedly employed under. The Government subsequently filed a motion to dismiss Dinger's claim for lack of subject matter jurisdiction and a motion for summary judgment on the grounds that Wishkeno was not acting pursuant to a self-determination contract at the time of the accident. After reviewing **[*4]** the complaint and other evidence submitted in support of the parties' positions, the Court concludes that it lacks the authority to adjudicate this matter and must dismiss the suit under *Rule 12(b)(1) of the Federal Rules of Civil Procedure*.

II. Legal Standards

A. Sovereign Immunity and the FTCA

The Government argues that this Court lacks subject-matter jurisdiction over Dinger's claim because the Government has not waived its sovereign immunity from private suit. Federal courts are courts of limited jurisdiction, and must have a statutory or constitutional basis to exercise jurisdiction over the subject matter of a suit.[6] Absent an unequivocal waiver, sovereign immunity prohibits private lawsuits against the federal government and its agencies.[7] The Federal Tort Claims Act is a limited waiver of the federal government's sovereign immunity.[8] A claimant may bring suit under the FTCA for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant."[9] Therefore, a court has subject matter **[*5]** jurisdiction over a tort claim brought against the United States only if the plaintiff can show that his or her claim falls within the statutory requirements of the FTCA.[10]

In this case, the Government asserts that Dinger has not met the statutory requirements of the FTCA because Wishkeno was not an employee of the Government acting within the scope of employment at the time of the accident. Specifically, the Government argues that Dinger has failed to allege facts sufficient to show that Wishkeno's employment with the ***Tribe*** was based on an ISDEAA contract between the federal government and the ***Tribe***.

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[3] *25 U.S.C. §§ 450 et seq.*

[4] *Id. § 450f*.

[5] *Id. § 450f(c)*.

[6] *See* U.S. Const. art. III; *Sheldon v. Sill, 49 U.S. 441, 448-49, 12 L. Ed. 1147 (1850)*.

[7] *See Dolan v. United States Postal Serv., 546 U.S. 481, 484, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006)*; *United States v. Nordic Village, Inc., 503 U.S. 30, 33, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992)*.

[8] *See 28 U.S.C. § 1346(b)(1)*.

[9] *Id.*

[10] *See In re "Agent Orange" Product Liability Litig., 818 F.2d 210, 214 (2d Cir. 1987)* (stating that he burden is on the plaintiff to both plead and prove compliance with the statutory requirements of the FTCA), *quoted in Johnson v. Potter, 2006 U.S. Dist. LEXIS 23644, 2006 WL 1302120, at *3 (D. Kan. Apr. 19, 2006)*.

B. ISDEAA Self-Determination Contracts and the FTCA

Under an ISDEAA self-determination **[*6]** contract, the federal government provides funding to a tribal organization to plan, conduct, and administer a program or service that otherwise would have been provided directly by the federal government, thereby furthering public policy in favor of greater ***Indian self-determination***.[11] A "self-determination contract" under the ISDEAA is a contract between an Indian ***tribe*** and either the Secretary of the Interior or the Secretary of Health and Human Services.[12] Congress amended the ISDEAA in 1988 to permit ***FTCA claims*** to be brought when death or injury results from the performance of an ISDEAA self-determination contract.[13] Although tribal members do not become federal employees when operating under ISDEAA self-determination contracts, they are "covered employees" and are treated as federal employees for purposes of the FTCA.[14] Therefore, a plaintiff may bring an ***FTCA claim*** against the federal government if the plaintiff suffered an injury caused by a person who was acting pursuant to an ISDEAA self-determination contract. In this case, Dinger may sue under the FTCA if Wishkeno was employed with the ***Tribe*** through an ISDEAA self-determination contract.

C. Applicable Standard of Review

The Government makes its argument that Wishkeno was not a covered employee acting pursuant to an ISDEAA contract in both a motion to dismiss and a motion for summary judgment, and introduces affidavits and documents outside the pleadings as support for its motions. Consequently, a threshold issue for the Court's determination is whether to address the Government's argument as a motion to dismiss under *Rule 12(b)(1) of the Federal Rules of Civil Procedure*, or as a *Rule 56* motion for summary judgment due to the introduction of materials outside the pleadings.

Motions to dismiss for lack of subject matter jurisdiction generally take one of two forms: (1) facial attacks, which question the sufficiency of the allegations in the complaint; or (2) factual attacks, which challenge the content of the allegations regarding subject matter jurisdiction.[15] With respect to Wishkeno's status as a federal employee, the Government asserts a factual challenge to Dinger's complaint. In a factual attack under *Rule 12(b)(1)*, the court has "wide **[*8]** discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts."[16] Therefore, referencing materials submitted by the parties outside the pleadings does not automatically classify the Government's motion as a *Rule 56* motion for summary judgment.

The Court would, however, be required to rule on the Government's summary judgment motion if "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim."[17] Here, Dinger brings a substantive claim of negligence. The jurisdictional question—whether Dinger's claim falls within the FTCA's waiver of sovereign immunity—turns on whether Wishkeno was employed by the ***Tribe*** pursuant to a self-determination contract under the ISDEAA. It is not necessary for the Court to resolve any negligence issues to determine whether Wishkeno was employed by the ***tribe*** pursuant to the ISDEAA. Therefore, the Court will address the Government's arguments as a *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction.

III. [*9] Analysis

As the party invoking the Court's jurisdiction, Dinger bears the burden of establishing subject matter jurisdiction in this case.[18] Both parties have submitted

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[11] *See* *25 U.S.C. § 450f*; *Goodthunder v. Na'Nizhoozhi Ctr., Inc., 1995 U.S. Dist. LEXIS 20960, 1995 WL 865870, at *2 (D. N.M. Dec. 1, 1995)*.

[12] *25 U.S.C. § 450b(i)*, **[*7]** *(j)*, *(l)*.

[13] *Goodthunder, 1995 U.S. Dist. LEXIS 20960, 1995 WL 865870, at *2*.

[14] *See* *25 U.S.C. § 450f*; *Allender v. Scott, 379 F. Supp. 2d 1206, 1211 (D. N.M. 2005)*.

[15] *Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995)*.

[16] *Id. at 1003*.

[17] *Sizova v. Nat'l Institute of Standards & Tech., 282 F.3d 1320, 1324 (10th Cir. 2002)*.

[18] *See* *Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974)*.

exhibits in support of their positions regarding the nature of Wishkeno's employment. Contesting Dinger's allegation that Wishkeno's position with the ***tribe*** was funded by the Department of the Interior, the Government first submitted a copy of a grant to the ***Tribe*** from the Department of Health and Human Services ("HHS"). The Government argues that the framework of that grant program, Native Employment Works, did not contain any waiver of sovereign immunity.

In response, Dinger submitted several exhibits to support her claim that Wishkeno was operating pursuant to an ISDEAA self-determination contract at the time of the accident. First, Dinger included letters from the ***Tribe***'s insurance provider, Travelers, explaining that Travelers would cover costs related to the accident because "Ms. Wishkeno was operating her personal vehicle on behalf of the Kickapoo ***Tribe*** in Kansas in the administration or operation of the Flint Hills Job Corps Project, a federally **[*10]** funded project, and which involves [an ISDEAA] Contract."[19] But the letters also include caveats that Travelers's conclusions were "based on the information known to date."[20] Additionally, Dinger provided the Court with a copy of a letter from the Kickapoo Legal Department, which states that they determined that Wishkeno was "at all times acting within the scope of employment when the accident occurred" and "acting under a grant from the Department of Health and Human Services."[21] But the letter does not state that the grant from HHS involved an ISDEAA self-determination contract with the ***Tribe***. Likewise, none of the other documents that Dinger submitted—i.e., letters between attorneys involved in the case—offer any proof or suggestion that Wishkeno's employment with the ***Tribe*** was pursuant to a self-determination under the ISDEAA.

The Government's reply to Dinger's oppositional memorandum includes affidavits from two government officials. First, the Self-Determination **[*11]** Officer with the regional office of the Bureau of Indian Affairs avers that "there are no ISDEAA contracts between the Department of the Interior and the Kickapoo ***Tribe*** in Kansas that relate to the activity engaged in by Candace Wishkeno at the time of this accident."[22] Second, a Senior Contract Specialist with HHS's Indian Health Service avers that HHS records show that the ***Tribe*** "is not eligible for Federal Tort Claims Act ("FTCA") coverage for its Native Employment Works Program under the Kickapoo ***Tribe***'s Self-Determination Contract with the Indian Health Service due to its lack of inclusion within this contract."[23]

Given this evidence from the Government, the Court must conclude that Dinger has failed to show that Wishkeno was employed under a self-determination contract as defined in the ISDEAA. Consequently, the pleadings do not contain sufficient facts to establish that Wishkeno was a covered employee subject to liability under the FTCA. The Court must therefore dismiss Dinger's negligence claim against the United States for lack of subject matter jurisdiction.

IT IS ACCORDINGLY ORDERED this **[*12]** 13th day of March, 2013, that Defendant United States of America's Motion to Dismiss (Doc. 8) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendant United States of America's Motion for Summary Judgment (Doc. 15) is hereby **DISMISSED AS MOOT**.

IT IS SO ORDERED.

/s/ Eric F. Melgren

ERIC F. MELGREN

UNITED STATES DISTRICT JUDGE

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[19] Pl.'s Mem. in Opposition to Mot. to Dismiss (Exhibit 1), Doc. 11-1, at 4.

[20] *Id*. at 7; Pl.'s Mem. in Opposition to Mot. to Dismiss (Exhibit 2), Doc. 11-2, at 2.

[21] Pl.'s Mem. in Opposition to Mot. to Dismiss (Exhibit 3), Doc. 11-3, at 2.

[22] Aff. of Candace Fox, Doc. 14-1, at ¶ 2.

[23] Aff. of Ronda Longbrake, Doc. 14-2, at ¶ 3.

Manuel v. United States

United States District Court for the Eastern District of California

November 14, 2014, Decided; November 14, 2014, Filed

1:14-cv-665-LJO-BAM

Reporter
2014 U.S. Dist. LEXIS 160537 *; 2014 WL 6389572

LUCINDA MANUEL, Plaintiff, v. THE UNITED STATES OF AMERICA, et al., Defendants.

MEMORANDUM DECISION AND ORDER RE DEFENDANT'S MOTION TO DISMISS (DOC. 11)

Core Terms

Tribe's, self-determination, Tribal, contracts, funded, federal government, employees, sovereign immunity, liaison, carrying, Declaration, asserts, subject matter jurisdiction, newsletter, time of an accident, waived, tribal organization, federal employee, general fund, alleges, programs, argues, social services, state law, omissions, testifies, purposes

Counsel: **[*1]** For Lucinda Manuel, Plaintiff: John Laurence Rozier, LEAD ATTORNEY, Nelson and Rozier, Visalia, CA.

For The United States of America, Defendant: Alyson A. Berg, LEAD ATTORNEY, United States Attorney's Office, Fresno, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

I. INTRODUCTION

On May 5, 2014, Plaintiff Lucinda Manuel ("Plaintiff") filed this case against Defendants United States ("Defendant") and Does 1-50, inclusive. Doc. 2, Complaint ("Compl."). Plaintiff asserts one cause of action for negligence against Defendant based on injuries she sustained in a motor vehicle accident on March 16, 2012. *Id*. at 1-2. Plaintiff brings her claim against Defendant under provisions of the Federal Tort Claims Act ("the FTCA"), *28 U.S.C. §§ 1346(b)*, *2401(b)*, and *2671-80*. *Id*. at 2, 6.

Currently before the Court is Defendant's motion to dismiss Plaintiff's complaint under *Fed. R. Civ. P. 12(b)(1)* on the ground that this Court lacks subject matter jurisdiction over the complaint. Doc. 11-1 at 1. Defendant argues Plaintiff cannot assert her claim against Defendant under the FTCA because the federal government has not waived its sovereign immunity from tort claims like Plaintiff's. *Id*.

The **[*2]** Court has reviewed the papers and determined that the matter is suitable for decision without oral argument pursuant to *Local Rule 230(g)*. Doc. 22. For the reasons discussed below, the Court GRANTS Defendant's motion to dismiss.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

On November, 2012, Plaintiff "was involved in a serious

[1] The following facts are undisputed unless otherwise indicated.

motor vehicle accident," ("the accident") which she alleges was caused by Ms. Frances Hammond ("Hammond"). Compl. at ¶¶ 8, 12.[2] Hammond is an employee of the Tule River ***Tribe*** ("the ***Tribe***") and the Tule River Tribal Council ("the Tribal Council"). The accident occurred "on Reservation Road in Porterville, California . . . off of the Indian reservation and on a county road maintained by the County of Tulare, California." *Id*. at ¶ 8. Plaintiff alleges that Hammond "crossed the center line of a county road causing her vehicle to strike a vehicle occupied by [P]laintiff, thereby causing severe personal injuries" to Plaintiff. *Id*. at ¶ 12.

Plaintiff alleges that "[a]t the time of the accident . . . Hammond was employed in a community **[*3]** liaison position given charge with putting out the Tribal newsletter." *Id*. at ¶ 4. Plaintiff claims that

> Hammond was on the job and in the course and scope of her employment with the ***Tribe*** and/or the Tribal council at the time of the accident in that she was traveling from her office in the administration building at Tribal headquarters down the mountain to the city of Porterville in order to purchase a SIM card for her camera and then to later cover a newsworthy event in the city of Porterville that same evening for inclusion in the Tribal newspaper.

Id. at ¶ 8. The event Hammond intended to cover was a concert at the ***Tribe***'s casino.[3]

Hammond is "part of the central Tribal administration," and has an office at the administrative building at the Tribal headquarters. *Id*. at ¶ 5. Plaintiff alleges that "The ***Tribe*** is funded through an Annual Funding Agreement (AFA) with the Federal Government . . . which includes various general administrative expenses and reimbursement **[*4]** for indirect costs at approximately 12%." *Id*. at ¶ 5. "[T]he Federal Government funds numerous other programs and budgets for the ***Tribe***, all of which are served by the newsletter and . . . Hammond's community liaison position." *Id*. Plaintiff further alleges that "***tribe*** or tribal organization which employs . . . Hammond had entered into contracts with the Federal Government to assume the administration of programs formerly administered by the Federal Government on behalf of the ***tribe***." Compl., Ex. A, Attachment 3,[4] at 14. "Part of the administration of said ***Indian*** ***self-determination*** contracts was the employment of community outreach and liaison personnel such as . . . Hammond." *Id*.

Plaintiff brings this suit against Defendant "in the place of the **[*5]** Tule River Indian ***Tribe***, the Tule River Tribal Council, and its employee . . . Hammond, pursuant to . . . the [FTCA]." *Id*. at ¶ 3; *see also id*. at ¶ 14. Plaintiff asserts that "Hammond's position with the ***Tribe*** was funded directly and/or indirectly by the United States government . . . such that liability for [her] claim fails to the United States . . . under the [FTCA]." *Id*. at 1. Specifically, Plaintiff asserts that this action

> is a tort claim against a ***tribe*** or tribal organization . . . and its employee . . . Hammond, arising out of the ***tribe*** or tribal organization carrying out an ***Indian*** ***self-determination*** contract as defined by 25 U.S.C. Section 450b(j) and 450e-1, and as such this is to be considered a claim against the United States and covered to the full extent of the [FTCA].

Compl., Ex. A, Attachment 3, at 14 (citation omitted).

Plaintiff acknowledges that "no ***Indian*** ***Self-Determination*** Act contract in force at the time of the accident has yet been located, which specifically identifies . . . Hammond as an employee." *Id*. at 6. Plaintiff also does not dispute that Hammond's "payroll checks were coded to indicate payment from the Tribal General Fund." Doc. 16 at 6. Plaintiff argues, however, that she may assert her claim against **[*6]** Defendant under the FTCA "under the umbrella of the [***Tribe***'s] nine (9) separate ***Indian*** ***Self-Determination*** Act contracts in force on the date of the accident" because Hammond "was acting as a community liaison in service of all nine (9) contracts." *Id*. at 17. In sum, Plaintiff claims that Hammond is an employee of the government for FTCA purposes pursuant to ***Tribe***'s self-determination contracts with the federal government,

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[2] Plaintiff erroneously states once in the complaint that the accident occurred on March 16, 2012. *See* Compl. at 1.

[3] *See* Doc. 11-5 at ¶ 2. Plaintiff does not allege in the complaint that Hammond intended to cover the casino concert on the day of the accident, but does not dispute Defendant's assertion that was Hammond's intention. *See* Doc. 16 at 7.

[4] "The FTCA requires a government tort plaintiff, prior to filing a district court action, to present a 'claim to the appropriate Federal agency' and the agency's claim denial." Pineda v. Golden Valley Health Ctrs., No. 10-cv-847-LJO-GSA, 2010 U.S. Dist. LEXIS 64217, 2010 WL 2629286, at *3 (E.D. Cal. June 28, 2010) (quoting 28 U.S.C. § 2675). Defendant does not dispute that Plaintiff satisfied this administrative prerequisite prior to filing this case. Plaintiff incorporates by reference and attaches her ***FTCA claim*** to the complaint. *See* Compl. at ¶ 5.

thereby waiving Defendant's sovereign immunity under the FTCA. *See* Doc. 16 at 17.

Defendant moves to dismiss Plaintiff's complaint on the ground this Court lacks subject matter jurisdiction over the complaint under the FTCA. Doc. 11-1 at 7. Defendant acknowledges that Tribal employees, including Hammond, potentially could be employees of the government for FTCA purposes under the ***Tribe***'s self-determination contracts. *See* Doc. 11-1 at 9 ("Congress has specifically consented to suit under the FTCA for certain claims arising out of the performance of self-determination contracts.") (citing *Hinsley v. Standing Rock Child Protective Servs., 516 F.3d 668, 672 (8th Cir. 2008)*). Defendant asserts, however, that "Hammond was not a federal employee, she was not performing work under a Tribal self-determination contract with the United States, and her tribal position **[*7]** was not federally funded." Doc. 11-1 at.

Defendant therefore maintains that the ***Tribe***'s Self-Determination contracts do not provide a basis for finding that Hammond was an employee of the government at the time of the accident such that Defendant has waived its sovereign immunity under the FTCA. In support, Defendant provides declarations from individuals involved with the ***Tribe***'s management and various Tribal contracts and documentation. Doc. 11-1 at 1; *see, e.g.*, Doc. 11-4, Declaration of Claude DeSoto, Jr., ("DeSoto Decl."); Doc. 11-6, Declaration of Neil Peyron ("Peyron Decl."); Doc. 11-7, Declaration of Froilan Sarmiento ("Sarmiento Decl."); Doc. 12, Declaration of Victoria May ("May Decl.") (collectively, "the Declarations"); Doc. 21-2, Declaration of Froilan Sarmiento ("Second Sarmiento Decl.").

III. STANDARD OF DECISION

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for "lack of subject-matter jurisdiction." Faced with a *Rule 12(b)(1)* motion, a plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996)*. A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp., 655 F.2d 968, 968-69 (9th Cir. 1981)*. A challenge to subject matter jurisdiction may **[*8]** be facial or factual. *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*. As explained in *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1038 (9th Cir. 2004)*:

> In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

A *Rule 12(b)(1)* motion can be made as a speaking motion—or factual attack—when the defendant submits evidence challenging the jurisdiction along with its motion to dismiss. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)*; *see Savage, 343 F.3d at 1039-40 & n. 2*. A proper speaking motion allows the court to consider evidence outside the complaint without converting the motion into a summary judgment motion. *See Safe Air, 373 F.3d at 1039*.

In a speaking motion, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Safe Air, 373 F.3d at 1039*. The Court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)*. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary **[*9]** to satisfy its burden of establishing subject matter jurisdiction." *Savage, 343 F.3d at 1039-40, n. 2*.

IV. DISCUSSION

A. Jurisdiction and Sovereign Immunity.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941)*. "There cannot be a right to money damages without a waiver of sovereign immunity." *United States v. Testan, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1983)*. "[T]he United States may not be sued without its consent and . . . the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)*.

A waiver of traditional sovereign immunity is not implied but must be unequivocally expressed. *See Testan, 424*

U.S. at 399. "[S]tatutes which are claimed to be waivers of sovereign immunity are to be strictly construed against such surrender." Safeway Portland Emp. Fed.Credit Union v. Fed.Deposit Ins. Corp., 506 F.2d 1213, 1216 (9th Cir.1974).

A party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity. Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, *466 U.S. 958, 104 S. Ct. 2168, 80 L. Ed. 2d 552 (1984)*. "Thus, the United States may not be sued without its consent and the terms of such consent define the court's jurisdiction." Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987), *cert. denied*, *487 U.S. 1204, 108 S. Ct. 2845, 101 L. Ed. 2d 882 (1988)*. "The question whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction." McCarthy, 850 F.2d at 560. "Absent consent to sue, dismissal of the action is required." Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982).

B. FTCA.

Plaintiff asserts that she may bring **[*10]** her claim against Defendant because Defendant has waived its sovereign immunity under the FTCA. *See* Compl. at ¶ 1. Plaintiff further asserts that the federal government funded Hammond's position to such an extent that Defendant should be liable for the negligent acts Hammond committed during the course of her employment. *See id*. at 1-2.

"The FTCA is the exclusive remedy for tortious conduct by the United States, and it only allows claims against the United States." Fed. Deposit Ins. Corp. v. Craft, 157 F.3d 697, 706 (9th Cir. 1998). The FTCA "vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees." Jerves v. United States, 966 F.2d 517, 518 (9th Cir.1992). "Section 1346(b) [of the FTCA] grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." Fed. Deposit Ins. Corp.v. Meyer, 510 U.S. 471, 477, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (citations omitted). Section 1346(b) provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, **[*11]** under circumstances where the United States, if a private person, would be held liable to the claimant in accordance with the law of the place where the act or omission occurred.

Under the FTCA, the United States may be held liable in actions "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Accordingly, "[t]he FTCA waives the United States' sovereign immunity for certain negligence claims, but it does so only if a private person, performing the same act as the United States, would be liable under the governing state law." Garcia v. United States, 709 F. Supp. 2d 1133, 1138 (D. N. M. 2010) (citing 28 U.S.C. § 2674).

Accordingly, whether Defendant is liable for Hammond's alleged negligence under the FTCA turns on whether she is an employee of the government under the FTCA. *See* Compl. at ¶¶ 3, 14. Section 2671(1) of the FTCA provides that an "employee of the government" includes, among other things, "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity."

C. Self-Determination Contracts and the FTCA.

The ***Indian Self-Determination*** and Education Assistance Act ("ISDEAA") "waive[s] federal sovereign immunity in federal district court for certain contract claims." Demontiney v. U.S. ex. rel. Dep't of Interior, Bureau of Indian Affairs, 255 F.3d 801, 806 (9th Cir. 2001) (citing 25 U.S.C. § 450m-1(a)). "The ISDEAA's waiver of **[*12]** federal sovereign immunity is limited to 'self-determination contracts' entered into by Indian ***tribes*** or tribal organizations and the government." Id. at 805. A "self-determination contract" is a

> contract . . . entered into . . . between a tribal organization and the appropriate Secretary[5] for the planning, conduct and administration of programs or services which are otherwise provided to Indian

[5] The "appropriate Secretary" is "either the Secretary of Health and Human Services or the Secretary of the Interior or both." 25 U.S.C. § 450b(i).

tribes and their members pursuant to Federal law.

25 U.S.C. § 450b(j). "Under a self-determination contract, the federal government supplies funding to a tribal organization, allowing the tribal organization to plan, conduct and administer a program or service that the federal government otherwise would have provided directly." *FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1995)* (citing *25 U.S.C. § 450f*, *450b(j)*).

Section 314 of the 1990 amendments to ISDEAA ("Section 314") provides:

> With respect to claims resulting from the performance of functions . . . under a contract . . . authorized by the [ISDEAA] . . . an Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any **[*13]** such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract or agreement . . . . [A]ny civil action or proceeding involving such claims brought hereafter against any ***tribe***, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the [FTCA].

Pub.L. No. 101-512, Title III, § 314, 104 Stat.1915, 1959-60 (1990) (codified at *25 U.S.C. § 450f* notes) (citations omitted). Simply stated, Section 314 "allow[s] recovery under the [FTCA] for certain claims arising out of the performance of self-determination contracts." *FGS Constructors, 64 F.3d at 1234*; *see also Demontiney, 255 F.3d at 807* ("The language of section 314 . . . applies to tort claims brought under the [FTCA] . . . against a contractor who has a self-determination contract."); *Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004)* ("Congress therefore provided that the United States would subject itself to suit under the [FTCA] for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA.").

D. Whether this Court Has Jurisdiction Over Plaintiff's Claim.

Plaintiff bears the burden of establishing this Court's subject matter jurisdiction **[*14]** over her claim against Defendant. *McCombe, 99 F.3d at 353*. This Court has jurisdiction over the claim only if it arises out of Hammond's performance of a Tribal self-determination contract. *See Navajo Nation, 382 F.3d at 897*.[6] Thus, if Hammond was not acting within the scope of her employment pursuant to a Tribal self-determination contract at the time of the accident, she was not an employee of the government under the FTCA, Defendant did not waive its sovereign immunity under the FTCA, and Plaintiff's claim must be dismissed for lack of subject matter jurisdiction.

1. Standard.

Courts employ a two-part test to determine "whether the actions or omissions of a tribal employee are covered under the FTCA" pursuant to a self-determination contract. *Farmer v. United States, No. 13-cv-251-LRS, 2014 U.S. Dist. LEXIS 150018, 2014 WL 5419637, at *2 (E.D. Wash. Oct. 22, 2014)*.[7] "The first inquiry is whether the tribal employee is a federal employee and focuses primarily on the scope of the [self-determination] contract **[*15]** and whether the contract authorized the acts or omissions forming the basis of the underlying claim." *Id*. (citing *Allender v. Scott, 379 F. Supp. 2d 1206, 1211 (D.N.M. 2005))*. The second part of the test "examines whether the tribal employee was acting within the scope of his [or her] employment." *Id*. (citing *Allender, 379 F. Supp. 2d at 1211, 1218)*.

2. The parties' positions.

As noted, Plaintiff acknowledges that "no ***Indian Self-Determination*** Act contract in force at the time of the accident has yet been located, which specifically identifies . . . Hammond as an employee." Compl., Ex.

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[6] Plaintiff points to no potential source of Defendant's liability under the FTCA other than the ***Tribe***'s self-determination contracts. *See* Doc. 16 at 17-18; Compl. Ex. A, Attachment 3, at 14 ("This is a tort claim . . . arising out of the tribal or tribal organization carrying out an ***Indian self-determination*** contract").

[7] The Court is unaware of—and the parties have not provided—any controlling Ninth Circuit precedent that addresses how this Court must assess whether Hammond is a federal government employee under the ***Tribe***'s self-determination contracts for FTCA purposes. Accordingly, the Court draws from out-of-Circuit case law to assess the issue.

A, Attachment 3, at at 6. Plaintiff's position is not entirely clear, but it appears that Plaintiff asserts that she may bring her claim "under the umbrella" of the ***Tribe***'s self-determination contracts in existence at the time of the accident for two reasons. Doc. 16 at 17. First, Plaintiff argues Hammond's position "was funded directly and/or indirectly by the United States **[*16]** Government under various Self Determination Act contracts between the ***Tribe*** and [the] United States Government such that liability for this claim falls to [Defendant] under the [FTCA]." Compl. at 1; *see also id*. at ¶ 14. Plaintiff claims that this funding renders Hammond an employee of the federal government under the ISDEAA. Doc. 16 at 17-18. Second, Plaintiff argues that Hammond's position as community liaison serviced the ***Tribe***'s self-determination contracts, which also renders her an employee of the federal government under the ISDEAA. Doc. 16 at 18.

Defendant argues that Hammond was not an employee of the government at the time of the accident because (1) she was not performing work under a Tribal self-determination contract and (2) her position was not federally funded. *See* Doc. 11-1 at 1. In support, Defendant offers the Declarations and their supporting documentation.

3. Analysis.

a. Funding for Hammond's Position.

Defendant provides the Declarations to support its position that Hammond's community liaison position is not funded by the ***Tribe***'s self-determination contracts.

Mr. Claude DeSoto, Jr., is "the community development specialist grants/contracts for the [***Tribe***]." DeSoto **[*17]** Decl. at ¶ 1. In that capacity, he oversees "all aspects of grant and contract administration concerning the [***Tribe***]," and he "maintains] files for each contract and grant for the [***Tribe***]." *Id*. Mr. DeSoto testifies that "[n]o self-determination contract exists for the community liaison position held by [Hammond]," *id*. at ¶ 2, and that "she is in a department that is solely funded by the [***Tribe***]." *Id*. at ¶ 3.

Mr. Neil Peyron is "the Chairman of the [Tribal Council]." Peyron Decl. at ¶ 1. Because of his position, he is "familiar with the [***Tribe***'s] self-determination contracts," as well as "the operations of the [***Tribe***], including its economic ventures . . . [and] the ***Tribe***'s employment of persons to operate on behalf of the ***Tribe*** and its general operations." *Id*. Mr. Peyton testifies that the ***Tribe*** "uses a portion of its general fund to pay the salaries of certain tribal employees." *Id*. at ¶ 3. "One of the positions funded by the ***Tribe***'s general fund is a tribal community liaison, the position held by [Hammond] at the time of the [accident]." *Id*. Mr. Peyron further testifies that "Hammond's position is funded solely by the [Tribal Council]," and "is not funded by any contracts between the **[*18]** [***Tribe***] and the [federal government]." *Id*. at ¶ 4. As a result, the Tribal newsletter "is funded by the ***Tribe***'s general fund and funds from non-self-determination contracts." *Id*. at ¶ 5.

Mr. Sarmiento is the "Chief Financial Officer of the [Tribal Council]." Sarmiento Decl. at ¶ 1. Mr. Sarmiento testifies that "Hammond's position is funded solely by the [Tribal Council]," and "is not funded by any contracts between the [***Tribe***] and the [federal government]." *Id*. at ¶ 5. Mr. Sarmiento further testifies that the Tribal newsletter "is not funded under any contract between the ***Tribe*** and the [federal government]," but "is funded by the ***Tribe***'s general fund and funds from non-self-determination contracts." *Id*. at ¶ 6. Mr. Sarmiento also explained that the "***Tribe***'s General Fund does not include any monies received from any self-determination contracts," but rather "come from the ***Tribe***'s economic enterprises and other non-federal sources." Second Sarmiento Decl. at ¶ 2. Thus, the "'indirect costs' from the . . . ***Tribe***'s self-determination contracts are not used to fund any portion of the duties of the ***Tribe***'s community liaison position." *Id*. at ¶ 3.

Ms. Victoria May is the "***Indian Self-Determination*** **[*19]** Officer/Level 1 Awarding Official for the Central California Agency of the Bureau of Indian Affairs [("the CCA")]." May Decl. at ¶ 1. As such, she is "familiar with the contracts between the [federal government] and the [***Tribe***]." *Id*. Ms. May explains that the CCA "oversees the self-determination contracts with the [***Tribe***] for specific programs that are made at the request of the ***Tribe***." *Id*. at ¶ 2. "The self-determination contracts, if approved, allow for federal funding of specific programs formally operated by the United States." *Id*.

The ***Tribe*** had seven self-determination contracts with the federal government at the time of the accident. *Id*. at ¶ 3.[8] According to Ms. May, Hammond's "position is not

[8] The self-determination contracts are attached to Ms. May's declaration. *See* Doc. 12, Exs. A-G.

funded under any contracts between the [***Tribe***] and the [federal government]." *Id*. at ¶ 8.

Plaintiff provides no evidence that undermines the Declarations and their supporting evidence. Plaintiff acknowledges that none of the ***Tribe***'s self-determination contracts "identifies Ms. Hammond as an employee," Doc. 16 at 6, and that the ***Tribe***'s general fund funded Hammond's position. *Id*. at 17. Plaintiff nonetheless **[*20]** asserts "[i]t is suspected that, through discovery, [Plaintiff] will . . . learn that the indirect costs provided under each ***Indian Self-Determination*** Act contract were deposited into the Tribal General Fund, the very same source of Ms. Hammond's salary." *Id*. at 18. The Court has reviewed the ***Tribe***'s self-determination contracts and cannot find any indication that any of them contemplates funding for Hammond's position. The Court finds that the Declarations establish that Hammond's position was not funded by any of the ***Tribe***'s self-determination contracts.

However, the relevant inquiry for whether a Tribal employee is an employee of the government under the ISDEAA is whether that Tribal employee is carrying out a self-determination contract; the source of the funding for that Tribal employee's position is not dispositive. *See* Navajo Nation, 382 F.3d at 897 (tribal employees "acting pursuant to . . . self-determination contracts under the ISDEAA" are federal government employees); Shirk v. U.S. ex rel. Dep't of Interior, No. CV-09-1786-PHX-NVW, 2010 U.S. Dist. LEXIS 89687, 2010 WL 3419757, at *5 (D. Ariz. Aug. 27, 2010) ("tribal employees are deemed federal employees for purposes of the FTCA to the extent they act within the scope of their employment, as defined by an ISDEAA contract"), *appeal docketed*, No. 10-17443, *Shirk v. United States* (9th Cir. Oct. 26, 2010) **[*21]** . Thus, the funding for a tribal employee's position may be irrelevant for assessing whether that employee was carrying out a tribal self-determination contract. *See* Adams v. Tunmore, No. CV-05-270-FVS, 2006 U.S. Dist. LEXIS 64289, 2006 WL 2591272, at *3 (E.D. Wash. Sept. 8, 2006).[9] This is so because a tribal employee may carry out a self-determination contract even if he/she is not funded by that contract. *See* Big Crow v. Rattling Leaf, 2004 DSD 1, 296 F. Supp. 2d 1067, 1070 (D.S.D. Jan. 2, 2004) (tribal employee paid by one of ***tribe***'s self-determination contracts found to be employee of the government for ISDEAA/FTCA purposes under second self-determination contract for carrying out functions of that contract).

b. Nature of Hammond's Position.

Plaintiff asserts that, regardless of the source of the funding for Hammond's position, Hammond performed worked covered by the ***Tribe***'s self-determination contracts. *See* Doc. 16 at 7, ¶ 2.[10] Plaintiff argues that the nature of Hammond's position renders her an employee of the government under the ***Tribe***'s self-determination contracts. The thrust of Plaintiff's argument is that Hammond services the ***Tribe***'s self-determination contracts by virtue of her community liaison position, which "inform[s] the ***Tribe*** as to the activities of the ***Tribe*** in performing" its self-determination contracts and "serve[s] the general needs of Tribal members under the various" self-determination contracts. Doc. 16 at 12-13. Plaintiff lists numerous duties Hammond performs in her position as community liaison that, according to Plaintiff, shows that Hammond supports the ***Tribe***'s programs that are funded by self-determination contract funds. *See id*. at 12-13.

Simply put, Plaintiff asserts that Hammond is an employee of the government under the ISDEAA because she "was acting as a community liaison in service of" the ***Tribe***'s self-determination contracts. *Id*. at 17; *see also id*. at 18 ("[T]he ***tribe*** has elected to provide [Hammond's] function in furtherance of all of its activities which specifically includes the activities under the [***Tribe***'s self-determination contracts]"); Compl. at ¶

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[9] *Adams* did not involve the ISDEAA, but involved "*Public Law 101-512*, which imposes liability upon the United States [under the FTCA] for the acts of tribal organizations and their employees administering a [Tribal Controlled School Act of 1988 ("TCSA")] Grant." 2006 U.S. Dist. LEXIS 64289, 2006 WL 2591272, at *2. However, its analysis and conclusions are applicable here because the dispositive issue in the case was whether the defendant was an employee of the government under *Public Law No. 101-512, Title III, § 314*, whose operative provisions are identical to those of Section 314. *See* 2006 U.S. Dist. LEXIS 64289, [WL] at *2-3 ("Under *Public Law 101-512*, employees of a school operated under a TCSA Grant are considered employees of the BIA and can be sued under the FTCA. **[*22]** Therefore, if, at the time of the incident, [the defendant] was an employee of the [tribal school] performing functions under the TCSA Grant, [the defendant] is considered a federal employee for purposes of the FTCA.").

[10] Plaintiff appears to argue in the alternative **[*23]** that the ***Tribe***'s self-determination contracts directly and indirectly funded Hammond's position. *See* Compl. at ¶ 14; Doc. 16 at 7, ¶ 2.

5. In support, Plaintiff points to Hammond's deposition,[11] which she claims "connects [Hammond's] activities to the functions of the [***Tribe***'s self-determination contracts]." Doc.16 at 19.

The only somewhat specific reason Plaintiff **[*24]** provides as to why Hammond's position falls under the ***Tribe***'s self-determination contracts is that all of the ***Tribe***'s programs and budgets, including those funded by the ***Tribe***'s self-determination contracts, "are served by the [Tribal] newsletter." Compl. at ¶ 5. Hammond writes about various Tribal programs and activities in the newsletter and, in doing so, she attends Tribal meetings and events and speaks with Tribal members. Doc. 16 at 9. Plaintiff contends that Hammond, via the newsletter, "perform[s] an essential function to inform" the ***Tribe***'s performance of its self-determination contracts. *Id*. at 12.

Although Plaintiff's argument is not entirely clear, the Court construes Plaintiff to essentially argue that Hammond's newsletter constitutes Hammond carrying out the ***Tribe***'s self-determination contracts under Section 314 because the newsletter assists the ***Tribe***'s members in carrying out the self-determination contracts themselves. Plaintiff does not provide—and the Court cannot find—any authority to support Plaintiff's tenuous assertion. Hammond's support to the ***Tribe*** via the newsletter, which may indirectly benefit the ***Tribe***'s performance of its self-determination contracts, cannot reasonably be construed as **[*25]** carrying out those contracts.[12]

[11] Plaintiff requests that the Court take judicial notice of Hammond's deposition. Doc. 16-2. Defendant argues that Hammond's deposition is not admissible because deposition testimony is not judicially noticed. Doc. 21 at 10-11. Regardless of its being styled as a request for judicial notice, the Court may consider Hammond's testimony to determine whether this Court has subject matter jurisdiction over Plaintiff's complaint. *See* Savage, 343 F.3d at 1039-40, n. 2; McCarthy, 850 F.2d at 560.

[12] Plaintiff argues that this Court must "liberally construe" the ***Tribe***'s self-determination contracts against the government. *See* Doc. 16 at 7-8. Defendant disputes Plaintiff's contention. *See* Doc. 21 at 3-4. Although the ISDEAA is liberally construed to benefit Indian ***tribes*** and self-determination contracts are generally liberally construed to benefit Indian contractors, *see* Bristol Bay Area Health Corp. v. United States, 110 Fed. Cl. 251, 259 (2013), it does not follow that the ***Tribe***'s self-determination contracts should be liberally construed in Plaintiff's favor. Regardless, as discussed below, Plaintiff's claim fails even if this Court liberally construes the ***Tribe***'s self-determination contracts in Plaintiff's favor.

Courts have found tribal employees to be employees of the government under Section 314 where their conduct could reasonably be construed as carrying out a tribal self-determination contract. For instance, in *Andrade*, a ***tribe*** had a self-determination contract with the federal government to administer a social services program. 2008 U.S. Dist. LEXIS 68867, 2008 WL 4183011, at *5. The ***tribe*** created a "specific social services entity to carry out the [self-determination] contract." 2008 U.S. Dist. LEXIS 68867, [WL] at *7. When that entity experienced a staffing shortage, the ***tribe*** brought in employees from elsewhere **[*26]** to assist the social services entity in administering the social services program. *Id*. The court held that those employees became employees of the government under Section 314 because they were indisputably performing work that the social services entity was supposed to do under the ***tribe***'s self-determination contract. *Id*.

Similarly, in *Adams*, a tribal employee was found to be a federal employee for FTCA purposes. 2006 U.S. Dist. LEXIS 64289, 2006 WL 2591271, at *4.[13] The plaintiff alleged that the defendant, a tribal employee, negligently caused a car accident between them. 2006 U.S. Dist. LEXIS 64289, [WL] at *1. At the time, the defendant was employed by a tribal school and was driving a car owned by the ***tribe*** for an employment-related purpose. *Id*. The tribal school was funded by a TCSA Grant, but the defendant was not paid by that grant. 2006 U.S. Dist. LEXIS 64289, [WL] at *3. The defendant

In *Allender*, an officer of the Ramah Navajo Chapter ("Ramah") tribal police arrested the plaintiff for an

[13] As noted, *Adams* concerned TCSA Grant contracts, not ISDEAA self-determination contracts. *See* 2006 U.S. Dist. LEXIS 64289, 2006 WL 2591272, at *2-3. But the analysis of whether a tribal employee is a federal employee under a TCSA Grant pursuant to ***Public Law No. 101-512, Title III, § 314***, is virtually identical to the analysis of whether a tribal employee is a federal employee under Section 314. *See* ***Public Law No. 101-512, Title III, § 314*** ("With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized **[*27]** by the [TCSA] . . . an Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . .while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment"). *Adams* therefore is instructive here.

alleged violation of state law. 379 F. Supp. 2d at 1209, 1220. The plaintiff sued the defendants for various claims that allegedly arose out of his arrest and subsequent detention. Id. at 1210. At the time of the plaintiff's arrest, Ramah had a self-determination contract that provided funds for, among other things, a "Public Safety Department," which was tasked with "law enforcement . . . services." Id. at 1217. The officer who arrested the plaintiff was employed under that self-determination contract. Id. at 1215-16. Because Ramah's self-determination contract only contemplated that the Public Safety Department would conduct "investigations of offenses and violations of . . . state law," the United States argued that the officer was not authorized to enforce **[*28]** state law. Id. at 1217. The United States therefore argued that the officer was not an employee of the government under Section 314. Id. at 1217. The court disagreed, found that "enforcing state law was properly within the Public Safety Department function," and therefore held that the officer was a federal employee under Section 314. Id. at 1217-18.

Conversely, in *Dinger v. United States*, the court found that a tribal employee was not a federal employee under the ISDEAA. 2013 U.S. Dist. LEXIS 34518, 2013 WL 1001444, at *4 (D. Kan. Mar. 13, 2013). In *Dinger*, the plaintiff alleged that a tribal employee ("Wishkeno") negligently caused a car accident that killed the plaintiff's husband. 2013 U.S. Dist. LEXIS 34518, [WL] at *1. The plaintiff brought suit against the United States on the ground that Wishkeno was a federal employee pursuant to a tribal self-determination contract. *Id*. The plaintiff's complaint "did not identify an ISDEAA contract that Wishkeno was allegedly employed under." *Id*. The United States offered declarations "from two government officials," who testified that Wishkeno was not employed under a tribal self-determination contract. 2013 U.S. Dist. LEXIS 34518, [WL] at *4. The court concluded that the plaintiff "failed to show that Wishkeno was employed under a self-determination contract as defined in the ISDEAA" and dismissed the complaint for lack of subject matter jurisdiction. **[*29]** *Id*.

Plaintiff provides no specific argument or explanation as to how the terms and provisions of the ***Tribe***'s self-determination contracts contemplate Hammond's position and its correlative duties. Plaintiff likewise provides no detailed explanation as to how Hammond was carrying out any of the ***Tribe***'s self-determination contracts in her role as community liaison. Plaintiff simply asserts in a vague and general fashion that Hammond serviced all of the contracts through her production of the newsletter, which assisted the ***Tribe***'s performance of the self-determination contracts. If this Court were to accept Plaintiff's argument, a tribal employee who confers any benefit on another tribal employee carrying out a self-determination contract—no matter how indirect or tangential—could potentially be rendered a federal employee under Section 314. The Court is unaware of any authority that supports such an expansive reading of Section 314. The Court cannot accept Plaintiff's argument given that waivers of sovereign immunity must be unequivocally expressed. *See* Testan, 424 U.S. at 399.

In sum, Plaintiff fails to establish that the ***Tribe***'s self-determination contracts authorized Hammond's acts or omissions underlying Plaintiff's negligence **[*30]** claim. Allender, 379 F. Supp. 2d at 1211. Defendant, however, has demonstrated that the ***Tribe***'s self-determination contracts did not establish, fund, or contemplate Hammond's position as Tribal community liaison. Plaintiff has also failed to allege facts showing that Hammond was carrying out any of the ***Tribe***'s self-determination contracts. The Court therefore finds that Hammond is not an employee of the federal government under Section 314. Consequently, Defendant is not subject to liability under the FTCA for Hammond's alleged negligence. Accordingly, the Court must dismiss Plaintiff's complaint for lack of subject matter jurisdiction.[14]

V. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss and DISMISSES WITHOUT LEAVE TO AMEND Plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff's claim is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: **November 14, 2014**

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

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[14] Because the Court dismisses Plaintiff's complaint, the Court DENIES Plaintiff's request for certification of Hammond as a federal employee under the FTCA. *See* Doc. 16 at 5-6.

Beetus v. United States

United States District Court for the District of Alaska

March 22, 2021, Decided; March 22, 2021, Filed

Case No. 4:19-cv-00044-SLG

Reporter
2021 U.S. Dist. LEXIS 53705 *; 2021 WL 1093617

CHANTEL SHARAE LOUISE BEETUS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Core Terms

funding agreement, employees, funding, tribal, ***tribes***, carrying, contractor, Village, motion to dismiss, independent contractor, supervision, subject matter jurisdiction, Self-Determination, programs, Compact, alleges, asserts, Annual, hiring

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For United States of America, Defendant: Dustin Michael Glazier, LEAD ATTORNEY, U.S. Attorney's Office (Anch), Anchorage, AK.

Judges: Sharon L. Gleason, UNITED STATES DISTRICT JUDGE.

Opinion by: Sharon L. Gleason

Opinion

ORDER RE MOTION TO DISMISS

Before the Court at Docket 10 is Defendant United States of America's Motion to Dismiss. Plaintiff Chantel Sharae Louise Beetus opposed at Docket 20. The United States replied at Docket 25. Oral argument was not requested and was not necessary to the Court's decision. For the following reasons, the United States' Motion to Dismiss will be denied.

I. BACKGROUND

A. Statutory Background

In 1975, Congress passed the ***Indian Self—Determination*** *and Education Assistance Act* ("ISDEAA").[1] "The ISDEAA created a system by which ***tribes*** could take over the administration of programs operated by the [Bureau of Indian Affairs]."[2] Pursuant to the ISDEAA, a ***tribe*** "receiving a particular service from the BIA may submit a contract proposal to the **[*2]** BIA to take over the program and operate it as a contractor and receive the money that the BIA would have otherwise spent on the program."[3] To further promote ***Indian self-determination***, Congress enacted the Tribal Self—Governance Act of 1994 ("TSGA") as an

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[1] *Pub. L. No. 93-638, 88 Stat. 2203 (1975)* (codified as amended at *25 U.S.C. § 5301 et seq.*).

[2] *Shirk v. U.S. ex rel. Dep't of Interior, 773 F.3d 999, 1002 (9th Cir. 2014)* (alteration in original) (internal quotation marks omitted) (quoting *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1033 (9th Cir. 2013)*).

[3] *Id.* (quoting *Los Coyotes Band of Cahuilla & Cupeño Indians, 729 F.3d at 1033*).

amendment to the ISDEAA.[4] The TSGA permits certain ***tribes*** to enter into self-governance compacts with the federal government.[5] The self-governance compacts "become the basis for annual funding agreements that 'give the ***tribes*** a block of funding that they can allocate as they see fit,' thus ensuring greater tribal control over the design and implementation of compact programs."[6] Together, the ISDEAA as amended by the TSGA "enable[s] ***tribes*** to run health, education, economic development, and social programs for themselves. This strengthened self-government supported Congress' decision to authorize ***tribes*** to withdraw trust funds from Federal Government control and place the funds under tribal control."[7]

After it enacted the ISDEAA, Congress extended the *Federal Tort Claims Act's ("FTCA")* waiver of sovereign immunity to certain claims resulting from the performance of ISDEAA contracts or agreements.[8] The extension, commonly **[*3]** known as Section 314, provides:

> [A]n Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement . . . [A]ny civil action or proceeding involving such claims brought hereafter against any ***tribe***, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be . . . afforded the full protection and coverage of the Federal Tort Claims Act.[9]

In short, Indian ***tribes***, tribal organizations, Indian contractors, and their employees are protected by the FTCA when they are carrying out functions authorized in or under an ISDEAA agreement or contract, and the United States is subject to potential tort liability for the acts or omissions of tribal employees.[10]

Whether the actions of Tanana Chiefs Conference ("TCC")[11] and Tanana Tribal Council ("TTC")[12], and their **[*4]** employees, while allegedly carrying out an ISDEAA agreement or contract, falls within the ambit of Section 314, thereby subjecting the United States to potential FTCA liability, is at issue in this case.

B. Factual & Procedural Background

Ms. Beetus initiated this action on December 19, 2019.[13] Plaintiff, who was a minor at the time, alleges that she was sexually assaulted by Eric Adams, an employee of TCC and/or TTC, while attending a cultural and wellness camp ("Culture Camp") on an island in the

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[4] *See id.*; *see also* ***Pub. L. No. 103-413, 108 Stat. 4270 (1994)***.

[5] *Shirk, 773 F.3d at 1002*.

[6] *Id.* (quoting *Los Coyotes Band of Cahuilla & Cupeño Indians, 729 F.3d at 1031 n.3*).

[7] *United States v. Jicarilla Apache Nation, 564 U.S. 162, 180 n.8, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011)* (citation omitted).

[8] The Federal Tort Claims Act provides for a limited waiver of sovereign immunity by granting federal district courts jurisdiction over "civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." *28 U.S.C. § 1346(b)(1)*. "While waiving sovereign immunity so parties can sue the United States directly for harms caused by its employees, the FTCA made it more difficult to sue the employees themselves by adding a judgment bar provision." *Brownback v. King, 141 S. Ct. 740, 746, 209 L. Ed. 2d 33 (2021)*.

[9] ***Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990)*** (*25 U.S.C. § 5321* note).

[10] *Colbert v. United States, 785 F.3d 1384, 1390 (11th Cir. 2015)*.

[11] Tanana Chiefs Conference is the English name for the Dena' Nena' Henash non-profit organization, which represents the interests of its 42 Alaska Native Village members, including the Native Village of Tanana. *See* Docket 1 at 2, ¶ 3 (Compl.); *see also* Docket 10-1 (Articles of Incorporation and Bylaws of Dena' Nena' Henash); Docket 10-8 at 2, 3 ¶¶ 4, 5, (Aff. of Doreen Deaton).

[12] Tanana Tribal Council is "a governing body made up of and providing governance to the" Native Village of Tanana, a federally recognized Indian ***Tribe***. *See* Docket 1 at 4, ¶ 6 (Compl.); *see also* Docket 10-8 at 3 ¶ 5 (Aff. of Doreen Deaton).

[13] *See* Docket 1 (Compl.).

Yukon River about 16 miles upriver from Tanana Village, Alaska, in June 2017.[14] Mr. Adams was a boat operator responsible for transporting camp participants to and from the island camp.[15] Plaintiff brings various tort claims, primarily alleging that the sexual assault was proximately caused by TCC's and/or TTC's failure to adequately safeguard minor camp participants and hire, train, and supervise employees, including Eric Adams, among other claims.[16]

The Complaint further alleges that the Culture Camp was organized, managed, and funded pursuant to an ISDEAA contract or agreement between the United States and TCC and/or TTC.[17] Since Ms. Beetus asserts that the alleged conduct of TCC and/or **[*5]** TTC—and their employees—occurred while carrying out an ISDEAA contract or agreement, Ms. Beetus invokes Section 314 to construe her claims as an action against the United States pursuant to the FTCA.[18] On June 15, 2020, the Government moved to dismiss for lack of subject matter jurisdiction.[19]

II. LEGAL STANDARDS

A. *Rule 12(b)(1)* Motion

The question of whether the United States has waived its sovereign immunity under the FTCA is one of subject matter jurisdiction and may be considered under *Federal Rule of Civil Procedure 12(b)(1)*.[20] Pursuant to *Rule 12(b)(1)*, a defendant may attack a complaint for lack of subject matter jurisdiction either by a "facial" or a "factual" attack.[21] In a facial attack, the defendant challenges the complaint by arguing that the complaint lacks jurisdiction "on [its] face."[22] In a factual attack, a defendant presents extrinsic evidence to demonstrate that the complaint lacks jurisdiction based on the facts of the case.[23] When resolving a factual attack on jurisdiction, a court "need not presume the truthfulness of the plaintiff's allegations."[24] "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the **[*6]** motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject

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[14] Docket 1 at 4-5, ¶¶ 10-12 (Compl.); Docket 1 at 6, ¶ 15 ("Eric Adams was acting in the course and scope of his employment as an employee and/or agent and/or apparent agent of Tanana Chiefs Conference and/or Tanana Tribal Council."); Docket 20 at 4-5 (Opp.).

[15] Docket 1 at 6, ¶ 15 (Compl.).

[16] Docket 1 at 10-14, ¶¶ 29-41 (Compl.).

[17] Docket 1 at 4-5, ¶ 11 (Compl.) (The Culture Camp "was a program involving numerous camps conducted by the Tanana Chiefs Conference, and the . . . Culture Camp was a part of that program and was hosted by the Tanana Tribal Council, pursuant to moneys obtained by the Tanana Chiefs Conference from the United States Government . . . ."); Docket 1 at 3, ¶ 5 ("Tanana Chiefs Conference . . . is a signatory to the Alaska Tribal Health Compact with the U.S. Secretary of Health and Human Services and carries out federal programs for Alaska Natives, American Indians and other eligible individuals, through Funding Agreements with the Indian Health Service and the Bureau of Indian Affairs as authorized by, *inter alia*, the Indian Health Care Improvement Act . . . and Titles V and IV of the ***Indian Self-Determination*** and Education Assistance Act . . . ."); Docket 1 at 2, ¶ 4.

[18] *See* Docket 1 at 3, ¶ 5 (Compl.); *see also* Docket 1 at 2, ¶ 2 ("The United States of America is a party defendant under the Federal Tort Claims Act."); Docket 1 at 10, ¶¶ 26, 27 ("The United States may be responsible for Tanana Chiefs Conference under the Federal Torts Claim Act.") ("The United States may be responsible for Tanana Tribal Council under the Federal Torts Claim Act.").

[19] *See* Docket 10 (Mot. to Dismiss).

[20] *See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)* (applying *Rule 12(b)(1)* to motion to dismiss ***FTCA claim***); *see also Brownback, 141 S. Ct. at 749 & n.8 (2021)* (holding that when in a FTCA case "pleading a claim and pleading jurisdiction entirely overlap," the district court may dismiss the claim under *Rule 12(b)(1)* or *Rule 12(b)(6)*, or both).

[21] *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*.

[22] *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)* (quoting *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004))*.

[23] *Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014)*; *Wolfe, 392 F.3d at 362*; *Safe Air for Everyone, 373 F.3d at 1039*.

[24] *Safe Air for Everyone, 373 F.3d at 1039* (citing *White, 227 F.3d at 1242*).

matter jurisdiction."[25] "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."[26]

B. *Shirk* Analysis

In *Shirk v. United States ex rel. Department of the Interior*, the Ninth Circuit Court of Appeals laid out a two-step analytical test to determine whether the action of a tribal employee falls within the ambit of Section 314, thereby subjecting the United States to potential tort liability pursuant to the FTCA.[27] First, a court "must determine whether the alleged activity is, in fact, encompassed by the relevant [ISDEAA] federal contract or agreement" between a ***tribe***, tribal organization, or Indian contractor and the United States.[28] Second, a court "must decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law."[29] The scope of the relevant ISDEAA contract or agreement "defines the relevant 'employment' for purposes of the scope of employment analysis at step two."[30] As a tribal employee's actions are covered by the FTCA only if both prongs **[*7]** are met, a "plaintiff's failure at either step is sufficient to defeat subject matter jurisdiction."[31]

DISCUSSION

The United States moves to dismiss the Complaint on the basis that Plaintiff fails to satisfy both steps of the *Shirk* test. The United States presents a factual attack by attaching multiple exhibits to its motion.[32]

I. *Shirk* Step One

With regard to TCC's potential liability, the United States asserts that the TCC only provided "pass-through funding" to TTC, which was purportedly operating the camp as an independent contractor.[33] The United States points to the Service Contract between TCC and TTC for the Culture Camp, which contains an independent contractor provision.[34] Because the FTCA expressly excludes coverage for acts or omissions of "contractors," the United States contends that TCC cannot be held liable pursuant to Section 314.[35] As to TTC's potential liability, the United States contends that TTC's Self-Determination Agreement and Annual Funding Agreement do not "contain any mention of an agreement to use funding for" a Culture Camp.[36] As such, the United States concludes that TTC's alleged conduct did not result "from the performance of, or a failure to perform" **[*8]** a relevant ISDEAA contract or agreement, thereby failing the first *Shirk* prong.[37]

Plaintiff responds that the United States' independent

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[25] *Safe Air for Everyone, 373 F.3d at 1039* (quoting *Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)*).

[26] *Leite, 749 F.3d at 1121* (citing *Harris v. Rand, 682 F.3d 846, 851 (9th Cir. 2012)*).

[27] *773 F.3d 999 (9th Cir. 2014)*.

[28] *Id. at 1006*.

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see* *25 C.F.R. § 900.181* ("Indian contractor means . . . [a]ny other contractor that qualifies as an 'Indian contractor' under the ***Indian Self-Determination*** Act.").

[32] Docket 10-1 (TCC Articles of Incorporation), 10-2 (TCC Bylaws), 10-3 (Service Contract), 10-4 (TCC Funding Agreement), 10-5 (Culture Camp Flyer), 10-6 (TTC Self-Determination Agreement), 10-7 (TTC FY2017 Cumulative Funding Report), 10-8 (Aff. of Doreen Deaton); Docket 25-1 (Alaska Tribal Health Compact). Plaintiff characterizes the United States' motion to dismiss as a factual attack, which the United States does not rebut. Docket 20 at 6 (Opp.); *see generally* Docket 25 (Reply).

[33] Docket 10 at 6 (Mot. to Dismiss).

[34] Docket 10 at 6 (Mot. to Dismiss) (citing Docket 10-3 at 4 ¶ 11 (Service Contract) ("[TTC] is an independent contractor, not an employee of TCC.")).

[35] Docket 10 at 6-7 (Mot. to Dismiss); *see also* Docket 25 at 2-4 (Reply) (citing *Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005)*; *28 U.S.C. § 2671* (excluding "any contractor with the United States" from the definition of "Federal agency" under the FTCA).

[36] Docket 10 at 6-7 (Mot. to Dismiss) (citing Docket 10-6 (TTC Self-Determination Agreement) and Docket 10-7 (TTC FY2017 Cumulative Funding Report)). In its briefing, the United States references TTC's "Annual Funding Agreement" but attached a "Cumulative Funding Report." *See* Docket 10 at 6-7 (Mot. to Dismiss) (citing Docket 10-7).

[37] Docket 10 at 7 (Mot. to Dismiss).

contractor argument is an attempt to create "an artificial barrier" between TCC and TTC, when in fact, "[TCC] and [TTC] administered the Culture Camp as a joint effort."[38] Plaintiff identifies TCC's Funding Agreement—which is a separate agreement from TTC's Self-Determination Agreement and Annual Funding Agreement—as the relevant ISDEAA agreement, and notes that it expressly applies the FTCA to both TCC and tribal villages, such as TTC.[39]

Here, it appears that the relevant ISDEAA contract or agreement for both TCC and TTC is the Tanana Chiefs Conference's Funding Agreement with the Indian Health Service for Fiscal Years 2015-2017 ("TCC's Funding Agreement").[40] As both parties distinguish TCC and TTC in some manner, the Court will address each in turn.

With respect to TCC, the United States acknowledges that TCC employees were carrying out certain aspects of the Culture Camp as authorized by TCC's Funding Agreement. According to the United States, "TCC provided administrative and other support for the Camp . . . pursuant to Sections 3.1.17, 3.1.17.1, and 3.1.17.2 **[*9]** of TCC's" Funding Agreement.[41] For example, "TCC's behavioral health and wellness and prevention staff attended the Native Village of Tanana's Culture Camp and provided health and wellness programing for the children, and also provided materials for use by the Camp staff."[42] Plaintiff, in part, alleges that TCC employees present at the Culture Camp were negligent in supervising camp youth.[43] Accordingly, as the United States acknowledges that TCC employees were acting pursuant to TCC's Funding Agreement at the Culture Camp, that alleged activity is encompassed within the relevant Funding Agreement. TCC's Funding Agreement itself also expressly applies the FTCA to any TCC employees carrying out services such as those offered at the Culture Camp.[44]

TCC's Funding Agreement provides FTCA coverage to TTC's employees as well:

> Funds provided under this Agreement may be allocated to and expended by an Alaska Native Village ("Village") which is a party to this Agreement in accordance with the terms of the Compact, this Agreement, and a Memorandum of Agreement ("MOA") approved by TCC and the Village. The Federal Tort Claims Act will apply to [programs, services, functions, and activities] carried out by the Village under such MOA and to the village and its employees to the same extent as if they had been carried out directly by TCC . . . TCC will be responsible for assuring compliance by the Village with the Compact, this Funding Agreement, and the MOA.[45]

The United States identifies the Service Contract as the above-referenced Memorandum of Agreement.[46] The Service Contract, in turn, applies to the Culture Camp, providing that TTC would "[c]oordinate, manage, and implement a Culture Wellness Camp to include securing the site location and preparation, provide food and lodging for participants, coordinate travel, provide sanitation, health and safety, and all logistical details."[47] At least some of the alleged **[*10]** tortious acts and omissions of TTC employees plainly fall within the Service Contract, which was incorporated into TCC's Funding Agreement.[48] Accordingly, the alleged activities

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[38] Docket 20 at 3 (Opp.).

[39] Docket 20 at 3, 11-13 (Opp.); *see* Docket 10-4 at 11-12 (§ 3.7.1 Federal Tort Claims Act Coverage) (§ 15 Memorandum of Agreement with Member Villages) (TCC Funding Agreement).

[40] *See infra* pp. 11-13; *see also* Docket 10-4 (TCC Funding Agreement).

[41] Docket 10 at 3 (Mot. to Dismiss) (citing Docket 10-8 at 5 (Aff. of Doreen Deaton)); Docket 10-4 at 8-9 (§ 3.1.17 Behavioral Health Services) (§ 3.1.17.1. Community Based Services) (§ 3.1.17.2 Prevention and Wellness Services) (TCC Funding Agreement).

[42] Docket 10-8 at 5, 6 ¶¶ 12, 16 (Aff. of Doreen Deaton) ("Under our Annual Funding Agreement, TCC is obligated to provide covered health services to member ***Tribes*** who delegate their federal health care shares to TCC . . . .").

[43] *See, e.g.*, Docket 1 at 5, 7 ¶¶ 13, 19 (Compl.).

[44] Docket 10-4 at 11 § 3.7.1 ("Pursuant to Article V, Section 3 [Federal Tort Claims Act Coverage; Insurance] of the Alaska Tribal Health Compact, the Federal Tort Claims Act applies to TCC's [programs, services, functions, and activities] under this Agreement . . . .") (TCC Funding Agreement).

[45] Docket 10-4 at 21 § 15 (Memorandum of Agreement with Member Villages) (TCC Funding Agreement).

[46] Docket 25 at 2 (Reply).

[47] Docket 10-3 at 1 (Service Contract).

[48] Docket 25 at 1-2 (Reply) ("As an initial matter, Plaintiff has alleged an incomplete evidentiary record before the Court, suggesting that the motion to dismiss cannot be determined without the Compact and Memorandum of Agreement

of TTC employees, including Mr. Adams' provision of transportation services and his hiring and supervision, are encompassed within TCC's Funding Agreement.[49]

Despite the clauses in TCC's Funding Agreement expressly applying the FTCA to TCC and TTC employees carrying out the Culture Camp, the United States maintains that dismissal of this action under step one of *Shirk* is warranted for three reasons. First, the United States argues that neither TTC's Self-Determination Agreement nor TTC's Annual Funding Agreement (which is separate from TCC's Funding Agreement) "contain any mention of an agreement to use funding for a Culture and Wellness Camp . . . ."[50] Even if that were the case, the Court disagrees that TTC's Self-Determination Agreement or TTC's Annual Funding Agreement is the relevant ISDEAA contract or agreement for *Shirk* purposes.[51] As previously discussed, the United States acknowledges that TCC employees were carrying out aspects of TCC's Funding Agreement at the Culture Camp and incorporated the Service **[*11]** Contract between TCC and TTC, which provided that TTC employees would principally implement the Culture Camp, into TCC's Funding Agreement.[52] Based on this evidence, the Court has found that TCC's Funding Agreement is the relevant ISDEAA contract or agreement. Second, the United States asserts that the funding that TCC received and passed on to TTC was not "typical federal funding."[53] As the United States does not provide any legal authority or meaningful analysis to support this proposition, it is not exactly clear what point is being made. In any event, it is not apparent to the Court that the precise source of federal funding for an ISDEAA agreement is determinative.[54] Third, the United States asserts that TTC is an independent contractor not subject to the FTCA.[55] The United States points to the Service Contract itself, which contains a generic independent contractor provision.[56] However, the United States attempts to rely on an inapposite independent contractor case.[57] None of the parties to

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approved by the Tanana Chiefs Conference (TCC) and the Tanana Tribal Council (TTC). For the benefit of the Court, Defendant has attached the Compact as Exhibit I, and points the Court to the previously submitted Exhibit C (Service Contract between TCC and Native Village of Tanana) as the Memorandum of Agreement referenced in the TCC's Funding Agreement.") (citing Docket 10-4 at 21 (§ 15 Memorandum of Agreement with Member Villages) (TCC Funding Agreement)); Docket 10-3 (Service Contract).

[49] *See, e.g.*, Docket 1 at 5-6, ¶ 14 (Compl.) ("Tanana Chiefs Conference and/or Tanana Tribal Council jointly promoted and held the Culture & Wellness Camp. Tanana Chiefs Conference's and/or Tanana Tribal Council's failures, include, among other things, the lack of adequate and proper guidelines and planning for the Culture & Wellness Camp, the lack of adequate and proper hiring and supervision of the Culture & Wellness Camp boat driver Eric Adams and other employees with supervisory powers over Chantel Beetus, the lack of proper safeguards for the protection of campers, and the ignoring of warning signs of inappropriate conduct and behavior by Culture & Wellness Camp employees and/or agents and/or apparent agents.").

[50] Docket 10 at 6-7 (Mot. to Dismiss) (citing Docket 10-6 (TTC Self-Determination Agreement) and Docket 10-7 (TTC FY2017 Cumulative Funding Report)).

[51] In its briefing, the United States references TTC's "Annual Funding Agreement" but attached a "Cumulative Funding Report." *See* Docket 10 at 6-7 (Mot. to Dismiss) (citing Docket 10-7). As such, the Court cannot evaluate the United States' claim as to that agreement.

[52] *See* Docket 10 at 3 (Mot. to Dismiss) ("TCC provided administrative and other support for the Camp, as it does for other similar village culture camps in the Interior Alaska Region, pursuant to Sections 3.1.17, 3.1.17.1, and 3.1.17.2 of TCC's IHS AFA ("Behavioral Health Services").") (citing Docket 10-8 at 5 (Aff. of Doreen Deaton)); *see also supra* pp.11-12.

[53] Docket 10 at 6 (Mot. to Dismiss); Docket 25 at 3 (Reply).

[54] *See, e.g.*, *Manuel v. United States, No. 1:14-CV-665-LJO-BAM, 2014 U.S. Dist. LEXIS 160537, 2014 WL 6389572, at *8 (E.D. Cal. Nov. 14, 2014)* ("[T]he relevant inquiry for whether a Tribal employee is an employee of the government under the ISDEAA is whether that Tribal employee is carrying out a self-determination contract; the source of the funding for that Tribal employee's position is not dispositive."). Even though the court in *Manuel* relied, in part, on the district court opinion in *Shirk*, which was later vacated by the Ninth Circuit on grounds not expressly addressing the source of funding issue, the Court still finds the district court's reasoning regarding the funding source to be persuasive. *See* *Shirk v. U.S. ex rel. Dep't of Interior, No. CV—09-1786—PHX—NVW, 2010 U.S. Dist. LEXIS 89687, 2010 WL 3419757, at *5 (D. Ariz. Aug. 27, 2010)*, *vacated and remanded*, *773 F.3d 999 (9th Cir. 2014)*.

[55] Docket 10 at 6 (Mot. to Dismiss); Docket 25 at 2-4 (Reply).

[56] Docket 25 at 2 (Reply) ("While TCC's Funding Agreement indicates FTCA coverage for villages implementing programs as an extension of TCC, the Service Contract demonstrates that TTC implemented the Culture Camp as an independent contractor instead.") (citing Docket 10-3 at 4 ¶ 11 (Service Contract)).

[57] Docket 25 at 4 (Reply) (citing *Autery, 424 F.3d at 956*); *see*

that suit were "Indian ***tribe***[s], tribal organization[s] or Indian contractor[s]," all of which are covered by Section 314.[58] Here, TTC is an Indian contractor—who is covered by the FTCA—not a private contractor with **[*12]** the federal government—who is not.[59] Accordingly, the Court finds the United States' arguments unpersuasive.

In conclusion, Plaintiff alleges that TCC and/or TTC employees were negligent in supervising, training, and hiring Culture Camp employees, and in monitoring youth participants. Both TCC and TTC employees were carrying out aspects of the Culture Camp, which were encompassed within the relevant ISDEAA agreement, TCC's Funding Agreement. Accordingly, the Court finds that the first step of the *Shirk* analysis is satisfied.

II. *Shirk* Step Two

Under the second *Shirk* step, a court "must decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law."[60] The United States asserts that "an employee perpetrating a sexual assault cannot" be acting within his scope of employment under Alaska state law.[61] Plaintiff responds that it is inappropriate to determine in a 12(b)(1) motion whether Mr. Adams was acting within the scope of his employment because this question is "generally a fact-specific inquiry for **[*13]** a jury."[62] Plaintiff also responds that Mr. Adams' conduct "is not the sole basis of culpable conduct," maintaining that her claims of negligent supervision, training, and hiring of employees and negligent monitoring of minor children against TCC and TTC are still actionable under Ninth Circuit precedent.[63]

The Court need not determine at this juncture whether there is a plausible argument that Mr. Adams' actions fall within the scope of his employment.[64] This is because Plaintiff has also pleaded negligent hiring and supervision **[*14]** claims and the United States does not dispute that these ***FTCA claims*** may proceed under Ninth Circuit precedent.[65]

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also 28 U.S.C. § 2671 (excluding "any contractor with the United States" from the definition of "Federal agency" under the FTCA).

[58] ***Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990)*** (found at 25 U.S.C. § 5321 note).

[59] *See, e.g.,* *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs., 255 F.3d 801, 808 (9th Cir. 2001)* (agreeing with Eighth Circuit Court of Appeals that "the purpose and policy of the ISDEAA are best served if 'Indian contractor' is limited to a '***tribe***-related organization that may itself enter into a self-determination contract, not a private party . . . that has been retained to work on a project funded by a self-determination contract'" (quoting *FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234-35 (8th Cir. 1995)))*. As a federally recognized Indian ***tribe***, TTC could itself enter into a self-determination agreement. *See* Docket 10-8 at 3 ¶ 5 (Aff. of Doreen Deaton).

[60] *773 F.3d at 1006*.

[61] Docket 25 at 6 (Reply) (citing *D.W.J. v. Wausau Bus. Ins. Co., 192 F. Supp. 3d 1014 (D. Alaska 2016)* and ***VECO, Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999))***. The United States also asserts that TTC's Self-Determination Agreement and Annual Funding Agreement did not contain funding for Mr. Adams position, a boat operator, and, therefore, he could not be "carrying out the contract or agreement" pursuant to Section 314. Docket 10 at 7-8 (Mot. to Dismiss). However, as previously discussed, the Court disagrees that TTC's Self-Determination Agreement and Annual Funding Agreement are the relevant ISDEAA contracts or agreements. *See supra* pp. 11-13.

[62] Docket 20 at 16 (Opp.) ("Concerning whether Eric Adams committed the sexual assault while he was in the course and scope of his employment, that determination should not be made at the *Rule 12(b)(1)* juncture. Under Alaska state law, whether conduct is within the scope of employment is generally a fact-specific inquiry for a jury.") (citing *Ondrusek v. Murphy, 120 P.3d 1053, 1057 (Alaska 2005))*.

[63] Docket 20 at 16 (Opp.) (citing *Kearney v. United States, 815 F.2d 535 (9th Cir. 1987)* (holding intentional tort exception to FTCA did not apply when Government's own negligence was alleged proximate cause of injury)).

[64] *Cf.* *Shirk, 773 F. 3d at 1007* ("Thus, a court could decide such a case at step two by stating that there is no plausible argument that the employee's actions fall within the scope of his employment, where such employment is defined as carrying out a federal contract.").

[65] *See* *Morrill v. United States, 821 F.2d 1426, 1427 (9th Cir. 1987)* (holding FTCA exception for claims arising out of sexual assault did not preclude imposition of liability on Government for supervisory negligence); *Kearney, 815 F.2d at 537*; *Bennett v. United States, 803 F.2d 1502, 1503 (9th Cir. 1986)*; *see also* *Senger v. United States, 103 F.3d 1437, 1442 (9th Cir. 1996)* (holding *Morrill* still good law with respect to claim of negligent hiring and supervision).

CONCLUSION

In light of the foregoing, the United States' Motion to Dismiss at Docket 10 is DENIED.

DATED this 22nd day of March, 2021, at Anchorage, Alaska.

/s/ Sharon L. Gleason

UNITED STATES DISTRICT JUDGE

Hinsley v. Standing Rock Child Protective Servs.

United States Court of Appeals for the Eighth Circuit

November 15, 2007, Submitted; February 5, 2008, Filed

No. 07-1435

Reporter
516 F.3d 668 *; 2008 U.S. App. LEXIS 2499 **

Jessica Hinsley, personally and as Guardian Ad Litem for K.M, a minor, Appellants, v. Standing Rock Child Protective Services and the Bureau of Indian Affairs Appellees.

Prior History: [1]** Appeals from the United States District Court for the District of North Dakota.

Hinsley v. Standing Rock Child Protective Servs., 470 F. Supp. 2d 1037, 2007 U.S. Dist. LEXIS 4525 (D.N.D., 2007)

Core Terms

discretionary function, self-determination, warn, sexually, district court, child abuse, tribal, ***tribes***, protective services, tort claim, contracts, decisions

Case Summary

Procedural Posture
Appellant half-sister (sister) appealed the U.S. District Court for the District of North Dakota's dismissal of her Federal Tort Claims Act (***FTCA) claims*** in which she alleged that appellees, a tribal child protective services (CPS) and the Bureau of Indian Affairs, negligently placed her half-brother (brother) in her home without warning her that he was a child molester, resulting in her brother's sexual abuse of the sister's daughter.

Overview
The brother had a history of sexually abusing children. Shortly before his eighteenth birthday, the brother's case worker contacted an investigator for the tribal CPS, and asked him to contact the sister to see if the half-brother could move in with the sister upon his release from the state CPS. The sister alleged that the tribal CPS negligently placed the brother in her home without warning her that he was a child molester. At issue was whether the discretionary exception to FTCA liability applied in the instant case. The appellate court found no statute, policy, or regulation mandating the CPS to warn the public or a third-party about the sexually abusive proclivities of a person who was being discharged from the CPS. The decision to release the brother to his sister without a warning involved an effort to balance the interest in maintaining the confidentiality of the brother's past actions against the safety concerns that arose from placing a known sexual abuser in a home filled with children. Such decisions lay with policymakers and CPS employees--the FTCA did not empower judges to second guess such decisions via tort action.

Outcome
The appellate court affirmed the order of the district court dismissing the half-sister's claims.

LexisNexis® Headnotes

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN1[] **Native Americans, Indian Self-Determination & Education Assistance Act**

Under the ***Indian*** ***Self-Determination*** and Education Assistance Act, ***tribes*** and tribal organizations may enter into contracts with the federal government to assume the administration of programs formerly administered by the federal government on behalf of the ***tribe***. 25 U.S.C.S. § 450f(a)(1).

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN2[] **Native Americans, Indian Self-Determination & Education Assistance Act**

25 U.S.C.S. § 3210(b) provides that Indian ***tribes*** or tribal organizations can administer child protective services programs pursuant to a self-determination contract.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(c). An appellate court will affirm the district court if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Governments > Federal Government > Claims By & Against

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN4[] **Federal Government, Claims By & Against**

It is well settled that the United States may not be sued without its consent. The Federal Tort Claims Act, 28 U.S.C.S. § 1346(b), however, waives the United States' historic defense of sovereign immunity and authorizes suits against the United States for damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of 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.

Governments > Federal Government > Claims By & Against

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN5[] **Federal Government, Claims By & Against**

Congress has consented to suit under the Federal Tort Claims Act (FTCA) for certain claims arising out of the performance of ***Indian*** ***self-determination*** contracts. Tort claims against ***tribes***, tribal organizations, or their employees, that arise out of the ***tribe*** or tribal organization carrying out a self-determination contract, are considered claims against the United States and are covered to the full extent of the FTCA.

Governments > Federal Government > Claims By & Against

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

Governments > Native Americans > General Overview

HN6[] **Federal Government, Claims By & Against**

The Federal Tort Claims Act (FTCA) includes a number of exceptions to its broad waiver of sovereign immunity,

and these exceptions apply with equal force to ***FTCA claims*** brought against a tribal organization. One exception provides that no liability shall lie for the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused. *28 U.S.C.S. § 2680(a)*. When an alleged act falls within the discretionary function exception, the federal court lacks subject matter jurisdiction.

Governments > Federal Government > Claims By & Against

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

HN7 **Federal Government, Claims By & Against**

The discretionary function exception to the Federal Tort Claims Act marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.

Governments > Federal Government > Claims By & Against

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

HN8 **Federal Government, Claims By & Against**

A court employs a two-part test to determine whether the discretionary function exception to the Federal Tort Claims Act applies. First, the conduct at issue must be discretionary, involving an element of judgment or choice, and not controlled by mandatory statutes or regulations. If the employee violates a mandatory statute, regulation, or policy, the conduct does not involve an element of judgment or choice, and therefore, the conduct is not sheltered from liability under the discretionary function exception. If, on the other hand, no mandate exists, the action is considered a product of judgment or choice and the first step is satisfied. Under the second part of the test, the court determines whether the judgment or choice is based on considerations of public policy. If the challenged action is based on a judgment grounded in social, economic, or political policy, the discretionary function exception applies. With that background, the court turns to the applicability of the discretionary function exception to the instant case.

Governments > Federal Government > Claims By & Against

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

HN9 **Federal Government, Claims By & Against**

When Congress waives the government's sovereign immunity under the Federal Tort Claims Act, however, it elects to preclude liability for administrative decisions grounded in social policy. In doing so, Congress accepts the possibility that this exemption would sometimes deliver harsh results.

Counsel: For Jessica Hinsley, personally and as Guardian Ad Litem for K.M., a minor, Plaintiff-Appellant: Justin Vinje, VINJE LAW FIRM, Bismarck, ND.

For Standing Rock Child Protective Services and Bureau of Indian Affairs, Defendant-Appellee: Cameron Hayden, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Bismarck, ND.

Judges: Before RILEY, TASHIMA, [1] and SMITH, Circuit Judges.

Opinion by: A. WALLACE TASHIMA

Opinion

[*670] TASHIMA, Circuit Judge.

[1] The Honorable A. Wallace Tashima, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Jessica Hinsley appeals the district court's [2] entry of summary judgment against her in a Federal Tort Claims Act ("FTCA") action. Hinsley alleges that the Standing Rock Child Protective Services ("Standing Rock CPS") negligently placed her half-brother in her home without warning her that he was a child molester, resulting in her brother's sexual abuse of Hinsley's daughter. The district court dismissed the action, reasoning that the challenged conduct fell within the discretionary function exception to the FTCA. We affirm the district court.

I.

HN1[↑] Under the ***Indian*** ***Self-Determination*** and Education Assistance Act (ISDEAA), ***tribes*** and tribal organizations may enter into contracts with the federal government to assume the administration of programs formerly administered by the federal government on behalf of the ***tribe***. *See* 25 U.S.C. § 450f(a)(1). *See generally Cohen's Handbook of Federal Indian Law* § 22.02 (Neil Jessup Newton et al. eds., 2005) (hereinafter "*Cohen*"). Such contracts are referred to as self-determination contracts. *See* 25 U.S.C. § 450b(j) (defining "self-determination contract"). *See generally Cohen* § 22.02[1] (discussing the genesis of self-determination contracts). The Standing Rock Sioux ***Tribe*** operates, pursuant to a self-determination contract, a Child Protective Services Agency charged with investigating incidents of child neglect, child abuse, and sexual abuse of children and empowered to take custody of abused children and place them with other families. *See* HN2[↑] 25 U.S.C. § 3210(b) (providing that Indian ***tribes*** or tribal organizations can administer child protective services programs pursuant to a self-determination contract).

T.C. is a young man who **[**3]** has a history of sexually abusing children. As a minor, he was in the custody of South Dakota's Child Protective Services. Shortly before his eighteenth birthday, Mabel Medicine Crow, T.C.'s case worker in South Dakota, contacted James McLaughlin, an investigator for the Standing Rock CPS, and asked him to contact Jessica Hinsley, T.C.'s half sister, to see if T.C. could move in with Hinsley upon his release from South Dakota's Child Protective Services. McLaughlin was familiar with T.C.'s history: in addition to having previously worked on T.C.'s case, he was told by Medicine Crow **[*671]** that T.C. had a history of sexually abusing children and had molested young girls at a foster home in South Dakota, and that, due to these actions, T.C. was removed from the foster home and placed in a group home.

Following his conversation with Medicine Crow, McLaughlin asked Hinsley, [3] a mother of three children, whether she would be willing to have T.C. live in her home. [4] Hinsley claims that McLaughlin neither told her about her brother's past abuse, nor warned her that T.C. should not be left alone with children. [5] Although she was reluctant to accept another person into her home, Hinsley allowed T.C. **[**4]** to move in with her. [6] Because Hinsley worked full time as a bartender, she relied upon several babysitters, including T.C., whom she allowed to be alone with her children on several occasions. According to Hinsley, T.C. sexually assaulted her three-year-old daughter, K.M., during these baby-sitting sessions.

Hinsley, personally and as guardian ad litem for K.M., brought this FTCA action against the Standing Rock CPS and the Bureau of Indian Affairs ("BIA"), alleging that the Standing Rock CPS negligently placed T.C. in her home without warning her that he was a child molester. The Standing Rock CPS moved for summary judgment, asserting that its actions were protected by the discretionary function exception of the FTCA. The district court agreed. *See* Hinsley v. Standing Rock Child Protective Servs., 470 F. Supp. 2d 1037, 1040-43 (D.N.D. 2007). Hinsley timely appeals.

II.

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[2] The Honorable Daniel L. Hovland, **[**2]** United States District Judge for the District of North Dakota.

[3] McLaughlin was also familiar with Hinsley: earlier in his tenure with the Standing Rock CPS, he filed for custody of Hinsley, T.C., and their sister after receiving allegations that their uncle had abused them.

[4] McLaughlin claims that he drove to Hinsley's home, whereas, Hinsley, claims he telephoned her at work.

[5] McLaughlin, in contrast, contends that he told Hinsley that T.C. was a danger to small children, warning her that T.C. should not be left alone with young children.

[6] The particulars of that acceptance are also disputed by the parties. Hinsley contends that she believed that the Standing Rock CPS formally placed T.C. in her home even though, as she acknowledges, she voluntarily accepted her brother, never signed a placement agreement, never received any payments from the Standing Rock CPS, and was never again contacted by CPS. The Standing Rock CPS, on the other hand, **[**5]** contends that it never represented to Hinsley that a formal placement was being made and notes that the Standing Rock Sioux Tribal Court issued an order releasing T.C. from the custody of the CPS as of his eighteenth birthday.

HN3[] We review the district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party. Fed. R. Civ. P. 56(c); Lewis v. St. Cloud State Univ., 467 F.3d 1133, 1135 (8th Cir. 2006). We will affirm the district court if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III.

HN4[] It is well settled **[**6]** that the United States may not be sued without its consent. *See, e.g.,* United States v. White Mountain Apache ***Tribe***, 537 U.S. 465, 472, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003); Riley v. United States, 486 F.3d 1030, 1032 (8th Cir. 2007). The FTCA, however, waives the United States' historic defense of sovereign immunity and authorizes suits against the United States for damages

> for injury or loss of property, or personal injury or death caused by the negligent **[*672]** or wrongful act or omission of any employee of the Government while acting within the scope of 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.

28 U.S.C. § 1346(b).

HN5[] Congress has also consented to suit under the FTCA for "certain claims arising out of the performance of [***Indian***] ***self-determination*** contracts." FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1995). Tort claims against ***tribes***, tribal organizations, or their employees, that arise out of the ***tribe*** or tribal organization carrying out a self-determination contract, are considered claims against the United States and are covered to the full **[**7]** extent of the FTCA. *See* Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990) (codified at 25 U.S.C. § 450f notes); *see also* 25 U.S.C. § 450f(d); 28 U.S.C. §§ 1346(b), 2671-2680; FGS Constructors, Inc., 64 F.3d at 1234. *See generally* BIA Federal Tort Claims Act Coverage General Provisions, 25 C.F.R. §§ 900.180-.188 (2007); *Cohen*§ 22.02[4].

HN6[] The FTCA, however, includes a number of exceptions to its broad waiver of sovereign immunity--and these exceptions apply with equal force to ***FTCA claims*** brought against a tribal organization. *See*§ 314, 104 Stat. at 1959-60 (codified at 25 U.S.C. § 450f notes) (describing how any tort claim brought against a tribal organization carrying out a self-determination contract will be "afforded the full protection and coverage of the Federal Tort Claims Act"). The exception relevant to this case provides that no liability shall lie for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). **[**8]** When an alleged act falls within the discretionary function exception, the federal court lacks subject matter jurisdiction. Dykstra v. U.S. Bureau of Prisons, 140 F.3d 791, 795 (8th Cir. 1998).

The purpose of the discretionary function exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. Gaubert, 499 U.S. 315, 323, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1990). ***HN7***[] This "exception to the FTCA 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" Dykstra, 140 F.3d at 795 (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)).

HN8[] We employ a two-part test to determine whether the discretionary function exception applies. *See* Riley, 486 F.3d at 1032 (citing Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)). "First, the conduct at issue must be discretionary, involving 'an element of judgment or choice,'" *id.* (quoting Berkovitz, 486 U.S. at 536), and not controlled by mandatory **[**9]** statutes or regulations, Gaubert, 499 U.S. at 328-29. If the employee violated a mandatory statute, regulation, or policy, the conduct does not involve an element of judgment or choice, and therefore, the conduct is not sheltered from liability under the discretionary function exception. *See* Riley, 486 F.3d at ***[*673]*** 1032. If, on the other hand, no mandate exists, the action is considered a product of judgment or choice and the first step is satisfied. Dykstra, 140 F.3d at 795. Under the second part of the test, we determine whether the judgment or choice was based on considerations of public policy. Gaubert, 499 U.S. at 325. If the challenged action was based on a judgment grounded in social, economic, or political policy, the discretionary function exception applies. Dykstra, 140 F.3d at 795; *see also* Gaubert,

499 U.S. at 325. [7] With that background, we turn to the applicability of the discretionary function exception to the instant case.

Hinsley bases her negligence claim on the Standing Rock CPS's failure to warn her of T.C.'s dangerous propensities. [8] We have found no statute, policy, or regulation mandating the Standing Rock CPS to warn the public or a third-party about the sexually abusive proclivities of a person who is being discharged from the CPS, nor has Hinsley alerted us to such a mandate. Therefore, the first part of the discretionary function analysis is satisfied.

With respect to the second part of the test, Hinsley urges this court to hold that the discretionary function exception is inapplicable because the strong policy interest in preventing child abuse demands that a warning be given. This argument betrays her case: it exposes the fact that the decision to warn is, at its core, a policy decision. The decision to release T.C. to his sister without a warning involves an effort to balance the interest in maintaining the confidentiality of T.C.'s past actions against the safety concerns that arise from placing a known sexual abuser in a home filled with children. As the district court correctly noted, "[s]uch decisions clearly implicate competing and legitimate concerns of public safety, the safety of third persons into whose homes an individual is placed, the need to maintain the confidentiality of a juvenile's records, and the juvenile's future interests upon release." *Hinsley, 470 F. Supp. 2d at 1043*. Policymakers may disagree about how those interests should be balanced, but those decisions lie with policymakers and **[**12]** CPS employees--the FTCA does not empower judges to second guess such decisions via tort action. *See Gaubert, 499 U.S. at 323*. We therefore conclude that the second part of the discretionary function exception test has been satisfied.

IV.

Hinsley's allegations make out a very sympathetic case for her and her daughter. ***HN9***[] When Congress waived the government's sovereign immunity under the FTCA, however, it elected to preclude liability for administrative decisions grounded in social **[*674]** policy. In doing so, Congress accepted the possibility that this exemption would sometimes deliver harsh results. Because the discretionary function exception applies to the Standing Rock CPS's decision not to warn Hinsley, the judgment of the district court is **AFFIRMED.**

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[7] The individual government employee need not have consciously considered any policy factors. *C.R.S. by D.B.S. v. United States, 11 F.3d 791, 797-98 (8th Cir. 1993)*. "The judgment or decision need only be susceptible to policy analysis, regardless of whether **[**10]** social, economic, or political policy was ever actually taken into account, for the exception to be triggered." *Demery v. U.S. Dep't of Interior, 357 F.3d 830, 833 (8th Cir. 2004)*. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion . . ., but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert, 499 U.S. at 325*. In cases alleging negligent failure to warn "[i]t is also irrelevant whether the alleged failure to warn was a matter of 'deliberate choice,' or a mere oversight." *Allen v. United States, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987)*.

[8] Because the district court granted the government's motion for summary judgment, we view the facts in the light most **[**11]** favorable to Hinsley, and therefore assume that McLaughlin failed to warn Hinsley of her brother's dangerous propensities.

McLaughlin v. United States

United States District Court for the District of North Dakota, Southwestern Division

November 3, 2010, Decided; November 3, 2010, Filed

Case No. 1:09-cv-00059

Reporter
2010 U.S. Dist. LEXIS 163573 *

Lisa McLaughlin, individually and on behalf of Cinch McLaughlin, Plaintiff, vs. The United States of America, Defendant.

Core Terms

Daycare, employees, motion to dismiss, Self-Determination, RECOMMENDATION, tribal, ***tribes***, lack of subject matter jurisdiction, sovereign immunity, funded, subject matter jurisdiction, contracts

Counsel: **[*1]** For Lisa Mclaughlin, individually and on behalf of Cinch McLaughlin, Plaintiff: Rodney E. Pagel, LEAD ATTORNEY, PAGEL WEIKUM, PLLP, Bismarck, ND USA.

For United States of America, Defendant: Cameron W. Hayden, U.S. ATTORNEY'S OFFICE, Bismarck, ND USA.

Judges: Charles S. Miller, Jr., United States Magistrate Judge.

Opinion by: Charles S. Miller, Jr.

Opinion

REPORT AND RECOMMENDATION

Before the court is the government's motion to dismiss under rule 12(b)(1) for lack of jurisdiction. (Docket No. 9). The briefing on the motion has been completed. (Docket Nos. 12 & 13). For the reasons set forth below, the undersigned recommends that the court grant the motion to dismiss without prejudice.

I. BACKGROUND

Plaintiff Lisa McLaughlin ("McLaughlin") is the mother of Cinch McLaughlin. She brings this action both individually and on her son's behalf.

McLaughlin and her son reside in Sioux County, North Dakota, on the Standing Rock Sioux Indian Reservation. In approximately August of 2007, McLaughlin began taking Cinch to the Kampus Kids Daycare facility operated by the Sitting Bull College, located in Fort Yates, North Dakota. The Sitting Bull College ("College") is owned and operated by the Standing Rock Sioux ***Tribe***.

McLaughlin alleges that Cinch **[*2]** suffered a brain injury at some point between January 21 and February 21, 2008, while in the care of the Kampus Kids Daycare Center ("Kampus Daycare"). McLaughlin alleges that Kampus Daycare had a duty to provide reasonable and appropriate care for her son, and that it breached this duty through various acts of negligence that proximately caused her son's brain injury. She requests damages in excess of $75,000.

Before commencing this action, McLaughlin's counsel contacted Renee Vermillion, the College's Business Manager, via letter on June 1, 2008. He advised the College of his representation of McLaughlin and requested records and any video recordings in the daycare's possession. Ms. Vermillion replied by letter on June 3, 2008. She requested that McLaughlin inform the

College whether or not she intended to file a lawsuit and advised McLaughlin that the College was in contact with their insurance company regarding the potential lawsuit. McLaughlin responded via letter on June 28, 2008. She confirmed the hiring of an attorney and directed the College to correspond with her attorney to obtain doctor's reports.

Approximately a month later, McLaughlin's counsel received a letter dated July **[*3]** 21, 2008, from Terry Leikam, Senior Casualty Claims Specialist for the Program for Sovereign Indian Nations, who indicated he was handling McLaughlin's claim. Later, on September 2, 2008, plaintiff's counsel received another letter from Leikam, which stated:

> Because the above referenced ***Tribe*** or Tribal Organization is an Indian Contractor under [the] ***Indian Self-Determination*** and [E]ducational [A]ssistance Act (*Public Law 93-638*), your exclusive remedy for this is against the United States Government pursuant to the Federal Tort Claim[s] Act (FTCA) (*28 U.S.C. 2401*). We will provide you with the documents necessary to file the ***FTCA claim***.
>
> Your claim grows out of an allegation of negligence involving a teacher in the day care during the course and scope of his employment duties. Since the day care is funded under the ***Indian Self-Determination*** and Educational Assistance Act, your claim must be filed against the United States, in the Federal court and under the Federal Tort Claims Act.

(Docket No. 12-4).

McLaughlin claims that, based on this letter, she elected to proceed against the United States as the defendant in this matter, rather than against the College. (Docket No. 12, pp. 4). Accordingly, McLaughlin filed an administrative **[*4]** claim with the United States Department of the Interior on November 12, 2008, pursuant to the Federal Tort Claims Act ("FTCA"), *28 U.S.C §§ 1346(b)* & 2671-2680. (Docket No. 12-2, pp. 9-11).

In a letter dated April 2, 2009, the government denied McLaughlin's claim, stating she had failed to establish that a federal employee or tribal employee covered by the FTCA had committed a negligent or wrongful act cognizable under the statute. (Docket No. 12-2, pp. 13-14). The letter also informed McLaughlin that, if she was dissatisfied with the determination, she could file suit in the United States District Court within six months. Id.

On September 10, 2009, McLaughlin commenced this action against the government under the FTCA. On May 13, 2010, the government filed its motion to dismiss for lack of subject matter jurisdiction, contending that McLaughlin has no cognizable claim under the FTCA and that, since there is no other applicable waiver of sovereign immunity, the action must be dismissed for lack of subject matter jurisdiction.

II. STANDARD OF REVIEW

"'Subject matter jurisdiction defines the court's authority to hear a given type of case.'" *Carlsbad Tech., Inc. v. HIF Bio. Inc., 129 S. Ct. 1862, 1866 (2009)* (quoting *United States v. Morton, 467 U.S. 822, 828 (1984)*). It represents "'the extent to which a court can rule on the conduct **[*5]** of persons or the status of things.'" Id. (quoting Black's Law Dictionary 870 (8th ed. 2004)).

Because subject matter jurisdiction goes to the power of the court to hear the case, the court is the one that must decide any disputed questions of law or fact relevant to the determination of the court's jurisdiction as a threshold matter. E.g., *Green Acres Enters.,Inc. v. United States, 418 F.3d 852, 856 (8th Cir. 2005)*; *Osborn v. United States, 918 F.2d 724, 728-729* & nn. 3-4 (8th Cir. 1990); *Mentz v. United States, 359 F. Supp. 2d 856, 858 (D.N.D. 2005)*. And, if necessary, the court may rely upon matters outside the pleadings. Id. As the Eight Circuit has explained, the "court has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Johnson v. United States, 534 F.3d 958, 962 (8th Cir. 2008)* (quoting *Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981)*). Because "there is no statutory procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Id. at 964* (quoting *Land v. Dollar, 330 U.S. 731, 735 n.4 (1947)* (overruled on other grounds by *Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)*).

In evaluating a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party seeking to establish federal jurisdiction has the burden of proof that jurisdiction exists, and "this burden **[*6]** may not be shifted to" the other party. Great Rivers Habitat Alliance v. Fed. Emergency Mgmt. Agency, 2010 WL 3168368, 2 (8th Cir. 2010) (quoting *Newhard, Cook & Co. v.*

Inspired Life Ctrs, 895 F.2d 1226, 1228 (8th Cir. 1990)); Mentz, 359 F. Supp. 2d at 858 (citing Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990)). "[N]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of undisputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." Mentz, 359 F. Supp. 2d at 858 (quoting Osborn, 918 F.2d at 730). Finally, in resolving a motion to dismiss under Rule 12(b)(1), the court may make credibility determinations and weigh conflicting evidence. See T.L. ex rel. Ingram v. United States, 443 F.3d 956, 961 (8th Cir. 2006); see also Mentz, 359 F. Supp. 2d at 858.

III. DISCUSSION

A. The *Indian* *Self-Determination* and Education Assistance Act's extension of FTCA liability

It is well settled that jurisdiction over any suit against the United States requires a clear statement from the government waiving sovereign immunity, together with a claim falling within the terms of the waiver. United States v. White Mountain Apache ***Tribe***, 537 U.S. 465, 472 (2003) (citations omitted); see generally Hinsley v. Standing Rock Child Protective Services, 516 F.3d 668, 671-672 (8th Cir. 2008); Riley v. United States, 486 F.3d 1030, 1032 (8th Cir. 2007). In this case, McLaughlin brings suit pursuant to the FTCA, which, if applicable, provides the requisite waiver of sovereign immunity and authorizes suit against the United States for damages caused by negligent or wrongful acts committed by its employees within the scope of their employment. 28 U.S.C. § 1346(b).

To help facilitate the carrying out of the government's Indian trust responsibilities, Congress enacted **[*7]** the ***Indian*** ***Self-Determination*** Education and Assistance Act, Pub. L. No. 93-638, 25 U.S.C. §§ 450, et seq. (the "ISDEAA"). Under the ISDEAA, ***tribes*** and tribal organizations may enter into contracts with the federal government to assume the administration of programs formerly administered by the federal government on behalf of Indian ***tribes***. E.g., Hinsley, 516 F.3d at 670; FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234-1235 (8th Cir.1995); 25 U.S.C. § 450f(a)(1). Such contracts are referred to as "self-determination contracts" or sometimes, as the parties have referred to them here, as "638 Contracts." See 25 U.S.C. § 450b(j) (defining "self-determination contract"). In order to provide a remedy for wrongful or negligent acts committed by employees of ***tribes*** or tribal organizations carrying out "638 Contracts," Congress amended the ISDEAA to extend the government's liability under the FTCA to cover such acts. It did so by deeming the acts to be acts of federal employees for which an action may be brought under the FTCA. See Hinsley, 516 F.3d at 672; FGS Constructors, Inc. v. Carlow, 64 F.3d at 1234-1235. In relevant part, § 314 of the amending law provides:

> [W]ith respect to claims resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the ***Indian*** ***Self-Determination*** and Education Assistance Act ... an Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter **[*8]** to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any such contract or agreement and its employees are deemed employees of the Bureau ... while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any ***tribe***, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act ....

Pub.L. No. 101-512, Title III, § 314, 104 Stat.1959; 25 U.S.C. § 450f notes.

B. The government's motion to dismiss

The government's motion to dismiss argues that in order to hold it liable under the FTCA in this case, McLaughlin must show either that those persons involved with the operation of the Kampus Daycare were either employees of the United States or that the Daycare was the subject of a "638 Contract." As proof that neither path to liability exists and, consequently, that there is no waiver of sovereign immunity which would provide the court with subject matter jurisdiction, **[*9]** the government has submitted an affidavit from Leonica Alkire, the College's Vice President of Finance. (Docket No. 10-1). Alkire states in her affidavit that the College operates the Kampus Daycare, that the United States (including the BIA) is not involved, and that the Daycare's employees are not employees of the United

States. (Docket No. 10-1, ¶ 3). Alkire also states that the Kampus Daycare is not the subject of a "638 Contract," which would make those employed by the Daycare federal employees for purposes of the FTCA. Alkire states that the money for the operation of the Kampus Daycare comes from its general funds that consists of "471 funds," *i.e.*, funds obtained pursuant to the Tribally-Controlled Community College Act, found at *25 U.S.C. § 1801, et seq.*, and fee revenue. (Doc. No. 10-1, ¶¶ 4-5).

In response to the government's motion, McLaughlin agrees the government has correctly summarized the governing law in terms of what is required to hold it liable. She also concedes there is no evidence that the employees of the Kampus Kids Daycare were employed by the United States and that the only question is whether there is an applicable "638 Contract."

The only thing that McLaughlin offers to counter **[*10]** the evidence submitted by the government regarding whether there is an applicable "638 Contract" is the earlier referenced letter that plaintiff's counsel received from the Terry Leikam, the claims specialist for the College's insurance carrier, stating that the daycare was funded under the ISDEAA. (Docket No. 12-4). McLaughlin posits that the adjustor must have obtained this information from someone in authority at the College as part of his investigation. She argues the letter is sufficient to defeat the government's motion, at least absent it coming forward with specific proof that the adjustor was provided inaccurate information.

McLaughlin's argument fails. As previously discussed, the burden is upon McLaughlin to prove subject matter jurisdiction, including here an applicable waiver of sovereign immunity, and this burden cannot be shifted to the government. And, while the statement of the insurance adjustor that the Kampus Daycare was funded under the ISDEAA is troubling, there is no indication it was based upon firsthand knowledge. Simply put, the adjustor's statement is hearsay and without more is insufficient to overcome the affidavit testimony of the Vice-President of the **[*11]** College, who is responsible for the College's finances and obviously has firsthand knowledge regarding the matters she attests.[1]

Consequently, McLaughlin has failed to carry her burden of proving an applicable waiver of sovereign immunity and subject matter jurisdiction. The case must be dismissed without prejudice.

IV. CONCLUSION AND RECOMMENDATION

Based on the foregoing, it is recommended the United States' motion to dismiss for lack of subject matter jurisdiction (Docket No. 9) be **GRANTED**, and McLaughlin's complaint be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

NOTICE OF RIGHT TO FILE OBJECTIONS

Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of the Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond.

Dated this 3rd day of November, 2010.

/s/ Charles S. Miller, Jr.

Charles S. Miller, Jr.

United States Magistrate Judge

End of Document

[1] McLaughlin initially requested an opportunity to conduct additional discovery. The undersigned conducted a phone conference with counsel for both parties prior to issuing this Report and Recommendation, and McLaughlin's attorney withdrew the request based upon the determination that it was unlikely to produce any contrary facts.

Anthony v. United States

United States District Court for the District of Arizona

October 8, 2020, Decided; October 8, 2020, Filed

No. CV-20-08002-PCT-DJH

Reporter
2020 U.S. Dist. LEXIS 187378 *; 2020 WL 5974583

Ophelia Anthony, et al., Plaintiffs, v. United States of America, Defendant.

Outcome
The court ordered, inter alia, that defendant's Motion to Dismiss was granted. Plaintiffs' Complaint was dismissed, with leave to file a First Amended Complaint in accordance with the court's Order within fourteen days.

Core Terms

hiring, workers' compensation, discretionary function, argues, sovereign immunity, self-determination, Amend, prong, policies, courts, employees, waive, amended complaint, motion to dismiss, discretionary, regulation, grounded, handbook, injuries, parties, notice

Case Summary

Overview
HOLDINGS: [1]-Neither plaintiffs, employees of the Fort Defiance Indian Hospital Board (FDIHB), nor the United States alleged that FDIHB made a "judgment or choice" to deviate from its hiring policies so as to hire a sex offender; instead, the FDIHB's alleged failure to implement its own policy showed a lack of discretion. FTCA discretionary function exception did not apply; [2]-Workers' compensation did not cover these claims because plaintiffs elected to pursue common law remedies, so defendant's final two arguments for sovereign immunity failed; [3]-Under FTCA, plaintiffs could continue to pursue their claims, and, having proper subject-matter jurisdiction, the court could hear them; [4]-For liability to attach to defendant under Arizona law, plaintiffs had to allege that FDIHB failed to post its workers' compensation notice. Without it, plaintiffs' Complaint was legally insufficient.

LexisNexis® Headnotes

Administrative Law > Sovereign Immunity

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Governments > Federal Government > Claims By & Against

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN1[] **Administrative Law, Sovereign Immunity**

A party bringing a motion under *Fed. R. Civ. P. 12(b)(1)* asserts that the court lacks subject-matter jurisdiction to hear a claim. *Fed. R. Civ. P. 12(b)(1)*. Generally, the doctrine of sovereign immunity prevents courts from exercising jurisdiction over the Federal Government. However, when the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction. Through the Federal Tort Claims Act (FTCA), *28 U.S.C.S. § 2671 et seq.*,

Congress decided that there are some instances when the United States will waive its sovereign immunity and allow money damages for injuries resulting from a Government employee's wrongful acts. 28 U.S.C.S. § 2679. FTCA liability also extends to Indian contractors acting under the ***Indian Self-Determination*** and Education Assistance Act of 1975, Pub. L. No. 93-638. Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959 (1990).

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN2[] Exclusions From Liability, Discretionary Functions

The discretionary function exception of the Federal Tort Claims Act, 28 U.S.C.S. § 2671 et seq., maintains sovereign immunity when employees perform a discretionary action on behalf of the Government. 28 U.S.C.S. § 2680(a). In Berkovitz, the Supreme Court established a two-pronged test to determine whether this exception applies. First, courts ask whether there is a truly discretionary action, one that is the product of judgment or choice and not a mandatory directive. Second, courts ask whether the action is susceptible to a policy analysis. This prong is designed to fulfill Congress' wish to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. To survive a motion to dismiss and satisfy this prong, a plaintiff must show that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis. When a Government agent is afforded discretion in a particular action, courts presume that the action involves the same policy considerations as those that enabled the discretionary action.

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Discretionary Functions

HN3[] Exclusions From Liability, Discretionary Functions

The court has generally held that the design of a course of governmental action is shielded by the discretionary function exception, whereas the implementation of that course of action is not.

Governments > Native Americans > Property Rights

Torts > ... > Liability > Federal Tort Claims Act > Elements

HN4[] Native Americans, Property Rights

Under the Federal Tort Claims Act, 28 U.S.C.S. § 2671 et seq., the United States is liable if a private person, under similar circumstances, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.S. § 1346(b)(1). Traditionally however, federal courts have applied the law of the state as the law of the place, even when the allegedly negligent act occurred on Indian land. Consequently, the court may not surreptitiously deviate from this settled precedent.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Exclusivity > Employees & Employers

Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law

Workers' Compensation & SSDI > Defenses > Exclusivity Provisions

Workers' Compensation & SSDI > Exclusivity > Exceptions

HN5[] Workers' Compensation, Employees & Employers

Under Arizona law, workers' compensation is the exclusive remedy for injuries caused by an employer acting in the scope of employment, unless an employee specifically rejects workers' compensation. Ariz. Rev. Stat. §§ 23-1022(A), 23-906(A). Employers are statutorily required to post notice of employee's right to reject workers' compensation. Ariz. Rev. Stat. § 23-906(D). If they do not, employees may accept workers' compensation for injuries received while no noticed was

posted, or they may pursue other common law remedies against their employer. Ariz. Rev. Stat. § 23-906(E).

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN6 **Documentary Evidence, Affidavits**

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7 **Motions to Dismiss, Failure to State Claim**

A motion under Fed. R. Civ. P. 12(b)(6) attacks a complaint's legal sufficiency. Complaints must contain a short and plain statement of the grounds for the court's jurisdiction and a showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). They must also make sufficient factual allegations so that a court may draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Governments > Courts > Authority to Adjudicate

HN8 **Amendment of Pleadings, Leave of Court**

Courts freely give leave to amend complaints, except when proposed amendments would be futile.

Counsel: **[*1]** For Ophelia Anthony, JoVonna Becenti, Pauline Curley, Margaret Dejolie, Cherilyn Delgarito, Cynthia Garcia, Rhonda Halona, Tina James-Tafoya, Elvera Saganey, Cherrilyn Thompson, Jamie Whitehorse, Jamie Yazzie, Paula Yazzie, Plaintiffs: Jason Jack Bliss, Kathryn Grace Mahady, LEAD ATTORNEYS, Aspey Watkins & Diesel PLLC, Flagstaff, AZ.

For United States of America, Defendant: Brock Jason Heathcotte, LEAD ATTORNEY, US Attorneys Office - Phoenix, AZ, Phoenix, AZ.

Judges: Honorable Diane J. Humetewa, United States District Judge.

Opinion by: Diane J. Humetewa

Opinion

WO

ORDER

Pending before the Court are Defendant United States' Motion to Dismiss (Doc. 19) and Plaintiffs' Motion to Amend Complaint (Doc. 33). The parties have fully briefed the Court on each matter.[1]

I. Background

When Congress passed the ***Indian Self-Determination*** *and Education Assistance Act of 1975 ("ISDEAA"), Pub. L. No. 93-638*, it intended to bring about "meaningful ***Indian self-determination***" by encouraging "meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services. 25 U.S.C. § 5302(b). The ISDEAA created a

[1] Plaintiffs filed a Response to the Motion to Dismiss (Doc. 26), and Defendant filed its Reply (Doc. 27). Defendant filed a Response to the Motion to Amend Complaint (Doc. 34), and Plaintiffs filed their Reply (Doc. 35).

way for tribal organizations to enter into self-determination contracts with the United States so that they themselves might **[*2]** administer federal health programs. *See* 25 U.S.C. § 5326. The Fort Defiance Indian Hospital Board, Inc. ("FDIHB"), located on the Navajo Nation, is the product of an ISDEAA contract made with the United States Department of Health and Human Services. (Doc. 1 at ¶¶ 17-18).

Plaintiffs are all employees of FDIHB. (*Id.* at ¶ 3). As alleged in the Complaint, their claims stem from the misconduct of a former co-employee, Garrison Sloan ("Sloan"), who hid cameras in FDIHB restrooms. (*Id.* at ¶ 25). After a 2018 grand jury indictment, Sloan pleaded guilty to voyeurism and was sentenced to six years in prison and mandatory lifetime registration as a sex offender. (*Id.* at ¶¶ 124-28); (Doc. 1-1 at 3). This was not the first time Sloan had been caught making surreptitious recordings. In 2004, Sloan pleaded guilty to videotaping women in an Arizona State University locker room. (Doc. 1 at ¶¶ 130-133). Plaintiffs claim that FDIHB failed to follow its own policy when it hired Sloan, either by failing to conduct a background check or by hiring him despite his background. (*Id.* at ¶¶ 144-50).

In their Complaint, Plaintiffs bring four claims against Defendant United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq. (Doc. **[*3]** 1 at ¶ 1). The claims include negligence; negligent hiring, retention, and supervision; invasion of privacy; and intentional infliction of emotional distress. (*Id.* at ¶¶ 170-94). In their Motion to Amend Complaint, Plaintiffs seek to add four more parties as plaintiffs. (Doc. 33 at 1-2).

Defendant claims immunity. Specifically, Defendant's Motion to Dismiss argues the FTCA does not waive sovereign immunity in this case. (Doc. 19 at 1). The Motion seeks to dismiss the Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction and failure to adequately state a claim. (*Id.*) Defendant also argues that Plaintiffs' Motion to add parties is futile and should be dismissed because it will not cure the original Complaint's jurisdictional deficiencies. (Doc. 34 at 2).

The Court must have jurisdiction to hear this case, and so it will first address the issue of sovereign immunity. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). The Court will then determine whether Plaintiffs' Complaint adequately states a claim and whether to grant Plaintiffs' Motion to Amend.

II. Subject-Matter Jurisdiction

HN1[] A party bringing a motion under Rule 12(b)(1) asserts that the court lacks subject-matter jurisdiction to hear a claim. Fed. R. Civ. P. 12(b)(1). Generally, the doctrine of sovereign **[*4]** immunity prevents courts from exercising jurisdiction over the Federal Government. FDIC v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). However, "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." United States v. Mottaz, 476 U.S. 834, 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986). Through the FTCA, Congress decided that there are some instances when the United States will waive its sovereign immunity and allow money damages for injuries resulting from a Government employee's wrongful acts. 28 U.S.C. § 2679. FTCA liability also extends to Indian contractors acting under the ISDEAA. *Pub. L. No. 101-512, § 314, 104 Stat. 1915, 1959 (1990)*.

Defendant makes three arguments why, in this instance, the FTCA does not waive sovereign immunity. First, Defendant argues that it remains immune from suit pursuant to the FTCA's discretionary function exception. (Doc. 19 at 7). Second, Defendant argues the FTCA does not waive immunity for Plaintiffs' claims because they are on-the-job injuries that fall under the applicable workers' compensation plan. (*Id.* at 9). Third, and relatedly, Defendant argues that the nature of Plaintiff's ***FTCA claim*** requires the Court to treat Defendant as a private employer, and under Arizona law, the exclusive remedy for on-the-job injuries would be workers' compensation. (*Id.* at 11). These final two **[*5]** arguments rely on Defendant's assertion that workers' compensation covers Plaintiffs and their claims. (*Id.* at 5). The Court will address each argument in turn.

a. Discretionary Function Exception

HN2[] The FTCA's discretionary function exception maintains sovereign immunity when employees perform a discretionary action on behalf of the Government. 28 U.S.C. § 2680(a). In Berkovitz v. United States, the Supreme Court established a two-pronged test to determine whether this exception applies. 486 U.S. 531, 536-37, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). First, courts ask whether there is a truly discretionary action, one that is "the product of judgment or choice" and not a mandatory directive. Id. at 536. Second,

courts ask whether the action is "susceptible to a policy analysis." *Gonzalez v. United States, 814 F.3d 1022, 1027-28 (9th Cir. 2016)* (quoting *United States v. Gaubert, 499 U.S. 315, 325, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)*). This prong is designed to fulfill Congress' wish "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)*. To survive a motion to dismiss and satisfy this prong, a plaintiff must show that the "challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert, 499 U.S. at 325*. "The focus of the inquiry is not on the agent's subjective intent **[*6]** in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* When a Government agent is afforded discretion in a particular action, courts presume that the action involves the same policy considerations as those that enabled the discretionary action. *Id. at 324*.

Defendant argues that the hiring, training, and supervision of employees usually entails policy judgments protected by the discretionary function exception. (Doc. 19 at 89); *see Vickers v. United States, 228 F.3d 944, 950 (9th Cir. 2000)* ("This court and others have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield."). Because FDIHB had the discretion to hire and supervise Sloan, Defendant argues, its decision to do so is protected by the discretionary function exception. (Doc. 19 at 9). Plaintiffs argue that FDIHB violated its own hiring policy, either when it failed to conduct a background check on Sloan or when it hired Sloan despite failing the background check. (Doc. 26 at 11-12). Plaintiffs further argue that FDIHB had no discretion to violate **[*7]** its own policy, and so the first prong of the discretionary function analysis fails because there was no discretionary action. (*Id.*)

In its Reply, Defendant argues that FDIHB policy is not mandatory because it does not rise to the level of a federal statute, regulation, or policy. (Doc. 27 at 7). Therefore, the first prong is satisfied because the FDIHB "exercised discretion to hire Sloan free from the mandates of any federal statute, regulation or policy." (*Id.*) And yet, in the next paragraph, Defendant argues that FDIHB's decision satisfies the second prong because the decision to hire Sloan was "grounded in social, economic, or political policy." (*Id.*) Defendant continues to argue that "the FDIHB hiring policies contain provisions that clearly demonstrate their political aspect, making the application of the discretionary function exception especially appropriate in this case." (*Id.*) Strangely, Defendant argues the decision to hire Sloan is at once "free from" and "grounded" in federal policy. (*Id.*)

Defendant cites *Big Owl v. United States*, in which a teacher used the FTCA to bring a claim against the United States after a school board failed to notify her, as was required by the **[*8]** staff handbook, that it might not renew her contract. *961 F. Supp. 1304, 1305-06 (D. S.D. 1997)*. The United States was potentially liable for the school board's actions because an Indian ***tribe*** operated the school pursuant to a grant from the Bureau of Indian Affairs. *Id. at 1307*; *see Pub. L. No. 101-512* (imposing liability on the United States resulting from a party's performance under a grant or agreement authorized by the *Tribally Controlled Schools Act ("TCSA"), Pub. L. No. 100-297*). On a motion for summary judgment, the United States argued that the FTCA did not waive immunity because hiring decisions are a discretionary function. *Big Owl, 961 F. Supp. at 1308*. The teacher argued that the handbook's policy was mandatory and so the discretionary function exception did not apply. *Id.*

When assessing the first *Berkovitz* prong, the District of South Dakota found that because the school board was free to "amend and deviate from its procedures," the handbook was merely a "guide to be followed at the discretion of the Board." *Id. at 1309*. The court held that the decision to not rehire the teacher was discretionary despite violating the handbook's stated procedure. *Id.* As to the second prong, the court found that Congress intended for the school board to make employment decisions at their discretion in furtherance **[*9]** of the TCSA's policy of providing educational services and fostering ***Indian self-determination***. *Id.* The court granted the United States' summary judgment motion, holding that the school board's actions satisfied the FTCA's discretionary function exception. *Id.*

The analogy could be made that, like the handbook in *Big Owl*, FDIHB's policies are merely guidelines. And, like the TCSA, the ISDEAA allows Indian contractors discretion in hiring practices to further the policy of establishing "meaningful ***Indian self-determination***." *See 25 U.S.C. § 5302(b)*. Therefore, FDIHB's decision

to deviate from its "policies" is part of the self-determination process and falls within the discretionary function exception.

However, neither Plaintiffs nor Defendant allege that FDIHB made a "judgment or choice" to deviate from its hiring policies so as to hire a sex offender. *See* Berkovitz, 486 U.S. at 536. Instead, the FDIHB's alleged failure to implement its own policy shows a lack of discretion. *See* Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005)**HN3**[] ("[W]e have generally held that the *design* of a course of governmental action is shielded by the discretionary function exception, whereas the *implementation* of that course of action is not."). And yes, Congress intended for the ISDEAA to grant Indian contractors **[*10]** with discretion to hire whomever they choose to further strengthen ***Indian self-determination***. But FDIHB's self-determined policies would become meaningless if they were mere guidelines incapable of holding their creator to account. ***Indian self-determination*** is furthered by taking FDIHB's policies seriously, not by ignoring them. This is especially the case when the policies in question protect the safety of FDIHB's own employees. For these reasons, the Court finds that the facts here fail to satisfy the first *Berkovitz* prong, and so the discretionary function exception does not apply.

b. Workers' Compensation

As noted above, Defendant's final two jurisdictional arguments rely on its conclusion that workers' compensation covers Plaintiffs' claims. (Doc. 19 at 5). They are, first, that the FTCA does not waive liability for claims covered by workers' compensation, and, second, that under Arizona law, the exclusive remedy for Plaintiffs' on-the-job injuries is workers' compensation. (*Id.* at 9, 11).

HN4[] Under the FTCA, the United States is liable "if a private person," under similar circumstances, "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." **[*11]** 28 U.S.C. § 1346(b)(1). Defendant asserts, without authority, that the Navajo Nation's law governs Plaintiffs' claims. (Doc. 19 at 5-7). Traditionally however, federal courts have applied the law of the state as the law of the place, even when the allegedly negligent act occurred on Indian land. *See* Bear Medicine v. United States, 241 F.3d 1208, 1218 (9th Cir. 2001); Seyler v. United States, 832 F.2d 120, 121 (9th Cir. 1987); Ben v. United States, 2007 U.S. Dist. LEXIS 36397, 2007 WL 1461626, at *2 (D. Ariz. May 16, 2007). Consequently, the Court may not surreptitiously deviate from this settled precedent. The law of the place where the Defendant's alleged negligence occurred is Arizona law, not the Navajo Nation's law. *See* Ben, 2007 U.S. Dist. LEXIS 36397, 2007 WL 1461626.

HN5[] Under Arizona law, workers' compensation is the exclusive remedy for injuries caused by an employer acting in the scope of employment, unless an employee specifically rejects workers' compensation. A.R.S. §§ 23-1022(A); 23-906(A). Employers are statutorily required to post notice of employee's right to reject workers' compensation. *Id.* § 23-906(D). If they do not, employees may accept workers' compensation for injuries received while no noticed was posted, or they may pursue other common law remedies against their employer. *Id.* § 23-906(E); Galloway v. Vanderpool, 205 Ariz. 252, 254, 69 P.3d 23 (2003).

In their Response, Plaintiffs allege that FDIHB did not post the required notices, and so Plaintiffs argue they do not need to pursue their claim under workers' compensation. (Doc. 26 at 9).[2] Defendant, in **[*12]** its Reply, does not contest the allegation that FDIHB failed to post the appropriate notice.

Instead, Defendant argues that because Plaintiffs can choose to pursue their claims through workers' compensation, they must do so. (Doc. 27 at 4). For supporting authority, Defendant cites a federal regulation that is intended to provide "[g]eneral guidance . . . but is not intended as a definitive description of [FTCA] coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis." 25 C.F.R. § 900.183. The regulation suggests that claims for on-the-job injuries that are covered by worker's compensation may not be pursued under the FTCA. *Id.* This may be good general guidance. But in this case, Arizona law provides an exception so that worker's compensation is not the exclusive remedy to this claim. Furthermore, a private person in Defendant's place would not be able to prevent Plaintiffs from electing common law remedies. *See* 28 U.S.C. § 1346(b)(1). Workers' compensation does not cover

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[2] **HN6**[] "[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

these claims because Plaintiffs have elected to pursue common law remedies. For this reason, Defendant's final two arguments for maintaining sovereign immunity fail. Under the FTCA, Plaintiffs may continue **[*13]** to pursue their claims, and, having proper subject-matter jurisdiction, the Court may hear them.

III. Failure to State a Claim

Defendant also argues that "Plaintiffs failed to state a claim for negligent hiring" and moves to dismiss the Complaint under *Rule 12(b)(6)*. (Doc. 19 at 1). Though Defendant never expounds upon the reasons why the claims fail under *Rule 12(b)(6)*, its jurisdictional arguments imply that the Complaint fails to show that Defendant can be held liable.

HN7[] A motion under *Rule 12(b)(6)* attacks a complaint's legal sufficiency. *Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011)*. Complaints must contain a short and plain statement of the grounds for the court's jurisdiction and a showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*. They must also make sufficient factual allegations so that a court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

For reasons stated above, for liability to attach to Defendant under Arizona law, Plaintiffs must allege that FDIHB failed to post its workers' compensation notice. This allegation is a precondition to Defendant's alleged liability and the Court's jurisdiction. However, this allegation does not appear in Plaintiffs' Complaint, nor does it appear in Plaintiffs' proposed amended **[*14]** complaint. Without it, Plaintiffs' Complaint is legally insufficient. The Court will therefore grant Defendant's Motion to Dismiss under *Rule 12(b)(6)*, without prejudice, and provide Plaintiffs' fourteen days to file an amended complaint that cures the deficiencies noted herein.

IV. Motion to Amend Complaint

HN8[] Courts freely give leave to amend complaints, except when proposed amendments would be futile. *See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*. Plaintiffs' Motion to Amend Complaint seeks to add four plaintiffs to this action. (Doc. 33 at 1). Defendant argues that the addition of these parties does not cure the deficiencies it identified in its Motion to Dismiss, and thus it must be denied if the Motion to Dismiss is granted. (Doc. 34 at 1). The Court agrees. Defendant, however, does not offer any other objection to the addition of these plaintiffs. Accordingly, the Court notes that to the extent Plaintiffs timely file an amended complaint that cures the above-noted deficiencies, the Court sees no reason why adding four additional plaintiffs would prejudice Defendant at this early stage in the litigation.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (Doc. 19) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Complaint **[*15]** (Doc. 1) is **dismissed**, with leave to file a First Amended Complaint in accordance with this Order within **fourteen (14) days**.

IT IS FURTHER ORDERED that the deadline to join additional parties is extended to **fourteen (14) days** from the date of this Order.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend Complaint (Doc. 33) is **DENIED as moot**.

IT IS FINALLY ORDERED that if Plaintiffs do not file a First Amended Complaint within **fourteen (14) days** of the date this Order is entered, the Clerk of Court shall dismiss this action without further order of this Court.

Dated this 8th day of October, 2020.

/s/ Diane J. Humetewa

Honorable Diane J. Humetewa

United States District Judge

End of Document

Hebert v. United States

United States Court of Appeals for the Fifth Circuit

January 26, 2006, Filed

No. 05-30223 Summary Calendar

Reporter
438 F.3d 483 *; 2006 U.S. App. LEXIS 1984 **

NORRIS P. HEBERT, SR., Plaintiff, JOHN C. WIRICK, IV; ET AL., Defendants, JOHN C. WIRICK, IV; RONALD VIDALLIA, Defendants-Third Party Plaintiff-Appellants, INDIAN NATIONS INSURANCE COMPANY, Intervenor Defendant-Appellant, versus UNITED STATES OF AMERICA, Third Party Defendant-Appellee.

Subsequent History: Rehearing denied by *Hebert v. Wirick, 2006 U.S. App. LEXIS 32833 (5th Cir. La., Mar. 21, 2006)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Louisiana.

Core Terms

tribal, law enforcement officer, district court, Casino, ***Tribe***'s, sovereign immunity, magistrate judge, federal law, state law, arrest, subject matter jurisdiction, settlement, battery, waived

Case Summary

Procedural Posture

Appellants, tribal law enforcement officers and an insurer, sought review of a decision of the United States District Court for the Western District of Louisiana, which determined after a trial that the officers could not be indemnified by appellee United States for costs and a settlement incurred in a civil rights action because the indemnification was precluded by the Federal Tort Claims Act (FTCA), *28 U.S.C.S. §§ 2674*, *1346*.

Overview

The officers were named as defendants in a civil rights lawsuit by a witness after the officers responded to a domestic dispute that occurred at a parking lot that was adjacent to a casino located on tribal land. The witness began to argue with the officers and attempted to reenter the casino against the officer's request. One of the officers knocked the witness to the ground, so that he would not reenter the casino, and caused non-serious injuries to the witness. The officers named the United States as a third party defendant, contending that they were entitled to indemnification under the FTCA. The trial court denied the officers' request for indemnification. The court agreed that the FTCA precluded reimbursement from the U.S. regardless of whether or not the officer was acting under state or tribal law. Neither of the officers was employed by the Bureau of Indian Affairs at the time of the incident and they were not acting under any special commission to assist the Bureau with law enforcement services. The officers were not attempting to enforce federal law when the incident occurred and the exception to immunity set forth in *28 U.S.C.S. § 2680* did not apply.

Outcome

The court affirmed the judgment entered by the district court.

LexisNexis® Headnotes

Governments > Native Americans > ***Indian*** ***Self-Determination*** & Education Assistance Act

HN1[] **Native Americans, Indian Self-Determination & Education Assistance Act**

Pursuant to the ***Indian*** ***Self-Determination*** and Education Assistance Act, 25 U.S.C.S. § 450, ***tribes*** can contract with the Bureau of Indian Affairs (BIA) to perform law enforcement services. Additionally, under the Indian Law Enforcement Reform Act, 25 U.S.C.S. § 2803 (2005), the BIA can commission a Special Law Enforcement Commission (SLEC) to assist the BIA in providing law enforcement services.

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

HN2[] **Federal Tort Claims Act, Jurisdiction**

Under the Federal Tort Claims Act, 28 U.S.C.S. § 1346(b), if an act was not committed by an employee of the United States, then the district court must dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Torts > ... > Liability > Federal Tort Claims Act > General Overview

HN3[] **Standards of Review, De Novo Review**

The United States Court of Appeals for the Fifth Circuit applies a de novo standard of review to the question of whether an individual is an employee of the government for purposes of the Federal Tort Claims Act, 28 U.S.C.S. §§ 2674, 1346.

Torts > ... > Liability > Federal Tort Claims Act > Elements

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN4[] **Federal Tort Claims Act, Elements**

The Federal Tort Claims Act (FTCA), 28 U.S.C.S. §§ 2674, 1346, imposes liability upon the United States for the tortious conduct of its employees, when acting within the course and scope of their employment, in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C.S. §§ 2674, 1346. The United States represents defendants sued in their individual capacities when they have acted within the scope of their federal employment and it is in the interests of the United States to afford representation. 28 C.F.R. § 50.15 (2005). When Congress enacted the FTCA, it waived the government's immunity from liability for certain torts, in particular for the negligent acts of government employees acting within the scope of their employment. 28 U.S.C.S.§ 1346(b). There is, however, an exception to that limited waiver of immunity, under which the United States retained its immunity from suit for certain enumerated intentional torts, including any claim arising out of assault, battery, or false imprisonment. 28 U.S.C.S. § 2680(h).

Torts > ... > Liability > Federal Tort Claims Act > Scope of Employment

HN5[] **Federal Tort Claims Act, Scope of Employment**

The exception set forth in 28 U.S.C.S. § 2680(h) excludes assault and battery and similar claims allegedly committed by investigative or law enforcement officers of the United States government. Investigative or law enforcement officer is defined as any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law.

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > General Overview

HN6[] **Federal Tort Claims Act, Exclusions From**

Liability

The United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued. Sovereign immunity protects the United States from liability, and deprives the court of subject matter jurisdiction over the claims against it. The Federal Tort Claims Act, *28 U.S.C.S. §§ 2674*, *1346*, is a waiver of sovereign immunity, allowing the federal government to be sued for the actions of any employee of the government while acting within the course and scope of his office or employment under circumstances where the United States would be liable if it were a private employer. *28 U.S.C.S. § 1346*.

Counsel: For JOHN C WIRICK, IV, Defendant - Third Party Plaintiff - Appellant, RONALD VIDALLIA, Defendant - Third Party Plaintiff - Appellant, INDIAN NATIONS INSURANCE CO, Intervenor - Defendant - Appellant: George D Ernest, III, David A Hurlburt, Hurlburt, Privat & Monrose, Lafayette, LA.

For UNITED STATES OF AMERICA, Third Party Defendant - Appellee: Karen J King, US Attorney's Office, Western District of Louisiana, Lafayette, LA.

Judges: Before BARKSDALE, STEWART and CLEMENT, Circuit Judges.

Opinion by: CARL E. STEWART

Opinion

[*484] CARL E. STEWART, Circuit Judge:

John C. Wirick, IV, Ronald Vidallia and Indian Nations Insurance Company ("Wirick et al.") seek reimbursement from the United States for a settlement they paid in an underlying civil rights claim. They appeal the judgment, and dismissal with prejudice, in favor of the United States in this *42 U.S.C. § 1983* action. For the following reasons, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 9, 2001, Chitimacha Tribal Police Officer John C. Wirick, IV ("Wirick") responded to a domestic dispute between two non-Indians **[**2]** in a parking lot adjacent to the Cypress Bayou Casino ("Casino"), located on tribal land surrounded by St. Mary Parish, Louisiana. Norris Hebert ("Hebert"), the original plaintiff in this suit, was a witness to the incident in the parking lot. Wirick began questioning the persons involved in the dispute, and Hebert became impatient and wanted to leave. Wirick initially asked Hebert to remain at the scene so Wirick could obtain a statement, but later, Wirick asked Hebert to leave the premises. Because Hebert had been drinking, however, Wirick stated that Hebert's girlfriend would need to drive him. At this point, Hebert ignored Wirick and sought to reenter the Casino. Wirick attempted to stop him and, in doing so, Hebert was knocked to the ground and injured, but not seriously, as he later refused medical treatment at a nearby hospital. Accordingly, Hebert was charged with resisting an officer, simple battery and remaining where forbidden.

On September 6, 2002, Hebert filed a suit against Wirick, the Chitimacha Tribal Police, Casino employee Virginia Desormeaux, Tribal Police Chief Ronald Vidallia ("Vidallia"), and the Casino in district court alleging a violation of his civil rights. **[**3]** At the time of the incident, Wirick was authorized to act under the Bureau of Indian Affairs ("BIA") Special Law Enforcement Commission ("SLEC") and the St. Mary Parish Sheriff's Deputy Commission. According to Wirick et al., because of the overlapping federal, state and tribal jurisdictions on Indian reservations, Wirick was permitted to enforce the law under all three jurisdictions. ***HN1***[] Pursuant to the ***Indian Self-Determination*** and Education Assistance Act, *25 U.S.C. § 450 (2005)*, ***tribes*** can contract with the BIA to perform law enforcement services. Additionally, under the Indian Law Enforcement Reform Act, *25 U.S.C. § 2803 (2005)*, the BIA can commission an SLEC to assist the BIA in providing law enforcement services. Accordingly, prior to the altercation underlying this appeal, the BIA signed a Deputation Agreement with the Chitimacha Police Department in which the BIA agreed to and did issue an SLEC to Wirick, cross deputizing him as a BIA law enforcement officer.

[*485] Testimony of David Nicholas ("Nicholas"), BIA Special Agent in Charge for the District 6 Office,

however, revealed that Wirick was not employed by the BIA as a Special Agent. **[**4]** He explained that Wirick was an SLEC under a Deputation Agreement and thereby, the BIA had no direct supervision of him. Furthermore, Nicholas testified that tribal officers with SLECs had the same authority as BIA officers and therefore an SLEC does not grant tribal officers the authority to enforce state law. On the other hand, Wirick's supervisor, Vidallia, testified that Wirick had the authority to arrest non-Indians for state law violations and that Wirick was under the direct control of the Chitimacha Police Department.

After Hebert filed the lawsuit, Wirick and Vidallia contacted the local United States Attorney, pursuant to the Federal Tort Claims Act ("FTCA"), *28 U.S.C §§ 2674*, *1346 (2005)*, requesting representation in preparation for their defense. The United States, however, refused to certify the parties' scope of employment as federal in nature and therefore did not agree to provide legal counsel. As a result, Wirick and Vidallia reached a settlement in the amount of $ 25,000 with Hebert.

On January 2, 2003, after the settlement agreement was made, Wirick and Vidallia answered the original complaint made by Hebert and filed a third party complaint **[**5]** naming the United States as the third party defendant pursuant to the FTCA. Wirick and Vidallia asserted that the United States should be substituted as a defendant because they were acting within the course and scope of their employment as law enforcement officers of the BIA. Specifically, Wirick and Vidallia sought reimbursement for the settlement amount paid to Hebert. Therefore, the district court dismissed Hebert's claims against Wirick and Vidallia and joined the United States as a third party defendant.

Accordingly, the United States filed a motion to dismiss for lack of subject matter jurisdiction on July 16, 2003, stating that the United States had not waived sovereign immunity to be sued for indemnification under the FTCA. The district court denied this motion and a subsequent motion by the United States for summary judgment. Thereafter, the United States filed a second motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies. The district court granted this motion, but only concerning the *§ 1983* claims; the motion to dismiss was denied as to the negligence and battery claims. Furthermore, prior to trial, the district court **[**6]** also dismissed Hebert's claims for attorneys' fees. To complicate matters further, Indian Nations Insurance Company ("Indian Nations"), the insurer of Wirick and Vidallia, then intervened in the lawsuit, claiming a right of subrogation for funding the settlement payment to Hebert.

Wirick et al. consented to trial before a magistrate judge on January 4, 2005. The court concluded that Wirick was not covered under the FTCA because he was not enforcing federal law, denied the claims of Wirick et al. and dismissed the case with prejudice. Thereafter, on February 22, 2005, Wirick et al. filed a timely notice of appeal asserting that the magistrate judge erred in dismissing the underlying civil rights claim because Wirick was acting within the scope of his employment and thus should have been provided coverage by the FTCA.

II. DISCUSSION

A. Standard of Review

HN2[↑] Under the FTCA, *28 U.S.C. § 1346(b) (2005)*, if an act was not committed by an **[*486]** employee of the United States, then the district court must dismiss for lack of subject matter jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*. *Linkous v. United States, 142 F.3d 271, 275 (5th Cir. 1998).* **[**7]** Accordingly, this case was dismissed by the district court. Therefore,***HN3***[↑] "we apply a de novo standard of review to the question of whether an individual is an employee of the government for purposes of the FTCA." *Id.* (citations omitted); *Musslewhite v. State Bar of Tex., 32 F.3d 942, 945 (5th Cir. 1994)* (holding that a district court's dismissal for lack of subject matter jurisdiction warrants de novo review).

B. Scope of Employment

First we note that the magistrate judge did not determine what law Wirick et al. were acting pursuant to in this case, though their brief erroneously quotes the lower court as determining that "Wirick was acting under the ***Tribe***'s inherent sovereignty." Instead, the magistrate judge correctly determined what law Wirick et al. were *not* acting under. For the reasons stated below in excerpts from the magistrate judge's Findings of Facts and Conclusions of Law, as well as our own independent analysis, we find that the FTCA precludes the present action for reimbursement against the government.

HN4[↑] The FTCA imposes liability upon the United States for the tortious conduct of its employees, when acting within the course and scope of their **[**8]** employment, in the same manner and to the same

extent as a private individual under like circumstances. 28 U.S.C. §§ 2674, 1346. The United States represents defendants sued in their individual capacities when they have acted within the scope of their federal employment and it is in the interests of the United States to afford representation. 28 C.F.R. § 50.15 (2005). When Congress enacted the FTCA, it waived the government's immunity from liability for certain torts, in particular for the negligent acts of government employees acting within the scope of their employment. 28 U.S.C. § 1346(b). There is, however, an exception to that limited waiver of immunity, under which the United States retained its immunity from suit for certain enumerated intentional torts, including "any claim arising out of assault, battery, [or] false imprisonment." 28 U.S.C. § 2680(h) (2005).

Furthermore, ***HN5***[↑] this exception excludes assault and battery and similar claims allegedly committed by "investigative or law enforcement officers of the United States government." *Id*. "Investigative or law enforcement officer" **[**9]** is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Therefore, because the case before us involves an assault and battery claim, we must determine if this "investigative or law enforcement officer" exception applies. In other words, the question is whether Hebert's arrest was made pursuant to federal law, triggering FTCA protection. Finding no applicable Fifth Circuit case law, the magistrate judge relied on Dry v. United States, 235 F.3d 1249 (10th Cir. 2000).

In *Dry*, Choctaw Nation Tribal officers arrested Native Americans on Choctaw land and charged them with numerous offenses in tribal court. Id. at 1251. The tribal members then filed suit against certain law enforcement personnel and asserted constitutional violations in concert with ***FTCA claims***. *Id*. The district court found the FTCA inapplicable and dismissed all claims against the tribal defendants. Id. at 1255. On appeal, the Tenth Circuit determined that the tribal defendants **[*487]** were not acting as "federal investigative or law enforcement officers" **[**10]** under 28 U.S.C. § 2680. Id. at 1257. Instead, the court concluded they were acting under the ***Tribe***'s inherent tribal sovereignty over its own members and stated that "Indian ***tribes*** have power to enforce their criminal laws against ***tribe*** members." Id. at 1254.

We agree with Wirick et al. that there is an obvious difference between Dry and the case before us. In *Dry*, the parties were tribal members; in this case, the parties to the original domestic dispute and subsequent altercation involving Hebert are not tribal members. Therefore, Wirick et al. assert that Wirick and Vidallia could not have been acting pursuant to the Chitimacha ***Tribe***'s inherent authority. Even the United States Attorney who refused representation to Wirick and Vidallia initially argued that they were acting pursuant to state law because the Chitimacha ***Tribe*** does not possess criminal jurisdiction over non-Indians within its reservation. *See* Oliphant v. Suquamish Indian ***Tribe***, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Nonetheless, we do not find it necessary to squarely decide the state law versus tribal authority question in order **[**11]** to dispose of the appeal before us. The magistrate judge correctly decided the salient issue presented to it, Wirick and Vidallia did not act within the scope of federal employment in order for FTCA coverage to attach to Hebert's claim. Neither Wirick nor Vidallia were employed as Bureau of Indian Affairs law enforcement officers or special agents, nor were they acting in accordance with any special commission to assist the Bureau of Indian Affairs with providing law enforcement services. In short, the record demonstrates that no enforcement of federal law occurred when Hebert was arrested.

The parties also rely on the six-page Deputation Agreement issued by the United States Bureau of Indian Affairs to bolster their respective arguments regarding Wirick and Vidailla's employment status. Wirick et al. refer to key language in the contract discussing "when law enforcement officers arrest a criminal suspect, the officers may not know if the suspect or the victim is an Indian . . . ." The government highlights that the contract also provides, "the purpose" of the Agreement, on its face, is "to provide commissioned officers the authority to enforce federal and tribal laws only." The main **[**12]** point of this contract, however, is that there is an agreement conferring powers inherent to tribal officers to a non-Native American officer from St. Mary Parish, Louisiana. It may be debatable whether Wirick was acting in accordance with state law or inherent tribal law when he responded to the domestic disturbance at the casino and later entered into an altercation with Hebert. Nonetheless, it is clear that Wirick was not enforcing federal law. Accordingly, this case does not trigger the "investigative or law enforcement officer" exception to the FTCA.

C. Sovereign Immunity

In this appeal, both parties also address whether the United States has waived its sovereign immunity. The

underlying basis of Hebert's federal court complaint against Wirick, Vidallia, the Chitimacha Tribal Police, Casino employee Virginia Desormeaux, and the Casino is an alleged violation of his Constitutional rights under color of state law.

HN6[] "The United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Smith v. Booth, 823 F.2d 94, 96 (5th Cir. 1987)*. Sovereign immunity protects the United States from **[*488]** liability, **[**13]** and deprives the court of subject matter jurisdiction over the claims against it. *See United States v. Mitchell, 463 U.S. 206, 212, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)*. The FTCA is a waiver of sovereign immunity, allowing the Federal Government to be sued for the actions of any employee of the government while acting within the course and scope of his office or employment under circumstances where the United States would be liable if it were a private employer. *28 U.S.C. § 1346*. Having determined that Wirick and Vidallia were not enforcing federal law and, thus, were not acting under powers provided by the federal government, we need not entertain the assertion that, "even if Hebert alleges *[§] 1983* claims, the government must still step in and defend if the federal employee is acting within the course of his employment." As we have stated, Wirick and Vidallia, for purposes of this appeal, are not federal employees who acted within the scope of their employment. Accordingly, we find that Wirick and Vidallia's conclusory assertions are insufficient to sustain their burden to show that sovereign immunity was waived by the government with regard to their **[**14]** *§ 1983* claim.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

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As of: April 12, 2021 6:15 AM Z

After v. United States

United States District Court for the District of South Dakota, Central Division

July 18, 2012, Decided; July 19, 2012, Filed

CIV 10-3019-RAL

Reporter
2012 U.S. Dist. LEXIS 100265 *; 2012 WL 2951556

LORETTA RUNS AFTER, next friend and Legal Guardian of T.M. (a minor child), Plaintiff, vs. THE UNITED STATES OF AMERICA, Defendant.

Subsequent History: Affirmed by *After v. United States, 2013 U.S. App. LEXIS 13383 (8th Cir. S.D., July 1, 2013)*

Core Terms

claimant, presentment, tribal court, district court, sovereign immunity, present a claim, federal agency, requesting, subject matter jurisdiction, juvenile detention, documentation, extenuating circumstances, legal representative, minor child, regulations, asserts, merits

Case Summary

Overview

Federal Tort Claims Act action brought by a grandmother on behalf of her grandson for injuries sustained while incarcerated at a juvenile detention center was dismissed because the grandmother failed to comply with *28 U.S.C.S. § 2675(a)*'s presentment requirement and therefore the court lacked jurisdiction. The grandmother asserted that the U.S. possessed all or at least some of the juvenile personal property sheets listing the grandmother as the grandson's guardian and various tribal court documents at the time of the initial investigation but provided no evidence to support her contention.

Outcome
Motion granted.

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Fed. R. Civ. P. 12(b)(1) provides for the dismissal of a suit when the court lacks subject matter jurisdiction. The United States Court of Appeals for the Eighth Circuit has drawn a distinction between facial and factual *Rule 12(b)(1)* motions, explaining the applicable standard in each instance. When faced with a factual *Rule 12(b)(1)* motion,. the trial court may proceed as it never could under *Rule 12(b)(6)* or *Fed. R. Civ. P. 56*. Because at issue in a factual *Rule 12(b)(1)* motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive

truthfulness attaches to the 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. The burden of proving subject matter jurisdiction falls on the plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

Governments > Federal Government > Claims By & Against

HN2 Affirmative Defenses, Immunity

Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN3 Liability, Federal Tort Claims Act

The Federal Tort Claims Act, 28 U.S.C.S. §§ 2671-2680, contains a limited waiver of the United States' sovereign immunity for certain torts committed by government employees, granting federal district courts jurisdiction over claims against the United States for money damages for: injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of 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. 28 U.S.C.S. § 1346(b)(1).

Governments > Native Americans > Tribal Sovereign Immunity

Torts > ... > Liability > Federal Tort Claims Act > Employees

HN4 Native Americans, Tribal Sovereign Immunity

Congress has expanded the liability of the United States under the Federal Tort Claims Act, 28 U.S.C.S. §§ 2671-2680, to employees working pursuant to 638 contracts entered into by Indian ***tribes*** or tribal organizations and the Federal Government. The United States therefore can be liable for tortious acts committed by employees of the tribal detention center, which operates pursuant to a 638 contract.

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN5 Claim Presentation, Content & Form

The procedural requirements of 28 U.S.C.S. § 2675(a) limit the Federal Tort Claims Act's (FTCA), 28 U.S.C.S. §§ 2671-2680, waiver of sovereign immunity by prohibiting a plaintiff from bringing suit against the United States unless the plaintiff first "presents" the claim to the proper federal agency. Specifically, § 2675(a) provides that an FTCA action shall not be instituted upon a claim against the United States unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency. The presentment requirement of § 2675(a) is jurisdictional and must be pleaded and proven by the FTCA claimant.

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN6 Claim Presentation, Content & Form

See 28 C.F.R. § 14.2(a).

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN7 Claim Presentation, Content & Form

A properly "presented" claim under 28 U.S.C.S. §

2675(a) must include evidence of a representative's authority to act on behalf of the claim's beneficiaries under state law. The Eighth Circuit further held that failure to properly present an Federal Tort Claims Act, 28 U.S.C.S. §§ 2671-2680, claim is a jurisdictional defect because a claim that fails to satisfy § 2675(a)'s requirements remains inchoate, unperfected, and not judicially actionable.

Governments > Courts > Judicial Precedent

HN8 **Courts, Judicial Precedent**

The United States District Court for the District of South Dakota, Central Division, is bound to follow Eighth Circuit precedent.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Evidence > Burdens of Proof > Allocation

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

When a defendant challenges subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdictional facts.

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN10 **Claim Presentation, Content & Form**

The focus under the Mader case is not whether a plaintiff has actual authority to bring a claim, but whether the plaintiff has first presented to the appropriate federal agency evidence of his or her authority to act on behalf of the claim's beneficiaries under state law. 28 U.S.C.S. § 2675(a). The Eighth Circuit has adopted this approach as consistent with Congress's desire to give federal agencies the initial opportunity to review Federal Tort Claims Act, 28 U.S.C.S. §§ 2671-2680, claims; without evidence of a plaintiffs authority to represent a claim's beneficiaries, federal agencies cannot seriously consider settling the claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > Public Entity Liability > Immunities > Sovereign Immunity

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN11 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Compliance with 28 U.S.C.S. § 2675(a) is a jurisdictional term of the Federal Tort Claims Act's, 28 U.S.C.S. §§ 2671-2680, limited waiver of sovereign immunity. Congress alone has the power to waive the United States' sovereign immunity and to set the terms and conditions of such a waiver.

Counsel: **[*1]** For Loretta Runs After, next friend and Legal Guardian of T.M. (a minor child), Plaintiff: James C. Cerney, LEAD ATTORNEY, Cerney Law Office PLLC, Mobridge, SD; Margaret E. Bad Warrior, Zuya Sica Law Office PLLC, Eagle Butte, SD.

For United States of America, Defendant: Camela C. Theeler, LEAD ATTORNEY, U.S. Attorney's Office (Sioux Falls, SD), Sioux Falls, SD.

Judges: ROBERTO A. LANGE, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERTO A. LANGE

Opinion

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Loretta Runs After, the legal guardian of T.M., a minor child, brought this case under the Federal Tort Claims Act ("FTCA"), *28 U.S.C. §§ 2671-2680*, against Defendant, the United States of America. Doc. 7. Defendant seeks, and Runs After opposes, dismissal of the complaint under *Federal Rule of Civil Procedure 12(b)(1)* for lack of subject-matter jurisdiction. Doc. 25; Doc. 26; Doc. 27; Doc. 28; Doc. 29; Doc. 32. For the reasons explained below, this Court believes that it must grant Defendant's motion to dismiss.

II. FACTS

T.M. was born in 1996 and is an enrolled member of the Cheyenne River Sioux ***Tribe*** ("***Tribe***"). Doc. 28-1. T.M. has lived with Runs After, who is his grandmother, on the Cheyenne River Sioux Indian **[*2]** Reservation since he was approximately three months old. Doc. 28-2. On September 10, 2002, a tribal court judge granted Runs After temporary custody of T.M. Doc. 29.

In 2008, at age 12, T.M. was placed in the juvenile detention center in Eagle Butte, South Dakota. Doc. 28-2. The ***Tribe*** operates the juvenile detention center pursuant to a "638 contract." [1] Runs After alleges that while T.M. was incarcerated at the juvenile detention center, T.M.'s fellow inmates sexually assaulted him and branded the letter "c" [2] into his arm. Doc. 7; Doc. 28-2. Defendant disputes these allegations. [3] Shortly after T.M. was released from the juvenile detention center, Runs After filed an affidavit with the tribal court requesting that the court transfer temporary custody of T.M. to George Montreal, Sr., T.M.'s grandfather. Doc. 29-24. The tribal court gave Montreal physical custody of T.M and made T.M. a ward of the court on September 30, 2008. Doc. 29-25. Montreal returned T.M. to Runs After and T.M.'s mother on October 31, 2008. Doc. 29-26. The tribal court returned physical custody of T.M. to Runs After on January 23, 2009, and terminated its wardship over him on February 18, 2009. Doc. 29-36; Doc. **[*3]** 29-37.

On June 17, 2009, James Cerney, Runs After's **[*4]** attorney, submitted an administrative claim on a Standard Form 95 [4] to the Office of the Field Solicitor for the Department of the Interior contending that the staff of the Cheyenne River juvenile detention center was negligent in their supervision of the juvenile detainees. Doc. 27; Doc. 27-1; Doc. 27-2. The Standard Form 95 contains a box for the claimant's signature and asks for the name and address of the claimant and the claimant's personal representative. The instruction section of the Standard Form 95 explains:

> The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal

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[1] A "638 contract," or self-determination contract, is an agreement between a ***tribe*** and the federal government under the ***Indian Self-Determination*** and Education Assistance Act ("ISDEAA") of 1975. The ISDEAA allows ***tribes*** to enter into agreements with the federal government to administer services formerly administered by the federal government on behalf of the ***tribe***. See *Hinsley v. Standing Rock Child Protective Servs., 516 F.3d 668, 670 (8th Cir. 2008)*. The agreements are commonly referred to as "638 contracts," based on the public law number of the 1975 Act. See *United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993)*; *25 U.S.C. § 450h*.

[2] Presumably the "c" stood for the Crypts gang.

[3] Specifically, Defendant contends "[t]he only witness listed in the claim submission regarding T.M.'s sexual assault has since recanted in writing. The evidence also shows that T.M. wanted to become a gang member and asked that the gang symbol for the 'Crypts' be burned into him as part of the initiation 'ceremony.' T.M. told to his friend that he is a Crypts gang member and denied to medical providers that he was assaulted in any way." Doc. 32 at 3 n.2.

[4] Standard Form 95 is the prescribed form for presenting ***FTCA claims***. See *28 C.F.R. § 14.2(a)* ("For purposes of the provisions of *28 U.S.C. §§ 2401(b)*, *2672*, and *2675*, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident . . .").

> capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

Doc. 27-1; see also *28 C.F.R. § 14.2(a)*. Cerney listed T.M. as the **[*5]** claimant and himself and attorney Peg Bad Warrior as T.M.'s personal representatives. Doc. 27-1. Cerney signed the "signature of claimant" section of the Standard Form 95 as "James Cerney Attorney for minor child." Id. The Standard Form 95 did not contain any mention of Runs After. Cerney failed to provide any evidence of authority to act for T.M when he submitted the Standard Form 95. Doc. 27-1.

On November 23, 2009, Jason Bramwell, a paralegal for the Office of the Field Solicitor, sent Cerney a letter acknowledging receipt of the claim and stating "[p]lease submit a copy of interviews, medical reports and additional evidence in support of [T.M.'s] claim. In addition, kindly submit evidence of your authority to represent T.M. (See *28 C.F.R. § 14.2(a)*). Please provide the requested information **[*6]** within twenty days from the date of this letter." Doc. 27-3. In a footnote to the letter, Bramwell explained:

> You have not submitted documentation evidencing that you have authority to represent the claimant in accordance with *28 C.F.R. § 14.2(a)*. Evidence of authority to represent a claimant generally consists of a fully executed representation agreement. Since this documentation was not provided, a copy of this letter is being sent to Loretta Runs After, claimant's parent/guardian. [5]

Id.

On December 9, 2009, Cerney's legal assistant, Amy Thue, sent Bramwell some of T.M.'s medical records. Doc. 28-3. Thue sent Bramwell additional medical records concerning T.M. on January 4, 2010, Doc. 28-4. On February 1, 2010, Bramwell sent Cerney and Bad Warrior a second letter requesting evidence of their authority to represent T.M. Doc. 27-4. The letter contained the same footnote **[*7]** as the November 23, 2009 letter. Id.

On February 5, 2010, Thue sent Bramwell a "retainer contract/attorney agreement" signed by Cerney, Bad Warrior, and Runs After as the legal custodian of T.M. Doc. 27-5. Emails between Cerney, Bad Warrior, and Thue indicate that Cerney thought that submitting the attorney agreement would satisfy Bramwell's request for evidence of Cerney's authority to represent T.M. [6]

On March 23, 2010, the Field Solicitor sent Cerney and Bad Warrior a letter denying Runs After's claim. Doc. 27-6. The letter explained that the claim failed "to establish that a federal employee, or tribal employee covered by the FTCA extension, committed a negligent or wrongful **[*8]** act cognizable under the FTCA. Therefore, the claim is hereby denied." Doc. 27-6. In a footnote, the Field Solicitor stated "[w]e have not received documentation evidencing that Ms. Runs After is the legal custodian of [T.M.]. If a request for reconsideration is submitted, please also provide evidence that Ms. Runs After is the legal custodian of [T.M.]." Id.

Rather than submitting a request for reconsideration, Runs After filed the present law suit on August 27, 2010. Doc. 1. In opposition to Defendant's motion to dismiss, Runs After filed a series of exhibits that include, among other things, juvenile personal property sheets listing Runs After as T.M.'s guardian and various tribal court documents concerning T.M. Doc. 29-1 through Doc. 29-46. [7]

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[5] The affidavit of Jason C. Bramwell filed in this case established that the administrative record for this ***FTCA claim*** contained only two tribal court records—a Cash Bond signed by Runs After as "Parent/Guardian" of T.M., and an Application for Temporary Release listing no information about T.M.'s parent or guardian. Doc. 32-1.

[6] In a December 7, 2009 email to Thue, Cerney stated "please include the attorney client agreement to SG so they have proof we are representing [T.M.]." Doc. 28-5. In a February 3, 2010 email to Bad Warrior, Cerney wrote "[w]e received a letter today from the SG office. They are requesting documentation of our authority to represent [T.M.]. They are also asking for supporting information as evidence to the rape. We will go ahead and forward a copy of the attorney client agreement to resolve issue one." Doc. 28-6.

[7] Specifically, Doc. 29-1 through Doc. 29-46 consist of: Doc. 29-1, an April 6, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-2, an April 7, 2008 juvenile profile sheet listing Runs After as T.M.'s guardian; Doc. 29-3, an April 7, 2008 cash bond form from tribal court that Runs After signed as T.M.'s guardian; Doc. 29-4, a May 2, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; **[*9]** Doc. 29-5, a May 2, 2008 cash bond form from tribal court that Runs After signed as T.M.'s guardian; Doc. 29-6, a June 17, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-

Runs After does not contend that she provided these documents to Defendant as part of her claim prior to the lawsuit. Runs After asserts in her argument that Defendant has been in possession of Docs. 29-1 through 29-23 since Defendant's "initial investigation." Doc. 28 at 2, 7. Defendant, however, filed an affidavit of Jason Bramwell establishing that the only tribal court orders in the administrative record were an August 20, 2008 cash bond form from the tribal court that Runs After signed as T.M.'s parent/guardian, and Runs After's September 3, 2008 application to the tribal juvenile detention center requesting T.M.'s temporary release. Doc. 32-1, Runs After did not file any affidavit or other material to dispute the Bramwell affidavit.

III. DISCUSSION

A. Dismissal Under *Rule 12(b)(1)*

HN1[↑] *Federal Rule of Civil Procedure 12(b)(1)* provides **[*14]** for the dismissal of a suit when the court lacks subject matter jurisdiction. The United States Court of Appeals for the Eighth Circuit has drawn a distinction between facial and factual *12(b)(1)* motions,

7, a June 17, 2008 tribal court detention order in the matter of T.M. listing Runs After as a respondent; Doc. 29-8, a June 19, 2008 personal recognizance bond from tribal court which Runs After signed as T.M.'s parent/guardian; Doc. 29-9, an August 1, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-10, an August 7, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-11, an August 7, 2008 tribal court detention order in the matter of T.M. listing Runs After as the respondent; Doc. 29-12, an August 7, 2008 tribal court order listing Runs After as T.M.'s guardian and notifying Runs After that T.M. had been taken into temporary custody; Doc. 29-13, an August 12, 2008 tribal court order setting an advisory hearing in the matter of T.M. and listing Runs After as the respondent; Doc, 29-14, an August 20, 2008 explanation of the terms of T.M.'s house arrest that Runs After signed as T.M.'s parent; Doc. 29-15, an August **[*10]** 20, 2008 cash bond form from tribal court that Runs After signed as T.M.'s parent/guardian; Doc. 29-16, T.M.'s August 20, 2008 probation supervision contract that Runs After signed as T.M.'s parent/guardian; Doc. 29-17, an August 27, 2008 tribal court order listing Runs After as T.M.'s parent/guardian and notifying Runs After that T.M. had been taken into temporary custody; Doc. 29-18, an August 31, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-19, a September 5, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-20, a September 8, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-21, a September 10, 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-22, a September 11, 2008 detention order in the matter of T.M. listing Runs after as the respondent; Doc. 29-23, a September 17, 2008 tribal court detention order in the matter of T.M. listing Runs After as the respondent; Doc. 29-24, a September 18, 2008 temporary custody order in the matter of T.M. listing Runs After as the respondent; Doc. 29-25, a September 30, 2008 tribal court order in the **[*11]** matter of T.M. temporarily releasing T.M. to the custody of Gary Montreal and listing Runs After as an interested party in attendance at the hearing; Doc. 29-26, a November 5, 2008 tribal court order continuing a detainment hearing in the matter of T.M. and listing Runs After as a respondent; Doc. 29-27, a November 14, 2008 tribal court terms of release order in the matter of T.M. that listed Buffy Handboy or Toni Handboy as the respondent; Doc. 29-28, a November 17, 2008 juvenile personal property sheet listing the tribal court as T.M.'s guardian; Doc. 29-29, a November 17, 2008 tribal court order continuing a hearing in the matter of T.M. and listing Buffy Handboy or Toni Handboy as the respondents; Doc. 29-30, a November 23, 2008 juvenile personal property sheet listing the tribal court as T.M.'s guardian; Doc. 29-31, a December 11, 2008 tribal court order in the matter of T.M. listing Runs After as a respondent; Doc. 29-32, a December 18, 2008 application to the tribal juvenile detention center filled out by Runs After and requesting T.M.'s temporary release; Doc. 29-33, a December 23, 2008 request by Runs After that T.M. be temporarily released to her; Doc. 29-34, a December 29, **[*12]** 2008 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-35, a January 13, 2009 tribal court order continuing a hearing in the matter of T.M. and listing Runs After as a respondent; Doc. 29-36, a January 23, 2009 tribal court order of disposition in the matter of T.M. listing Runs After as a respondent; Doc. 29-37, a February 18, 2009 order of dismissal in the matter of T.M. listing Runs After as a respondent; Doc. 29-38, a March 31, 2009 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-39, an April 3, 2009 personal recognizance bond form from tribal court that Runs After signed as T.M.'s parent/guardian; Doc. 29-40, a June 24, 2009 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-41, a June 27, 2009 personal recognizance bond form from tribal court that Runs After signed as T.M.'s parent/legal guardian; Doc. 29-42, a September 20, 2009 juvenile personal property sheet listing Runs After as T.M.'s guardian; Doc. 29-43, a September 22, 2009 personal recognizance bond form from tribal court that Runs After signed as T.M.'s guardian; Doc. 29-44, a September 21, 2009 juvenile personal property sheet **[*13]** that lists Runs After as T.M.'s guardian; Doc. 29-45, an October 15, 2009 document from the South Dakota Human Services Center listing Runs After as T.M.'s guardian; and Doc. 29-46, a November 30, 2011 tribal court order in the matter of T.M. dismissing Montreal's petition for custody and stating that physical custody of T.M. would remain with Runs After.

explaining the applicable standard in each instance. See Osborn v. United States, 918 F.2d 724, 728-730 (8th Cir. 1990); J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Bd., No. Civ. 11-4008-RAL, 842 F. Supp. 2d 1163, 2012 U.S. Dist. LEXIS 4164, 2012 WL 113866, at *7 (D. S.D. Jan. 13, 2012). When faced with a factual 12(b)(1) motion like the one Defendant has made:

> the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the 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.

Id. at 730 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). **[*15]** "The burden of proving subject matter jurisdiction falls on the plaintiff." VS Ltd. P'ship v. Dep't of Hous. & Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000). Here, the parties have submitted evidence in support of and in resistance to the motion to dismiss, and this Court will consider such evidence as it relates to the jurisdictional challenge.

B. Sovereign Immunity

HN2[] "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). HN3[] The FTCA contains a limited waiver of the United States' sovereign immunity for certain torts committed by government employees, granting federal district courts jurisdiction over claims against the United States for money damages for:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of 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.

28 U.S.C. § 1346(b)(1). HN4[] Congress has expanded the liability of the **[*16]** United States under the FTCA to employees working pursuant to 638 contracts entered into by Indian ***tribes*** or tribal organizations and the Federal Government. Demontiney v. U.S. ex rel. Dep't of Interior, 255 F.3d 801, 806 (9th Cir. 2001); Felix Cohen, Federal Indian Law § 22.02[4][a] (2005). The United States therefore can be liable for tortious acts committed by employees of the tribal detention center, which operates pursuant to a 638 contract.

HN5[] The procedural requirements of 28 U.S.C. § 2675(a) limit the FTCA's waiver of sovereign immunity by prohibiting a plaintiff from bringing suit against the United States unless the plaintiff first "presents" the claim to the proper federal agency. See Mader v. United States, 654 F.3d 794, 798 (8th Cir. 2011) (en banc); Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993). Specifically, § 2675(a) provides that an FTCA action "shall not be instituted upon a claim against the United States ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." The presentment requirement of § 2675(a) "is jurisdictional and must be pleaded and proven by **[*17]** the FTCA claimant." Bellecourt, 994 F.2d at 430; see also Mader, 654 F.3d at 805 ("We have long held that compliance with § 2675(a)'s presentment requirement is a jurisdictional precondition to filing an ***FTCA claim*** in federal district court.").

In the present case, Defendant contends that Runs After failed to comply with § 2675(a)'s presentment requirement and that this Court therefore lacks jurisdiction to entertain Runs After's suit. Although the FTCA does not identify the exact information plaintiffs must provide to properly "present" their claim to a federal agency, the Attorney General has promulgated a regulation defining § 2675(a)'s presentment requirement. See 28 C.F.R. § 14.2(a); Mader, 654 F.3d at 798. Section 14.2(a) reads:

> HN6[] For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, [1] an executed Standard Form 95 or other written notification of an incident, [2] accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the **[*18]** incident; and [3] the title or legal capacity of

> the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

Prior to 2011, there was conflicting authority within the Eighth Circuit concerning whether representatives of FTCA claimants had to provide evidence of authority to act on behalf of such claimants to satisfy § 2675(a)'s presentment requirement. While one Eighth Circuit panel held that § 2675(a) requires a representative to submit evidence of authority to act for an FTCA plaintiff, Lunsford v. United States, 570 F.2d 221, 225-26 (8th Cir. 1977), a later Eighth Circuit panel stated that a plaintiff satisfies § 2675(a)'s presentment requirement when the plaintiff provides the relevant agency with "(1) sufficient information for the agency to investigate the claims . . . and (2) the amount of damages sought." Farmers State Sav. Bank v. Farmers Home Admin., 866 F.2d 276, 277 (8th Cir. 1989). The Eighth Circuit directly addressed and resolved the divide in authority among Eighth Circuit panels on the evidence-of-authority question in its en banc decision **[*19]** in Mader.

In Mader, the widow of a man who had committed suicide after a doctor at the Veterans Affairs ("VA") hospital altered his course of treatment completed a Standard Form 95 on which she claimed to be the personal representative of her husband's estate. Mader, 654 F.3d at 798-99. The widow's attorney signed the form and sent it to the VA. Id. at 799. Upon receipt of the form, the VA sent the widow's attorney a letter requesting evidence of the widow's authority to represent her husband's estate. When no one responded to the letter, the VA telephoned the widow's attorney several times, again asking for evidence of authority. Id. Neither the widow nor the widow's attorney ever provided such authority. The VA denied the widow's claim because of her failure to provide evidence of her authority and, in the alternative, denied the claim on the merits. Id. The widow filed an ***FTCA claim*** against the United States in federal district court, purporting to be her husband's personal representative. Id. The district court found that the widow had failed to provide evidence of her authority under § 2675(a) and dismissed the widow's claim for lack of federal subject matter jurisdiction. Id. **[*20]** An Eighth Circuit panel reversed and decided that § 2675(a) did not require the widow to submit evidence of her authority. The United States sought and was granted rehearing en banc.

Before the en banc Eighth Circuit, the widow argued that the proper standard to determine whether a claimant had satisfied § 2675(a)'s presentment requirement was the "minimal notice" standard of Farmers Home Admin., 866 F.2d at 277. By a seven-to-five margin, the Eighth Circuit disagreed. When interpreting the meaning of the term "presented" under § 2675(a), the Eighth Circuit considered the text of the FTCA and "its context, object, and policy." Mader, 654 F.3d at 800. By amending the FTCA in the form of 28 U.S.C. §§ 2672 and 2675(a), the Eighth Circuit explained, Congress "intended to give agencies the first opportunity to meaningfully consider and settle ***FTCA claims***." Id. at 803. Evidence of an FTCA plaintiff's authority to represent a claim's beneficiaries is important to the settlement process envisioned by Congress, because "agencies simply cannot meaningfully consider ***FTCA claims*** with an eye towards settlement if representatives fail to first present evidence of their authority to act on behalf **[*21]** of claims' beneficiaries." Id. In keeping with congressional intent to allow federal agencies the initial opportunity to review ***FTCA claims***, the Eighth Circuit held that ***HN7***[⬆] "a properly 'presented' claim under § 2675(a) must include evidence of a representative's authority to act on behalf of the claim's beneficiaries under state law." [8] Id. The Eighth Circuit further held that failure to properly present an ***FTCA claim*** is a jurisdictional defect because "a claim that fails to satisfy § 2675(a)'s requirements remains inchoate, unperfected, and not judicially actionable." Id. at 807. Because the widow in Mader had failed to provide such evidence despite numerous requests from the VA, the Eighth Circuit affirmed the district court's decision to dismiss the widow's claim for lack of subject matter jurisdiction. Id. at 808.

The Mader decision is at odds with other circuits that have refused to deem it a jurisdictional defect for an FTCA claimant to fail to present evidence of a claimant's representative capacity. See id. at 809-10 (Bye, J., dissenting); see also Transco Leasing Corp. v. United States, 896 F.2d 1435, 1443 (5th Cir. 1990) ("Because ... the regulations promulgated pursuant to § 2672 are

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[8] The requirement of evidence of a representative's capacity is spelled out in 28 C.F.R. § 14.2(a) and not explicitly in § 2675(a). Despite debate over the authority of the Attorney General to add such a requirement or whether to make such a requirement jurisdictional, the majority opinion in Mader read into § 2675(a) the requirement, jurisdictional in nature, of presentment **[*22]** of evidence of authority to act to the Government prior to filing an FTCA case. Mader, 654 F.3d at 804-08; see also id. at 808-16 (Bye, J., dissenting).

independent of the jurisdictional notice requirements of § 2675(a), the Bank's failure to comply with Regulation 14.3(e) is not a jurisdictional bar to the claims of [the decedent's] widow and daughter."); Knapp v. United States, 844 F.2d 376, 379 (6th Cir. 1988) ("[T]he regulations contained in 28 C.F.R. §§ 14.1-14.11 govern administrative settlement proceedings; they do not set federal jurisdictional prerequisites.") (internal marks and citations omitted); GAF Corp. v. United States, 818 F.2d 901, 905, 260 U.S. App. D.C. 252 (D.C. Cir. 1987) (holding that the regulations contained in 28 C.F.R. §§ 14.1-14.11 "do not govern the jurisdictional requirements of § 2675(a)); Warren v. U.S. Dep't of Interior, 724 F.2d 776, 778-79 (9th Cir. 1984) **[*23]** (declining to interpret the evidence-of-authority requirement as jurisdictional). If Runs After's case were in a district court outside of the Eighth Circuit, her claim might well survive the motion to dismiss. ***HN8***[↑] This Court, however, is bound to follow Eighth Circuit precedent. See Hood v. United States, 342 F.3d 861, 864 (8th Cir. 2003)("The District Court ... is bound ... to apply the precedent of this Circuit.").

Defendant, relying on Mader, asserts that Runs After did not satisfy § 2675(a) because she failed to submit evidence of her authority to represent T.M. prior to filing suit and that this Court therefore lacks subject matter jurisdiction over Runs After's claim. ***HN9***[↑] When, as in the present case, a defendant challenges subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdictional facts. See VS Ltd. P'ship, 235 F.3d at 1112. Runs After has failed to meet this burden. Runs After asserts that Defendant possessed all or at least some of Doc. 29-1 through Doc. 29-46 at the time of the Department of Interior's initial investigation, but has provided no evidence—by way of affidavit or otherwise—to support this contention. Defendant's reference **[*24]** in pre-suit letters to Runs After as T.M.'s "parent/guardian" reveals that Defendant had some information regarding Runs After's relationship with T.M., but Defendant has explained that the only tribal court record in its possession at the time containing that information was the August 20, 2008 cash bond fo rm signed by Runs After as T.M.'s parent/guardian. Doc. 32-1. The United States could not rely on the cash bond as proof of Runs After's authority to make an ***FTCA claim*** for T.M.; indeed, between the time of the cash bond and the Standard Form 95, the guardian for T.M. changed from Runs After to George Montreal, Sr. and then back to Runs After. Cf. Mader, 654 F.3d at 801-803. Runs After submitted no affidavit showing what evidence of her authority to represent T.M. that she or Cerney provided to Defendant as part of the administrative claim. Nor has Runs After sought to have any evidentiary hearing before this Court to challenge Defendant's proof that only two tribal court records were part of its administrative file, neither of which conclusively established Runs After to be the one authorized to make the claim.

Runs After advances two main arguments in an attempt to distinguish **[*25]** her case from Mader. First, Runs After asserts that she and Cerney were more responsive and open to Defendant's requests than were the attorney and widow in Mader, which in fact is true. Despite this difference, however, Runs After and the widow in Mader both committed the same critical error: neither one provided the appropriate agency with evidence of their authority to represent the FTCA claimant in question. There is nothing in the majority opinion in Mader to suggest that an effort by an FTCA claimant that falls short of providing proof of representative authority under the Eighth Circuit's interpretation of § 2675(a) is sufficient to avoid dismissal of the claim.

Second, Runs After contends that unlike the widow in Mader, she actually has authority to bring a claim on behalf of T.M, which also appears to be true. However, ***HN10***[↑] the focus under Mader is not whether a plaintiff has actual authority to bring a claim, but whether the plaintiff has first presented to the appropriate federal agency evidence of his or her authority "to act on behalf of the claim's beneficiaries under state law." Mader, 654 F.3d at 803; see also 28 U.S.C. § 2675(a) ("An [FTCA] action shall not be instituted **[*26]** . . . unless the claimant shall have *first* presented the claim to the appropriate Federal agency . . ."') (emphasis added). The Eighth Circuit adopted this approach as consistent with Congress's desire to give federal agencies the initial opportunity to review ***FTCA claims***; without evidence of a plaintiffs authority to represent a claim's beneficiaries, federal agencies cannot seriously consider settling the claim. See Mader, 654 F.3d at 803. The Eighth Circuit in Mader referred to the widow's lack of authority to bring the claim as an alternative ground for dismissal, after concluding that it was the absence of compliance with the requirement of presentment of representative authority that justified dismissal of the claim. Id. at 808.

In addition to her attempts to distinguish her case from Mader, Runs After contends that her failure to submit evidence of her authority was harmless because the Department of the Interior investigated her claim and

denied it on the merits. [9] The Eighth Circuit's majority opinion in Mader that ***HN11***[↑] compliance with § 2675(a) "is a jurisdictional term of the FTCA's limited waiver of sovereign immunity" forecloses this argument. *Mader, 654 F.3d at 808*. Congress **[*27]** alone has the power to waive the United States' sovereign immunity and to set the terms and conditions of such a waiver. See *United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660, 67 S. Ct. 601, 91 L. Ed. 577, 108 Ct. Cl. 763 (1947)* ("It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress."). Because, at least in the Eighth Circuit, presentment of authority to represent a claimant is a condition to the United States' waiver of sovereign immunity under the FTCA, *Mader, 654 F.3d at 800*, the Department of the Interior's denial of Runs After's claim on the merits cannot excuse Runs After's failure to submit evidence of her authority to represent T.M. After all, in Mader, the VA had denied the widow's claim on its merits, *Id. at 799*, yet the Eighth Circuit did not thereby deem the lack of presentment of representative authority to be harmless.

Defendant could have been more explicit in its requests for evidence of Runs After's authority to bring a claim on behalf of T.M. After all, Bramwell's letters to Cerney asked for evidence of "*your* authority to represent [T.M.] (See *28 C.F.R. § 14.2(a)*)." Doc. 27-3 (emphasis added); see also Doc. 27-4. Yet Defendant's communications were not so ambiguous or confusing as to mislead Runs After or her attorneys into thinking that the attorney agreement was sufficient to satisfy the presentment requirement as interpreted and applied in Mader. Defendant's letters stated that "[y]ou have not submitted documentation evidencing that you have authority to represent the claimant in accordance with *28 C.F.R. § 14.2(a)*." Doc. 27-3; Doc. 27-4. In addition, the instruction section of the Standard Form 95 parrots the language of *28 C.F.R. § 14.2(a)* and explains that when a claim is signed by an agent or legal representative, "it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, **[*29]** executor, administrator, parent, guardian or other representative." Doc. 27-1; see also *28 C.F.R. § 14.2(a)*. Nor, as Runs After asserts, does the attorney agreement by itself satisfy *§ 14.2(a)*'s presentment requirement. Although indicative of Cerney's authority to represent Runs After, the attorney agreement does not establish that either Runs After or Cerney had authority to bring an ***FTCA claim*** on behalf of T.M.

This Court has considered whether the rationale of the district court in *Forest v. United States, 539 F. Supp. 171 (D. Mont. 1982)* justifies denying the motion to dismiss. The court in Forest acknowledged the presentment requirement's jurisdictional nature, yet held that the failure of a decedent's sister to provide evidence of her authority to represent the decedent's minor child was an "'extenuating circumstance' sufficient to excuse literal compliance" with *§ 14.2(a)*'s presentment requirement. *539 F. Supp. at 174*. In reaching this conclusion, the court explained that the "function of *28 U.S.C. § 2401(b)* and *§ 2675(a)* is to provide 'for more fair and equitable treatment of private individuals when they are involved in litigation with their government.'" *Id. at 174* (quoting **[*30]** S. Rep. No. 89-1327, at 2515-16). This differs from the majority opinion in Mader, which determined Congress's intent in enacting *§§ 2675(a)* and *2672* to be to allow federal agencies the initial opportunity to review and settle ***FTCA claims***. *654 F.3d at 803*. The Forest court's reliance on *House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978)* overruled by *Warren v. U.S. Dep't of Interior, 724 F.2d 776, 780 (9th Cir. 1984)*, also makes it difficult for this Court to follow Forest. In House, the Ninth Circuit held that an attorney's failure to provide evidence of his authority to represent an FTCA claimant deprived a district court of jurisdiction to hear the suit "in the absence of unusual and extenuating circumstances ..." *573 F.2d at 618*. [10] The court in Forest found that the "need to protect the rights of minor children" was an extenuating circumstance. *539 F. Supp. at 174*. Unlike *House*, the Mader decision does not contemplate an "extenuating circumstance" exception to *§ 14.2(a)*'s presentment requirement. This Court is reluctant to create an "extenuating circumstance" exception on its own in light of the majority opinion in *Mader* and believes it best for the Eighth Circuit **[*31]** to determine

[9] As noted above, the Department of the Interior's denial letter also stated "[w]e have not received documentation evidencing that Ms. Runs After is the legal custodian of [T.M.]. If a request for reconsideration is **[*28]** submitted, please also provide evidence that Ms. Runs After is the legal custodian of [T.M.]." Doc. 27-6.

[10] The Ninth Circuit overruled *House* in Warren by declining to interpret *28 C.F.R. § 14.3(e)*—which contained the evidence-of-authority requirement prior to 1987—as jurisdictional. *Warren, 724 F.2d at 779-80*.

if such an exception exists and should apply here.

This Court is cognizant that the result of this decision is a harsh one. A minor, through no fault of his own, might be barred from bringing an ***FTCA claim***. Outside of the Eighth Circuit, where the presentment-of-authority responsibility set forth in *28 C.F.R. § 14.2(a)* is not deemed jurisdictional, this case would not be susceptible to dismissal. See *Transco Leasing Corp., 896 F.2d at 1443*; *Knapp, 844 F.2d at 379-80*; *GAF Corp. v. United States, 818 F.2d at 905*; *Warren, 724 F.2d at 778-79*; *Champagne v. United States, 573 F. Supp. 488, 491-93 (E.D. La. 1983)* (widow satisfied presentment requirement even though she failed to provide evidence of her authority to present ***FTCA claim*** on behalf of minor children). From the perspective of this Court, it is for the Eighth Circuit to determine whether Mader ought to be modified or some exception created to allow the claim to survive the motion to dismiss, and ultimately is up to **[*32]** the Supreme Court of the United States to determine whether Mader or decisions from other circuit courts of appeals properly interpret and apply *§ 2675(a)*. This Court, however, is bound to follow Eighth Circuit precedent. *Hood, 342 F.3d at 864*.

IV. CONCLUSION

For the reasons stated above, it is hereby

ORDERED that Defendants' Motion to Dismiss (Doc. 25) is granted.

Dated July 18, 2012.

BY THE COURT:

/s/ Roberto A. Lange

ROBERTO A. LANGE

UNITED STATES DISTRICT JUDGE

Stago v. Wide Ruins Cmty. Sch., Inc.

Navajo Nation Supreme Court

May 4, 2001, Decided

No. SC-CV-63-99

Reporter
2001 Navajo Sup. LEXIS 5 *

DR. LULA MAE STAGO, PETITIONER/APPELLEE, v. WIDE RUINS COMMUNITY SCHOOL, INC., RESPONDENT/APPELLANT.

Subsequent History: Vacated by, On reconsideration by *Stago v. Wide Ruins Cmty. Sch., 2002 Navajo Sup. LEXIS 8 (2002)*

Related proceeding at *Wide Ruins Cmty. Sch., Inc. v. Stago, 2003 U.S. Dist. LEXIS 16147 (D. Ariz., July 15, 2003)*

Prior History: **[*1]** Appeal of a decision by the Navajo Nation Labor Commission, Case NNLC No. 98-038.

Core Terms

Tribally, Schools, federal court, organizations, ***tribe***, tribal organization, attorney's fees, school board, backpay, Federal Tort Claims Act, tribally-controlled, suits, hire, subject matter jurisdiction, exclusive jurisdiction, personal injury action, executive director, self determination, sovereign immunity, lack jurisdiction, civil suit, out-of-pocket, contractor, coverage, expenses, waived

Counsel: Stephen K. Smith, Esq., and Howard Brown, Esq., Flagstaff, Arizona, for the Respondent /Appellant.

Lawrence A. Ruzow, Esq., Window Rock, Navajo Nation (Arizona), for the Petitioner/Appellee.

Judges: Before Yazzie, Chief Justice, Austin and *Morris (*by designation), Associate Justices.

Opinion by: Yazzie

Opinion

In December 1999, the Navajo Nation Labor Commission ("Commission") awarded the Appellee, Dr. Lula Mae Stago, back pay, out-of-pocket expenses, and attorney's fees upon finding that the Appellant, Wide Ruins Community School, Inc. ("Wide Ruins") had violated the Navajo Preference in Employment Act ("NPEA"). The issue before us is whether the Federal Tort Claims Act ("FTCA") precluded the Commission from hearing the case. We hold that under the FTCA, Wide Ruins can only be sued in federal court and thus the Commission lacked jurisdiction over Dr. Stago's claims.

I.

Wide Ruins' status as a tribally controlled school (or grant school) pursuant to federal law (Tribally Controlled Schools Act, *25 U.S.C. §§ 2501-2511*) and sanctioned as such by the Navajo Nation is not in dispute. Wide Ruins has been a tribally controlled school since **[*2]** February 1, 1998. A tribally controlled school is "a school, operated by a ***tribe*** or a tribal organization, enrolling students in kindergarten through grade 12, including preschools, which is not a local educational agency and which is not directly administered by the

Bureau of Indian Affairs." 25 U.S.C. § 2511(5).

In January 1998, the school board for Wide Ruins interviewed Dr. Stago and Albert A. Yazzie for the position of executive director of Wide Ruins. According to school board guidelines, a Master's Degree in Educational Administration was required for the position, although the board might allow for such alternatives as it found "appropriate and acceptable." Commission's Interim Order at 3 (August 20, 1999). The board hired Mr. Yazzie for the position, although he lacked the required degree (which Dr. Stago possessed).

Dr. Stago filed a complaint with the Commission, alleging that Wide Ruins had violated the NPEA, 15 N.N.C. §§ 601 et seq., by hiring Mr. Yazzie. Specifically, Dr. Stago claimed that the school board failed to hire the best qualified Navajo for the position. The Commission agreed, and after finding that Dr. Stago had no duty to mitigate damages by accepting the higher **[*3]** paying position of principal, awarded her back pay and out-of-pocket expenses in the amount of $27,700, along with attorney's fees in the amount of $8,633.47. The Commission further ordered Wide Ruins to readvertise for the position of executive director. Wide Ruins appealed to this Court, contending inter alia that the Commission lacked subject matter jurisdiction over Dr. Stago's action and that the federal courts have exclusive jurisdiction. This Court first denied the appeal, but later agreed to reconsider the case. Dr. Stago cross appeals on the time period of her back pay award and the hourly rate set by the Commission for her attorney's fees.

II.

A. The Federal Tort Claims Act

According to 25 U.S.C. § 450f, Historical and Statutory Notes, "an Indian ***tribe***, tribal organization or Indian contractor" acting under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501-2511, or the ***Indian Self-Determination*** and Education Assistance Act of 1975, 25 U.S.C. §§ 450 et. seq., "is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services" with respect to civil suits against **[*4]** them. Any civil claim against ***tribes***, organizations, and contractors covered under the two Acts "shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act." Thus, Wide Ruins is part of the Bureau of Indian Affairs and it is protected by the FTCA. The United States specifically waived its sovereign immunity regarding claims against grant schools that fall under the two Acts. However, such claims must be litigated in federal district court, as Congress granted these courts "exclusive jurisdiction" over ***FTCA claims***. 28 U.S.C. § 1346(b).

According to 25 U.S.C. § 450f, tribal organizations performing functions authorized by the Tribally Controlled Schools Act of 1988 are considered part of the Bureau of Indian Affairs. Suits against such organizations must be brought under the FTCA, as this is the only instance in which the United States has waived the sovereign immunity that would usually be accorded the Bureau of Indian Affairs in these cases. Wide Ruins is a tribal organization operating a tribally-controlled school under the Tribally Controlled Schools Act. Thus, **[*5]** Wide Ruins can only be sued in federal court, under the FTCA. The Commission therefore lacked jurisdiction over Dr. Stago's claims.

B. 25 U.S.C. § 450e(c)

Dr. Stago wants the Tribally-Controlled Schools Act construed narrowly to support the Navajo Nation's and federal government's goal of enhancing tribal sovereignty, and Congress' express authorization for use of "tribal employment ... preference laws." See 25 U.S.C. § 450e(c). This statute says:

Notwithstanding subsections (a) and (b) of this section [which deals with wage and labor standards and Indian preference in employment], with respect to any self determination contract, or portion of a self determination contract, that is intended to benefit one ***tribe***, the tribal employment or contract preference laws adopted by such ***tribe*** shall govern with respect to the administration of the contract or portion of the contract.

Dr. Stago also wants the FTCA construed to cover only personal injury actions against grant schools.

We are not persuaded by Dr. Stago's arguments. Section 450f, Historical and Statutory Notes, explicitly states that "any civil action" pursuant to the Tribally Controlled Schools Act "shall be deemed an action against **[*6]** the United States ... and be afforded the full protection and coverage of the Federal Tort Claims Act." The FTCA explicitly states that "any claim" against a tribal organization covered by the Tribally Controlled Schools Act must be brought under the FTCA in federal court. Also, there is no evidence that Congress wanted to limit suits against grant schools to personal injury actions. We find that Dr. Stago's claims belong in

federal court.

III.

Because tribal organizations running tribally-controlled schools are considered part of the Bureau of Indian Affairs for the purpose of civil suits against them, suits against such organizations must be brought in federal court under the FTCA. The Commission's decision is therefore vacated, and Dr. Stago's case is dismissed due to lack of subject matter jurisdiction.

Filed this 4th day of May, 2001.

Perry v. Seminole Tribe of Fla.

United States District Court for the Middle District of Florida, Tampa Division

July 30, 2009, Decided; July 30, 2009, Filed

CASE NO. 8:08-CV-2455-T-17TBM

Reporter
2009 U.S. Dist. LEXIS 66150 *; 2009 WL 2365892

WILLIAM BERNARD PERRY, Plaintiff, v. SEMINOLE ***TRIBE*** OF FLORIDA, etc., et al., Defendants.

Core Terms

Tribe, motion to dismiss, lack of subject matter jurisdiction, tribal government, unmistakable, immune, tribal, employees, failure to state a claim, federal government, sovereign immunity, act of congress, waive immunity, Self-Determination, abrogation, Arrest, viable, moot

Counsel: [*1] For William Bernard Perry, Plaintiff: Carl Roland Hayes, LEAD ATTORNEY, Law Office of Carl R. Hayes, Tampa, FL.

For Seminole Police Department, William Latchford, Chief of Seminole Police, Johnny Nuckles, Seminole ***Tribe*** of Florida, Defendants: Donald A. Orlovsky, LEAD ATTORNEY, Kamen & Orlovsky, PA, West Palm Beach, FL.

Judges: ELIZABETH A. KOVACHEVICH, UNITED STATES DISTRICT JUDGE.

Opinion by: ELIZABETH A. KOVACHEVICH

Opinion

ORDER

This cause is before the Court on:

Dkt. 7 Motion to Dismiss for Lack of Subject Matter Jurisdiction
Dkt. 9 Order to Show Cause

In the Amended Complaint (Dkt. 6), Plaintiff William Bernard Perry seeks compensatory and punitive damages for violation of the *First Amendment*, *Fourth Amendment*, *Fifth Amendment*, *Eighth Amendment* and *Fourteenth Amendment*.

Plaintiff's Complaint arises from events which took place on September 15, 2007 on the Tampa Reservation of the Seminole ***Tribe*** of Florida. At that time, Plaintiff Perry alleges Plaintiff went to the "Seminole Hard Rock Casino, Inc." to pick up his girlfriend at 3:00 a.m. Plaintiff Perry was arrested and charged with DUI and Resisting Arrest Without Violence. These charges were terminated in favor Plaintiff Perry on September 8, 2008 in Hillsborough **[*2]** County Criminal Court.

I. Motion to Dismiss under *Rule 12(b)(1), Fed.R.Civ.P.*

Defendants move for dismissal of this case under *Rule 12(b)(1), Fed.R.Civ.P.*, because this Court does not have subject matter jurisdiction over Plaintiff's claims, based on the doctrine of tribal sovereign immunity. Defendants argue that each Defendant is immune from suit. Defendants argue that, in the absence of a clear, express and unmistakable waiver of immunity by the Seminole ***Tribe*** of Florida, or the clear, express and unmistakable abrogation of immunity by act of Congress, federal and state courts do not have jurisdiction to resolve civil disputes brought against the Seminole ***Tribe*** or any of its subordinate governmental units and its Tribal Police Officers and other employees and agents. *See Kiowa **Tribe** of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.*

Ct. 1700, 140 L. Ed. 2d 981 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi ***Tribe*** of Oklahoma, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

Defendants argue that Plaintiff's only claim arising from the conduct alleged in his Amended Complaint would be an action brought solely and exclusively against the United States of America under the Federal Tort Claims Act, 28 U.S.C. Sec. 2671 et seq., **[*3]** upon compliance with the condition precedent of notice to the United States of America on Form 95. Defendants argue that, under the FTCA, the Seminole ***Tribe*** and its employees, including Officer Nuckles and Chief Latchford, are deemed to be federal employees. Defendants argue that all claims against Indian ***tribes***, such as the Seminole ***Tribe***, arising from the ***Indian Self-Determination*** and Education act, Public Law 93-638, including police functions, be deemed and brought against the United States. *See* 25 U.S.C. Secs. 450-450n. The federal government provides liability insurance to the tribal government when the tribal government carries out a federal function pursuant to a self-determination contract, based on the legal trust relationship between the tribal government and the federal government. *See* FGS Contructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8th Cir. 1995).

Plaintiff Perry has not filed a response in opposition to Defendants' Motion to Dismiss for lack of subject matter jurisdiction. After consideration, the Court finds that there has been no clear, express and unmistakable waiver of immunity by the Seminole ***Tribe*** of Florida, nor has there been a clear, express and unmistakable **[*4]** abrogation of tribal immunity by an act of Congress. The Court therefore dismisses this case for lack of subject matter jurisdiction.

II. Motion to Dismiss under Rule 12(b)(6), Fed.R.Civ.P.

Defendants also move to dismiss for failure state a claim, under Rule 12(b)(6), Fed.R.Civ.P. Defendants argue that Plaintiff's constitutional claim does not state a claim against Defendants, either individually or officially, arising under 42 U.S.C. Sec. 1983, because Defendants could not have acted under color of state law. Defendants argue that the common law immunity from suit enjoyed by Defendant Seminole ***Tribe*** extends to Defendants Seminole Police Department, Chief Latchford and Officer Nuckles, and shields them from liability under 42 U.S.C. Sec. 1983. Defendants argue that the First, Fourth, Fifth, Eighth and Fourteenth Amendments do not constrain Indian ***tribes***, which are regarded as separate sovereign tribal governments predating the Constitution.

Defendants argue that if Plaintiff Perry has a viable claim under the FTCA, the claim against the United States covers all claims against all moving Defendants. Defendants also argue that if the ***FTCA claim*** is not viable, Plaintiff's claim fails on **[*5]** jurisdictional grounds, since Defendants are each immune from suit under the doctrine of tribal sovereign immunity.

Because the Court has dismissed this case based on lack of subject matter jurisdiction, the Court denies the Motion to Dismiss for failure to state a claim as moot. Accordingly, it is

ORDERED that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is **granted**, and Defendants' Motion to Dismiss for Failure to State a Claim is **denied** as moot. The Clerk of Court shall close this case.

DONE and ORDERED in Chambers, in Tampa, Florida on this 30th day of July, 2009.

/s/ Elizabeth A. Kovachevich

ELIZABETH A. KOVACHEVICH

UNITED STATES DISTRICT JUDGE

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Emm v. Yerington Paiute Tribe

United States District Court for the District of Nevada

March 28, 2018, Decided; March 28, 2018, Filed

Case No. 3:17-cv-00614-MMD-WGC

Reporter
2018 U.S. Dist. LEXIS 65269 *; 2018 WL 1866155

JOHANNA EMM, Plaintiff, v. YERINGTON PAIUTE ***TRIBE***, et al., Defendants.

Subsequent History: Adopted by, Request granted, Dismissed by, in part, Dismissed without prejudice by, in part *Emm v. Yerington Paiute **Tribe**, 2018 U.S. Dist. LEXIS 64992 (D. Nev., Apr. 18, 2018)*

Dismissed by *Emm v. Yerington Paiute **Tribe**, 2018 U.S. Dist. LEXIS 85935 (D. Nev., May 22, 2018)*

Core Terms

tribe, tribal, allegations, tribal court, violations, powers, medical negligence, leave to amend, self-government, claimant

Counsel: [*1] Johanna Emm, Plaintiff, Pro se, Yerington, NV.

Judges: WILLIAM G. COBB, UNITED STATES MAGISTRATE JUDGE.

Opinion by: WILLIAM G. COBB

Opinion

REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to *28 U.S.C. § 636(b)(1)(B)* and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiffs' Application to Proceed in Forma Pauperis (IFP) (ECF No. 1) and pro se Complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." *28 U.S.C. § 1915(a)(1)*; *Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000)* (en banc) (stating that *28 U.S.C. § 1915* applies to all actions filed IFP, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided **[*2]** by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

"'[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some particularity, definiteness and certainty.'" *U.S. v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981)* (quoting *Jefferson v. United States, 277 F.2d 723, 725 (9th Cir. 1960)*). A litigant

need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339, 69 S. Ct. 85, 93 L. Ed. 43 (1948)*.

A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee; therefore, the application should be granted.

II. SCREENING

A. Standard

"The court shall dismiss the case at any time if the court determines that ... the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." *28 U.S.C. § 1915(e)(2)(B)(i)-(iii)*. This provision applies to all actions filed IFP, whether or not the plaintiff is incarcerated. *See Lopez, 203 F.3d at 1129*; *see also Calhoun v. Stahl, 254 F.3d 845 (9th Cir. 2001)* (per curiam).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in *Federal Rule of Civil Procedure 12(b)(6)*, and *28 U.S.C. § 1915(e)(2)(B)(ii)* tracks that language. Thus, when reviewing the adequacy of a complaint under *28 U.S.C. § 1915(e)(2)(B)(ii)*, the court applies the same standard as is applied under *Rule 12(b)(6)*. *See Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012)* ("The standard for **[*3]** determining whether a plaintiff has failed to state a claim upon which relief can be granted under *§ 1915(e)(2)(B)(ii)* is the same as the *Federal Rule of Civil Procedure 12(b)(6)* standard for failure to state a claim."). Review under *12(b)(6)* is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America, 232 F.3d 719, 723 (9th Cir. 2000)* (citation omitted).

In reviewing the complaint under this standard, the court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)* (citations omitted). Allegations in pro se complaints are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* (internal quotation marks and citation omitted).

A complaint must contain more than a "formulaic recitation of the elements of a cause of action," it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "The pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state "enough facts to state a claim to relief that is plausible **[*4]** on its face." *Id. at 570*; *see also Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

A dismissal should not be without leave to amend unless it is clear from the face of the complaint that the action is frivolous and could not be amended to state a federal claim, or the district court lacks subject matter jurisdiction over the action. *See Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995)*; *O'Loughlin v. Doe, 920 F.2d 614, 616 (9th Cir. 1990)*.

B. Plaintiffs' Complaint

Plaintiff has filed a civil rights complaint pursuant to *42 U.S.C. § 1983*. (ECF No. 1-1.) The caption names the Yerington Paiute ***Tribe*** and the Law Offices of Charles R. Zeh, Esq., as defendants, but the body of the complaint also names Thom, A. Laurie (Administrator/Tribal Chairwoman); Linda L. Howard (Tribal Council Member); Sandra M. Pickens (Tribal Court Judge); Dr. Bruce G. Vogel (Medical Director); Timothy C. Seward (Attorney); David E. Humke (Former Tribal Court Judge); D. Geoffrey D. Stommer (Attorney); Wayne M. Garcia (Former Tribal Chairman 2005); and James C. Van Winkle (Judge, Tribal Court of Appeals).

Plaintiff's complaint contains three counts, which she summarizes as having two components. First, she seeks to restore a medical malpractice claim that she previously filed against Dr. Vogel in the Yerington Paiute Tribal Court in 2007, but the complaint was dismissed as untimely and for **[*5]** lack of jurisdiction. She appealed to the Inter-Tribal Court of Appeals, and the appeal was also dismissed on May 22, 2008. Plaintiff filed another medical negligence claim in tribal court on December 12, 2015, which was dismissed on res judicata grounds. She appealed this determination as well, but it was also dismissed. She sought to take the matter up with the Tribal Council, but was unsuccessful. The medical malpractice actions stemmed from

allegations that on November 7, 2006, Dr. Vogel negligently twisted her neck in a chiropractic manipulation that collapsed her neck, and then denied her surgery for eight months, leaving her in pain.

Second, Plaintiff alleges the denial of due process rights by various tribal officials in connection with the dismissal of her complaint and appeal in tribal court; failure of the tribal council to take action to rectify the matter; and, alleged retaliation for filing the complaint which she claims culminated in the arrest of her son and withholding of her pay check.

The court will address the claims in reverse order.

Plaintiff's due process claims are predicated on *25 U.S.C. § 1302(a)(8)*, *(9)*. *25 U.S.C. § 1301, et. seq.*, is known as the *Indian Civil Rights Act (ICRA)*. In enacting ICRA, Congress established **[*6]** a set of statutory protections for Indians against their tribal governments, which roughly parallel the constitutional rights identified in the *Bill of Rights of the United States Constitution*. *See Wasson v. Pyramid Lake Paiute **Tribe**, 782 F.Supp.2d 1144, 1147 (D. Nev. 2011)*. The requirements of ICRA apply to an "Indian ***Tribe***" when exercising "powers of self-government." ICRA defines "Indian ***tribe***" as "any ***tribe***, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." *25 U.S.C. § 1301(1)*. The "powers of self-government" are defined as:

> all governmental powers possessed by an Indian ***tribe***, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses[ ] and ... the inherent power of Indian ***tribes***, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

25 U.S.C. § 1301(2).

Plaintiff invokes two of the statutory protections provided for in *ICRA*. *Section 1302(a)(8)* provides, similar to the *Fourteenth Amendment of the United States Constitution*, that an Indian ***tribe***, in exercising powers of self-government, shall not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." *Section 1302(a)(9)* provides that an Indian ***tribes*** exercising the powers of self-government **[*7]** shall not pass any bill of attainder or ex post facto law.

In *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*, the Supreme Court held that Congress did not provide for a private cause of action for violations of ICRA against the ***tribe*** or its officers, except for habeas review under *25 U.S.C. § 1303* ("[T]he writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian ***tribe***."). The Supreme Court specifically noted that "Congress considered and rejected proposals for federal review of alleged violations of [ICRA] arising in a civil context." *Santa Clara Pueblo, 436 U.S. at 67*; *see also Williams v. Pyramid Lake Paiute **Tribe**, 625 F.Supp. 1457, 1458 (D. Nev. 1986)* ("[T]he only remedy Congress intended to redress violations of ICRA is a petition for a writ of habeas corpus. ...Although a ***Tribe*** is bound by ICRA, a federal court has no jurisdiction to enjoin violations or to award damages for violations of that Act.").

While Congress enacted ICRA to provide tribal members with certain protections available under the United States Constitution, Congress was also concerned about maintaining the sovereign status of a ***tribe*** to create and maintain its own government. It was this reasoning that led to the determination that there could not be a private right of action for a violation **[*8]** of ICRA except for a petition for writ of habeas corpus contesting the validity of detention by a ***tribe***. In this action, Plaintiff seeks damages, not her release from custody as she is not in custody of the ***tribe***. To the extent she contests her son's custody, even assuming she could assert a habeas claim on his behalf, the complaint alleges that her son was fined and sentenced to thirty days in jail in 2016; therefore, he would no longer be in custody for this offense. Therefore, the court is without jurisdiction to entertain a suit for the alleged violations of ICRA, and those claims should be dismissed.

The court will now address Plaintiff's complaint insofar as she seeks to restore her medical negligence claim against Dr. Vogel. Plaintiff's complaint alleges that her tribal court actions were dismissed, at least in part, on the ground that the tribal court did not have jurisdiction because Dr. Vogel was a federal employee under the *Federal Tort Claims Act (FTCA)*. Therefore, the court will construe Plaintiff's pro se complaint as asserting a medical negligence claim under the FTCA against Dr. Vogel.

In enacting the FTCA, Congress abrogated its sovereign immunity from suit in part to **[*9]** provide that the United States may be liable for damages for negligent torts committed by its employees (or certain independent

contractors) acting within the scope of their 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." *28 U.S.C. § 1346(b)(1)*. Congress extended the FTCA to negligent acts of Tribal contractors carrying out contracts, grants, or cooperative agreements pursuant to *Public Law 93-638, the **Indian Self-Determination** and Education Assistance Act*. *See* *25 U.S.C. § 5321(d)*, *25 U.S.C. § 5396*.

In the event Dr. Vogel was a tribal employee, tribal employees are deemed federal employees for purposes of the FTCA while acting within the scope of their employment in "carrying out" contracts or compacts under the ***Indian Self-Determination*** and Education Assistance Act, or there is a personal services contract with the ***tribe*** and the services are provided in a facility owned, operated or constructed under jurisdiction of Indian Health Service (an agency within the Department of Health and Human Services).

The complaint poses some questions about whether Plaintiff exhausted her administrative remedies with the applicable federal **[*10]** agency, in this case, the Department of Health and Human Services, and whether her claim is barred by the statute of limitations, but because the answers to these questions are not clear from the face of the complaint, they do not serve as a basis for dismissal at this juncture.

A claimant under the FTCA is required to first file an administrative tort claim with the applicable federal agency. *28 U.S.C. § 2675(a)*. The statute of limitations for claims brought under the FTCA is two years from the incident or when the claimant has knowledge of the alleged injury. *28 U.S.C. § 2401(b)*. This would seem to preclude Plaintiff's claim at this late juncture, but this conclusion does not take into account any applicable tolling of the statute of limitations. It should be noted that once an administrative tort claim is filed with the agency, the claimant must wait six months for the government to conduct its administrative review. If the case is not resolved during that six-month review period, the claimant may file suit at any time. If the government denies the administrative claim, suit must be filed within six months of the date of denial.

What is problematic for Plaintiff, however, is that Plaintiff's exclusive remedy under the **[*11]** FTCA is a federal tort claim against the United States. The purported employee, Dr. Vogel, is immune from civil liability. *28 U.S.C. § 2679*. As a result, the ***FTCA claim*** should be dismissed as to Dr. Vogel.

A pro se litigant should be allowed leave to amend his complaint to name the proper party, unless it is clear no amendment could cure the defect. Therefore, Plaintiff should be given leave to amend to assert the FTCA medical negligence claim against the proper party—the United States. Plaintiff should keep in mind the administrative hurdles discussed above in determining whether to file an amended complaint. In other words, if Plaintiff determines that she did not file an administrative tort claim with the agency within two years of the incident (which, construing the allegations liberally, Plaintiff alleges occurred between 2006 and 2009), or did not adhere to the requirements for filing suit after the six-month administrative review period, it is likely any amended complaint would ultimately be dismissed.

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain this action without the **[*12]** necessity of prepayment of fees or costs or the giving of security therefor. This order granting IFP status does not extend to the issuance of subpoenas at government expense.

(2) Directing the Clerk to **FILE** the complaint (ECF No. 1-1);

(3) **DISMISSING** the ICRA claims **WITH PREJUDICE**;

(4) **DISMISSING** the FTCA medical negligence claim against Dr. Vogel, but **WITH LEAVE TO AMEND** to assert the claim against the proper party—the United States.

(5) Plaintiff should be given thirty days leave to amend from the date any order adopting and accepting this Report and Recommendation is filed. Plaintiff should be advised that a failure to timely file an amended complaint will result in dismissal of the action.

Plaintiff should be aware of the following:

1. That she may file, pursuant to *28 U.S.C. § 636(b)(1)(C)*, specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to

Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to *Rule 4(a)(1) of the Federal Rules of Appellate Procedure* should not be filed until entry **[*13]** of judgment by the district court.

DATED: March 28, 2018.

/s/ William G. Cobb

WILLIAM G. COBB

UNITED STATES MAGISTRATE JUDGE

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Trujillo v. United States

United States District Court for the District of New Mexico

November 14, 2003, Date Filed

Civil No. 03-0580 WPJ/LFG

Reporter
313 F. Supp. 2d 1146 *; 2003 U.S. Dist. LEXIS 25141 **

ROBERT TRUJILLO, SR., Individually, and ERLINDA TRUJILLO, as guardian and next friend of ROBERT TRUJILLO, JR, a minor child, Individually and STARLYNE TRUJILLO, a minor child, Individually, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.

Disposition: [1]** Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(1)and 12(b)(6) or, in Alternative, Motion for Summary Judgment Pursuant to Fed.R.Civ. P. 56 GRANTED, case DISMISSED.

Core Terms

tribal, law enforcement officer, assault, battery, Pueblo, arrest, intentional torts, infliction of emotional distress, false imprisonment, federal law, employees, immunity

Case Summary

Procedural Posture

Plaintiffs, arrestee, his wife, and their two minor children, sued defendants, law enforcement officers, and asserted claims for assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, and intentional infliction of emotional distress. The complaint asserted jurisdiction under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq. The officers moved to dismiss or, alternatively, for summary judgment.

Overview

The estranged wife of the arrestee requested that the officers come to her residence because she believed that the arrestee was intoxicated and should not have the children. The arrestee alleged that the officers physically attacked and beat him, that they used excessive, unreasonable, unjustified deadly force without legal probable cause that he had committed any criminal offense, and that the minor children witnessed the alleged attack on their father. The court found that the officers were entitled to summary judgment on the arrestee's claims under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq., because although sovereign immunity was waived for those intentional tort exceptions listed in 28 U.S.C.S. § 2680(h) when committed by law enforcement officers acting within the scope of their employment, under the contract between the Isleta Pueblo and the Bureau of Indian Affairs, the officers did not perform, nor were they called upon to enforce, federal law enforcement duties. Therefore, the intentional tort exception, 28 U.S.C.S. § 2680(h), applied to the officers because they were not federal "law enforcement officers."

Outcome

The officers' motion to dismiss or, in the alternative, motion for summary judgment was granted. The case was dismissed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1 **Supporting Materials, Affidavits**

A party may go beyond the allegations contained in the complaint and challenge the facts upon which jurisdiction depends. A Fed. R. Civ. P. 12(b) motion to dismiss can challenge the substance of the complaint's jurisdictional allegation in spite of its formal sufficiency by relying on affidavits or any other evidence properly before the court. A court has wide discretion to allow affidavits or other documents to resolve disputed jurisdictional facts under Fed. R. Civ. P. 12(b). In such instances, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a Fed. R. Civ. P. 56 motion. However, if resolution of the jurisdictional question is intertwined with the merits of a case, a court must convert a motion to dismiss for lack of subject matter jurisdiction into a motion to dismiss for failure to state claim or motion for summary judgment. A jurisdictional question is intertwined with the merits of a case if subject matter jurisdiction is dependent on the same statute that provides the substantive claim in the case.

Torts > Public Entity Liability > Immunities > General Overview

Administrative Law > Sovereign Immunity

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > Remedies > Damages > Monetary Damages

Governments > Federal Government > Claims By & Against

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

Torts > Public Entity Liability > Liability > General Overview

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Torts > ... > Liability > Federal Tort Claims Act > Elements

Torts > ... > Liability > Federal Tort Claims Act > Jurisdiction

Torts > ... > Liability > Federal Tort Claims Act > Remedies

HN2 **Public Entity Liability, Immunities**

The Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671 et seq., sets forth certain conditions under which the United States waives its sovereign immunity and authorizes suits for damages. The general rule under the FTCA is that the district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages for injury or loss of property,

or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of 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. *28 U.S.C.S. § 1346(b)*. That waiver of immunity is subject to certain statutory exceptions enumerated in *28 U.S.C.S. § 2680*.

Criminal Law & Procedure > Search & Seizure > General Overview

Torts > Intentional Torts > Abuse of Process > Defenses

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

Governments > Federal Government > Employees & Officials

Torts > Intentional Torts > Abuse of Process > General Overview

Torts > Intentional Torts > Assault & Battery > General Overview

Torts > Intentional Torts > False Arrest > General Overview

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Intentional Torts

HN3 **Criminal Law & Procedure, Search & Seizure**

Under *28 U.S.C.S. § 2680(h)*, the United States retains its sovereign immunity with respect to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process and other specified intentional torts. The exception is, however, subject to the following: Provided that, with regard to acts or omissions of investigative or law enforcement officers of the United States government, the provisions of *28 U.S.C.S. § 2680* and *28 U.S.C.S. § 1346(b)* shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of *28 U.S.C.S. § 2680(h)*, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. In other words, sovereign immunity is waived for those intentional tort exceptions listed in *28 U.S.C.S. § 2680(h)* when committed by law enforcement officers acting within the scope of their employment.

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

Public Health & Welfare Law > Social Services > Native Americans

HN4 **Native Americans, Indian Self-Determination & Education Assistance Act**

The objective behind Pub. L. No. 93-638, enacted in 1975 as the ***Indian Self-Determination*** and Education Assistance Act (ISDEAA), *25 U.S.C.S. § 450 et seq.*, was to increase tribal participation in the management of federal Indian programs and activities. ISDEAA allowed ***tribes*** to enter into contracts with the Bureau of Indian Affairs in the Department of the Interior to administer programs or services that would otherwise have been administered by the federal government.

Governments > Native Americans > Authority & Jurisdiction

Public Health & Welfare Law > Social Services > Native Americans

Governments > Federal Government > Employees & Officials

Governments > Native Americans > ***Indian Self-Determination*** & Education Assistance Act

HN5 **Native Americans, Authority & Jurisdiction**

Nothing in the ***Indian Self-Determination*** and Education Assistance Act, *25 U.S.C.S. § 450 et seq.*, or in relevant case law, suggests that the mere existence of a Pub. L. No. 93-638 contract between Bureau of Indian Affairs and a ***tribe*** for the provision of law

enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments. Absent the power to enforce federal law, tribal officers are not federal investigative or law enforcement officers.

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Administrative Law > Sovereign Immunity

Governments > Federal Government > Claims By & Against

Torts > Intentional Torts > Assault & Battery > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Torts > ... > Types of Negligence Actions > Negligent Infliction of Emotional Distress > General Overview

Torts > ... > Federal Tort Claims Act > Exclusions From Liability > Intentional Torts

HN6[] **Liability, Federal Tort Claims Act**

28 U.S.C.S. § 2680(h) does not merely bar claims for assault or battery; it excludes any claim arising out of assault or battery. That includes not only claims sound in negligence, but also those that stem from a battery committed by a government employee. A plaintiff cannot turn an intentional tort into negligence conduct by a turn of a phrase, by merely labeling the conduct as negligence. The nature of a plaintiff's claims are properly determined by focusing not on the label the plaintiff uses, but on the conduct upon which the allegations are premised.

Counsel: For Plaintiffs: Anthony F. Little, Anthony F. Little & Associates, Albuquerque, NM.

For Defendants: Jan E. Mitchell, US Attorney's Office, Albuquerque, NM.

Judges: William P. Johnson, UNITED STATES DISTRICT JUDGE.

Opinion by: William P. Johnson

Opinion

[*1148] MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendant's Motion to Dismiss Pursuant to *Fed.R.Civ.P. 12(b)(l)and 12(b)(6)* or, in the Alternative, Motion for Summary Judgment Pursuant to *Fed.R.Civ. P. 56*, filed October 3, 2003 **(Doc. 8).** Having considered all the pleadings, memoranda and other materials submitted by the parties, as well as the applicable law, I find that Defendants' motion is well-taken and will be granted.

BACKGROUND

The facts of this case start out as a child **[**2]** custody dispute. According to the allegations in the Complaint, Plaintiff Erlinda Trujillo, the estranged spouse of Robert Trujillo, Sr., ("Mr. Trujillo") contacted the Isleta Police Department and requested that law enforcement officers come to her residence located on the Pueblo because she believed that her ex-spouse was intoxicated and should not have the children. Three Isleta Tribal Police officers, Caryn Romero ("Romero"), Darryl Chavez ("Chavez") and Victor Day ("Day) arrived at Erlinda Trujillo's residence shortly after Robert Trujillo, Sr. had departed with the children on route to his grandmother's house. The officers pursued Mr. Trujillo to the grandmother's house. The officers placed the two minor children in the locked back passenger compartment of a police unit and then attempted to place Mr. Trujillo under arrest. Plaintiffs allege that, while Mr. Trujillo remained passive, he would not allow the police officers to place handcuffs on his wrist. Plaintiffs also allege that the three officers physically attacked and beat Robert Trujillo Sr., and used excessive, unreasonable, unjustified deadly force without legal probable cause that he had committed any criminal offense **[**3]** and that the minor children witnessed the alleged attack on

their father. [1]

The Complaint, which asserts jurisdiction under the Federal Tort Claims Act, 28 USC § 1346(b) and § 2671 et seq. ("FTCA"), seeks compensation for assault (Count I), battery (Count II), false arrest (Count III), false imprisonment (Count IV), malicious prosecution (Count V), abuse of process (Count VI), intentional infliction of emotional distress (Count VII), and negligent infliction of emotional distress (Count VIII) for Plaintiff Robert Trujillo, Sr., negligent infliction of emotional distress (Count IX) and false imprisonment (Count X) for Plaintiff Robert Trujillo, Jr., and, negligent infliction of emotional distress (Count XI) and false imprisonment (Count XII) for Plaintiff Starlyne Trujillo.

[4] Legal Standard**

HN1[] A party may go beyond the allegations contained in the complaint and challenge the facts upon which jurisdiction depends. Sizova v. National Institute of Standards & Technology, 282 F.3d 1320, 1324-25 (10th Cir. 2002); Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). A Rule 12(b) motion to dismiss can challenge the substance of the complaint's jurisdictional allegation in spite of its formal sufficiency by relying on affidavits or any other evidence properly before the court. Sizova, 282 F.3d at 1324-25; New Mexicans *[*1149]* for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995). A court has wide discretion to allow affidavits or other documents to resolve disputed jurisdictional facts under Rule 12(b). In such instances, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a Rule 56 motion. Sizova, 282 F.3d 1324-25; Holt, 46 F.3d at 1003. However, if resolution of the jurisdictional question is intertwined with the merits of a case, a court must convert a motion to dismiss for lack of subject matter **[**5]** jurisdiction into a motion to dismiss for failure to state claim or motion for summary judgment. Sizova, 282 F.3d at 1324-25; Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1129 (10th Cir. 1999); Tippett v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997) Holt, 46 F.3d at 1003. A jurisdictional question is intertwined with the merits of a case if subject matter jurisdiction is dependent on the same statute that provides the substantive claim in the case. Sizova, 282 F.3d at 1324-25; Holt, 46 F.3d at 1003. In this case, both the subject matter jurisdiction of this Court and Plaintiffs' substantive claims depend on the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). Resolution of the jurisdictional issue will require the Court to look beyond the allegations in the pleadings. Thus, Defendant's Motion will be converted to and analyzed as a motion for summary judgment pursuant to Fed. R. Civ. P. 56.

DISCUSSION

The FTCA HN2[] sets forth certain conditions under which the United States waives **[**6]** its sovereign immunity and authorizes suits for damages. See Berkovitz v. United States, 486 U.S. 531, 535, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988). The general rule under the FTCA is that the "district courts … shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages … for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of 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." 28 U.S.C. § 1346(b). This waiver of immunity is subject to certain statutory exceptions enumerated in 28 U.S.C. § 2680.

HN3[] Under § 2680(h), the United States retains its sovereign immunity with respect to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process" and other specified intentional torts. The exception is, however, subject to the following:

> *Provided,* That, with **[**7]** regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

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[1] Under Defendant's statement of facts, undisputed by Plaintiffs, Mr. Trujillo was charged in the Isleta Pueblo Tribal Court with several offenses related to the incident. The Tribal Court judge dismissed all charges.

In other words, sovereign immunity is waived for those intentional tort exceptions listed in § 2680(h) when committed by law enforcement officers acting within the scope of their employment. The question to be decided here is whether Officers Romero, Chavez and Day, who responded to Ms. Trujillo's call, were federal law enforcement officers when they allegedly committed the acts described in the Complaint. **[*1150]** Under the language in § 2680(h), Plaintiff's ***FTCA claims*** can proceed only if the answer is yes.

HN4[⬆] The objective behind Public Law 93-638, enacted in 1975 as the ***Indian Self-Determination*** *and Education Assistance Act* ("ISDEAA"), **[**8]** was to increase tribal participation in the management of federal Indian programs and activities. See *25 U.S.C. §§ 450 et seq.* ISDEAA allowed ***tribes*** to enter into contracts with the Bureau of Indian Affairs ("BIA") in the Department of the Interior ("DOI") to administer programs or services that would otherwise have been administered by the federal government. The Isleta Police Department was funded pursuant to a such a contract. The objective, as contained in the contract, was to provide law enforcement services to all pueblo of Isleta residents, according to the guidelines contained in the Pueblo of Isleta Law and Order Code, and to respond to any and all verbal or written complaints registered by residents of the Isleta Indian Reservation.

Defendant acknowledges that the tribal officers involved here are federal employees for purposes of the FTCA by virtue of the *Public Law 93-638* contract that funded the Isleta Police Department. See *25 U.S.C. § 450f(d)*. However, Defendant urges that although the officers are federal employees for purposes of the FTCA, the statutory exceptions in **[**9]** *§ 2680(h)* bar Plaintiffs' claims because they are not federal "law enforcement officers." Plaintiff's reliance on the ISDEAA helps only with the issue which Defendant does not challenge and on which there is no question - that the three tribal officers are considered federal employees under the general provisions of the FTCA. See *Comes Flying v. U.S., 830 F. Supp. 529 (D.S.D. 1993)*.

HN5[⬆] Nothing in the ISDEAA, or in relevant case law, suggests that the mere existence of a Public Law 93-638 contract between BIA and a ***tribe*** for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments. Absent the power to enforce federal law, tribal officers are not federal investigative or law enforcement officers. See, *Dry v. U.S. 235 F.3d 1249, 1257 (10th Cir. 2000)* (although tribal officers had DOI employee status, they acted with tribal law authority, and not as federal law enforcement officers, when acting under a Choctaw/BIA contract under the *Indian Law Enforcement Act*); [2] see also *U.S. v. Rubin, 573 F. Supp. 1123 (D.C.Colo. 1983)* (finding that United States **[**10]** Attorney, his assistants and Justice Department attorneys were not "law enforcement officers" for purposes of *28 U.S.C. § 2680(h)* because they were not empowered to execute search warrants, to seize evidence, or to make arrests for violation of federal law); accord, *Wilson v. U.S., 959 F.2d 12 (2d Cir. 1992)*(involving parole officers).

Thus, the answer to whether Officers Romero, Chavez and Day are "law enforcement officers" under *§ 2680(h)*, lies in the particular contract under **[**11]** which the services are carried out. In *U.S. v. Young, 85 F.3d 334 (8th Cir. 1996)*, cited by Plaintiffs, the court held that a Sioux ***Tribe*** police officer was a federal officer for purposes of *18 U.S.C.A. § 111*, a criminal statute which addresses "assaulting, resisting or impeding certain officers or employees." **[*1151]** This case is not similar enough to the present case to be helpful to Plaintiffs. The court's decision in Young turned on the particulars of the contract the ***tribe*** had entered into with the DOI, which indicated that the tribal officers were hired to perform law-enforcement functions "that would otherwise be performed by BIA officers." Further, the court emphasized that not every person carrying out a "Public law 638 contract" fits the definition of a federal officer -- which brings the inquiry full circle to a look at the contract at issue here.

Defendant has presented evidence which confirms that under the contract between the Isleta Pueblo and the BIA, Officers Romero, Chavez and Day did not perform, nor were they called upon to enforce, federal law enforcement duties. The "Law Enforcement Program" contract between BIA and the Isleta **[**12]** Pueblo did not state or otherwise mention federal law enforcement as one of its objectives. [3] **[**14]** Ex. A, Attachment 1.

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[2] Defendant also offers a case with issues strikingly similar to the present case, Morsette v. U.S., 26 Ind.L.Rep.3052 (Sept 17, 1998), which held that tribal officers, while covered by a self-determination contract and considered federal employees for purposes of FTCA, were not federal law enforcement officers under *§ 2680(h)* absent a showing that they performed federal law enforcement duties, were cross deputized, or were called upon to perform in emergencies to enforce federal law. Ex. C.

[3] As "Contractor," the Pueblo was required to "provide oral

Under the policy directive followed by the BIA, only tribal officers who received special law enforcement officer ("SLEO") commissions could assist the BIA "in enforcing applicable Federal criminal statutes, including Federal hunting and fishing regulations, in Indian country." Bowekaty Decl., Ex. B. [4] These commissions were issued "on a case-by-case basis for each officer being entrusted" with federal authority and responsibility, and issued only to qualified full-time tribal criminal investigators and tribal police officers. Ex. B, and Ex. B, Attachment 1; see also *25 C.F.R. § 12.21(b)*. The Isleta Pueblo's Chief of Law Enforcement stated in his affidavit that Romero, Chavez and Day "were enforcing provisions of the Pueblo of Isleta Law and Order Code and not Federal law." Ex. A. The BIA did not issue SLEO commissions to Officers Romero, Chavez or Day at any time. Plaintiffs do not offer any factual evidence which conflicts with Defendants' Statement of Facts, or which rebuts evidence which indicates that the three officers were not performing **[**13]** the duties of federal law enforcement officers. Nor do Plaintiffs offer evidence which suggests that the officers were "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," in order to bring their allegedly tortious actions within the purview of *§ 2680(h)*. See *Arnsberg v. U.S., 757 F.2d 971 (9th Cir. 1984)* (FTCA limits the United States' liability to instances where wrongful acts by law enforcement officers). I must therefore accept Defendants' material facts and evidence as true. See *Locke v. U.S., 2002 DSD 22, 215 F. Supp.2d 1033 (D.S.D. 2002)* (intentional tort exception to FTCA precluded claim where plaintiff did not challenge evidence to the effect that tribal officer did not receive necessary certification, enforced only tribal laws or ordinances, and was not a federal law enforcement officer).

Under different circumstances, the acts of Romero, Chavez and Day might subject the United States to liability because of their status as federal employees. In the present circumstances, and based on the foregoing discussion, I conclude that the intentional torts exception (*§ 2680(h)*) applies to Officers Romero, Chavez and Day because they are not "law enforcement **[*1152]** officers." Thus, the United States is immune from liability for those claims.

Negligence Claims

Plaintiffs contend that their claims for Negligent and Intentional Infliction of Emotional Distress are not barred by *§ 2680(h)*. However, *§ 2680(h)* ***HN6***[⬆] does not merely bar claims for assault or battery; it "excludes any claim *arising out of* assault or battery." *United States v. Spelar, 338 U.S. 217, 219, 94 L. Ed. 3, 70 S. Ct. 10 (1949)*(emphasis added); *United States v. Shearer, 473 U.S. 52, 55, 87 L. Ed. 2d 38, 105 S. Ct. 3039 (1985)*. This includes not only claims sound in negligence, but also those that stem from a battery committed by a Government employee. **[**15]** *Id.* Plaintiffs cannot turn an intentional tort into negligence conduct by a turn of a phrase -- by merely labeling the conduct as negligence. See *Wine v. United States, 705 F.2d 366, 367 (10th Cir. 1983)*.

The nature of Plaintiffs' claims are properly determined by focusing not on the label Plaintiffs use, but on the conduct upon which the allegations are premised. *Benavidez v. U.S., 177 F.3d 927, 931 (10th Cir. 1999)*. Plaintiffs describe the violating conduct as a "physical assault." They state that the three tribal officers "attacked" and "beat" Mr. Trujillo, and that "in the process they used excessive, unreasonable, unjustified deadly force without legal probable cause …."PP, 20. Because the conduct underlying Plaintiffs' "negligence" claims clearly arises out of Plaintiffs' claims for intentional torts, they are barred by *28 U.S.C. § 2680(h)*. Cmp. *United States v. Shearer, 473 U.S. 52, 87 L. Ed. 2d 38, 105 S. Ct. 3039 (1985)* (assault and battery claim could not be maintained against the United States by couching it in negligence terms).

Request to Amend

Given the disposition of the case, Plaintiffs' request to amend **[**16]** the Complaint to amend a typographical error is denied.

THEREFORE,

IT IS ORDERED that Defendant's Motion to Dismiss Pursuant to *Fed.R.Civ.P. 12(b)(1)and 12(b)(6)* or, in the Alternative, Motion for Summary Judgment Pursuant to

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testimony, written reports, service of warrants, and any other assistance requested by the Isleta Tribal Court and other tribal, federal, and state courts." Ex. A, Attachment 1, at 21. The Contractor was also to "assist" in the investigation of federal or state offenses. However, none of these obligations are analogous with federal law enforcement duties.

[4] Such authorization is pursuant to *25 C.F.R. § 12.21*.

Fed.R.Civ. P. 56 **(Doc. 8)** is hereby GRANTED, and the case is DISMISSED.

William P. Johnson

UNITED STATES DISTRICT JUDGE

End of Document

Roemen v. United States

United States District Court for the District of South Dakota, Southern Division

May 28, 2020, Decided; May 28, 2020, Filed

4:19-CV-4006-LLP

Reporter
463 F. Supp. 3d 990 *; 2020 U.S. Dist. LEXIS 93325 **; 2020 WL 2770555

MICAH ROEMEN, Plaintiff, vs. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.

Subsequent History: Later proceeding at *Roemen v. United States, 2020 U.S. Dist. LEXIS 231754 (D.S.D., Dec. 9, 2020)*

Prior History: *Tom Ten Eyck & Michelle Ten Eyck v. United States, 463 F. Supp. 3d 969, 2020 U.S. Dist. LEXIS 93333, 2020 WL 2770436 (D.S.D., May 28, 2020)*

Core Terms

tribal, ***Tribe***, sovereign immunity, sovereign, certification, alleges, federal government, individual capacity, motion to dismiss, employees, damages, color, official capacity, federal employee, violations, pursuit, constitutional right, tribal land, tort claim, Personnel, immunity, Reservation, Supervisory, Counts, cases, suits, plaintiff's claim, police officer, federal law, authorities

Counsel: **[**1]** For Micah Roemen, Plaintiff: Steven C. Beardsley, LEAD ATTORNEY, Michael S. Beardsley, Beardsley, Jensen & Lee, Prof. L.L.C., Rapid City, SD.

For United States of America, Defendant: Delia M. Druley (USA), Meghan K. Roche, LEAD ATTORNEYS, U.S. Attorney's Office (Sioux Falls, SD), Sioux Falls, SD.

For Robert Neuenfeldt, Individually, Defendant: John K. Nooney, Robert J. Galbraith, LEAD ATTORNEYS, Nooney & Solay, Rapid City, SD; Seth C. Pearman, LEAD ATTORNEY, Flandreau Santee Sioux ***Tribe***, Flandreau, SD.

Judges: Lawrence L. Piersol, United States District Judge.

Opinion by: Lawrence L. Piersol

Opinion

[*994] MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Pending before the Court is a Motion to Dismiss, Doc. 8, filed by defendant, Robert Neuenfeldt ("Neuenfeldt"). For the following reasons, Neuenfeldt's Motion to Dismiss is granted in part and denied in part.

BACKGROUND

On June 18, 2017, Plaintiff, Michal Roemen ("Plaintiff") and Morgan Ten Eyck ("Ten Eyck") were passengers in a vehicle driven by Tahlen Bourassa ("Bourassa"). Doc. 21, ¶¶ 11-13. Plaintiff is resident of Minnehaha County, South Dakota. Doc. 21, ¶ 1. Neither Plaintiff, Bourassa, or Ten Eyck are Indians. Docs. 27-29.

Plaintiff alleges **[**2]** that in the early morning hours of June 18, 2017, Flandreau Tribal Police Officers, along with Moody County Deputy Sheriffs, the South Dakota Highway Patrol, and the City of Flandreau Police Department stopped a vehicle driven by Bourassa. Doc. 21, ¶ 13. Plaintiff alleges that defendant Neuenfeldt, Chief of Police for Flandreau Santee Sioux ***Tribe*** threatened to take Bourassa to jail and that Bourassa then fled in his vehicle accompanied by Plaintiff and Ten Eyck as passengers. Doc. 21, ¶ 14. The police report of the incident states that Neuenfeldt encountered Plaintiff when assisting Moody County Sheriff's Deputies in conducting a security check on a non-tribally-owned, rural property near Dell Rapids, South Dakota. Doc. 29. The Sheriff's Deputies had encountered approximately 20 **[*995]** people having a party on the property without permission from the property owner and issued several citations for underage alcohol consumption. Doc. 29. The scene of the operative events was miles away from the Flandreau Santee Sioux Reservation.

Neuenfeldt and an uncertified deputy for Moody County Sheriff's Office initiated pursuit in Neuenfeldt's tribal police cruiser. Doc. 21, ¶ 15. The South Dakota Highway **[**3]** Patrol was also initially involved in the pursuit. Doc. 21, ¶ 16. It is alleged that "it is believed" that neither Bourassa, Plaintiff, nor Ten Eyck had committed any crimes to justify the pursuit. Doc. 21, ¶ 17. At the time Bourassa's vehicle was stopped, Neuenfeldt and the other officers on the scene knew the identity of the driver, Bourassa, and knew that he was actively being monitored by the South Dakota Parole Board through a GPS ankle bracelet. Doc. 21, ¶¶ 18, 19.

The pursuit took place over thirty minutes reaching speeds in excess of 100 miles per hour on gravel roads. Doc. 21, ¶ 20. On two occasions, spike strips were laid out without proper authorization. Doc. 21, ¶ 21. Plaintiff alleges that it is believed that Neuenfeldt disregarded orders to terminate the pursuit. Doc. 21, ¶ 25. Once the South Dakota Highway Patrol terminated pursuit, Neuenfeldt and his passenger, a deputy from the Moody County Sheriff's Office, continued the pursuit. Doc. 21, ¶ 26. Just prior to the accident, spike strips were laid out and a barricade of police cars forced Bourassa to take a take a dead-end gravel road. Doc. 21, ¶ 22. Plaintiff alleges that Defendants "knew the dead-end road would result **[**4]** in an accident." Doc. 21, ¶ 23. In the course of the pursuit, Bourassa lost control of his vehicle and rolled several times, throwing all three occupants from the vehicle. Doc. 21, ¶ 26. In the accident, Plaintiff sustained a serious closed head injury, pulmonary contusion, broken wrist, vertebral body factures at C1, C2, and C6 and required a halo placement. Doc. 21, ¶ 28. Plaintiff has sustained thousands of dollars in medical bills. Doc. 21, ¶ 29.

On or about April 27, 2018, Plaintiff submitted an Administrative Tort Claim in the amount of $1,000,000 to the United States Department of the Interior pursuant to *28 U.S.C. § 2675*. Doc. 21, ¶ 7. On December 3, 2018, the United States Department of the Interior denied Plaintiff's administrative claim. Doc. 21, ¶ 8.

On January 14, 2019, Plaintiff filed a complaint against the United States of America; Robert Neuenfeldt, individually; and Unknown Supervisory Personnel of the United States, individually. Doc. 1. In his complaint, he alleged claims of negligence against "Defendants;" a claim against Neuenfeldt under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 288, 397 (1971)*; a common law assault and battery claim against Neuenfeldt; and a *Bivens* action against Unknown Supervisory Personnel of the United States. Doc. **[**5]** 1.

On March 12, 2019, Defendant Robert Neuenfeldt filed a motion to dismiss the claims against him. Doc. 8. Therein, Neuenfeldt argues that such claims are barred by tribal sovereign immunity because the Amended Complaint alleges that Neuenfeldt was acting as the ***Tribe***'s Chief of Police when he allegedly engaged in such conduct. Doc. 9 at 7. To the extent the Court considers Neuenfeldt to be a federal employee[1] for purposes of the negligence claim alleged against him in Count I of the Amended Complaint, Neuenfeldt argues **[*996]** that the United States is the proper party under the Federal Tort Claims Act ("FTCA"). With regard to the *Bivens* claim alleged against him in Count II of the Amended Complaint, Neuenfeldt argues that there is nothing within *Bivens*, or any other authority relied upon by Plaintiff, to suggest that *Bivens* provides Plaintiff with a cause of action against employees of a tribal government.

On March 18, 2019, the United States Attorney filed a Certification of Scope of Employment pursuant to *28 C.F.R. § 15.4*, Doc. 12, certifying that Officer Neuenfeldt was an employee of the federal government and was

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[1] It is alleged that at all relevant times, Neuenfeldt was performing functions under a contract entered into by and between the ***Tribe*** and the Federal Government pursuant to *25 U.S.C. § 5321*.

acting within the scope of his office or employment at the time of the alleged conduct with **[**6]** respect to Counts I and III of the complaint alleging negligence and common law assault and battery. The Certification further states that Officer Neuenfeldt was not acting within the scope of his employment with respect to Counts II and IV of the complaint alleging *Bivens* claims against Neuenfeldt and Unknown Supervisory Personnel of the United States for alleged violations of his Constitutional rights. The United States Attorney states in its certification that constitutional tort claims such as those alleged in Counts II and IV are not cognizable under the FTCA, and that the United States and its agencies are not proper *Bivens* defendants due to sovereign immunity. Doc. 12 at 5, n.2 (citing *Washington v. Drug Enforcement Admin., 183 F.3d 868, 874 (8th Cir. 1999)* and *Schutterle v. United States, 74 F.3d 846, 848 (8th Cir. 1996)*).

On April 1, 2019, the Court granted an unopposed motion to amend/correct complaint and Plaintiff filed his Amended Complaint on April 9, 2019. Docs. 16, 19, 21. The allegations and causes of action in the Amended Complaint are virtually identical to those alleged in the initial complaint. As in the initial complaint, in the Amended Complaint, Plaintiff alleges that at all relevant times, the employees of the Police Department of the ***Tribe*** were performing functions pursuant to a Section 638 contract **[**7]** entered into with the United States Government which renders them employees of the United States Government. Doc. 21, ¶ 5. Plaintiff also alleges that at all relevant times, Neuenfeldt was acting as the ***Tribe***'s Chief of Police under color of state and federal law. Doc. 21, ¶ 6.

STANDARD OF REVIEW

Neuenfeldt has moved to dismiss Plaintiff's claims against him for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure*, and pursuant to *Rule 12(b)(6)* for failure to state a claim upon which relief may be granted.

Rule 12(b)(1) Standard

Neuenfeldt argues that this court lacks subject matter jurisdiction over the claims against him because tribal sovereign immunity extends to his actions. The assertion of tribal "[s]overeign immunity is a jurisdictional question" which should be considered irrespective of the merits. *Rupp v. Omaha Indian **Tribe**, 45 F.3d 1241, 1244 (8th Cir. 1995)*; *see also Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989)*. If Neuenfeldt "possess[es] sovereign immunity, then [this court has] no jurisdiction to hear [plaintiff's claims against him]." *See Rupp, 45 F.3d at 1244*.

Rule 12 provides in part that "a party may assert the following defenses by motion: . . . lack of subject-matter jurisdiction . . . ." *Fed. R. Civ. P. 12(b)(1)*. When moving to dismiss under *Rule 12(b)(1)*, a party "may assert either a 'facial' or 'factual' attack on jurisdiction." *Moss v. United States, 895 F.3d 1091, 1097 (8th Cir. 2018)*. A facial attack on jurisdiction **[**8]** "is based on the complaint alone or on undisputed facts **[*997]** in the record." *Harris v. P.A.M. Transp., Inc., 339 F.3d 635, 637 (8th Cir. 2003)*. In a facial attack, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under *Rule 12(b)(6)*. *Carlsen v. GameStop, Inc., 833 F.3d 903, 908 (8th Cir. 2016)*. In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards. *Id.* Considering "matters outside the pleadings when subject matter jurisdiction is challenged under *Rule 12(b)(1)*" does not "convert the 12(b)(1) motion to one for summary judgment." *Harris, 339 F.3d at 637 n.4*.

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the 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.

Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990). Plaintiff, as the party invoking jurisdiction, bears the burden to establish it. *See Green Acres Enters., Inc. v. United States, 418 F.3d 852, 856 (8th Cir. 2005)*.

Neuenfeldt does not specify whether he is a factually **[**9]** or facially challenging subject matter jurisdiction. Neuenfeldt did not file any supporting affidavits or other evidence factually attacking jurisdiction with regard the claims asserted against him, nor has he requested an evidentiary hearing. Instead, Neuenfeldt argues that because Plaintiff has alleged that Neuenfeldt was acting in his capacity as the ***Tribe***'s Chief of Police at all times relevant to this action,

Plaintiff's claims against him are barred by tribal sovereign immunity.

As discussed in more detail below, the fact that Neuenfeldt was acting at all times in his capacity as the ***Tribe***'s Chief of Police is insufficient, on its own, to invoke the doctrine of tribal sovereign immunity. However, in the Court's initial review of Neuenfeldt's motion, the Court found that Plaintiff had pleaded insufficient facts establishing subject matter jurisdiction over the claims alleged against Neuenfeldt. Because it is plaintiff's burden to establish jurisdiction, the Court ordered the parties to provide additional factual information to aid the Court it its jurisdictional analysis. The undisputed facts provided by the parties in response to the Court's order, along with the facts alleged **[**10]** in the Complaint, are sufficient to permit the Court to now rule on the jurisdictional issue raised by Neuenfeldt in his motion to dismiss—that of tribal sovereign immunity.

Rule 12(b)(6) Standard

In considering a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, the factual allegations of a complaint are assumed true and construed in favor of the plaintiff, "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id. at 555* (internal citations omitted). The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief. *Id.; Benton v. Merrill Lynch & **[*998]** Co., Inc., 524 F.3d 866, 870 (8th Cir. 2008)*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Fed. R. Civ. P. 8(a)(2)*). "Determining whether a complaint states a plausible **[**11]** claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. (citation omitted)*.

When considering a motion to dismiss under *Rule 12(b)(6)*, the court generally must ignore materials outside the pleadings, but it may consider "'some materials that are part of the public record or do not contradict the complaint,' as well as materials that are 'necessarily embraced by the pleadings.'" *Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)* (citations omitted). In general, material embraced by the complaint include "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151 (8th Cir. 2012)*.

DISCUSSION

I. Sovereign Immunity

Neuenfeldt argues that because it is alleged and undisputed that at all relevant times, he was acting in his capacity as the ***Tribe***'s Chief of Police, Plaintiff's claims against him are, in essence, official capacity claims and are barred by tribal sovereign immunity.

As sovereign powers, federally-recognized Indian ***tribes*** possess immunity from suit in federal court. *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*; *Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1102 (8th Cir. 2012)*. In this case, Plaintiff is proceeding under *Bivens* against Neuenfeldt in his individual capacity. However, "a plaintiff **[**12]** cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the ***Tribe*** as a defendant, rather than the sovereign entity.'" *Cook v. AVI Casino Enters., Inc., 548 F.3d 718, 727 (9th Cir. 2008)*; *Idaho v. Coeur d'Alene **Tribe** of Idaho, 521 U.S. 261, 270 (1997)* (stating that in determining whether a state official may be liable for money damages in his official capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading."). In order to determine if sovereign immunity applies, courts must ask whether lawsuits brought against officers or employees of the ***tribe*** "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*. If the court answers that question in the affirmative, then the action is an *official* capacity action, and the individual employee is entitled to sovereign immunity. *See id. at 167*.

An allegation, such as that made by Neuenfeldt, "that an employee [such a Neuenfeldt] was acting within the scope of his employment at the time the tort was committed *is not, on its own*, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *See Lewis v. Clarke, 137 S.Ct. 1285, 1288, 197 L. Ed. 2d 631 (2017)* (emphasis added). Instead, courts must determine whether tribal sovereign immunity applies by evaluating whether the sovereign is the "real **[**13]** party in interest." *Lewis, 137 S.Ct. at 1290*. "[T]he general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 107, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*. Thus,

> **[*999]** [a] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting or to compel it to act.'

Pennhurst, 465 U.S. 89 at 102, n.11, 104 S. Ct. 900, 79 L. Ed. 2d 67 (citing *Dugan v. Rank, 372 U.S. 609, 620, 83 S. Ct. 999, 10 L. Ed. 2d 15 (1963)*; *see also Rochester Methodist Hosp. v. Travelers Ins. Co., 728 F.2d 1006, 1012 (8th Cir. 1984)* ("It is well established that agents, even government agents, may be subject to liability either in tort or in contract . . . '[T]he general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought.'"). In determining whether relief sought in a suit nominally addressed to the officer is relief against the sovereign, the Court in *Larson v. Domestic & Foreign Commerce Corp.* stated:

> In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered **[**14]** when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when the agents' actions are restrained, the sovereign itself may, through him, be restrained.

337 U.S. 682, 687-88, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949).

Some circuits such as the Ninth and Tenth Circuit Court of Appeals have held that tribal sovereign immunity never applies to a claim for damages against a tribal officer sued in his individual capacity. *See Pistor v. Garcia, 791 F.3d 1104, 1112 (9th Cir. 2015)*; *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co, 546 F.3d 1288, 1296-97 (10th Cir. 2008)*. In *Pistor v. Garcia*, the Ninth Circuit Court of Appeals noted that:

> As a general matter, individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law," and that were taken in the course of his official duties. By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself: they "'generally **[**15]** represent [merely] another way of pleading an action against an entity of which an officer is an agent.'" For this reason, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, *qua* entity, may possess." An officer sued in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," cannot claim *sovereign* immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally."

791 F.3d 1104, 1112 (9th Cir. 2015). The court concluded "[t]hese same principles fully apply to tribal sovereign immunity." *Id.* The court stated that "[a]lthough [t]ribal sovereign immunity extends to tribal officials when acting in their *official* capacity and within the scope of their authority, tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the **[*1000]** course of their official duties." *Id.* (internal quotation and citations omitted). Citing language from the Tenth Circuit Court of Appeals, the court in *Pistor* stated that:

> The general bar against official-capacity **[**16]** claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out* of actions they took in their official capacities . . . . Rather, it means that tribal officials are immunized from suits brought against them *because* of their official capacities—that is, because the powers they

> possess in those capacities enable them to grant the plaintiffs relief on behalf of the ***tribe***.

Id. (quoting Native Am. Distrib., 546 F.3d at 1296).

In *Pistor*, the court stated that in following this rule articulated by the Tenth Circuit, it held in *Maxwell v. County of San Diego* that two paramedics employed by a ***tribe***, who allegedly provided grossly negligent care to a shooting victim, were not entitled to tribal sovereign immunity from a state tort action brought against them in their individual capacities. *Pistor, 791 F.3d at 1113* (citing *Maxwell, 708 F.3d 1075, 1081, 1089-90 (9th Cir. 2013)*). Conducting a "remedy-focused analysis," the court in *Maxwell* explained:

> Tribal sovereign immunity derives from the same common law principles that shape state and federal sovereign immunity. Normally, a suit like this one—brought against individual officers in their individual capacities—does not implicate sovereign immunity. The plaintiff seeks money damages not from the state treasury but from **[**17]** the officer[s] personally. Due to the essential nature and effect of the relief sought, the sovereign is not the real, substantial party in interest.

Id. (citing *Maxwell, 708 F.3d at 1087-88*). The court in *Pistor* noted that *Maxwell* cautioned that:

> In any suit against tribal officers, we must be sensitive to whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if in effect the judgment would be to restrain the [sovereign] from acting, or to compel it to act."

Id. (citing *Maxwell, 708 F.3d at 1088*).

The *Pistor* court stated that the *Maxwell* court cited *Cook v. AVI Casino Enterprises, Inc., 548 F.3d 718, 725 (9th Cir. 2008)*, and *Hardin v. White Mountain Apache* ***Tribe****, 779 F.2d 476 (9th Cir. 1985)* as examples of lawsuits where the tribal sovereign was the real party in interest. *Id.* In *Cook*, the plaintiffs' object was to reach the public treasury through a respondeat superior ruling. *Id.* (citing *Maxwell, 708 F.3d at 1088*; *Cook, 548 F.3d at 727*). The ***tribe*** in *Cook* was thus "the 'real substantial party in interest,'" and the suit against the tribal officers in their official capacities was therefore barred by sovereign immunity principles. *Id.* (citing *Maxwell, 708 F.3d at 1088*; *Cook, 548 F.3d at 727*). The court stated that likewise, in *Hardin*, sovereign immunity barred the plaintiff from litigating a case against high-ranking tribal counsel members seeking to hold them individually liable for voting **[**18]** to eject the plaintiff from tribal land. *Id.* (citing *Hardin, 779 F.2d at 478*). To hold otherwise, the court stated, would interfere with the ***tribe***'s internal governance. *Id.* ("'*Hardin* was in reality an official capacity suit,' barred by sovereign immunity, because the alternative, to "[h]old[ ] the defendants liable for their legislative functions[,] would . . . have attacked 'the very core of tribal sovereignty.'") (quoting *Maxwell, 708 F.3d at 1089*). The court in *Pistor* stated that:

> *Mawell's* caution about masked official capacity suits aside, it remains "the general **[*1001]** rule that individual officers are liable when sued in their individual capacities." So long as any remedy will operate against the officers individually, and not against the sovereign, there is "no reason to give tribal officers broader sovereign immunity protections than state or federal officers."

Id.

This Court is hesitant to conclude, as does the Ninth and Tenth Circuits, that the general principles of sovereign immunity always apply to define the boundaries of tribal sovereign immunity. Without a doubt, a state or federal law enforcement officer sued for damages in his or her individual capacity for allegedly violating a person's constitutional rights would generally **[**19]** not be entitled to claim sovereign immunity, but would only be entitled only to personal immunity defenses. *See Hafter v. Melo, 502 U.S. 21, 30-31 (1991)* ("[T]he *Eleventh Amendment* does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983."); *Mehrkens v. Blank, 556 F.3d 865, 869 (8th Cir. 2009)* ("In *Bivens*, the Supreme Court established a right of individuals to sue individual federal agents for damages for unconstitutional conduct in [certain circumstances]."). However, as the Supreme Court recently stated in *Upper Skagit Indian* ***Tribe*** *v. Lundgren*, "immunity doctrines lifted from other contexts do not always neatly apply to Indian ***tribes***." *138 S.Ct. 1649, 1654, 200 L. Ed. 2d 931 (2018)* (citing *Kiowa* ***Tribe*** *of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)* ("[T]he immunity possessed by Indian ***tribes*** is not coextensive with that of the States.").

There is nothing in Supreme Court or Eighth Circuit precedent that compels this Court to conclude that a tribal official is precluded from invoking the defense of tribal sovereign immunity to a claim for money damages alleged against the officer in his individual capacity *if*

such claim arises from the officer exercising the ***tribe***'s inherent sovereign powers. While a money judgment would not pull from the tribal treasury, the Court concludes that permitting such a claim would have the effect of interfering **[**20]** with a ***tribe***'s inherent powers of self-government.

In *Lewis v. Clarke*, the Supreme Court examined whether a member of the Mohegan ***Tribe*** of Indians of Connecticut was entitled to sovereign immunity because he was acting within the scope of his employment as a driver for the ***Tribe***'s casino when the accident occurred. *137 S.Ct. 1285 (2017)*. The plaintiffs had filed suit against the tribal employee in his individual capacity in Connecticut state court. *Id. at 1290*. On appeal, the Supreme Court stated that the fact that "an employee was acting within the scope of his employment at the time the tort was committed is *not, on its own*, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Id. at 1288* (emphasis added). The Court applied general common-law principles of sovereign immunity[2] to **[*1002]** evaluate the defendant's sovereign immunity defense. *Id. at 1291*. In doing so, the Court stated that it must look beyond the caption to determine whether the "remedy sought is truly against the sovereign." *Id. at 1290*.

The *Lewis* Court concluded that tribal sovereign immunity did not extend to the tribal employee's actions. *Id. at 1291*. It is important to note that the tribal employee in *Lewis* was not exercising the ***Tribe***'s inherent powers of self-government. In concluding that tribal sovereign immunity did not extend to the employer's actions, the court found significant the fact that the lawsuit was brought against an employee of the ***tribe***'s casino while he was operating a vehicle on state, not tribal lands, and that any damages judgment would not operate against the ***Tribe***. *Id.* The Court stated that this is "simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'" *Id.* (quoting *Larson*, 337 U.S. at 687). In their separate concurrences, **[**22]** Justice Thomas and Justice Ginsburg expressed the view that tribal immunity should not extend to suits arising out of a ***tribe***'s commercial activities conducted beyond tribal territory. *Id. at 1294*.

By contrast, in *Lantry v. McMinn*, the court concluded that tribal sovereign immunity extended to a tribal police officer who was executing a tribal search warrant, signed by a tribal judge, on a house owned by a tribal member and located on the Reservation. *Civ. No. 08-638, 2010 U.S. Dist. LEXIS 163975, 2010 WL 11629661 at *9 (D. Nev. Mar. 3 2010)*. The court acknowledged that Indian ***tribes*** have inherent power to enforce their

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[2] The Court in *Lewis* stated that:

> The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. An officer in an individual-capacity action, on the other **[**21]** hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability." There is no reason to depart from these general rules in the context of tribal sovereign immunity.

Lewis, 137 S.Ct. at 1291.

Upon reading this language, one might be led to believe that the Supreme Court intends tribal sovereign immunity to be coextensive with the principals of state and federal sovereign immunity. However, as discussed above, the Supreme Court recently stated in *Upper Skagit Indian* ***Tribe*** *v. Lundgren*, "immunity doctrines lifted from other contexts do not always neatly apply to Indian ***tribes***." *138 S.Ct. at 1654* (citing *Kiowa* ***Tribe*** *of Okla.*, 523 U.S. at 1654 ("[T]he immunity possessed by Indian ***tribes*** is not coextensive with that of the States."). Additionally, in *Lewis*, the Court stated not that tribal sovereign immunity never extends to a tribal employee acting within the scope of his or her employment, but rather that such fact "is not, on its own," sufficient to bar a suit against the employee on the basis of tribal sovereign immunity. *See*, ***Lewis, 137 S.Ct. at 1288***. That the tribal employee in *Lewis* was engaged in commercial activity of the ***Tribe*** off the reservation was an important fact that the Court noted when concluding that tribal sovereign immunity did not extend to the employee's actions. *See* ***id. at 1292***. In fact, as noted in their separate concurrences, Justice Thomas and Justice Ginsburg expressed their view that tribal immunity should not extend at all to suits arising out of a ***tribe***'s commercial activities conducted beyond tribal territory. ***Id. at 1294***.

As noted by the Supreme Court in *Upper Skagit Indian* ***Tribe***, "[d]etermining the limits on the sovereign immunity held by Indian ***tribes*** is a grave question; the answer will affect all ***tribes***, not just the one before us." *138 S.Ct. at 1654*. Without further guidance from the Supreme Court or the Eighth Circuit Court of Appeals, the Court's analysis of existing legal authority leads it to conclude that individual capacity claims arising from a tribal officer exercising a ***tribe***'s inherent sovereign powers are barred under the doctrine of tribal sovereign immunity. However, individual capacity claims where the tribal officer is going about a ***tribe***'s commercial ventures is subject to further analysis depending on the facts of the case.

criminal laws against ***tribe*** members. *Id. at *8*. Because the officer was acting within the scope of the ***Tribe***'s inherent authority, the court concluded that he was entitled to the benefit of tribal immunity for the claims asserted against him. *See id.* Similarly, in *Dry v. United States*, the Tenth Circuit Court of Appeals held that tribal sovereign immunity extended to actions by tribal law enforcement officers who were "act[ing] as agents of the ***Tribe*** pursuant to their inherent sovereign power to exercise criminal **[*1003]** jurisdiction over intratribal offenses." *235 F.3d 1249, 1255 (10th Cir. 2000)*.

In *Stanko v. Oglala Sioux* ***Tribe***, a *pro se* plaintiff brought a § 1983 action against various tribal officers seeking damages for violations of **[**23]** his constitutional and civil rights. *Civ. No 17-5008, 2017 U.S. Dist. LEXIS 152933, 2017 WL 4217113 (D.S.D. Sept. 20, 2017)* (J. Viken). The plaintiff in *Stanko* was traveling on federally-maintained highway on reservation land when he was allegedly arrested, detained, assaulted, battered, and robbed by tribal officers. *Id. at *2*. The plaintiff filed a lawsuit, naming as defendants the ***Tribe*** and various tribal officers in their individual and official capacities. With regard to the individual capacity claims against the tribal defendants, the district court held that the plaintiff failed to state a § 1983 claim because "[a]s separate sovereigns pre-existing the Constitution, ***tribes*** have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Id. at *5* (quoting *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*; *Talton v. Mayes, 163 U.S. 376, 384, 16 S. Ct. 986, 41 L. Ed. 196 (1896))*.

On appeal, the Eighth Circuit Court of Appeals in *Stanko* disagreed with the district court's reasoning, stating that the cases cited by the district court did "not establish that tribal officers cannot be sued individually for violating the constitutional rights of non-Indians while on tribal lands. Non-Indian United States citizens do not shed their constitutional rights at an Indian reservation's border." *Stanko v. Oglala Sioux* ***Tribe****, 916 F.3d 694, 698 (8th Cir. 2019)*. However, the court affirmed the district **[**24]** court's decision to dismiss the plaintiff's § 1983 claim for failure to state a claim because the plaintiff failed to allege that the individual defendants were acting under color of state law, as § 1983 requires. *Id.*

While the Eighth Circuit in *Stanko* held that tribal officers can be sued individually for violating the constitutional rights of non-Indians while on tribal lands, the court did not specifically address the issue of tribal sovereign immunity, nor did it suggest that tribal sovereign immunity may never bar individual capacity suits against tribal officers, particularly when they are exercising the inherent sovereign powers of the ***Tribe***.

Neuenfeldt cites *Whiting v. Martinez, Civ. No. 15-3017, 2016 U.S. Dist. LEXIS 7435, 2016 WL 297434 (D.S.D. Jan. 22, 2016)* (J. Lange) in support of his argument that Plaintiff's claim for damages against him is precluded by tribal sovereign immunity since he was acting in his capacity as an employee of the the ***Tribe***'s police department. In *Whiting*, a *pro se* plaintiff sued for money damages a police officer employed by the ***Tribe***'s police department, a magistrate judge employed with the ***Tribe***, and a tribal prosecutor in their individual and official capacities under *28 U.S.C. § 1331* and *Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*. *2016 U.S. Dist. LEXIS 7435, 2016 WL 297434, at *1*. The plaintiff alleged a claim against the tribal police officer for false imprisonment, **[**25]** alleging that he was wrongly imprisoned when the tribal officer falsely stated that he was resisting arrest. *Id.* The plaintiff also alleged that as a result of his subsequent incarceration, he was deprived of his liberty and due process in violation of the *Fifth Amendment*. *Id.* The plaintiff alleged that the ***Tribe***'s magistrate judge and tribal prosecutor were acting under color of law when each stated that the plaintiff committed offenses of resisting arrest and disorderly conduct after reviewing the evidence and tribal complaint against him. *Id.*

The court in *Whiting* held that the plaintiff's claims against the defendants in their **[*1004]** individual capacities could not stand because the facts suggested that defendants were employed by the ***Tribe*** and were acting within their official authority at all times relevant to the lawsuit. *Id.* at *3. It is important to note that two of the three defendants, the magistrate judge and the tribal prosecutor, were alleged to have been acting within their prosecutorial and judicial functions—and were thus engaged in the ***tribe***'s inherent sovereign functions. It also appears that the tribal police officer was exercising the ***Tribe***'s inherent powers to enforce its criminal laws since **[**26]** the plaintiff stated that he was sentenced for his offenses in tribal court. *Id.*; *see also* Civ. No. 15-3017, Docket 1.

In sum, in determining whether tribal sovereign immunity bars a claim for damages against Neuenfeldt depends on whether or not Neuenfeldt was exercising the inherent sovereign powers of the ***Tribe***. If so, the

Court concludes that permitting such a claim to proceed would have the effect of interfering with the ***Tribe***'s powers of self-government.

In the present case, it is alleged that Bourassa was driving a vehicle with Plaintiff and Ten Eyck as passengers when they were stopped by Neuenfeldt, acting in his capacity as the ***Tribe***'s Chief of Police, Moody County Deputy Sheriffs, the South Dakota Highway Patrol, and the City of Flandreau Police Department. Doc. 21, ¶¶ 6, 13. In the supplemental responses filed with the Court, the parties concurred that the stop was not on tribal land, but occurred on a road abutting a non-tribally-owned, rural property near Dells Rapids, South Dakota. Docs. 27-29. Neuenfeldt arrived at the property to assist Moody County Sheriff's Deputies responding to a security check at the property. Docs. 27-29. It is alleged that Neuenfeldt and the other **[**27]** officers knew Bourassa's identity at the time of the stop, that Neuenfeldt threatened to take Bourassa to jail, and that Bourassa was actively being monitored by the South Dakota Parole Board through a GPS ankle bracelet. Doc. 21, ¶¶ 14, 18-19. Plaintiff alleges that Neuenfeldt, an uncertified deputy from the Moody County Sheriff's Office, and an officer from the South Dakota Highway Patrol, all initiated pursuit once Bourassa fled in his vehicle. Doc. 21, ¶¶ 14-16.

It is undisputed that Indian ***tribes*** have the inherent power to enforce their criminal laws against Indians within the boundaries of the reservation[3] . *United States v. Lara, 541 U.S. 193, 199, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)*; *United States v. Wheeler, 435 U.S. 313, 323-26, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)*. ***Tribes*** generally do not have criminal jurisdiction over non-Indians, *Oliphant v. Suquamish Indian **Tribe**, 435 U.S. 191, 212, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)*, although tribal police have the authority to detain non-Indians who commit crimes within Indian country until they can be turned over to the appropriate state or federal authorities, *Duro v. Reina, 495 U.S. 676, 696-97, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990)* ("The ***tribes*** [ ] possess [ ] traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. Tribal law enforcement authorities have the power to detain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender **[**28]** rests outside the ***tribe***, tribal officers may exercise their power to detain the offender and transport him to the proper authorities."); *United States v. Terry, 400 F.3d 575, 579 (8th Cir. 2005)* **[*1005]** (explaining that tribal officers have the authority "to detain non-Indians whose conduct disturbs the public order on their reservation").

In the present case, Neuenfeldt encountered Plaintiff when assisting Moody County Sheriff's Deputies in conducting a security check for possible trespassing at a non-tribally-owned, rural property. Although Neuenfeldt was acting in his capacity as a Tribal police officer at all times pertinent to this case, the Court concludes that Neuenfeldt was not exercising the inherent sovereign powers of the ***Tribe***. The parties agree that the stop was not on tribal land and that neither Plaintiff, Bourassa, nor Ten Ecyk were Indians. Docs. 27-29. Plaintiff furthermore alleges that the "pursuit was never on tribal land." Doc. 21, ¶ 33.s. Neuenfeldt's motion to dismiss on the basis of tribal sovereign immunity is thus denied.

II. Federal Tort Claims Act

Neuenfeldt alleges that that to the extent the Court considers him to be a federal employee for purposes of the negligence claim against him, the United States is the proper **[**29]** party under the Federal Tort Claims Act ("FTCA"). Plaintiff's negligence claim is alleged against "Defendants" collectively. Doc. 21, ¶¶ 30-39.

"The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *Audio Odyssey, Ltd. v. United States, 255 F.3d 512, 516 (8th Cir. 2001)* (quoting *United States v. Orleans, 425 U.S. 807, 813, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976)*). "Under the FTCA, the United States is liable, as a private person, for 'injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting under the scope of his office or employment.'" *Western Nat. Mut. Ins. Co. v. United States, 964 F.Supp. 295, 297 (D. Minn. 1997)* (quoting *28 U.S.C. § 1346(b)*). The remedy provided by the FTCA for injuries resulting from the activities of [Federal] Government employees "is exclusive of any other civil action or proceeding for money damages." *United States v. Smith, 499 U.S. 160, 162, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991)* (quoting

[3] The Sixth Circuit has ruled that ***tribes*** have inherent authority to prosecute their members for off-reservation conduct where necessary to protect tribal self-government or control internal relations. *See Kelsey v. Pope, 809 F3d 849 (6th Cir. 2016)*.

28 U.S.C. § 2679(b)(1)).

The Federal Tort Claims Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." Osborn v. Haley, 549 U.S. 225, 229, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007) (citing 28 U.S.C. § 2679(b)(1)); *see also* United States v. Smith, 499 U.S. 160, 161-62, 111 S. Ct. 1180, 113 L. Ed. 2d 134 (1991). Under the FTCA, "an action against the United States is the only remedy for injuries caused by federal employees acting within the **[**30]** scope of their employment." Anthony v. Runyon, 76 F.3d 210, 212-13 (8th Cir. 1996). The purpose of the FTCA is "to shield covered employees not only from liability but from suit" and to place the "cost and effort of defending the lawsuit . . . on the Government's shoulders." Osborn, 549 U.S. at 248, 252.

When a federal employee is sued, the Attorney General has the authority to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). Under the FTCA's implementing regulations, the United States Attorney for the district court in which the civil action at issue is brought "is authorized to make the statutory certification that the Federal employee was acting within the scope of his office or employment with the Federal Government **[*1006]** at the time of the incident out of which the suit arose." 28 C.F.R. § 15.4(a).

The statutory certification, "although subject to judicial review, is prima facie evidence that the employee's challenged conduct was within the scope of employ." Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991); *see also* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995). A plaintiff opposing the certification bears the burden of "com[ing] forward with specific facts rebutting the government's scope-of-employment certification." Brown, 949 F.2d at 1012; *see also* Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993) ("The Attorney General's decision regarding scope of **[**31]** employment certification is conclusive unless challenged. Accordingly, the party seeking review bears the burden of presenting evidence and disproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of the evidence.").

On March 18, 2019, the United States Attorney filed a Certification of Scope of Employment pursuant to 28 C.F.R. § 15.4, Doc. 12, certifying that Neuenfeldt was an employee of the federal government and was acting within the scope of his office or employment at the time of the alleged conduct with respect to Counts I and III of the Amended Complaint alleging negligence and common law assault and battery, Doc. 21.[4]

Plaintiff does not rebut the Government's scope-of-employment certification in this case. In fact, in his brief in opposition to Neuenfeldt's Motion to Dismiss, Plaintiff voices his agreement with Neuenfeldt's argument that the United States, rather than he, is the proper defendant for Plaintiff's ***FTCA claim***. Doc. 23 at 6 ("Despite the United States being the proper defendant for Plaintiff's ***FTCA claim***, which Plaintiff is in agreement with, Neuenfeldt fails to address the actual cause of action alleged against him and how **[**32]** it is improper—i.e., Plaintiff's cause of action under *Bivens*."). Because the United States is already a named defendant in this case, the proper relief is to dismiss the ***FTCA claim*** against Neuenfeldt, as he is no longer a proper defendant to that claim.

While Plaintiff's negligence claim and claim for assault and battery will be dismissed against Neuenfeldt, they will be dismissed without prejudice. The regulation which addresses withdrawal of the Certification states that "[a] certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action." 28 C.F.R. § 15.4(c). The United States has not attempted to withdraw its Certification although it has expressed in its Answer to Amended Complaint that it:

> [D]enies paragraph 4 [of the Amended Complaint] to the extent it asserts that Flandreau Santee Sioux Tribal employees, whose actions are alleged to have contributed to and/or caused the accident at issue, are deemed federal employees pursuant to the FTCA. The United States avers that the United States Attorney for the District of South Dakota has provided a certification of scope of employment related to Officer **[**33]** Neuenfeldt for two counts (Counts [I] and [III]) in the original Complaint based on information then available to the United States,

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[4] 25 U.S.C. § 2804(f)(1)(A) provides that while acting pursuant to a section 638 contract, "a person who is not otherwise a Federal employee shall be considered to be . . . an employee of the Department of the Interior" for purposes of the FTCA. 25 U.S.C. § 2804(f); 5 U.S.C. § 3374(c)(2).

and the United States would refer to that filing.

[*1007] Doc. 22, ¶ 4. Dismissal of the negligence and assault and battery claims against Neuenfeldt will therefore be without prejudice in the event that the United States subsequently withdraws the certification. *See* Burell v. Rossamo, Civ. No. 13-877, 2014 U.S. Dist. LEXIS 173791, 2014 WL 7178012, *3-4 (M.D. Fla. Dec. 16, 2014) (dismissing claims against federal employee without prejudice in FTCA case considering possible need for later reinstatement of claims against individual if the United States withdraws certification); Becker v. Fannin Cty., Ga., Civ. No. 09-0047, 2012 U.S. Dist. LEXIS 106478, 2012 WL 3113908, at *7-9 (N.D. Ga. Jul. 3, 2012) (allowing resubstitution of individual defendant after United States withdraw certification in FTCA case).

III. *Bivens* Claim

In his *Bivens* claim, Plaintiff alleges that Neuenfeldt, acting under color of federal law, violated his rights under the Fourth Amendment to be free from unreasonable searches and seizures and deprived him of his right to life and liberty under the Fifth Amendment without due process of law. Doc. 21, ¶¶ 40-52.

In most cases, an FTCA action is the exclusive civil remedy available against government employees acting within the scope of their employment. 28 U.S.C. § 2679(b)(1). The Act includes an exception, however, for claims "brought **[**34]** for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The exception permits plaintiffs to bring both an ***FTCA claim*** as well as a *Bivens* claim against the individual defendants. *See, e.g.*, Sanchez v. McLain, 867 F.Supp.2d 813, 820 (S.D. W. Vir. 2011).

In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, the Supreme Court recognized "an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights." Ashcroft v. Iqbal, 556 U.S. 662, 675, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A *Bivens* claim requires a violation of constitutional rights "by a federal agent acting under color of his authority." Bivens, 403 U.S. at 389.

Plaintiff alleges that Neuenfeldt is a federal actor for *Bivens* purposes because he is considered a federal employee by virtue of a section 638 contract entered into by and between the ***Tribe*** and the Federal Government pursuant to the ***Indian Self-Determination*** and Education Assistance Act (referred to as "ISDEAA" or "Public Law 98-638").

In the present case, Neuenfeldt, acting in his capacity as Chief of Tribal Police, encountered Plaintiff when he responded to a call from Moody County Sheriff's department to assist them when they discovered trespassers while conducting a security check on a non-tribally-owned, rural property. Pursuant to the Indian Law Enforcement Reform Act ("ILERA"), the "Secretary may authorize a law enforcement officer **[**35]** of [a Federal, tribal, State, or other Government agency]" to perform any activity the Secretary may authorize under section 2803" of ILERA. 25 U.S.C. § 2804(a)(2). The Secretary has the authority to enforce state law pursuant to a request for a state or local law enforcement agency, 25 U.S.C. § 2803(8), and that authority can be delegated to an Indian ***tribe*** pursuant to a 638 Contract. Strei v. Blaine, Civ. No. 12-1095, 2013 U.S. Dist. LEXIS 169996, 2013 WL 6243881 at *6 (D. Minn. Dec. 3, 2013) (citing United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993)); *United States v. Zieglar, 136 F.Supp.2d 981, 987 (D.S.D. 2001)* (J. Kornmann) ("To trigger the authority granted by § 2803(8), there must be some kind of "request", made by a state/local agency, for assistance from a BIA officer or a criminal or regulatory matter which the agency has jurisdiction over."). This delegation **[*1008]** includes authority to enter into cooperative law agreements such as the Law Enforcement Assist Agreement between Flandreau Santee Sioux Tribal Police and Moody County, South Dakota, that the Government referenced in its Certification of Scope of Employment. *See* Strei, 2013 U.S. Dist. LEXIS 169996, 2013 WL 6243881, at *7 (citing 25 U.S.C. § 2803(8); Schrader, 10 F.3d at 1350); *see also* Allender v. Scott, 379 F.Supp.2d 1206, 1215-16 (D.N.M. 2005) (holding that section 2803(8) of ILERA authorizes the Secretary "to assist with the enforcement of State law through cooperative agreement and cross-commissioning[.]").

The fact that Neuenfeldt was acting within the scope of a section 638 contract the ***Tribe*** had with the Federal Government does not necessarily render him a federal actor for *Bivens* purposes. **[**36]** Neuenfeldt argues that allowing a *Bivens* action to proceed against him, a tribal law enforcement officer, would extend *Bivens* to a new category of defendant which the Supreme Court has cautioned against doing. Doc. 24 at 5-6. The Supreme Court has expressly granted *Bivens* remedies in only three cases: Bivens v. Six Unknown Named

Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). In *Bivens*, the Court provided a damages remedy under the Fourth Amendment to persons who had been subjected by federal officers to unreasonable searches and seizures. 403 U.S. at 397. The Court then held under *Davis v. Passman* that the Fifth Amendment Due Process Clause gave a plaintiff a damages remedy for gender discrimination. 442 U.S. at 248. Most recently, the Court in *Carlson v. Green* held that the Eighth Amendment's Cruel and Unusual Punishments Clause gave a decedent's estate a damages remedy when federal jailers failed to treat decedent's asthma, resulting in his death. 446 U.S. at 25.

Since its decision in Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), the Supreme Court "has had to decide in several different instances whether to imply a *Bivens* action . . . [a]nd in each instance it has decided against the existence of such an action." Minneci v. Pollard, 565 U.S. 118, 124, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012); *see also* Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). The Court stated that:

> In 30 years of Bivens jurisprudence we have extended its holding only **[**37]** twice, to provide an otherwise nonexistent cause of action against *individual* officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative* remedy for harms caused by an individual officer's unconstitutional conduct.

Correctional Services Corp. v. Malesko, 534 U.S. 61, 70, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001).

In *FDIC v. Meyer*, one of the *Bivens* cases that arose subsequent to *Carlson*, the plaintiff brought a *Bivens* action against the Federal Savings and Loan Insurance Corporation claiming that discharge from his job as a senior officer of that institution deprived him of his Fifth Amendment Due Process Rights. 510 U.S. 471 (1994). The Court declined to extend *Bivens* to permit a suit against a federal agency even though Congress had waived the agency's sovereign immunity. Id. at 484-86. In a *Correctional Servs. Corp. v. Malesko*, the Court noted that in *Meyer*, it emphasized that "the purpose of *Bivens* is to deter *the officer*," not the agency. 534 U.S. 61, 69, ***[*1009]*** 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (citing *Meyer*, 510 U.S. at 485). The Court reiterated its reasoning in the *Meyer* opinion that "if given the choice, plaintiffs would sue a federal agency instead of an individual who could assert qualified immunity as an affirmative defense. To the extent aggrieved parties had less incentive to bring a damages claim against individuals, "the deterrent effects of **[**38]** the *Bivens* remedy would be lost." *Id.* (citing *Meyer*, 510 U.S. at 485).

In *Minneci v. Pollard*, a prisoner at a federal facility operated by a private company filed a *pro se* complaint alleging a *Bivens* claim against several employees of the facility alleging that they had deprived him of adequate medical care in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012). The plaintiff argued that his *Bivens* action against the prison employees was permissible under *Carlson* which recognized an Eighth Amendment-based *Bivens* action by a federal prisoner against prison personnel. Id. at 126. The Court stated that *Carlson* was distinguishable because the federal prisoner in *Carlson* sought damages from personnel employed by the government, not personnel employed by a private firm. *Id.* The Court stated that "the potential existence of an adequate 'alternative, existing process' differs dramatically in the two sets of cases." *Id.* Whereas prisoners ordinarily cannot bring state-law tort actions against individual employees of the Federal Government because the Federal Government is substituted as a defendant under the FTCA, prisoners ordinarily can bring state-law tort actions against employees of a private firm. *Id.* The Court held **[**39]** that it could not imply a *Bivens* remedy in cases such as plaintiff's:

> [W]here, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here). . . .

Id. at 131.

In the present case, Court concludes that Plaintiff may proceed to litigate his *Bivens* action against Neuenfeldt.

The Supreme Court has repeatedly acknowledged that "the purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Malesko, 534 U.S. at 70*. Unlike in *Minneci*, under the facts of this case, there is no adequate alternative to deter an individual in Neuenfeldt's position from committing constitutional violations. As this Court has already ruled, state law tort claims alleged against Neuenfeldt must proceed against the United States under the Federal Tort Claims Act. As the Supreme Court stated in *Carlson*, "[b]ecause the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy **[**40]** against the United States." *446 U.S at 21*.

The Court finds this case distinguishable from some of the other cases that have declined to extend *Bivens* liability to tribal employees acting pursuant to a section 638 contract. In *Goss v. United States*, the plaintiff brought a *Bivens* claim against a podiatrist employed by a tribal health care corporation that had a 638 contract with the federal government and was providing health services on the Navajo reservation. *353 F.Supp.3d 878, 882 (2018)*. The district court stated that the fact that the tribal organization works under a contract with the federal government does not transform **[*1010]** the defendant employee into a federal employee for all purposes. *Id. at 890*. In dismissing the plaintiff's *Bivens* claim, the court stated that while the defendant was a federal employee for purposes of the FTCA and was thus protected from liability from claims related to the provision of medical services, the defendant was otherwise an employee of a tribal organization and not subject to a *Bivens* claim. *Id.* The *Bivens* claim was for negligent supervision of another employee of the tribal organization.

In *Boney v. Valline, 597 F.Supp.2d 1167 (D. Nev. 2009)*, an arrestee brought a *Bivens* action against a tribal police officer, seeking damages for the officer's alleged violation **[**41]** of her Constitutional rights in connection with her arrest and son's death. The defendant had been dispatched to investigate a call by the plaintiff that her ex-husband was driving intoxicated on the Reservation. *Id.* at 1170. Upon arriving at the ex-husband's residence, the defendant encountered the plaintiff's ex-husband and her son. *Id.* The plaintiff's son became angry, yelling at the defendant, and the incident culminated with the defendant employing deadly force against the son. *Id.*

The plaintiff argued that the defendant in *Boney* was a federal actor or acting under color of federal law when he shot her son because the ***Tribe*** was in a section 638 contract with the BIA to provide law enforcement on the Reservation. *Id.* at 1172. One of the factors the court looked at in determining whether the federal government could be held liable for the tribal officer's conduct was whether he was performing a function that was traditionally within the exclusive prerogative of the federal government. *Id. at 1175*. Examining the facts of the case, the court found that the defendant was not performing a function exclusive to the federal government but rather was "acting under the ***Tribe***'s inherent tribal sovereignty" in enforcing its criminal **[**42]** laws against tribal members. *Id. at 1178*.

Contrary to the *Goss* and *Boney* cases, although Neuenfeldt was acting in his capacity as the ***Tribe***'s Chief of Police, his authority to assist with state law matters off tribal land specifically derived from the section 638 contract entered into by and between the ***Tribe*** and the Federal Government. Tribal police do not otherwise have authority to assist with state law matters on non-tribal land. Accordingly, Neuenfeldt was acting under color of federal, not tribal law. *See Polk Cty. v. Dodson, 454 U.S. 312, 317-18, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981)* (stating that a person acts under color of federal law by "exercising power possessed by virtue of [federal law] and made possible only because the wrongdoer is clothed with the authority of [federal] law."). Because Neuenfeldt was acting under color of federal law, and because there are no alternative remedies under state law to deter an individual in Neuenfeldt's position from violating constitutional rights of others, Plaintiff may proceed in litigate his *Bivens* claim against Neuenfeldt.

IV. Count IV — Second Claim for Relief for Supervisorial Responsibility for Violations of the Civil Rights Under Color of Law (*Bivens* Action)

In case there is any confusion, the Court does not find that Neuenfeldt **[**43]** is named as a defendant in Count IV of Plaintiff's Amended Complaint alleging a *Bivens* action for "supervisorial responsibility for violations of the civil right under color of law." Doc. 21, ¶¶ 56-63. In this claim, Plaintiff alleges that Defendants implemented and maintained customs, policies, and/or practices to encourage the use of excessive force by Defendant Neuenfeldt" and that "Defendant participated in, courage, **[*1011]** foster, condoned, and ratified the conduct of Defendant Neuenfeldt when [he] used excessive force in the pursuit and injuring Plaintiff Micah Roemen." Doc. 21, ¶¶ 57-58. The Court concludes that

this claim is alleged against named defendants, "Unknown Supervisory Personnel of the United States," in their individual capacities under *Bivens*.

Accordingly, it is hereby ORDERED that Neuenfeldt's Motion to Dismiss, Doc. 8, is GRANTED IN PART AND DENIED IN PART as follows:

(1) Counts I and III of the Amended Complaint alleging negligence and common law assault and battery shall be DISMISSED WITHOUT PREJUDICE against defendant Neuenfeldt; Counts I and III shall proceed against defendant United States of America; and

(2) The Motion to Dismiss Count II of the Amended Complaint **[**44]** alleging a *Bivens* claim against defendant Neuenfeldt is DENIED; and

(3) To the extent Neuenfeldt's motion seeks to dismiss Count IV of the Amended Complaint alleging a claim for relief for "supervisorial responsibility for violations of the civil right color of law (*Bivens* action)," his motion is DENIED for lack of standing; the allegations in Count IV allege that Plaintiff suffered an injuries as a result of customs, policies and practices of defendants Unknown Supervisory Personnel of the United States, and not as a result of customs, policies and practices of Neuenfeldt's.

Dated this 28th day of May, 2020.

BY THE COURT:

/s/ Lawrence L. Piersol

Lawrence L. Piersol

United States District Judge

Lee v. United States

United States District Court for the District of Arizona

September 18, 2020, Decided; September 18, 2020, Filed

No. CV 19-08051-PCT-DLR (DMF)

Reporter
2020 U.S. Dist. LEXIS 211198 *

Gloria Lee, Plaintiff, v. United States of America, et al., Defendants.

Opinion by: Douglas L. Rayes

Core Terms

coverage, federal employee, privileging, contractor, sovereign immunity, employees, nonpersonal, argues, alleges, suicide, Jail, waive, allegation of negligence, hospital privileges, supervision, independent contractor, provide a service, designated, omissions, eligible, provider, motion to dismiss, practitioners, non-Service, health care practitioner, negligence claim, patients, purposes, damages, health services

Counsel: **[*1]** For Gloria Lee as Administrator of the estate of Vincent Lee, Plaintiff: David Robert Jordan, LEAD ATTORNEY, Law Offices of David R Jordan PC, Gallup, NM; Theodore W Barudin, LEAD ATTORNEY, PRO HAC VICE, Ted Barudin & Associates PC, Albuquerque, NM.

For United States of America, Defendant: Laurence G Tinsley, Jr., LEAD ATTORNEY, US Attorneys Office - Phoenix, AZ, Phoenix, AZ.

For Burton Reifler M.D., Defendant: Donn Christopher Alexander, Justin Michael Ackerman, Kathleen S Elder, LEAD ATTORNEYS, Jones Skelton & Hochuli PLC, Phoenix, AZ.

Judges: Douglas L. Rayes, United States District Judge.

Opinion

ORDER

Plaintiff Gloria Lee, as Administrator for the Estate of Vincent Lee, brought this action, through counsel, pursuant to the *Federal Tort Claims Act (FTCA), 28 U.S.C. §2671, et. seq.* Defendant the United States of America has filed a Motion to Dismiss pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)* (Doc. 33). Plaintiff and Defendant Burton Reifler, M.D. ("Dr. Reifler") oppose the Motion. (Docs. 65, 66.) The Motion is fully briefed. (Doc. 74.)

The Court will grant the Motion to Dismiss.

I. Second Amended Complaint

Plaintiff brought this action against Defendants the United States (hereinafter "the Government") and U.S. employee or contractor Dr. **[*2]** Reifler on behalf of the estate of Plaintiff's deceased brother Vincent Lee. (Doc. 32.) This action arises from Vincent's death by suicide while confined in the Navajo Nation Chinle Correctional Facility ("Chinle Jail") while under the supervision and psychiatric care of the Government and its agents and employees, including "federal employee or contractor" Defendant Dr. Reifler. (*Id.* ¶¶ 4-9.) Plaintiff relevantly alleges the following facts as to all counts:

On August 27, 2016, an arrest warrant was issued for Vincent based on a probation violation. (*Id.* ¶ 24.) On September 1, 2016, while detained at the Chinle Jail,

Vincent attempted suicide in his cell. (*Id.* ¶ 25.) At that time, a doctor prescribed medication and instructed jail personnel that Vincent was to follow up with Behavioral Health following his release from jail or sooner, and Vincent was placed on suicide watch. (*Id.*)

On September 2, 2016, the Bureau of Indian Affairs (BIA) issued a corrective plan under which the Chinle Jail was to train all officers on classifying inmates entering the Jail and to schedule suicide prevention training for all officers. (*Id.* ¶ 26.)

On September 6, 2016, A. Arviso cleared Vincent from suicide **[*3]** watch. (*Id.* ¶ 27.)[1]

On February 18, 2017, Vincent was re-arrested on a bench warrant for another probation violation. (*Id.* ¶ 28.) While detained between February 18 and February 22, 2017, Vincent was having seizures. (*Id.* ¶ 29.) On February 22, 2017, the BIA issued a Serious Incident Report regarding Vincent's seizures. (*Id.* ¶ 30.) On February 23, the BIA issued a second such report (*id.* ¶ 31), and on February 24, 2017, Vincent was admitted to the Chinle Comprehensive Health Care Facility (CCHCF) indefinitely due to his seizures, and an Inmate Medical Clearance Form stated that he was not cleared for jail. (*Id.* ¶ 32.)

On February 24, 2017, Vincent continued to have seizures at CCHCF and became combative with nursing and correctional staff. (*Id.* ¶ 33.) On February 27, 2017, the prosecutor in Vincent's criminal case drafted a Motion for Release from custody pursuant to the *Navajo Rules of Criminal Procedure*, Rules 54(e) and 55(a)(1) (*id.* ¶ 34), and on March 1, 2017, Vincent was sent to St. Joseph's Hospital in Phoenix due to his altered mental state, chronic seizures, and a concussion. (*Id.* ¶ 35.) Vincent's Inmate Medical Clearance Form stated that Vincent was not medically fit for jail. (*Id.*)

On March 3, **[*4]** 2017, Dr. Steven Yeun released Vincent from St. Joseph's Hospital and cleared him to be readmitted to the Chinle Jail. (*Id.* ¶ 36.) Dr. Yeun prescribed medication and treatment for Vincent, which he outlined in Vincent's discharge paperwork. (*Id.*)

On March 4, 2017, the BIA issued corrective guidance which stated, in part, "Inmates are to be placed on observation watch anytime they return from the hospital/courts and or transport." (*Id.* ¶ 38.)

At the relevant time of this action, Defendant Dr. Reifler was a psychiatrist employed at or contracted by CCHFC, where he had hospital privileges, and on March 6, 2017, Dr. Reifler evaluated Vincent to make recommendations regarding his suicide attempts. (*Id.* ¶¶ 16, 42-44.)[2] Dr. Reifler allegedly made the following notes in Vincent's Chinle Correctional Inmate Clearance Report:

> **"...examined the prisoner and find him/her acceptable for admission into the jail. I suggest treatment for the prisoner's condition(s) as described below."**
>
> **Dr. Reifler made the following entry regarding the "treatment" for Mr. Lee as follows:**
>
> **"Under Physician's remarks: Close observation for suicide no longer needed. No longer having suicidal thoughts"**.

(*Id.* ¶ 45 (emphases and **[*5]** formatting in Second Amended Complaint).)[3]

On March 14, 2017, while reincarcerated at the Chinle Jail, Vincent attempted suicide by hanging himself from the upper bunk in his jail cell and was found at approximately 1:00 p.m. hanging from the bunk by a bed sheet he had tied around his neck. (*Id.* ¶ 37.) Also on March 14, 2017, Vincent was found hanging in the jail shower area, where he died. (*Id.* ¶ 39.)[4]

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[1] The Complaint identifies Arviso as "A. Arviso, LMHS" but does not define LMHS or identify Arviso's role at the Jail.

[2] It is not clear from the allegations in the Second Amended Complaint what suicide attempts this refers to or what occurred between Vincent's March 3, 2016 release from St. Joseph's hospital, presumably back to jail custody, and Dr. Reifler's March 6, 2017 evaluation of Vincent at CCHFC. Plaintiff alleges that Dr. Reifler saw Vincent "two days after his second suicide attempt on March 4, 2017 while at the [Chinle Jail]" (Doc. 32 ¶ 45), but there are no other factual allegations about this prior suicide attempt, including when or where or it occurred or what Dr. Reifler was told about it; nor are there any factual allegations about what prompted Vincent to be taken to CCHFC, the care he received there, or when and under what circumstances Vincent was released back to the Chinle Jail.

[3] It is not clear whether Dr. Reifler made additional recommendations in the Clearance Report that are not included in these allegations; it also appears from the third-person reference to Dr. Reifler that other staff made at least some of these notes based on what Dr. Reifler conveyed to them.

[4] It is not clear from the allegations in the Second Amended Complaint when or how this happened, how soon this took

In her four-count Second Amended Complaint, Plaintiff asserts claims of Negligence (Count One), Negligent Operation, Maintenance, Control, Supervision, Direction, and Training (Count Two), Medical Negligence (Count Three), and Wrongful Death (Count Four). (*Id.*) She seeks monetary damages and costs. (*Id.*)

II. Motion to Dismiss Legal Standards

A. Federal *Rule 12(b)(1)*

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to raise the defense that the court lacks jurisdiction over the subject matter of an entire action or of specific claims alleged in the action. A motion to dismiss for lack of subject-matter jurisdiction pursuant to *Rule 12(b)(1)* may facially attack the existence of subject-matter jurisdiction or may challenge the truth of the alleged facts that would confer subject-matter jurisdiction on the court. *Renteria v. United States, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006)* (citing *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)*. When considering a motion **[*6]** to dismiss for lack of subject matter jurisdiction, the Court takes as true the material facts alleged in the complaint. *See Whisnant v. United States, 400 F.3d 1177, 1179 (9th Cir. 2005)*. But the Court is not restricted to the face of the pleadings; it may consider affidavits to resolve any factual disputes concerning the existence of jurisdiction. *McCarthy v .United States, 850 F.2d 558, 560 (9th Cir. 1988)* (citation omitted); *see Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983)* (consideration of material outside the pleadings did not convert a *Rule 12(b)(1)* motion into one for summary judgment). If a defendant files a *Rule 12(b)(1)* motion attacking the existence of subject-matter jurisdiction, the plaintiff bears the burden of proving that jurisdiction exists. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)*. Because the United States has sovereign immunity, which prevents it from being sued for damages, "whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction." *McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988)*.

B. *Rule 12(b)(6)*

Dismissal of a complaint, or any claim within it, for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)* may be based on either a "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008)* (quoting *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*). In determining whether a complaint states a claim under this standard, the allegations in the complaint are taken as true **[*7]** and the pleadings are construed in the light most favorable to the nonmovant. *Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007)*. A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. But "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (internal quotation omitted). To survive a motion to dismiss, a complaint must state a claim that is "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *see Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*.

As a general rule, when deciding a *Rule 12(b)(6)* motion, the court looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*. If a court considers evidence outside the pleading, it must convert the *Rule 12(b)(6)* motion into a *Rule 56* motion for summary judgment. *United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003)*. A court may, however, consider documents incorporated by reference in the complaint or matters of judicial notice without converting the motion to dismiss into a motion for summary judgment. *Id.*

III. Motion to Dismiss

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place after the prior suicide attempt, or what medical or psychiatric attention, if any, Vincent received between these events.

In its Motion to Dismiss, the Government argues that **[*8]** Plaintiff's wrongful death claim must be dismissed because, under Arizona law, an estate may only recover economic losses—such as medical expenses—that the decedent himself suffered from the time of the alleged wrongful conduct until his death, and Plaintiff does not allege that Vincent incurred any such economic losses. (Doc. 33 at 3-4.) The Government further argues, to the extent Plaintiff seeks damages for alleged injuries to herself or other individuals stemming from Vincent's alleged negligent treatment and death, only statutory beneficiaries—meaning the decedents' parents or children—may recover damages based on their own suffering, and as Vincent's sister, Plaintiff is not a statutory beneficiary; nor has she alleged that she represents any statutory beneficiaries in this action. (*Id.*)

The Government also argues that, to the extent Plaintiff attempts to bring direct liability claims against the Government and the BIA based on institutional negligence, these claims are improper under the FTCA, which only subjects the Government to liability for the tortious acts of its employees, meaning natural persons, not entities or organizations. (*Id.* at 5.) The Government asserts that it has not **[*9]** otherwise waived its sovereign immunity to suit. (*Id.*)

By the same token, the Government argues that it cannot be held liable for Plaintiff's negligent hiring and negligent training claims because these claims rely solely on a theory of "corporate" liability, which, unlike the negligence of specific individuals, is not actionable under the FTCA. (*Id.* at 6.) The Government further argues that Plaintiff fails to identify any supervisor or employee who allegedly knew that any federal actors were incompetent in their duties or had a plausible reason to know they would act negligently such that the Court could draw the reasonable inference that any individual federal employees were liable for alleged negligent hiring or supervision. (*Id.* at 7-8.)

The Government finally argues that it cannot be held liable for Dr. Reifler's alleged negligence under the FTCA because Dr. Reifler was a private contractor, not a federal employee, and the Government is therefore immune to suit for his alleged negligence under the independent contractor exception. (*Id.* at 8-12.) The Government further argues that the Performance Work Statement in Dr. Reifler's contract does not convert Dr. Reifler into a federal employee for purposes of imputing **[*10]** FTCA liability to the Government. (*Id.* at 12-16.) Dr. Reifler filed a separate Response, specifically disputing that he is not covered by the FTCA. (Doc. 66.)

III. Discussion

The FTCA waives the United States' sovereign immunity from suit for:

> Injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the 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.

28 U.S.C. § 1346(b)(1).

Relief under the FTCA may be sought for negligent acts or omissions of employees or agents of the federal government. *See* *Vander v. United States Dep't of Justice, 268 F.3d 661, 663 (9th Cir. 2001)*; *Westbay Steel, Inc. v. United States, 970 F.2d 648, 651 (9th Cir. 1992)*. However, claims under the FTCA may only be brought against the United States. *28 U.S.C. §§ 1346(b)*, *2679(a)*; *Allen v. Veterans Admin., 749 F.2d 1386, 1388 (9th Cir. 1984)* (individual agencies of the Government may not be sued).

A. Count One: Negligence

All the alleged events in this action occurred in Arizona. Therefore, the Court must apply Arizona law. To state a negligence claim under Arizona law, a plaintiff must allege sufficient facts to support the following four elements: "(1) a duty requiring the defendant to conform to a certain standard of **[*11]** care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey, 214 Ariz. 141, 150 P.3d 228, 230 (Ariz. 2007)* (internal citations omitted). The first element, whether a duty exists, "is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Id.* (citing *Markowitz v. Ariz. Parks Bd., 146 Ariz. 352, 706 P.2d 364, 366 (Ariz. 1985)*). Thus, if no duty exists, defendants "may not be held accountable for damages they carelessly cause, no matter how unreasonable their conduct." *Gipson, 150 P.3d at 230-31*. The party claiming negligence has the burden to show a duty. *Quiroz v. ALCOA Inc., 243 Ariz. 560, 416 P.3d 824, 827 (Ariz. 2018)*; *Verduzco v. Am. Valet, 240 Ariz. 221, 377*

P.3d 1016, 1023 (Ariz. Ct. App. 2016).

Plaintiff's claim in Count One is based on the alleged negligence of "the employees, contractors, officials and agents of the Defendant United States" who had a duty "to operate and/or maintain the [Chinle Jail] in a safe condition for the benefit of detainees housed there, including Vincent Lee." (Doc. 32 ¶ 72.) This included the duty of these individuals "to supervise their employees, contractors, and agents to ensure that they did not act negligently in the operation and maintenance of their facility." (*Id.*) Plaintiff alleges that such supervision "included the obligation to adopt and implement reasonable and proper procedures . . . , including **[*12]** appropriate policies and procedures safeguarding suicide prevention, mental health care, adequate staffing, classification, supervision and provision of care." (*Id.*) Plaintiff further alleges that the "employees, contractors, officials, and agents of the Defendant" breached these duties based on the unreasonable conduct alleged in the Second Amended Complaint, which resulted in Vincent's wrongful death. (*Id.* ¶¶ 73-74.)

The Government generally argues, without identifying specific counts, that Plaintiff's "direct liability and institutional negligence claims" are improper as a matter of law and must be dismissed because Plaintiff merely references unspecified federal employees who acted negligently "as a whole," not as individuals, and Plaintiff merely asserts "improper 'institutional negligence' claims against both the Government and BIA," which are not cognizable under the FTCA. (Doc. 33 at 4-6.)

The basis for Plaintiff's claim against the Government in Count One, which the Second Amended Complaint identifies only as a claim for negligence, is indeed unclear. To the extent Plaintiff appears to seek to sue the Government and/or the BIA for its own alleged negligence or based on its purported **[*13]** vicarious liability as an employer, this claim fails as a matter of law for lack of subject matter jurisdiction. This is because, apart from its limited waiver of sovereign immunity under the FTCA, the Government has not waived its sovereign immunity to suit in this action. Elsewhere in the Second Amended Complaint, Plaintiff also purports to bring this action pursuant to the FTCA and various other federal laws and treaties, including the ***Indian Self-Determination*** *and Education Assistance Act*, *25 U.S.C. §2507*, and the *Indian Health Care Improvement Act of 1976, 25 U.S.C 1601, et. seq.* (*See* Doc. 32 ¶¶ 19-20.) Apart from the FTCA, however, these additional federal laws do not create a private right of action against the Government or waive its sovereign immunity thereto. Neither does the FTCA permit agencies of the Government, such as the BIA, to be sued. *Allen, 749 F.2d at 1388*.

Although Plaintiff may bring claims against the Government based on the alleged negligence of its employees under the FTCA, the allegations in Count One are also too vague and conclusory as to the alleged "negligent or wrongful act or omission of any employee" to state such a claim. *28 U.S.C. § 1346(b)(1)*. Nowhere in Count One or in the allegations incorporated therein does the Second Amended **[*14]** Complaint set forth the alleged acts or omissions of specific federal employees for which the Government could be held liable "if a private person" under Arizona law. *See id.*

In her Response to the Motion to Dismiss, Plaintiff argues that she did identify, by name and title, the federal employees who committed the tortious conduct underlying her claims. (Doc. 65 at 3, 7.) She points to her allegations in "Part III.C." of the Second Amended Complaint, which is titled "Direct and Vicarioius (sic) Liability of the BIA for the Wrongful Acts Committed at the Chinle Correction Facility." (*Id.*; *see* Doc. 32 at 13.) In this section, Plaintiff alleged that Arizona Corrections Director Delores Greyeyes, Lt. Fernando Towne, Sgt. Clara Begay, Sgt. Gerald Benally, and Sgt Kristin Phillips collectively failed to enforce BIA regulations related to suicide prevention; failed to train and supervise corrections personnel on these regulations and on the requirements of a 1992 Consent Decree regarding such things as identifying high risk detainees; and failed to resolve conflicts between the BIA Corrections Handbook and the Consent Decree regarding suicide prevention. (Doc. 32 ¶¶ 49-54.) She further alleged **[*15]** that these individuals, together with seven named Correctional Officers (COs), collectively failed to adhere to BIA regulations and the Consent Decree regarding observation requirements and other suicide prevention measures in Vincent's case and thereby contributed to Vincent's death. (*Id.* at 56-68.) And she alleged that the BIA is both vicariously and directly liable for these failures and for Vincent's resulting suicide. (*Id.* ¶¶ 69-70.)[5]

[5] As already discussed, only the United States, not the BIA, can be sued under the FTCA. Moreover, the BIA is not named as a Defendant in this action, and Plaintiff does not identify any theory of liability by which the BIA can be sued or by which its sovereign immunity as a federal entity is waived. The Court will therefore limit its discussion to whether these

These added allegations—generically stated and shared by up to a dozen federal employees—are insufficient to state an ***FTCA claim*** against the Government in Count One. Looked at in its entirety, the Second Amended Complaint is void of facts about what any particular federal employee's role and responsibility was at the Chinle Jail at the time of Vincent's detention, how any of the named individuals was negligent in performing his or her responsibilities related to Vincent's custody and treatment, or how any particular employee's negligent acts or omissions contributed to Vincent's suicide in federal custody. To bring a colorable ***FTCA claim***, Plaintiff must first meet the minimum pleading standards required to state an underlying negligence claim against a federal **[*16]** employee for which the Government can then be held liable. Thus, she must allege sufficient facts—not simply "labels and conclusions"—that would give the Government "fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly, 550 U.S. at 555* (internal citations and quotation marks omitted). Plaintiff fails to do so here and therefore fails to state an ***FTCA claim*** in Count One.

Based on the above, the Court will dismiss Plaintiff's negligence claim against the Government in Count One with prejudice based on lack of subject matter jurisdiction and will dismiss Plaintiff's implied ***FTCA claim*** in this Count for failure to state a claim.

B. Count Two: "Negligent Operation, Maintenance, Control, Supervision, Direction, and Training"

Plaintiff's claim in Count Two is based on the Government's alleged failure to carry out its statutory and contractual duties for the operation of the Chinle Jail and the CCHCF. (Doc. 32 ¶ 76.) Plaintiff alleges that the Government had a duty, through its contractors, "to properly screen, hire, control, direct, train, monitor, supervise and/or discipline employees, terminate, or otherwise take remedial action against its agents and contractors." (*Id.*) Plaintiff **[*17]** further alleges that the Government and its agents and employees breached these duties through the unreasonable conduct alleged in the Second Amended Complaint. (*Id.* ¶ 77.) In particular, she alleges that the Government knew that its agents and employees were acting improperly and negligently, but it failed to adopt or enforce proper protocols and breached the standards of care for operating the Chinle Jail and the CCHCF medical facility. (*Id.* ¶¶ 78-80.) Plaintiff further alleges that the Government had direct and actual knowledge of Vincent's suicide attempts, mental health issues, suicidal ideation, and seizures, requiring in-house treatment at St. Joseph's hospital. (*Id.* ¶ 81.) Further, she alleges that the Government's negligent conduct was a direct and proximate cause of Vincent's wrongful death and the damages to Vincent's estate. (*Id.* ¶ 82.)

Plaintiff's claim in Count Two suffers from the same deficiencies already noted in Count One. Namely, Plaintiff appears to seek to sue the Government for negligence directly, rather than to allege negligent acts or omissions of individual federal employees, for whom the Government must assume liability for negligence under the FTCA. As already **[*18]** discussed, Plaintiff's attempt to sue the Government directly fails for lack of subject matter jurisdiction because the Government is immune to suits for damages, and that immunity has not been waived. Additionally, to the extent Plaintiff also attempts to assert an ***FTCA claim***, the Government's statutory waiver of sovereign immunity under the FTCA is limited. The FTCA applies only to "the negligent or wrongful act or omission of *any employee of the United States* while acting within the scope of his office or employment," not to generalized theories of negligence asserted against the staff and employees of federal institutions as a whole. *See* *28 U.S.C.A. § 1346(b)(1)* (emphasis added).

The Ninth Circuit has specifically addressed the FTCA's statutory definition of "employee of the government," which encompasses five categories of employees, including, as relevant here, "persons acting on behalf of a federal agency in an official capacity." *Adams v. United States, 420 F.3d 1049, 1051 (9th Cir. 2005)*; *see* *28 U.S.C. § 2671*. In *Adams*, a private helicopter company that had contracted with the Bureau of Land Management tried to escape liability for its alleged negligence by arguing that it was a "person acting on behalf of a federal agency" and was therefore shielded from suit by the FTCA, **[*19]** which transfers such liability from federal employees acting in the scope of their employment to the United States. *420 F.3d at 1051-55*. The *Adams* court rejected this argument, finding, based on principles of statutory construction and Congressional intent, that "persons acting on behalf of a federal agency in an official capacity" means individual persons, not corporate entities. *Id.*

Adams is not directly on point here because Plaintiff has not attempted to sue the Government under the FTCA for the alleged negligent acts of a private corporation or

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additional allegations suffice to state an ***FTCA claim*** against the Government.

any other "corporate entity" allegedly responsible for Vincent's death. Instead, Plaintiff attempts to sue the Government for its own negligence, as to which the Government is immune, based on the generalized negligence of its "employees, contractors, officials, and agents," whom Plaintiff alleges are responsible for the overall operations and safety and security of detainees at the Chinle Jail and the CCHCF. (Doc. 32 ¶ 77.)

The basic principles articulated in *Adams* regarding what is meant by the phrase "employee of the government" in the FTCA nonetheless apply here. *Adams* concluded that the purpose of the FTCA was to protect federal employees acting within the scope of their **[*20]** employment from personal liability, meaning "to protect natural persons whose personal fortunes might suffer, not artificial corporate entities which have limited liability." *420 F.3d at 1054*. *Adams* therefore confirms that, for the FTCA to apply, a plaintiff must allege tortious conduct by federal employees, acting within the scope of their employment, for which those individuals could otherwise be held personally liable. Absent specific allegations regarding the roles and responsibilities of individual federal employees, how each employee breached his or her duties of care, and how their negligent conduct caused Vincent harm, Plaintiff's allegations in Count Two are too vague and conclusory to state an underlying negligence claim for which the Government can be held liable under the FTCA.

As with Count One, the Court will dismiss Plaintiff's direct negligence claim against the Government in Count Two with prejudice for lack of subject matter jurisdiction and will dismiss her implied ***FTCA claim*** in Count Two for failure to state a claim.[6]

C. Count Three: Medical Negligence

Plaintiff's claim in Count Three is based on Defendant Dr. Reifler's alleged medical negligence while acting in the scope of his employment **[*21]** as "an employee, contractor or agent of Defendant United States." (Doc. 32 ¶ 84.) Plaintiff alleges that Dr. Reifler failed (1) "to possess and apply the knowledge, skill, and care of a reasonably well-qualified practitioner under similar circumstances," (2) "to use reasonable care when performing examinations, care, and treatment of Vincent," (3) "to reasonably ensure sufficient medical supplies were on-hand to provide reasonable care and treatment of Vincent," (4) "to identify the extent of Vincent [] Lee's mental health and suicidal ideation conditions, chronic seizures, and to act with reasonable medical prudence in his treatment and care," and (5) "to appropriately transfer Vincent Lee to a facility capable of managing his condition." (*Id.* ¶ 90.) Plaintiff also alleges that Dr. Reifler's medical negligence was a direct and proximate cause of Vincent's death. (*Id.* ¶ 91.) And she alleges that the Government is liable for Dr. Reifler's negligent conduct under the FTCA. (*Id.* ¶ 87.)

The Government argues that it is not liable for Dr. Reifler's alleged negligent conduct because Dr. Reifler was an independent contractor, not a federal employee, and the Government did not exert any control **[*22]** over Dr. Reifler that would trigger federal employee status under the FTCA. (Doc. 33 at 8-12.) The Government also argues that the Performance Work Statement (PWS) attached to Dr. Reifler's contract documents did not convert Dr. Reifler into a federal employee, as statutorily required to confer FTCA coverage under *Section 1680c of the Indian Health Care Improvement Act (IHCIA)*, and the part of the PWS purporting to do just that is invalid and therefore does not convert Dr. Reifler's alleged negligence into an ***FTCA claim***. (*Id.* at 12-15.)

In his Response, Dr. Reifler does not dispute that he was a contractor, not a federal employee; nor does he dispute that, when providing psychological services at Chinle, he had the authority to make independent medical decisions. Instead, he argues that these facts are irrelevant because, under principles of contract law, the intent of the contracting parties regarding such coverage, not the "right of control," is the proper test to determine whether his alleged negligence is covered under the FTCA. (Doc. 66 at 11.) He further argues that the intent of the parties in this instance was for the Government to provide FTCA coverage to practitioners such as himself, who provide **[*23]** medical care to Indian Health Services (IHS) beneficiaries at an IHS facility, and the Government contracted to do so in

[6] The Government also argues in a footnote that Plaintiff's negligent hiring claim should be dismissed because Plaintiff failed properly to exhaust her administrative remedies as to this claim before filing this action. (Doc. 33 at 8 n.2.) Because the Court will dismiss Count Two in its entirety for lack of subject matter jurisdiction and failure to state a claim, the Court will not address this argument. Additionally, although not entirely clear, it appears that the Government's arguments that Plaintiff is not entitled to damages for her wrongful death claims under Arizona law is directed at her claims in Counts One and Two. Because the Court will dismiss these claims on other grounds, the Court will also not address these arguments.

unambiguous terms. (*Id.*) He also argues, based on Section 1680c of the IHCIA (25 U.S.C. § 1680c), that Congress has expressly permitted the Government to confer federal employee status on independent contractors such as himself for the purpose of extending FTCA coverage and the Government did so in his case. (*Id.* at 11-14.) He lastly argues, in the alternative, that the Government is equitably estopped from now taking a contrary position by denying him FTCA coverage in this litigation. (*Id.* at 14-17.)

Where, as here, the Government moves to dismiss for lack of subject matter jurisdiction, and the parties' arguments rely on contract documents and other evidence outside the pleadings, the Court will consider this evidence. McCarthy, 850 F.2d 558, 560 (9th Cir. 1988)

1. Relevant Facts

IHS is a federal agency within the U.S. Department of Health and Human Services. 25 U.S.C. § 1661. IHS was established under the IHCIA "[i]n order to more effectively and efficiently carry out the responsibilities, authorities, and functions of the United States to provide health care services to Indians and Indian ***tribes***." *Id.*

The Chinle Hospital ("Chinle")[7] is an IHS facility, which has historically **[*24]** been understaffed and must rely, in part, on contract physicians (aka "locum tenens" physicians) to fill vacancies and provide necessary medical services on a temporary basis. (Doc. 66 at 2.) Chinle relies on staffing agencies, including CHG Healthcare ("CHG"), to fill its staffing needs. (*Id.*)

a. Chinle/CHG Contract

On September 18, 2015, the Chinle Acquisitions Department entered into a "Non Personal Service Contract" with staffing agency CHG, which Chinle's Contracting Officer Priscilla Duncan then signed on behalf of the Government. (Doc. 37-4 at 2.)[8] The Contract stated that CHG would "provide Psychiatry Physician Services in the delivery of patient care" to Chinle "in accordance with the Performance Work Statement" related to the relevant position description. (*Id.*) It also established an "All Inclusive Rate" for "Psychiatry Physician services," under which staffing agency CHG, not the Government, was "responsible for all costs associated with providing said services," including travel, per diem, lodging, and for all applicable federal, state, and local taxes." (*Id.* at 3.)

b. The PWS

The PWS used by Chinle for "Board Eligible Psychiatrist or Board Certified Psychiatrist" defines a "Nonpersonal **[*25]** Services Contract" as "a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of administration, to the supervision and control usually prevailing in relationships between the Government and its employee." (Doc. 37-5 at 6 (PWS § 2.16).)

Among other topics, the PWS addresses whether a contract physician will be covered by the FTCA or will have to purchase malpractice insurance. (Doc. 66-1, Ex. 2 (Begay Dep.) 29:11-18.) At the relevant time of this action, the PWS for "Board Eligible Psychiatrist or Board Certified Psychiatrist," contained a clause, which stated

> According to the Indian Health Care Improvement Act Reauthorizations and Amendments (Section 194)[,] Federal Torts Claim Act (FTCA) (28 U.S.C. 1346(b), 1964) is extended to Indian Health Service (IHS) Nonpersonal Service Contractors if the health care practitioner is providing services in an IHS facility to IHS beneficiaries.

(Doc. 66-1, Ex. 6 (PWS) at 62 ¶ 7.) This clause (hereinafter the "FTCA Clause") was added in 2013 at the direction of Chinle's then-acting Clinical Director Dr. Mark Meyers and Chief Contracting Officer Frank Dayish, and it appeared in the PWS statements for all nonpersonal service providers. **[*26]** (Doc. 66-1 at 67; Doc. 66-1, Ex. 2 (Begay Dep.) at 31:14-32:14.) At that time, the IHS website also contained the following paragraph about "Independent Contractors":

> Previously, Health care providers working at Indian Health Service or Tribal facilities under non-

[7] This is the same facility referred to in the Second Amended Complaint by the acronym CCHCF, which the Court used in the previous sections of this Order. For ease of reference, in this section of the Order, the Court will follow the wording used in the relevant briefs, depositions, and other supporting materials and refer to CCHCF as Chinle.

[8] Citations throughout this Order refer to the document and page number generated by the Court's Case Management/Electronic Case Filing system.

> personal services contracts—such as *locums tenens* providers—were generally *not* covered under the Federal Tort Claims Act and had to secure their own malpractice insurance. **However, the recently passed *25 U.S.C. 1680c(e)* may extend Federal Tort Claims Act coverage to these "non-Service health care practitioners" who are given clinical privileges and who provide health care services to patients eligible for services from the Indian Health Service or under an ISDEAA contract**.

(Doc. 66-1, Ex. 7 (October 30, 2013 Email) at 67 (bolding added).)

Based on the instruction of Chinle acting Clinical Director Meyers, Tanya Begay (aka Tanya Johnson), the Supervisory Contract Specialist for the Navajo Area IHS, emailed Acquisitions staff, instructing them to incorporate the above paragraph into the PWS and/or Scopes of Work statements in all nonpersonal service contracts. (*Id.*; Doc. 66-1, Ex. 2 (Begay Dep.) at 31:14-32:14.) Begay explained in her email that, "[a]s of 10/02/2013 **[*27]** during a telecom with our CCO, I was informed that Nonpersonal Service Contracts are covered by Federal Torts Claim Act (FTCA). This means that . . . Indemnification and Medical Liability Insurance is not required at this time for Nonpersonal service contracts." (Doc. 66-1, Ex. 7 (October 30, 2013 email) at 67.)

On March 9, 2017, the Chinle Acquisitions Department entered into another "Non Personal Services Contract" with CHG for the period from January 1, 2017 to December 31, 2017, and Begay signed the contract on behalf of the United States. (Doc. 66-1, Ex. 5 (Solicitation Order) at 39, box 31(a); Doc. 66-1, Ex 2 (Begay Dep.) at 24:1-6.) As above, the Contract incorporated the PWS for "Board Eligible Psychiatrist or Board Certified Psychiatrist," which contained the FTCA Clause. (Doc. 66-1, Ex. 5 at 39, box 20.)

c. Dr. Reifler's Nonpersonal Contract Work at Chinle

The above Solicitation Order between Chinle and CHG and the corresponding WPS (collectively, the "Chinle/CHG Contract") were in effect when Dr. Reifler became a CHG-contracted nonpersonal service provider at Chinle. (Doc. 66 at 3.) In reliance on the FTCA Clause in the PWS, Dr. Reifler did not obtain separate medical malpractice insurance for any claims that might **[*28]** be asserted against him in connection with his work at Chinle. (*Id.*)

IHS policy dictates that all licensed independent practitioners who provide services within its facilities be credentialed (verified as qualified to practice) and privileged (authorized for privileges within the scope of their practice) by the same mechanisms as staff providers and have documented evidence of liability insurance coverage unless they are covered by the FTCA. (Doc. 66 at 4; Doc. 66-1, Ex. 1 (Ritchie Dep.) at 16:3-16.) As the Clinical Director of Chinle and Chair of the Medical Executive Committee, Dr. Eric Ritchie oversaw Dr. Reifler's credentialing process and approved him for staff privileges at Chinle after all qualifications were met. (Doc. 66 at 5.)

According to Dr. Ritchie, during a typical hospital credentialing process, a credentialing coordinator gathers background information on the practitioner and forwards this information to a medical executive committee to make a recommendation; the recommendation is then forwarded to the board of trustees of the hospital to determine whether the candidate has appropriate credentials. (Doc. 66-1, Ex. 1 (Ritchie Dep.) at 14:10-20.) Chinle follows a similar process, with the "governing body" of **[*29]** the hospital acting as the board of trustees. (*Id.*) The privileging process is a separate process that specifically has to do with the scope of practice and involves approving practitioners as qualified to perform certain privileges they request to perform within their areas of practice. (*Id.* at 16:5-10.) Dr. Reifler went through both the credentialing and privileging processes and was privileged to practice in the area of psychiatry at Chinle. (*Id.* at 16-23.)

On May 31, 2017, Dr. Ritchie responded to an email from Dr. Reifler regarding whether Dr. Reifler had FTCA coverage by stating, "any tort claims that arise as a result of your practice within the scope of your contract with Indian Health Service would be eligible for Federal Tort Claims Act coverage." (Doc. 66-1, Ex. 1 (Ritchie Dep.) at 4:10-5:9.) Dr. Ritchie also discussed this topic with Dr. Reifler in person before Dr. Reifler saw any Chinle patients, and Dr. Ritchie told Dr. Reifler that he would be covered for any potential claims against him under the FTCA. (*Id.* at 10:5-11:10.) Dr. Ritchie was aware at that time that Dr. Reifler was a locum tenens physician practicing at Chinle on a temporary basis and not a federal employee. (*Id.* at **[*30]** 5:11-20.)

d. Subsequent Change to the PWS

Sometime in 2018 or 2019, Dr. Ritchie spoke with IHS

Risk Manager Dr. Paul Fowler about whether individual practitioners whom he had learned were being sued in state court in a different lawsuit at that time (*Tsosie*) would be covered under the FTCA, and Dr. Ritchie also began an investigation of his own into this issue. (*Id.* at 19:7-20:2.) Based on his conversations with Dr. Fowler, Dr. Ritchie decided to change the FTCA Clause in the PWS for all nonpersonal service contracts, this time to state that FTCA coverage does *not* apply to nonpersonal service contractors providing services at Chinle. (*Id.* at 20:3-6.) That language remains in effect today. (*Id.* at 20:7-25.)

2. Discussion

Whether the Government may be sued for Dr. Reifler's alleged negligence in this action depends on whether Congress has waived the Government's sovereign immunity to such suit, either in the FTCA or another federal statute. *See* Dunn & Black, P.S. v. United States, 492 F.3d 1084, 1090 (9th Cir.2007) ("Only Congress enjoys the power to waive the United States' sovereign immunity."). "It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction **[*31]** on a court in the absence of some express provision by Congress." United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660, 67 S. Ct. 601, 91 L. Ed. 577, 108 Ct. Cl. 763 (citing cases); *see also* United States v. Mitchell, 463 U.S. 206, 215-16, 103 S. Ct. 2961, 77 L. Ed. 2d 580, (1983) ("no contracting officer or other official is empowered to consent to suit against the United States.") Instead, for the United States to be sued, it must "expressly waive[]" its sovereign immunity, and "[s]uch waiver cannot be implied, but must be unequivocally expressed." Dunn & Black, P.S., 492 F.3d at 1088. The scope of any such waiver must also be strictly construed "in favor of the sovereign." *Id.* (*quoting* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261, 119 S. Ct. 687, 142 L. Ed. 2d 718(1999) (internal quotation marks omitted).

a. FTCA

The FTCA acts as a congressional waiver of the United States' sovereign immunity with respect to the tortious acts of "any employee of the Government while acting within the scope of 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." 28 U.S.C. § 1346(b)(1). The FTCA does not cover the acts of independent contractors; generally, the Government may not be held liable for employees of a party with whom it contracts for a specified performance. Logue v. United States, 412 U.S. 521, 531, 93 S. Ct. 2215, 37 L. Ed. 2d 121 (1973). A court may, however, determine a party to be an employee of the Government for the purposes of the FTCA if the **[*32]** Government enjoys the power to control the detailed physical performance of the contractor or supervises the day-to-day operations of the contractor. Autery v. United States, 424 F.3d 944, 956 (9th Cir. 2005) ("[T]he critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor.") (internal citations omitted). A contractor is considered an employee only if the government agency manages the details of the contractor's work or supervises his daily duties, but not if the government agency acts generally as an overseer. Id. at 956-57.

The facts presented herein demonstrate, and Dr. Reifler does not dispute, that Dr. Reifler was an independent contractor, not a government employee, when he provided psychiatric care to Vincent at Chinle. Further, as a nonpersonal services contractor, it is undisputed that Dr. Reifler was "not subject . . . to the supervision and control usually prevailing in relationships between the Government and its employee." (*See* Doc. 37-5 at 6 (PWS § 2.16).) As such, Dr. Reifler was also not subject to the detailed control of any federal employees such that he could, on that basis, be considered a federal **[*33]** employee for purposes of the FTCA. *See* Carrillo v. United States, 5 F.3d 1302, 1305 (9th Cir. 1993) (finding for purposes of the FTCA that "[b]ecause Madigan did not control Dr. Ozimek's actions in diagnosing and treating patients, Dr. Ozimek was not an employee of the government when he treated Tyler Priest"). Because Dr. Reifler was a contract provider who was free to make his own, independent medical decisions while providing services at Chinle, the FTCA does not waive the Government's sovereign immunity to suit as to any claims arising from Dr. Reifler's alleged negligence in treating Vincent.

Dr. Reifler argues that FTCA coverage nonetheless applies to him because the CHG/Chinle contract "expressly extended FTCA coverage to Dr. Reifler via the FTCA clause contained in the PWS." (Doc. 66 at 6.) And he maintains that this waiver of sovereign immunity is enforceable because Congress lawfully provided for this extension under the 2010 amendment to the IHCIA

at 25 U.S.C. § 1680c(e)(1). (*Id.* at 11-14.)

b. ICHIA

Section 1680c(e)(1) of the IHCIA provides that, in healthcare facilities that are "operated under a contract or compact pursuant to the ***Indian Self-Determination*** and Education Assistance Act (25 U.S.C. 450 et seq.)," hospital privileges "may be extended to non-[Indian Health] Service health care practitioners." **[*34]** It further provides that these

> practitioners may, as part of the privileging process, be designated as employees of the Federal Government for purposes of section 1346(b) and chapter 171 of Title 28 [relating to Federal tort claims] only with respect to acts or omissions which occur in the course of providing services to eligible individuals as a part of the conditions under which such hospital privileges are extended.

25 U.S.C. § 1680c(e)(1) (2010).

The Government does not dispute that the relevant PWS at the time Dr. Reifler became a contracted medical provider at Chinle extended FTCA coverage to nonpersonal services contractors, including Dr. Reifler. But the Government argues that this does not resolve the issue because the PWS was not "a privileging document," and neither the FTCA Clause in the PWS nor Dr. Ritchie's email and personal assurances to Dr. Reifler were "part of the privileging process"; nor did they designate Dr. Reifler as an "employee[] of the Federal Government," as is required to trigger FTCA coverage under § 1680c(e)(1). (Doc. 33 at 12-13; *see* § 1680c(e)(1).)

To demonstrate that the specific requirements of § 1680c(e)(1) were not met in Dr. Reifler's case, the Government relies, in part, on the declaration of IHS Risk Management Program **[*35]** Director Dr. Paul Fowler. (Doc. 33 at 14.) According to Dr. Fowler, there are no implementing federal regulations for § 1680c(e)(1), and the IHS has never disseminated a process for implementing this provision. (Doc. 33-2, Ex. A. (Fowler Decl.) ¶ 17.) Therefore, when Dr. Reifler began providing services at Chinle in 2017, no procedures existed within IHS to designate any non-IHS personnel as federal employees during the privileging process, and Chinle's privileging process did not then, and does not now, designate anyone as a federal employee, as required to be eligible for FTCA coverage under § 1680c(e)(1). (*Id.*)

Fowler also acknowledges that the mandatory wording of the FTCA clause in the PWS does not comport with the language of § 1680c(e)(1), which states only that non-IHS employees "**may**, as part of the privileging process, be designated as employees of the Federal Government for purposes of" the FTCA, not that the extension of FTCA coverage is automatic. (*Id.*; *see* 25 U.S.C. § 1680c(e)(1) (emphasis added).) By contrast, the PWS states in mandatory language that FTC coverage "**is** extended to Indian Health Service (IHS) Nonpersonal Service Contractors if the health care practitioner is providing services in an IHS facility to IHS beneficiaries" **[*36]** and says nothing about the privileging process or the conditionality of such coverage under § 1680c(e)(1). (Doc. 37-5, Ex. 2 (PWS § 7.0) at 15 (emphasis added).)

Based on these distinctions, the Government argues that "[w]hile Chinle may have purportedly made representations about FTCA coverage" to Dr. Reifler, it did so without proper authority, since only Congress can waive sovereign immunity; therefore, any such representations are not binding on the Government. (Doc. 33 at 14.)

Dr. Reifler disputes the Government's position, arguing that "[i]t matters not that the PWS is not a 'privileging document' itself." (Doc. 66 at 14.) He argues that what matters is that he was granted hospital privileges "after undergoing the same credentialing and privileging process required of all federal employees" and that because he was "providing psychiatric services at an IHS facility, to an IHS beneficiary, all provisions of 25 U.S.C. § 1680c(e) are met such that FTCA coverage was lawfully extended to Dr. Reifler because Chinle was authorized to do so under authority extended by Congress." (Doc. 66 at 14.)

To support their differing positions, both parties rely on the Tenth Circuit's findings in Tsosie v. United States, 452 F.3d 1161 (10th Cir. 2006), which is the only published federal appeals **[*37]** court case of which the Court is aware that has addressed the extension of FTCA coverage to nonpersonal services contractors under § 1680c.[9]

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[9] This 2006 case predates and is different from the *Tsosie* case (referred to *infra* as *Arizona Tsosie*), which appears to be related to the state court case that prompted Dr. Ritchie to investigate the legality of the FTCA Clause and to eliminate that Clause from Chinle's PWS documents.

Tsosie dealt with a factually similar situation to the one presented here. In *Tsosie*, the surviving spouse and children of a Navajo decedent (Nettie Tsosie), who died from misdiagnosed hantavirus, brought an ***FTCA claim*** against the Government based on the alleged negligent diagnosis and ineffective treatment provided to Nettie by an emergency room physician operating under a nonpersonal services contract at a hospital owned and operated by the IHS. *452 F.3d at 1162*.

The *Tsosie* court first rejected the plaintiffs' argument that the Government could be sued for the doctor's alleged negligence under the FTCA on the ground that the doctor was operating in all relevant respects as "an employee of the Government." *Id. at 1163-65*. In applying the "control test," the court determined that the doctor's contract was carefully drafted to ensure his status as an independent contractor, including that he was able to make independent medical decisions and was not required to work under the supervision of government employees. *Id. at 1165*. As already noted, this analysis applies equally to **[*38]** Dr. Reifler, who also had the authority to make independent medical decisions at Chinle.

The plaintiffs in *Tsosie* also argued, as Dr. Reifler does here, that the doctor in that case was entitled to FTCA coverage pursuant to *25 U.S.C. § 1680c*. The *Tsosie* court also rejected this argument. *Id. at 1166-67*. Because *Tsosie* was decided in 2006, the opinion predated the 2010 Amendment of *§ 1680c*, which applies here. In 2006, the relevant provision regarding potential FTCA coverage was codified as *§ 1680c(d)*, "Extension of hospital privileges in health facilities to non-Service health care practitioners," and it stated, as follows:

> Hospital privileges in health facilities operated and maintained by the Service[10] or operated under a contract entered into under the ***Indian Self-Determination*** Act *may* be extended to non-Service health care practitioners who provide services to persons described in *subsection (a)* or *(b)* of this section. Such non-Service health care practitioners *may* be regarded as employees of the Federal Government for purposes of *section 1346(b)* and chapter 171 of Title 28 (relating to Federal tort claims) only with respect to acts or omissions which occur in the course of providing services to eligible persons as a part of the conditions under which such hospital **[*39]** privileges are extended.

Tsosie v. United States, 452 F.3d 1161, 1166-67 (10th Cir. 2006), quoting *25 U.S.C. § 1680c(d) (2006)* (emphases in *Tsosie*).

Then, as now, *§ 1680c*, which contains this subsection, was titled "Health Services for Ineligible persons," *see 25 U.S.C. § 1680c (2006)* and *(2010)*, meaning non IHS beneficiaries. *Tsosie, 452 F.3d at 1167*. Accordingly, *Tsosie* noted that this Section "specifically pertains to health services for ineligible persons at Indian Health Service facilities." *Id.* Seen in this context, *Tsosie* noted that the first sentence of *§ 1680c(d)* "simply excludes from FTCA protection non-Service health care providers who commit a tort during the treatment of ineligible persons." *Id.* This is because, the court reasoned, the sentence states only that hospital privileges—not FTCA coverage—*may* be extended to non-Service healthcare practitioners who provide care to ineligible patients at IHS hospitals. *Id.* By contrast, the second sentence clarifies that such practitioners *may* also "be regarded as employees of the Federal Government for purposes of . . . the [FTCA]," but only "with respect to acts or omissions which occur in the course of providing services to eligible persons as a part of the conditions under which such hospital privileges are extended." *25 U.S.C. § 1680c(d) (2006)* (emphasis added).

Tsosie opined **[*40]** that the omission in the first sentence of any mention of FTCA coverage for practitioners treating ineligible patients in IHS facilities does not mean the converse is true, i.e., that "non-Service health care providers treating eligible patients are automatically covered by the FTCA." *Id.* Instead, the court found that the second sentence, which refers to FTCA coverage, means only that "if a non-Service health care practitioner is granted hospital privileges to provide services to ineligible persons . . . that non-Service health care practitioner *may* be covered by the FTCA for purposes of the care that he might give to an eligible person." *Id. Tsosie* additionally found that

> by stating that non-Service health care practitioners *may* be covered by the FTCA, the statute clearly recognizes that there will be instances where the non-Service health care practitioners will not be covered by the FTCA, e.g., an independent contractor (non-personal services contract) which specifically requires that the contractor maintain its own liability insurance.

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[10] "Service" refers to the IHS. *See* "Definitions," *25 U.S.C. § 1603(18)*.

Id.

The 2006 codification of this provision discussed in *Tsosie* is identical in structure and relevant content to the 2010 version now in effect. In **[*41]** both versions, for instance, the first sentence states that hospital privileges "may" be extended to non-Service practitioners who treat ineligible patients in IHS facilities, and the second sentence adds that FTCA coverage "may" be extended to such practitioners, but only as to their treatment of "eligible individuals." *25 U.S.C.A. § 1680c(d) (2006)*; *id.* at *§ 1680c(e)(1) (2010)*. The two versions differ only with respect to the additional wording in the 2010 version, stating that the designation of a provider as a federal employee for purposes of FTCA coverage occurs "as part of the privileging process." *Id.*[11] In both codifications, the same sentence goes on to state that the extension of such coverage "may" apply and that the coverage is specifically limited to instances in which "the provider is providing services to eligible individuals as a part of the conditions under which such hospital privileges are extended." *25 U.S.C.A. § 1680c(d) (2006)*; *id. § 1680c(e)(1) (2010)*.

The operative question in this litigation, then, is whether the evidence currently before the Court shows that Dr. Reifler was designated as a federal employee for purposes of FTCA coverage "as part of the privileging process" pursuant to *§ 1680c(e)(1)* and was providing **[*42]** services to IHS-eligible individuals at an IHS facility "as a part of the conditions under which such hospital privileges [we]re extended." *25 U.S.C.A. § § 1680c(e)(1) (2010)*. Because the FTCA acts as a waiver of the Government's sovereign immunity, the application of the waiver in *§ 1680c(e)(1)* to the facts presented must be unambiguous, not simply implied. *United States v. Nordic Vill. Inc., 503 U.S. 30, 33, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992)* ("Waivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed.'") (internal quotation marks and citations omitted). Further, Dr. Reifler has the burden of proof of showing that the FTCA waiver applies. *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* ("It is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (internal citations omitted).

Here, it is undisputed that, when providing psychiatric care to Vincent at Chinle, Dr. Reifler was acting in the capacity of an independent contractor providing medical services to an IHS-eligible patient in an IHS facility, which Dr. Reifler had been authorized to provide pursuant to the credentialing and privileging process he went through under the supervision of Dr. Ritchie. But it does not automatically **[*43]** follow that Dr. Reifler had "as part of the privileging process . . . [been] designated as [an] employee[] of the Federal Government," such that the FTCA coverage expressly extended to him in the PWS and in personal assurances from Dr. Ritchie was authorized by Congress under *§ 1680c(e)(1)*. The addition of "as part of the privileging process" in the 2010 Amendments makes *§ 1680c* even less amenable to the interpretation advanced by Dr. Reifler that his FTCA coverage stems solely from being privileged to practice at Chinle without being designated a federal employee during that process.

Courts in the respondeat superior context have recognized that the process of privileging a contract provider to perform specific services at a medical facility does not, of itself, convert that contractor into an employee. *C.f. Bynum v. Magno, 125 F. Supp. 2d 1249, 1264 (D. Haw. 2000)* ("Drs. Magno, Dang and Callan have hospital privileges at QMC, but QMC is not their employer"); *McPherson v. HCA-HealthOne, LLC., 202 F. Supp. 2d 1156, 1167 (D. Colo. 2002)* ("the fact that the Medical Center set professional standards for doctors to meet, and conditioned staff privileges upon compliance with these standards, does not alter the status of doctors from that of independent contractors to one of employees"); *id.* ("the privilege to use facilities,

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[11] The 2010 amendment was set forth in *Section 194 of Senate Bill 1790*, "Indian Health Care Improvement and Extension Act of 2019," which was submitted by the Senate Committee on Indian Affairs on December 16, 2009 without a written report, and later enacted as H.R. 3590 as part of the Patient Protection and Affordable Care Act. *See* S.1790 — Indian Health Care Improvement Reauthorization and Extension Act of 2009, 111th Congress (2009-2010). *See Congres.gov*, https://www.congress.gov/bill/111th-congress/senate-bill/1790?q=%7B%22search%22%3A%5B%22Committee+on+Indian+Affairs+S1790%22%5D%7D&s=5&r=2 (last visited September 8, 2020). The Senate Bill stated, without any explanation, only that the then-proposed amendment "revises provisions concerning health services for ineligible persons." (*Id.*) In any case, the reasons or intent of the 2010 Amendment is not relevant here because, to the extent *§ 1680c(e)(1)* acts as a waiver of the Government's sovereign immunity, the statute itself must be unambiguous. "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*.

equipment and **[*44]** staff, without more, does not translate into an employer-employee relationship. Thus, the undisputed evidence reflects that Dr. Kamau is an independent contractor, and [he] is not an employee of the Medical Center.")

Because the Court must strictly construe § 1680c(e)(1) as requiring not just that Dr. Reifler was privileged to practice psychiatry at Chinle, but that he was also "designated as [an] employee[] of the Federal Government" as part of the privileging process, it must determine, based on the facts in evidence, whether this condition was met. In this case, neither Dr. Ritchie's deposition testimony nor any other evidence presented by the parties suggest that being credentialed and privileged to practice as a nonpersonal services provider at Chinle equates to being designated an employee of the Government. There is also no evidence that Dr. Reifler was ever designated a federal employee. The Court therefore cannot conclude that the prerequisite for obtaining FTCA coverage under § 1680c(e)(1) was met, such that the Government's purported waiver of sovereign immunity as to Dr. Reifler's alleged negligence is unambiguous.

There is also no decisive case law that would support Dr. Reifler's position that the **[*45]** requirements of § 1680c(e)(1) were met in his case. As noted, *Tsosie*—the only known federal appeals court decision to have addressed the issue—found that the permissive rather than automatic language § 1680c(d) (now § 1680c(e)(1)) did not support finding that FTCA coverage extended to the independent contractor in that case. 452 F.3d at 1167.

Dr. Reifler argues that *Tsosie* is not on point because, unlike in *Tsosie*, the PWS in Dr. Reifler's case specifically stated that FTCA coverage would be extended to him, and Dr. Ritchie further confirmed this information—both in an email and in person—before Dr. Reifler began providing care to Chinle patients. (Doc. 66 at 11.) While correct, the PWS is, as a matter of law, insufficient to confer such coverage because only Congress can waive the Government's sovereign immunity. Here, it is undisputed that, like the emergency room doctor in *Tsosie*, Dr. Reifler was an independent contractor operating under a nonpersonal services contract, which authorized him to exercise his own medical judgment when caring for patients at an IHS facility, and he was therefore outside the intended orbit of the FTCA. Further, the only other statutory provision permitting FTCA coverage under such circumstances—§ 1680c(e)(1)—must be **[*46]** narrowly construed in favor of the Government.

Narrowly construing the relevant statutory requirements for FTCA coverage to apply in this instance, the Court cannot conclude under the facts presented that the Government waived its sovereign immunity as to Dr. Reifler's alleged negligence pursuant to § 1680c(e)(1). Therefore, absent clear congressional intent to the contrary, the Court does not have jurisdiction over Plaintiff's ***FTCA claim*** stemming from Dr. Reifler's alleged negligence in treating Vincent. *Tobar, 639 F.3d at 1195 (9th Cir. 2011)*.

Finally, Plaintiff's reliance on *Tsosie v. United States, No. CV-18-00494-PHX-SPL, 2019 U.S. Dist. LEXIS 99198, 2019 WL 2476601, at *1 (D. Ariz. June 13, 2019)* (hereinafter "*Arizona Tsosie*"), does not persuade the Court otherwise. In *Arizona Tsosie*, Plaintiff Georgia Tsosie, a member of the Navajo Nation, brought a negligence claim against the Government based on the alleged deficient medical care provided to her son by an independent medical contractor, also at Chinle, allegedly causing her son to suffer an irreparable brain injury due to lack of oxygen to the brain. *2019 U.S. Dist. LEXIS 99198, [WL] at *1*. The doctor in *Arizona Tsosie*, like Dr. Reifler, was performing services outlined in a PWS that contained the same FTCA Clause discussed herein. (*Id.*) In *Arizona Tsosie*, the district court found that the Privileging **[*47]** Guide used to carry out the credentialing and privileging of locum tenens providers in that case did not "explicitly state that a physician that is granted hospital privileges is a federal employee." *2019 U.S. Dist. LEXIS 99198, [WL] at *4*. The Court nonetheless found that "[t]he Government's argument that the PWS is not part of the privileging process is irrelevant because *25 U.S.C. § 1680c(e)(1)*, alongside the language in the PWS, confers federal employee status upon the physician granted hospital privileges, not just the PWS." *Id.*

In reaching this conclusion, the *Arizona Tsosie* court placed the burden of proof on the Government to show that the court did not have jurisdiction over the plaintiff's ***FTCA claim***, stating that "[t]he Government does not set forth any persuasive reason for why the privileging process carried out at Chinle Hospital was insufficient to deem Dr. Alving a federal employee under *25 U.S.C. § 1680c(e)(1)*." *Id.* The court went on to state that, even if Chinle was not authorized to include the FTCA Clause in the PWS, "[t]he Government's actions and the representations it made to [medical staffing company] MDA and Dr. Alving [we]re sufficient to deem him a federal employee pursuant to *25 U.S.C. § 1680c(e)(1)*."

Finally, using apparent principles of equitable estoppel, the **[*48]** court noted that both the MDA and Dr. Alving relied upon the Government's representations to [their] detriment and that "[t]his point is only further emphasized by the fact that Chinle Hospital's director removed the FTCA Clause language from the PWS immediately following the Plaintiffs' commencement of this lawsuit." *Id.*

This Court is not persuaded by the reasoning in *Arizona Tsosie.* First, the *Arizona Tsosie* court overlooked that, where a party challenges the court's jurisdiction, the party seeking jurisdiction has the burden of demonstrating that such jurisdiction exists. *See Kokkonen, 511 U.S. at 377*. It is not the Government's burden to prove lack of jurisdiction where there has been no express waiver of sovereign immunity in this lawsuit and the facts before the Court do not show that the requirements for the Government to waive its sovereign immunity under *§ 1680c(e)(1)* were met. Further, as discussed, *§ 1680c(e)(1)* makes extending FTCA coverage to a nonpersonal services contractor contingent upon his being designated a federal employee as part of the privileging process, and there is no evidence that this occurred. As noted, the Court must start with the presumption that it does not have jurisdiction over suits against the Government, **[*49]** *see Kokkonen, 511 U.S. at 377*, and where it is ambiguous whether the Government has waived its sovereign immunity, the Court must find in favor of the sovereign. *Dunn & Black, P.S., 492 F.3d at 1088*. Applied to the facts in this case, *§ 1680c(e)(1)* does not act as an unambiguous waiver of the Government's sovereign immunity over Dr. Reifler's alleged negligence in treating Vincent; the Court therefore lacks subject matter jurisdiction over Plaintiff's ***FTCA claim*** in Count Three.

c. Equitable Estoppel

Finally, because the Court lacks subject matter jurisdiction over the Government in this action, it also lacks authority to order the equitable relief Dr. Reifler requests.

Whether and to what extent Dr. Reifler is entitled to equitable relief based on his detrimental reliance on the Government's express or implied contractual obligations is, at bottom, a contract issue, separate and apart from the negligence and ***FTCA claims*** in this action. Moreover, Congress has vested subject matter jurisdiction for claims arising out of "any express or implied contract with the United States" in the Court of Federal Claims. *28 U.S.C. § 1491(a)(1)* ("the *Tucker Act*").

Although *28 U.S.C. § 1346(a)(2)* grants the federal district courts concurrent jurisdiction with the Court of Federal Claims over contract claims seeking money **[*50]** damages of less than $10,000, an exercise of such jurisdiction would not authorize this Court to order the Government to provide FTCA coverage or be equitably estopped from denying that coverage in this action. Not only would such an order be an impermissible waiver of the Government's sovereign immunity, as already discussed, but the Tucker Act specifically pertains only to monetary damages, and courts have found that it "impliedly forbids" declaratory and injunctive relief. *N. Side Lumber Co. v. Block, 753 F.2d 1482, 1485 (9th Cir. 1985)*; *United States v. King, 395 U.S. 1, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969)* (Court of Federal Claims may not grant declaratory relief); *United States v. Jones, 131 U.S. 1, 9 S. Ct. 669, 33 L. Ed. 90, 24 Ct. Cl. 532 (1889)* (Court of Federal Claims may not grant equitable relief). The same restrictions that apply to the Court of Federal Claims "also limit the relief that the district courts may grant when exercising their concurrent Tucker Act jurisdiction." *N. Side Lumber Co., 753 F.2d at 1485*.

For the reasons discussed, the Court does not have jurisdiction over Plaintiff's ***FTCA claim*** against the Government in Count Three; neither does it have jurisdiction to order equitable relief against the Government stemming from Dr. Reifler's alleged detrimental reliance on the Government's contractual representations to him. The Court will therefore dismiss with prejudice Plaintiff's ***FTCA claim*** against the Government **[*51]** in Count Three.

D. Plaintiff's State Law Medical Negligence Claim

Plaintiff's sole remaining claim in this action is her state law medical negligence claim against Dr. Reifler in Count Three, over which this Court does not have original jurisdiction. Because the Court will dismiss all federal claims in this action, it may also dismiss this claim. *See Ove v. Gwinn, 264 F.3d 817, 826 (9th Cir. 2001)* ("A court may decline to exercise supplemental jurisdiction over related state-law claims once it has 'dismissed all claims over which it has original jurisdiction.'") (quoting *28 U.S.C. § 1367(c)(3)*)); *Gini v. Las Vegas Metro. Police Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994)* (when federal law claims are eliminated

before trial, the court generally should decline jurisdiction over state law claims and dismiss them without prejudice).

It is not clear, however, that Plaintiff cannot amend her Second Amended Complaint to state ***FTCA claims*** against the Government in Counts One and Two; further, it is within the Court's discretion to grant her leave to amend. *Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir.1996)*. *Rule 15 of the Federal Rules of Civil Procedure* declares that courts should "freely give leave [to amend] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. This amendment policy is to be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.1990)*. For this reason, the Court will grant Plaintiff leave to amend her Second Amendment Complaint to cure the deficiencies of her **[*52]** implied ***FTCA claims*** in Counts One and Two and will give Plaintiff 30 days from the date of this Order to file a Third Amended Complaint. If Plaintiff fails to file an amended pleading within 30 days, the Court will deny supplemental jurisdiction over Plaintiff's last remaining state law claim in Count Three, dismiss that claim and Dr. Reifler without prejudice, and terminate this action without further notice to the parties.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendant the United States' Motion to Dismiss (Doc. 33).

(2) The United States' Motion to Dismiss (Doc. 33) is **granted**; the state law negligence claims against the United States in Counts One and Two and the ***FTCA claim*** against the United States in Count Three are **dismissed with prejudice for lack of subject matter jurisdiction**; the implied ***FTCA claims*** against the United States in Counts One and Two are **dismissed without prejudice for failure to state a claim**.

(3) Plaintiff will have **30 days** from the date of this Order to file a Third Amended Complaint; if Plaintiff fails to file an amended pleading within 30 days, the Court will decline supplemental jurisdiction over Plaintiff's sole remaining **[*53]** state law negligence claim in Count Three, dismiss that claim and remaining Defendant Dr. Reifler without prejudice, and **terminate this action** without further notice to the parties.

Dated this 18th day of September, 2020.

/s/ Douglas L. Rayes

Douglas L. Rayes

United States District Judge

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Ruchert v. Williamson

United States District Court for the District of Idaho

July 21, 2017, Decided; July 21, 2017, Filed

Case No. 3:16-cv-00413-BLW

Reporter
2017 U.S. Dist. LEXIS 114461 *; 2017 WL 3120267

DENNIS RUCHERT and CHERYL RUCHERT a/k/a/ CHERYL YOUNG, husband and wife, Plaintiffs, v. JOHN PETE WILLIAMSON and JANE DOE WILLIAMSON, husband and wife; NEZ PERCE TRIBAL POLICE; and NEZ PERCE ***TRIBE***, Defendants.

Core Terms

certification, exhaustion, Tribal, ***Tribe***, employees

Counsel: **[*1]** For Dennis Ruchert, Cheryl Ruchert, also known as Cheryl Young, Plaintiffs: Darrel W Aherin, LEAD ATTORNEY, AHERIN RICE & ANEGON, Lewiston, ID.

For Nez Perce ***Tribe***, John Pete Williamson, Nez Perce Tribal Police, Defendants: Christopher J Kerley, LEAD ATTORNEY, EVANS, CRAVEN & LACKIE, P.S., Spokane, WA; Nicholas J Woychick, LEAD ATTORNEY, US ATTORNEY'S OFFICE, Boise, ID.

For Jane Doe Williamson, Defendant: Christopher J Kerley, LEAD ATTORNEY, EVANS, CRAVEN & LACKIE, P.S., Spokane, WA.

Judges: B. Lynn Winmill, Chief United States District Judge.

Opinion by: B. Lynn Winmill

Opinion

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Pending before the Court is Defendants' Motion to Dismiss for Lack of Jurisdiction (Dkt. 7). The motion is fully briefed and at issue. For the reasons explained below, the Court will grant the motion and dismiss Plaintiffs' claims.

BACKGROUND

This negligence action arises from a motor vehicle collision on March 27, 2014, involving Plaintiffs Dennis Ruchert and Cheryl Ruchert and Defendant John Pete Williamson, an employee of the Nez Perce Tribal Police Department. On March 8, 2016, Plaintiffs filed suit in state court, alleging that the collision was caused by Williamson's negligence and seeking damages **[*2]** for personal injuries and property damage. Defendants had the action removed to this Court on September 14, 2016. *See* Dkt. 3-2.

Soon thereafter, the United States filed the present Motion to Dismiss for lack of subject matter jurisdiction. Dkt. 7. The United States Attorney for the District of Idaho, on behalf of the Attorney General, filed a certification pursuant to *28 U.S.C. § 2679(d)(1)* stating that Williamson was acting within the scope of his employment with the Nez Perce Tribal Police Department at the time of the accident. *See Certification of United States Attorney Wendy J. Olson* at 2, Dkt. 7-2. The certification also attests that Defendants

Williamson, Nez Perce Tribal Police, and Nez Perce ***Tribe*** were performing authorized functions under the ***tribe***'s funding contract with the Bureau of Indian Affairs pursuant to the ***Indian Self Determination*** *and Education Assistance Act ("ISDEAA"), Pub. L. 101-512 § 314*, *25 U.S.C. § 450f*. Accordingly, the United States argues that it must be substituted as the sole named defendant in this action and that Plaintiffs' exclusive remedy lies under the *Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2679*. Because Plaintiffs failed to file an administrative tort claim with Williamson's employing agency prior to filing suit, **[*3]** as required by the FTCA, the United States argues that this court lacks subject matter jurisdiction to hear their claims.

LEGAL STANDARD

1. Overview of Federal Tort Claims Act

The Federal Tort Claims Act, *28 U.S.C. §§ 1346*, 2671-2680, waives the United States' sovereign immunity for "certain torts of federal employees acting within the scope of their employment." *See United States v. Orleans, 425 U.S. 807, 814, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976)* (citing *28 U.S.C. § 1346(b)(1)*. As defined in the FTCA, an "employee of the government" includes (1) "officers or employees of any federal agency . . . and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." *28 U.S.C. § 2671*.

Employees of a ***tribe*** or tribal organization may be deemed "federal employees" for purposes of the FTCA when acting pursuant to a contract authorized by the ***Indian Self—Determination*** and Education Assistance Act of 1975 ("ISDEAA"). *See Pub. L. 101-512*, *25 U.S.C. § 450f*. The ISDEAA created a system by which ***tribes*** could take over the administration of programs or services to Indian populations that otherwise would be provided by the Federal government. *See Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1033 (9th Cir. 2013)*. Congress extended the FTCA's waiver of sovereign immunity to claims "resulting from the performance of functions" under **[*4]** ISDEAA "contract[s], grant agreement[s], or cooperative agreement[s]." *25 U.S.C. § 450f*. However, this waiver of sovereign immunity is limited:

> [A]n Indian ***tribe***, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau . . . while acting within the scope of their employment in carrying out the contract or agreement.

Id.

The FTCA empowers the Attorney General to certify that a federal employee sued for wrongful or negligent conduct "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *§ 2679(d)(1)*. Upon such certification, the action "shall be deemed an action against the United States under the provisions of [the FTCA], and the United States shall be substituted as the party defendant." *Id.; see also Walker v. Chugachmiut, 46 F. App'x 421, 424 (9th Cir. 2002)* (citation omitted) ("Once certification is given in a civil action, the [FTCA] mandates . . . substitution of the United States as the defendant."). "The Attorney General's decision regarding scope of employment certification is conclusive unless challenged." *See Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993)* (citing *28 U.S.C. § 2679(d)(1)-(4)*).

ANALYSIS

1. Application of the Federal Tort Claims Act

The United States **[*5]** Attorney for the District of Idaho certified, on behalf of the Attorney General, that Defendant John Williamson was acting within the course and scope of his employment with the Nez Perce Tribal Police Department during the relevant time period. *See* Certification of United States Attorney Wendy J. Olson, Dkt. 7-2. The U.S. Attorney also certified that Defendants Williamson, Nez Perce Tribal Police, and Nez Perce ***Tribe*** were performing authorized functions under the Nez Perce ***Tribe***'s ISDEAA contract with the Bureau of Indian Affairs. *Id.* Plaintiffs have not challenged this certification. Accordingly, their Complaint must "be deemed an action against the United States under the provisions of [the FTCA] . . . ." *28 U.S.C. § 2679(d)(1)*.

2. FTCA's Administrative Exhaustion Requirement

The FTCA requires a claimant to present an administrative claim to the appropriate federal agency before filing an action in federal court. 28 U.S.C. § 2675(a). A court action cannot be instituted until the agency has either: (1) made a final denial in writing, or (2) failed to act within six-months after the administrative claim is filed. *Id.* Exhaustion of this administrative proceeding is a jurisdictional prerequisite. Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974).

Because Plaintiffs did not **[*6]** timely present their claims to the Department of Interior or to the Bureau of Indian Affairs, they have failed to exhaust their administrative remedies and cannot establish that subject matter jurisdiction is proper. Therefore, Plaintiffs' claims must be dismissed without prejudice under Fed. R. Civ. P. 12(b)(1).

Plaintiffs urge the Court to stay this case until they have satisfied the FTCA's administrative exhaustion requirement. Because exhaustion is a jurisdictional prerequisite, a stay is improper. Once a district court determines that it lacks jurisdiction, the only appropriate action is dismissal. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

This position is supported by FTCA case law. In McNeil v. United States, 508 U.S. 106, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993), for example, the Supreme Court held that a prematurely filed ***FTCA claim*** must be dismissed even if the plaintiff ultimately exhausts his administrative remedies during the pendency of litigation. Id. at 111-12. The Court added:

> Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department **[*7]** of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims.

Id. at 112 (footnote omitted); *see also* Plyler v. United States, 900 F.2d 41, 42 (4th Cir. 1990) ("Since the district court had no jurisdiction at the time the action was filed, it could not obtain jurisdiction by simply not acting on the motion to dismiss until" the FTCA exhaustion requirement had been met); Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981) (concluding that a prematurely-filed ***FTCA claim*** must be dismissed and adding that staying or holding a case in abeyance would only increase court congestion, spur unnecessary litigation, and slow down the judicial process). Accordingly, the Court will deny Plaintiffs' request to stay this litigation.

ORDER

IT IS ORDERED:

1. Defendants' Motion to Dismiss (Dkt. 7) is **GRANTED** and this matter is **DISMISSED WITHOUT PREJUDICE**.

2. A separate judgment will issue in accordance with Fed. R. Civ. P. 58.

DATED: July 21, 2017

/s/ B. Lynn Winmill

B. Lynn Winmill

Chief Judge

United States District Court

JUDGMENT

In accordance with the Memorandum Decision and Order entered concurrently herewith,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment be entered in favor of defendants and that this case be dismissed **[*8]** in its entirety, without prejudice.

DATED: July 21, 2017

/s/ B. Lynn Winmill

B. Lynn Winmill

Chief Judge

United States District Court