UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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		CIV. 06-4274
SUNBEAM NECKLACE, as Special Administrator of the Estate of Walter T. Thornton, Jr.,	:	
Plaintiff,	:	BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF SUNBEAM NECKLACE
vs.	:	
UNITED STATES OF AMERICA, acting through the Bureau of Indian Affairs,	:	
Defendant.	:	

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On January 23, 2006, Isaac Primeaux was traveling north on 395th Avenue to an area north of Wagner, South Dakota, commonly known as the North Housing Unit. Primeaux had been hired earlier that morning by Gordon Shields, an Administrative Officer of the Yankton Sioux Tribe (the Tribe), to clear snow and ice from a 1.5 mile long pedestrian pathway known as Route 11 (hereinafter "the Wagner Pathway"), which runs from the North Housing Unit to Wagner, South Dakota. (Primeaux Dep. at 51.) Primeaux was driving a 1989 Chevrolet pickup and towing a trailer loaded with a skid loader. (Primeaux Dep. at 51,52.) The truck, the trailer, and the skid loader were owned

and maintained by the Tribe. (Shields Dep. at 38, 39, 72.) As Primeaux proceeded north, the trailer disengaged from the truck, crossed the center line, and traveled directly into the path of an oncoming vehicle operated by Justin Necklace. Necklace and his grandfather, Walter Thornton, Jr., a passenger in the vehicle, were killed as a result of the crash.

Sunbeam Necklace, as the Personal Representative of Walter T. Thornton, Jr.'s estate, seeks to assert a negligence action against the Tribe pursuant to the Federal Tort Claims Act (FTCA). The parties have agreed to conduct the litigation in two phases. The first phase, and the issue presently before the Court, is whether the FTCA applies. If the answer is in the affirmative, the second stage of litigation will address the liability and damages arising out of the motor vehicle accident. Necklace respectfully requests that this Court grant its motion for summary judgment concluding that the FTCA applies because (1) Primeaux was an employee of the Tribe and (2) Primeaux was acting under the auspices of a contract authorized by the Indian Self-Determination and Education Act.

"The FTCA sets forth certain conditions under which the United States waives its sovereign immunity and authorizes suits for damages." Trujillo v. U.S., 313 F.Supp.2d 1146, 1149 (D.N.M. 2003). Pursuant to the FTCA, district courts have exclusive jurisdiction of civil actions against the United States as a result of the negligent or wrongful acts or omissions "of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §1346(b). The FTCA also applies to the

negligent or wrongful acts or omissions of tribal employees when performing official functions under a contract entered into pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA). Trujillo, 379 F.Supp.2d at 1216; see also 25 U.S.C. §§450-450n.

The ISDEAA, also referred to as Public Law 93-638, authorizes "tribes to enter into contracts with the Bureau of Indian Affairs (BIA) in the Department of the Interior to administer services on the reservation that would otherwise have been administered by the federal government." Id. Enabling tribes to administer these services "promotes the long-standing policy of encouraging Indian self-determination, giving Indian tribes control over the administration of federal programs benefitting Indians." FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1234 (8thCir. 1995). "Under self-determination [or 638] contracts, the federal government supplies funding to a tribal organization, allowing the tribal organization to plan, conduct and administer the program or service. . . directly." Id.

In 1988, Congress amended the ISDEAA to allow recovery under the FTCA for certain acts or omissions of tribal employees hired and acting pursuant to 638 contracts. Id. The amendment provides that

> [any] claims resulting from the performance of functions. . . under a contract, grant agreement, or cooperative agreement 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 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. . . 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). Recovery under the FTCA is dependent upon the status of the tortfeasor and the source and scope of the tortfeasor's actions.

I. Primeaux was an employee of the Yankton Sioux Tribe at the time of the accident.

Pursuant to the FTCA, and in the tribal context, a tortfeasor's negligence will only be imputed to the Government when two elements are established. First, the tortfeasor must have been an employee of the tribe. Id. Second, the employee must have been acting pursuant to a 638 contract. Id. By its terms, the FTCA does not extend to acts of independent contractors. U.S. v. Orleans, 425 U.S. 807, 96 S.Ct.1971, 48 L.Ed.2d 390 (1976). The determination of whether one is an employee of the United States or an independent contractor is determined by federal, not state law. Logue v. United States, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973); Rodriguez v. Sarabyn 129 F.3d 760, 765 (5thCir. 1997); Cavasos by and Through Cavasos v. United States, 776 F.2d 1263,

1264 (5thCir. 1985). "The primary consideration is the hiring party's *right* to control the manner and means by which the product [or work] is accomplished." Schweiger v. Farm Bureau Ins. Co. of Nebraska, 207 F.3d 480, 484 (8thCir. 2000) (emphasis added); see also Linkous v. U.S., 142 F.3d 271, 275 (5thCir. 1998) (noting that the critical factor is the power of the government to control the detailed, physical performance of the individual.); Berger Transfer & Storage v. Central States, Southeast and Southwest Areas Pension Fund, 85 F.3d 1374, 1378 (8thCir. 1996) (considering the hiring party's right to control the manner and means by which the product is accomplished). Whether the hiring party actually exercised this right is of no consequence. See Schweiger, 207 F.3d at 484.

The Tribe had the right to control the detailed physical performance of Primeaux's work. Primeaux was required to adhere to Shield's specific instructions describing how to properly complete the task of clearing the Wagner Pathway. (Shields Dep. at 66.) Shields instructed Primeaux to use the Tribe's 1989 Chevrolet pickup, trailer, and skid loader to clear ice and snow from the pathway. (Shields Dep. at 66.) When Primeaux arrived at the site where the equipment was stored, he asked Bryan Heth, an employee of the Tribe's Utilities Department, where to locate straps or chains to secure the skid loader to the trailer. (Primeaux Dep. at 52.) Primeaux wanted to use these devices because he felt that it was the proper way to transport the skid loader. (Primeaux Dep. at 53.) However, Heth informed Primeaux that there were no straps and that he would be required to transport the

skid loader without them. (Primeaux Dep. at 52.) Therefore, Primeaux was not only instructed to use Tribal equipment, but he was instructed on how to use the equipment itself.

Primeaux's work was also subject to inspection. If Shields found Primeaux's work unsatisfactory, Shields demanded that Primeaux complete the work to Shields' specifications. (Shields Dep. at 64, 65). Shields hired and could fire Primeaux. (Shields Dep. At 64, 65). Shields also had the right to assign additional work to Primeaux if it became available. (Shields Dep. at 72.) Accordingly, the facts and circumstances surrounding Primeaux's hiring and job performance demonstrate that the Tribe had the right to control the details and the physical performance of Primeaux's work, thereby satisfying the primary and critical factor used to evaluate an individual's status of employee.

When the right to control the physical performance of the individual is not dispositive of the individual's status, courts must consider additional factors. In Berger Transfer & Storage v. Central States, Southeast and Southwest Areas Pension Fund, the Eighth Circuit Court of Appeals considered the following factors to distinguish between an employee and an independent contractor as set forth by section 220 of the Restatement (Second) of Agency:

(a) the extent of control which, by agreement, the master may exercise over

> the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the discretion of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplied the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is part of the regular business of the employer;
> (I) whether or not the parties believe they are creating a relationship of master and servant; and
> (j) whether the principal is or is not a business.

85 F.3d 1374, 1377-78 (8thCir. 1996) (stating that the court primarily relied upon the factors outlined in section 220 of the Restatement of Agency when distinguishing between an independent contractor and employer); see also Rodriguez, 129 F.3d at 765 (quoting Restatement (Second) of Agency §220.). The following comments to section 220, which provide illustrative factors evidencing employee status, have also guided courts:

> (1) the work does not require one who is highly skilled;
> (2) the work is typically done by an employee in the locale, rather than an independent contractor;
> (3) the employer supplies the tools, instrumentalities, or place of work;
> (4) the employment is for a considerable period of time with regular hours;
> (5) the method of payment is by the hour or month;
> (6) the work is full time employment by one employer;
> (7) the work is part of the employee's regular business; and
> (8) the parties believe they have created an employment relationship.

Rodriquez, 129 F.3d at 765 (quoting Restatement (Second) Agency §220 cmts. a.& h.).

The additional factors set forth in section 220 of the Restatement of Agency and the comments therein further support Primeaux's status as an employee of the Tribe. Primeaux was not generally engaged in the business of snow removal. Rather, Shields regularly hired individuals to perform duties, such as road maintenance, on an as needed basis because the work did not require highly skilled workers. (Shields Dep. at 65.) Primeaux used equipment owned by the Tribe to complete every aspect of the job. The truck driven by Primeaux in addition to the trailer and skid loader Primeaux was hauling, were owned and maintained by the Tribe. (Shields Dep. at 38, 39, 72.) Primeaux was paid by the hour for his work. (Shields Dep. at 67.) In addition, Primeaux believed he was an employee of the Tribe when he was hired to clear Pathway. (Primeaux Aff. at ¶3.) Shields also believed Primeaux was an employee of the Tribe. (Shields Dep. at 64.) When all of the circumstances surrounding Primeaux's work for the Tribe are considered together, the factors assign Primeaux the status of an employee. Accordingly, the first element under the FTCA is satisfied.

II. Primeaux was acting pursuant to a self-determination or 638 contract when he was en route to clear the Wagner Pathway of snow and ice on the morning of January 23, 2006..

In 1996, the Tribe and the BIA entered into a self-determination or 638 contract (hereinafter "the 638 contract") pursuant to the ISDEAA which provided the Tribe with federal funds to administer a variety of services on the reservation. (Shields Dep. at 10..)

A portion of these funds were allocated for "roads maintenance," and could be applied to roads owned by the BIA within the Yankton Sioux Reservation. (Croymans Dep. at 43.) BIA-owned roads within each reservation comprise what is referred to as the BIA Road System. (Croymans Dep. at 43.) All of the BIA-owned roads within the Yankton Sioux Reservation were listed in the contract. (Erdmann Dep. at 25.) The Wagner Pathway was not in existence at the time of the contract's execution, and was, therefore, not included in the list. (Erdmann Dep. at 25.)

The United States argues that because the Wagner Pathway was not specifically enumerated within the 638 contract's scope of work, when Primeaux was en route to clear the pathway, he was not acting pursuant to the contract and the FTCA cannot apply. The United States claims the pathway could have only been added to the contract by a written modification because of the following provision in the 638 contract:

> [N]o modifications to this Contract shall take effect unless such modification is made in the form of a written request to the Contract, and the Contractor and Secretary provide written consent for the modification. The Agency Superintendent for Education shall forward request for modifications within (5) five days of receipt from the Contractor to the Aberdeen Area Office of Acquisition and Property Management.

However, as a general contract principle, even where a contract requires a written modification, the parties can modify the contract by their subsequent conduct. See Hofeldt v. Mehling, 2003 S.D. 25, ¶11, 658 N.W.2d 783, 787 (stating that contractual rights and

remedies may be modified or waived by the subsequent conduct of the parties); Truhe v. Turnac Group, LLC, 1999 S.D. 118, ¶26, 599 N.W.2d 378, 383 (holding that a contract may be rescinded by an oral agreement despite a provision in the contract requiring a writing); Moe v. John Deere Company, 516 N.W.2d 332, 336 (S.D. 1994) (recognizing that the parties' subsequent conduct may modify a contract); 6 Corbin on Contracts §1295 at 206 (1962).

Federal courts look to federal law, rather than state law, when interpreting a contract which the United States entered into pursuant to authority conferred to it by federal statute. Ambur v. U.S., 206 F.Supp.2d 1021, 1026 (D.S.D. 2002) (quoting Miree v. DeKalb County, Ga., 433 U.S. 25, 28, 97 S.Ct. 2490, 2493, 53 L.Ed.2d 557 (1977)); accord. United States v. Seckinger, 397 U.S. 203, 209-10, 90 S.Ct. 880, 884, 25 L.Ed.2d 224 (1970); see also Audio Odyssey, Ltd. v. United States, 255 F.3d 512, 520 (8thCir. 2001) (federal common law applies when a federal agency is a party and the outcome of the case will directly affect substantial financial obligations of the United States). While there is no precise source of federal common law, "'[t]here is a general uniformity of the contract principles applied throughout the country in state and federal courts alike.'" Ambur, 206 F.Supp.2d at 1026 (quoting Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942, 949 (8thCir. 2000) (Morris Sheppard Arnold, J, dissenting)). In crafting the federal common law of contract interpretation, the court looks

to the body of "state as well as federal case law as a source for federal common law on applicable principles of construction." Id. (quoting A.W.G. Farms, Inc. v. Federal Crop Ins. Corp., 757 F.2d 720, 726 (8thCir. 1985)). This Court has looked to South Dakota law on questions of contract construction, noting that there is no "difference between federal common law and South Dakota law on. . . matters of construction and interpretation of contracts." Id. Therefore, applicable South Dakota law is instructive. See id.

Under South Dakota law and general contract principles, the conduct of the Tribe and the BIA impliedly modified the 638 contract to include the Wagner Pathway despite the requirement that any modifications to the 638 contract be in writing. As a general common law rule, even where a contract requires modifications to be in writing, the parties may modify the contract by some other method. See Hofeldt, 2003 S.D. 25, ¶11, 658 N.W.2d at 787 (stating that contractual rights and remedies may be modified or waived by the subsequent conduct of the parties); Truhe, 1999 S.D. 118, ¶26, 599 N.W.2d at 383; Moe, 516 N.W.2d at 336 (recognizing that the parties' subsequent conduct may modify a contract); 6 Corbin on Contract §1295 at 206 (1962). This rule was recognized by the South Dakota Supreme Court in Truhe v. Turnac Group, LLC, where the court held that "an oral mutual agreement to cancel or rescind a contract operates to do so despite a clause in the contract which requires modifications to the contract be in writing." 1999 S.D. 118, ¶26, 599 N.W.2d at 383. In recognizing this rule, the Court noted that "[t]he

U.S. Eighth Circuit Court of Appeals has also subscribed to the general notion that 'a provision purporting to prohibit modification of a contract except by a specified method does not prevent the parties to the contract from modifying it by some other method.'" Id. (quoting Goshey v. ITT Life Ins. Corp., 590 F.2d 737, 740 (8thCir. 1979)). One such method is the subsequent conduct of the parties. See Moe, 516 N.W.2d at 336 (recognizing that the parties' subsequent conduct may modify a contract); Hofeldt, 2003 S.D. 25, ¶11, 658 N.W.2d at 787 (stating that contractual rights and remedies may be modified or waived by the subsequent conduct of the parties). As a general contract principle, "it is not essential that the mutual assent of the parties to modify the contract be express ... it may be implied from acts and circumstances ... from a course of conduct ... and from acts of one party in accordance with the terms of a change proposed by the other." 17A C.J.S. Contracts §375 at 427 (1963).

The conduct of the Tribe and the BIA evidenced a mutual assent to modify the 638 contract to include the Wagner Pathway. Since its completion, the pathway has been treated exactly like every other BIA-owned road enumerated in the contract. All maintenance costs associated with the pathway have been paid from funds allocated to the Tribe for "roads maintenance" under the contract. (Shields Dep. at 59.) Primeaux, himself, was paid with 638 contract "road maintenance" funds for his work on the morning of the accident. (Shields Dep. at 63, 64.)

The pathway has also been subject to a Yearly Roads Maintenance Schedule (the Schedule), which is required for all BIA-owned roads within the 638 contract's scope of work. (Erdmann Dep. at 18, 19.) Pursuant to this requirement, Bob Erdmann, a BIA Regional Road Maintenance Engineer, would conduct a yearly inspection of the BIA Road System on the Yankton Sioux Reservation and prepare a report with recommended maintenance repairs. (Erdmann Dep. at 7.) Since the pathway's completion, Erdmann's reports have included maintenance recommendations for "Route 11" or the "pedestrian pathway." (Erdmann Dep. at 15-19.) (Dep. Ex. 8, 11, 12.) Erdmann inspected the pathway because BIA records listed Route 11 as a BIA-owned road within the BIA Road System. (Erdmann Dep. at 28.)

BIA records provide further evidence of the BIA and Tribe's mutual assent to modify the 638 contract. (Dep. Ex. 4.) Pursuant to the Indian Reservation Roads Program (IRR), the BIA compiles a comprehensive database which inventories all public roads located within or providing access to Indian Reservations or Indian Trust Land. See 25 C.F.R. §§170.2, 170.5 (2007). The inventory lists, among other things, the ownership, BIA route number, and route name of each road. See 25 C.F.R. §170.442 (2007). When a road is given an ownership code number of "1," it indicates that the road is owned and maintained by the BIA and its offices. (Exhibit K of Affidavit of William P. Fuller). In a 2006 IRR inventory, Route 11, also referred to by the route name "Wagner Pedestrian

Pathway," is listed with an ownership code of "1." (Dep. Ex. 4.) Not only does this indicate that the BIA considered the pathway a BIA-owned road, but it also indicates that the BIA had conferred the pathway's maintenance responsibilities to the Tribe pursuant to the 638 contract.

The Tribe and the BIA's mutual assent to modify the 638 contract to include the Wagner Pathway is clear from the course of the parties' conduct. The fact that the pathway has always been maintained through 638 contract funds and subject to BIA inspection indicates that the pathway is for all purposes a BIA-owned road. This is further confirmed in reports generated by the BIA, which expressly gave the pathway BIA ownership status. The pathway's status as a BIA-owned road is significant because BIA-owned roads are subject to the mandates of the 638 contract. Therefore, the fact that the pathway was both subject to the mandates of the 638 contract and was given BIA-ownership status is conclusive - the BIA and the Tribe have unambiguously evidenced an intent to include the Wagner Pathway within the contract's scope of work. As such, when Primeaux, a tribal employee, was en route to clear the pathway on the morning of January 23, 2006, he was acting under the auspices of the 638 contract. Accordingly, both elements of the FTCA are satisfied and Aiken is entitled to proceed with her negligence action against the Tribe.

For all of the above reasons, Necklace respectfully requests that her motion for summary judgment be granted.

Dated this 14th day of September, 2007.

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Certificate of Service

I certify that on the 14th day of September, 2007, I sent a true and correct copy of the foregoing Brief in Support of Motion for Summary Judgment on Behalf of Sunbeam Necklace was served upon the following:

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One of the Attorneys for Defendant