UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

FRANK SIOUX BOB, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)))))))))	CIV. No. 07-5068 **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Defendant has moved to dismiss this action under Fed. R. Civ. P. (12) (b) (1) on the grounds that this court lacks subject matter jurisdiction over this action. Plaintiff opposes the motion for the reasons set forth hereafter.

A. General Principles of Jurisdiction.

Although it is the burden of plaintiff to show subject matter jurisdiction, the burden is not a heavy one. It simply must be non-frivolous. Golden v. Gorno Bros., 410 F3d 879, 881 (6th Cir. 2005); Garcia v. Copenhaver Bell & Assocs., 104 F3d 1256, 1260-1261 (11th Cir. 1997). In determining a motion to dismiss based on a facial challenge to jurisdiction of a court, the allegations are viewed most favorable to the plaintiff. Wever v. Clarke, 45 F3d 1253, 1255 (8th Cir. 1995). Allegations of the complaint are to be accepted as true and the court may dismiss the case only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Casazza v. Kiser, 313 F3d 414 (8th Cir. 2002).

B. The District Court Should Not Determine the 12 (b) (1) Motion Without Giving Sioux Bob Opportunity For Discovery.

The district court in this case should not engage in wholesale fact finding, considering and giving conclusive weight to affidavits submitted by the government from federal employees, without giving Sioux Bob an opportunity to engage in discovery or any hearing on the matters pertaining to jurisdiction.

There can be no question that the complaint in this action states on its face a matter over which jurisdiction is proper in federal court. The government's attack on jurisdiction was not based on the complaint failing to facially state a matter over which jurisdiction was proper in federal court.

In determining a 12 (b) (1) factual based motion to dismiss, the court may weigh the evidence before it and find the facts, so long as the fact finding does not involve the merits of the dispute. See McCann v. Newman Irrevocable Trust, 458 F3d 281 (3rd Cir. 2006); Hernandez-Santiago v. Ecolab, Inc., 397 F3d 30, 33 (1st Cir. 2005). Where necessary, an evidentiary hearing or plenary trial must be convened to find the facts. United Tribe of Shawnee Indians v. United States, 253 F3d 543, 546 (10th Cir. 2001). Indeed, if defendant thinks that the court lacks jurisdiction, the proper course is to request an evidentiary hearing on the issue. Osborn v. United States, 918 F2d 724, 730 (8th Cir. 1990). A rational mode of inquiry is required. Osborn v. United States, 918 F2d 724, 730 (8th Cir. 1990). See Fed. Civ. P. 12(d)(if matters outside pleadings not excluded must be treated as one for summary judgment and all parties given opportunity to present all pertinent material).

Whether a hearing must be held or not depends on the circumstances, and whether the parties have otherwise received notice and fair opportunity to be heard. McCann, supra. A central consideration in whether to convene such a hearing is whether any of the parties requested

it. Id.

Discovery can be permitted on a motion to dismiss for lack of subject matter jurisdiction and should be where the relevant discovery rests with the adversary, here the government. See Gualandi v. Adams, 385 F3d 236, 244 (2nd Cir. 2004). Refusal to grant discovery may be an abuse of discretion if it prejudices the plaintiff. Sizova v. National Inst. Of Standards & Tech., 282 F3d 1320, 1326 (10th Cir. 2002).

Plaintiff is requesting the opportunity to engage in discovery before the government's motion is determined. The Government should be required to proceed by summary judgment after opportunity for discovery by Sioux Bob. Otherwise, the facts upon which the present motion is to be decided will be based wholly and entirely on the materials submitted by the government. Plaintiff has no access to facts, by discovery or otherwise, that are within the possession of the government. No opportunity is given for cross examination of the people who submitted the affidavits and exhibits relied upon by the United States in moving to dismiss this action. Before a case is dismissed for lack of subject matter jurisdiction under 12 (b) (1), a rational mode of inquiry is required, not simply allowing the government to submit untested and one sided affidavits and exhibits, where the plaintiff has the opportunity to engage in discovery and subject the government's submissions to cross examination. Plaintiff will be denied a fair opportunity to discovery and present facts if the motion is decided under the posture chosen by the government here.

If discovery is not allowed, there will be no opportunity to rebut the government's affidavit that the tribal officers named in the complaint were not deemed in law and fact federal law enforcement officers; whether those tribal officers, regardless of the representations of the

government to the contrary in its brief, arrested for violations of federal laws, investigated cases involving violation of federal laws, testified in federal court concerning prosecutions of federal law, and generally enforced federal laws; whether the tribal officers were trained and supervised by federal law enforcement personnel; whether the officers thought they were enforcing federal law in dealing with Sioux Bob; whether there could be any reasonable method or means of law enforcement on the Pine Ridge Indian Reservation without enforcement of federal laws by tribal officers, which would undercut and expose the irrationality of the government's position in this case that the tribal officers were not federal law enforcement officers. Each of plaintiff's above contentions, if given the opportunity for discovery, can be established: (1) the law is clear that tribal officers are covered under the Federal Tort Claims Act; (2) tribal officers enforce and at the time were enforcing, in its broadest meaning, federal law; (3) some or all of the officers were federally trained; and (4) there would be no rational or responsive method of federal law enforcement without the utilization of tribal officers to enforce federal laws on the Pine Ridge Indian Reservation. Regardless of the government's position in this case on paper, the fact is that tribal officers enforce federal law and are federal law enforcement officers. [1]

Most of the cases cited by the government were determined after a reasonable time for discovery was afforded. Lavallie, infra, was determined by summary judgment as were

[1] The contract attached at exhibit 2 of the government's brief at C-4 states that the contractor shall interview victims, witnesses, and suspects involved, or alleged to be involved, in offenses committed in Indian County. At the next page, C-5, it states that the contractor may assist the Bureau of Indian Affairs, and other federal, tribal, and state law enforcement officials in the investigation of tribal, state, or federal offenses that occur on the reservation. The contractor at C-9 has the duty to carry out patrol duties and ensure protection of life, property, and crime prevention. Newly employed officers are required at C-9 to complete training at a Bureau of Indian Affairs operated training program. All of this certainly suggests that tribal officers have the obligation to enforce whatever law is necessary to protect the public.

Anderson v. United States, infra, and Mizner v. United States, infra. Only Locke, infra at 1035 n. 1, was determined on a motion to dismiss, but with the court finding that "the parties dispute non-material facts concerning the incident," suggesting that the Locke court applied summary judgment standards.

C. The Officers Were In Fact Law Enforcement And Investigative Officers.

The United States does state, nor could it argue, that the tribal officers in question are not deemed federal employees under the provisions of FTCA. See Val-U Construction v. United States, 905 F.Supp. 728 (DSD 2995) (FTCA should be liberally construed to implement is broad intent and that exceptions to the waiver of sovereign immunity should be strictly construed).

The law enforcement functions of the Tribe are funded pursuant to a 638 contract with the BIA under the Indian Self-Determination Education Assistant Act ("ISDEAA") as authorized by 25 USC 450f. The ISDEAA promotes long-standing federal policy of encouraging Indian self-determination, giving Indian tribes control over the administration of federal programs benefitting Indians. Under the 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:

> With 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 to be part of the Bureau of Indian Affairs in the Department of 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 USC 450f notes). The government implicitly agrees that, under the ISDEAA, the officers in this case were employees of the tribe under the 638 contract and were therefore 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 the tribal employees in this case may subject the United States to FTCA liability. "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 emplyment." United States v. Orleans, 425 US 807, 813, 96 S. Ct. 1971 (1976). Under the FTCA, the United States may be sued for damages arising from the negligent or wrongful acts or omission of "an emplyee of the government." 28 USC 1346(b)(1).

In the context of the present case, however, which involves some allegations of intentional torts, the government argues that the tribal officers named in the complaint were not "law enforcement officers" under the FTCA. The law enforcement provisio of the FTCA states at 29 USC 2680(h) as follows:

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, 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 provision of this chapter [28 USC 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.

The argument of the government is erroneous. First, the November 5, 1990, amendment to the ISDEAA codified at 25 USC 450f notes, set out above, provides that "after September 30,

1990, any civil action or proceeding involving such claims (resulting from the performance of functions) brought hereafter against any tribe...or tribal employee covered by this provision shall 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.... ." Clearly it was the legislative intent to provide that any claim for any negligent or intentional act of a tribal employee hired and paid under an ISDEAA contract, as exists in this case, see exhibit 1 of defendant's brief in support of motion to dismiss plaintiff's complaint, would be "afforded the full protection and coverage of the Federal Tort Claims Act." As to tribal employees working under an ISDEAA contract, as in this case, regardless of whether they are police officers or not, the legislative intention and clear language of the amendment was to afford their actions "the full protection and coverage" of the FTCA without any restrictions or exceptions. If any restrictions or exceptions were intended of the coverage, Congress would have clearly stated so in the 1990 amendment. It did not. The action and conduct of the tribal employees in this case are covered by the FTCA.

Second, the government relies upon the argument that again turns the 1990 amendment on its head. Its argument is as follows. Under 2680 (h), reference is made to omissions of investigative or law enforcement officers of the United States government as being covered by the FTCA even though the conduct involves the intentional torts set out there, some of which are alleged in the complaint in the present case. Because tribal officers are not "investigative or law enforcement officers of the United States government," the government seems to argue that coverage does not exist and there is no coverage for the specified intentional torts. This argument is disingenuous. By the very clear language and intent of the 1990 amendments to the ISDEAA contract, tribal employees are deemed to be employees of the Bureau of Indian Affairs.

If the tribal employees are working under an ISDEAA contract, as the tribal police officers were in the present case, they are deemed by the 1990 amendment to be federal investigative or law enforcement officers of the United States government. Under the government's interpretation and argument, if tribal police officers are not deemed to be federal law enforcement officers, one of the largest and oldest group of employees employed under ISDEAA, i.e., tribal police officers, would be deprived of the "full protection and coverage of the Federal Tort Claims Act", something that is contrary to and was never intended under the 1990 amendments. A tribal police officer employed under an ISDEAA contract is covered as a federal police officer. There is nothing in the legislative history or face of the amendment to support any argument that a tribal police officer employed under a ISDEAA contract would be covered only as a civilian but not as a police officer.

Third, the government's next argument goes further and somewhat related to its second argument above, maintains that tribal police employees are not "investigative or law enforcement officer(s)" because they are not officer(s) of the United States who are empowered by law to execute searches, to seize evidence, or make arrests for violations of federal law. As indicated in response to the second's argument above, the 1990 amendments to the ISDEAA made tribal police officers working under an ISDEAA grant, as in the present case, federal law enforcement officers. And there can be no doubt that tribal police officers are empowered by law to execute searches, to seize evidence, and to make arrests for violation of federal law. The requirement that an officer have power to execute searches or seize evidence makes no reference and is not qualified by the term "federal." In other words, tribal searches and tribal seizure of evidence satisfy the requirement so that the conduct of the tribal deemed federal officer under the 1990 amendment is covered under 2680 (h). The government's argument that it has prohibited tribal

police officers from enforcing federal law only applies to the provision that an officer have authority to make arrests for violation of federal law. If a tribal deemed federal officer has authority either to execute searches under tribal law or seize evidence under tribal law, one or the other, regardless of the ability to make an arrest for violation of federal law, the requirement of 2680 (h) is satisfied and the officer's conduct is covered by the FTCA even if intentional.

Fourth, the government argues that no commissions under 25 CFR 12.12 (b) were issued to any of the officers involved in this case making them federal officers. First, tribal officers are deemed federal officers under the 1990 amendments. The existence of a commission is irrelevant to coverage under the 1990 amendment. There is nothing in the 1990 amendments requiring any commission. Second, even if a commission were required, it would only be relevant to the ability to make arrests for violation of federal law, the only instance in 2680 (h) that mentions federal law. The lack of a commission would not prohibit a tribal deemed federal officer from executing tribal searches or seizing tribal evidence as set out in this memorandum. See Section 13 and 15 of Oglala Sioux Tribal Code, attached as exhibits 1 and 3. Third, a commission requirement belies the government's argument that tribal deemed federal officers have no authority to make arrests for violation of federal law. They clearly do, but under the government's argument only when they have been christened to do such. The power exists. See Section 14 of the Oglala Sioux Tribal Code, attached as exhibit 2 (any member of tribal police has authority to arrest for any offense defined by federal law). Lastly, there is no authority for the Bureau of Indian Affairs to dictate by regulation or otherwise the power of a tribal police officer.

The government cites Locke v. United States, 215 F.Supp.2d 1033 (SD 2002), Lavellie v. United States, 396 F.Supp.2d 1082 (DND 2005), and Anderson v. United States and Mizner v. United States, both of which were attached to the government's brief in this case. Each of these

cases were subsequent to Locke and relied upon Locke rationale. The holding in Locke as to the issues before this court can be distilled into two sentences: "Plaintiff has failed to cite any specific provision of law or set forth any non-conclusory facts in connection with her claim that DeCoteau was a federal law enforcement officer at the time of the alleged assaults. See Dry v. United States, 235 F3d 1249, 1257 (10th Cir. 2000). The affidavit of DeCoteau is unchallenged to the effect that he has not received the necessary certification, enforces only tribal laws or ordinances, and is not a federal law enforcement officer." Locke is not supported by any persuasive authority and with all due respects is wrong for the reasons stated in this memorandum. The rationale of Locke comes solely from the court's erroneous interpretation of the 1990 amendment and its oversight and misconception as to the requirements of 2680 (h). It does not appear that the arguments made in this memorandum were ever made in Locke. This memorandum establishes that tribal officers are deemed federal officers, certification is unnecessary to federal jurisdiction, and that discovery would show that the tribal officers in this case enforce both federal and tribal law. None of the officers submitted an affidavits in this case, as were submitted in Locke, to support the allegations of the government in this case as to their power and authority. [2]

[2] The complaint in this case alleges at ¶ 7 that the officers entered Sioux Bob's house under false pretense and broke down a door in his house. It is also alleged in ¶ 9 that they broke down the door to his house, negligently exercised force in taking him into custody, were deliberately indifferent to his medical needs, and subjected plaintiff to cruel punishment. Negligence is also alleged in ¶ 10. The government does not move to dismiss these claims which are based on negligence. Depending on the facts of the case, which, again, can only be determined after discovery, the use of force under South Dakota law, Horne v. Crozier, 565 NW2d 50, 54 (SD 1997), can either be intentional or negligent. See Gross v. United States, 676 F2d 295 (8th Cir. 1982). Conceivably, the officers may not have had any intent to use any force, but used force in a negligent manner. Breaking down his door is pure negligence and could not be barred under any of the government's arguments in this case. The separate claim of being indifferent to Sioux Bob's medical needs has nothing to do with assault and battery and is not dependent upon any facts growing out of any intentional acts.

CONCLUSION

For all above reasons, the motion to dismiss should be denied.

Dated this 8th day of January, 2008.

/s/ Terry L. Pechota

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2008, I served a true and correct copy of Plaintiff's Opposition To Defendant's Motion To Dismiss via electronic transmission upon the following:

Robert Gusinsky
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/s/ Terry L. Pechota

*This document was filed electronically