IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 08-11012-EE

DEAN SENECA

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal From The United States District Court
For The Northern District of Georgia

BRIEF FOR APPELLEE

DAVID E. NAHMIAS
UNITED STATES ATTORNEY

LYNN D. THESING
ASSISTANT UNITED STATES ATTORNEY

600 Richard B. Russell Bldg.
75 Spring Street, S.W.
Atlanta, Georgia 30303
404/581-6000

Attorneys for Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Dean Seneca,	)	
	)	
Appellant,	)	
	)	
v.	)	APPEAL NO. 08-11012-EE
	)	
United States of America,	)	
	)	
Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The United States concurs with the certificate of interested persons and corporate disclosure statement included with the brief filed by the Appellant, except as to the following person known to have an interest in the outcome of this appeal, who was not included on the Appellant's list:

Thesing, Lynn D., Assistant United States Attorney, Northern District of Georgia

STATEMENT REGARDING ORAL ARGUMENT

The defendant respectfully submits that oral argument is not necessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

Federal Regulations

STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal from the order and judgment of the district court, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the U.S. Attorney's certification that the individually named defendants were acting within the scope of their employment with the Government was sufficient to trigger substitution of the United States as defendant in this case;

II. Whether the district court correctly determined that substitution of the United States for the individually named defendants was appropriate because the plaintiff's claims resulted from the individual defendant's performance of programs, activities, functions or services under an Indian self-determination contract;

III. Whether the district court properly dismissed the plaintiff's complaint under the Federal Tort Claims Act because the plaintiff failed to exhaust his administrative remedies before filing this lawsuit.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below.

On July 23, 2007, Appellant Dean Seneca brought suit in the Northern District of Georgia against the United South and Eastern Tribes, Inc. ("USET"), as well as three individual employees of USET. See R1-1 (Complaint). The complaint asserted various tort claims related to an alleged libel in a letter USET sent to Seneca's federal employer, the Agency for Toxic Substances and Disease Registry (ATSDR). Id. According to Seneca, the letter contained several false statements about Seneca's professional dealings and reputation, was sent by USET with the malicious intent to harm Seneca, and resulted in Seneca receiving an Official Reprimand followed by reassignment to a less desirable position within ATSDR. See R1-1-(5-6) (Complaint, ¶¶ 20-25).

On October 17, 2007, the United States filed the certification of the Acting United States Attorney for the Northern District of Georgia pursuant to 28 U.S.C. § 2679(d)(1) that the individually named defendants in the case – James T. Martin, Brenda E. Shore, and Lisa Berrios – were acting within the scope of their employment as employees of the Government at the time of the events alleged in the complaint. See R1-20 (U.S. Attorney Certification). Pursuant to the certification, the United States also filed a Notice of Substitution naming itself as the sole defendant in the case. See R1-21 (Notice of Substitution).

Based on its substitution, the United States then moved to dismiss the complaint (R1-22 (Motion to Dismiss with Brief in Support)) for failure to exhaust administrative remedies as required by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), § 2671 et seq. See 28 U.S.C. § 2675(a). On November 19, 2007, Seneca filed a memorandum in which he both objected to the United States' Notice of Substitution and opposed the United States' Motion to Dismiss for failure to exhaust. See R1-29; see also R1-27 (Affidavit of Dean Seneca in Opposition to Motion To Dismiss); R1-28 (Affidavit of William Chen in Opposition to Motion To Dismiss). The United States filed a response on December 14, 2007. See R2-33. The district court (Batten, J.) issued an order on January 10, 2008, in which it substituted the United States as the sole defendant in the case and granted the United States' Motion to Dismiss for failure to exhaust administrative remedies. See R2-34. The clerk entered a final judgment against Seneca on January 11, 2008 (R2-35), and Seneca filed a Notice of Appeal on March 4, 2008 (R2-36).

2. Statement of the Facts

ATSDR is an agency of the U.S. Department of Health and Human Services ("HHS") (see http://www.atsdr.cdc.gov.), based in Atlanta, Georgia. R1-1-3 (Complaint, ¶ 10). At the time of the events giving rise to this case, Seneca was employed by ATSDR as the Assistant Director of the Office of Tribal Affairs. R1-1-4

(Complaint, ¶ 12). In that position, Seneca had frequent dealings with USET, a tribal organization comprised of 25 federally-recognized Indian tribes located in parts of eastern, southern, southeastern, and south central United States. R2-33 (Attach. # 1 (Shore Decl., ¶ 5)). "USET's mission is to enhance the development of Indian tribes, to improve the capabilities of tribal governments, and to assist member tribes and their governments in dealing effectively with public policy issues and in serving the broad needs of Indian people." Id., ¶ 6. One of USET's major program responsibilities is operation of the Health Information Office Program (also called Tribal Health Program Support). Id., ¶ 7. Its functions in this regard include facilitating interaction between member tribes and federal and state agencies with health-related missions, including HHS; providing technical assistance and support to health programs operated at the local tribal level; serving as spokesperson for federal Indian health policies, programs, and funding in accord with the priorities of member tribes; and working with tribes and health boards in other areas to advocate on behalf of the health needs of Indian Country. Id.

USET receives funding for these programs and services through a contract issued by the Secretary of HHS pursuant to the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"). Id., ¶ 8. This contractual relationship began in 1996 and continues in force today. Id.; see R2-33 (Attach. # 2 (Shore

Decl., at Attach. A) (Self-Determination Agreement between USET and the United States). The USET self-determination agreement expressly states that USET and its employees are deemed by statute to be part of or employed by the Public Health Service, "for purposes of coverage under the Federal Tort Claims Act, while performing programs, activities, functions or services under this Contract and the Annual Funding Agreement . . . ." R2-33 (Attach. # 2 (Attach. A to Shore Decl., p. 15)).

Seneca's complaint arises out of his interaction with USET in early 2006. According to Seneca, USET was preparing for the HHS budget formulation and consultation sessions that spring. R1-1-4 (Complaint, ¶ 13). Seneca claims that he was attempting to work with USET in this regard. R1-1-4 (Complaint, ¶ 14). In response to Seneca's interactions with various USET employees, the then-Executive Director of USET, James T. Martin,[1] wrote Seneca's supervisor, William Cibulas, a letter in which he outlined what he believed to be unprofessional conduct on the part of Seneca. See R1-1 (Attach. # 2) (July 5, 2006 Letter from Martin to Cibulas)). These accusations were confirmed and further supported in an August 16, 2006 follow-up letter from then-Interim Executive Director of

[1]Martin later resigned as Executive Director of USET to accept a position with the tribe of which he is a member, the Poarch Band of Creek Indians. See R2-33 (Attach. # 2 (Shore Decl., ¶ 21)). There is no support in the record for Seneca's attempt to imply a relationship between (1) Martin's letter to ATSDR complaining about Seneca, and (2) Martin's subsequent resignation as USET Executive Director. See Appellant's Br. at 7.

USET, Brenda Shore, to Cibulas. R1-1 (Attach. # 3). They also were supported in a memorandum from another USET employee, Lisa Berrios, to Shore. R1-1 (Attach. # 4).

After receiving these letters, Seneca's supervisor, Cibulas, issued Seneca an Official Reprimand. See R1-1-6 (Complaint, ¶ 25 and Attach. # 5). Seneca later received a second Official Reprimand for his aggressive conduct during the meeting when he was given his first Official Reprimand. R1-1-7 (Complaint, ¶ 26 and Attach. # 6). Seneca asserts that, as a result of these Official Reprimands, he has lost opportunities for career advancement, had the terms and conditions of his employment changed, suffered from numerous health problems, and sought assistance from the Employee Assistance Program. R1-1-7 (Complaint, ¶¶ 27-28).

3. Standard of Review

The U.S. Attorney's decision regarding scope of employment certification is subject to de novo review in both the district court and on appeal. Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 436-37 (1995); Nadler v. Mann, 951 F.2d 301, 305 (11th Cir. 1992); see also Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993) (per curiam), cert. denied, 513 U.S. 809 (1994). Where facts relevant to this inquiry are in dispute, the clearly erroneous standard applies. Nadler, 951 F.2d at 305; Green,8 F.3d at 698. This Court reviews de novo the district court's dismissal of this action for lack of subject matter jurisdiction and its interpretation and

application of statutory provisions. JBP Acquisitions, LP v. United States, 224 F.3d 1260, 1263 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

Congress has provided for Indian tribes and tribal organizations to enter into self-determination agreements with the United States government. By statute, claims resulting from the performance of functions under such agreements are covered by the FTCA. 25 U.S.C. § 450f, historical notes. Mirroring the statute, the self-determination agreement at issue here provides that USET employees are covered by the FTCA "while performing programs, activities, functions or services under this Contract . . . ." R2-33 (Attach. 2 (Shore Decl., at Attach. A, p. 15). Seneca attempted to sue several employees of a tribal organization whose activities are covered by the tribal organization's self-determination agreement. These employees are entitled to the protection of the FTCA.

The U.S. Attorney for the Northern District of Georgia certified that the individual employees were acting within the scope of their employment as employees of the Government. Seneca's attempt to challenge that certification as being facially invalid is unsupported in the law. Moreover, the district court's de novo review of the U.S. Attorney's certification confirms that substitution of the United States as the only defendant in this case was appropriate because the individual employees were acting

pursuant to a valid self-determination agreement with respect to the events giving rise to Seneca's claims. Seneca's limited interpretation of what types of activities relate to the self-determination contract is supported only by his own idiosyncratic and self-interested views. The government's statutory obligation to provide liability coverage for tort claims against individuals under an Indian self-determination agreement should not be interpreted so narrowly, particularly in light of the contractual admonition to construe the self-determination contract between USET and HHS liberally for the benefit of USET.

Finally, the district court properly dismissed Seneca's complaint against the United States for lack of subject matter jurisdiction. The court lacked subject matter jurisdiction because Seneca failed to exhaust his administrative remedies. The fact that Seneca filed an affidavit with ATSDR (an agency of HHS), grieving his reassignment and seeking reinstatement and related relief, does not satisfy the administrative exhaustion requirements of the FTCA. Seneca's affidavit in support of his grievance did not mention the FTCA or his alleged defamation and related tort claims, and therefore did not place either ATSDR or HHS on notice of his claims. His grievance affidavit also did not demand money damages in a sum certain, a jurisdictional prerequisite to filing an FTCA claim in federal court. Under controlling Eleventh Circuit

law, the affidavit fails to satisfy the FTCA's administrative claim requirement.

ARGUMENT AND CITATIONS OF AUTHORITY

This appeal concerns the substitution of the United States as a defendant in a tort case against employees of a tribal organization that has contracted with the United States pursuant to the ISDEAA. By way of background, the ISDEAA authorizes the federal government, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer [certain] programs or portions thereof . . . ." 25 U.S.C. § 450f(a)(1). The purpose of the ISDEAA is to increase tribal participation in the management of programs and activities that benefit Indians. See Snyder v. Navajo Nation, 382 F.3d 892, 896-97 (9th Cir. 2004). As one court explained, "[t]he ISDEAA promotes the long-standing federal 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 (8th Cir. 1995), cert. denied, 517 U.S. 1134 (1996).

"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.

Id., citing 25 U.S.C. § 450f, § 450b(j). It was important to Congress to limit the liability of tribes that agreed to self-determination arrangements. Id. Therefore, the statute provides 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:

> "With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, 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 . . . 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 . . . Service 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, Nov. 5, 1990, 104 Stat. 1959 (codified at 25 U.S.C. § 450f, historical notes) (emphasis added); see Snyder, 382 F.3d at 897; Allender v. Scott, 379 F. Supp. 2d 1206, 1211 (D.N.M. 2005); Hopeland Band of Pomo Indians v. Norton,

324 F. Supp. 2d 1067, 1070-71 (N.D. Cal. 2004); Wooten v. Hudson, 71 F. Supp. 2d 1149, 1152 (E.D. Okl. 1999).

Seneca objects to this protection being afforded the employees of USET in this case. His arguments against federal liability, however, fail as a matter of law for the reasons discussed below.

I. THE U.S. ATTORNEY'S CERTIFICATION WAS SUFFICIENT TO TRIGGER SUBSTITUTION OF THE UNITED STATES AS DEFENDANT IN THIS CASE.

Seneca's first argument is that the Certification of Sally Quillian Yates, Acting United States Attorney, (R1-20), was facially invalid because it did not expressly state that the individually named defendants were acting pursuant to an Indian self-determination contract. The certification requirement is found in § 2679(d)(1) of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act):

> "Upon certification by the Attorney General[2] that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant."

28 U.S.C. § 2679(d)(1). Seneca cannot dispute that the U.S. Attorney's certification met the requirements of this provision in

[2]The Attorney General has delegated certification authority to the United States Attorneys. See 28 C.F.R. § 15.4.

that it expressly states that "the individual named defendants – James T. Martin, Brenda E. Shore, and Lisa Berrios – were acting within the scope of their employment as employees of the Government at the time of the events alleged." R1-20-2 (U.S. Attorney Certification, ¶ 2). Instead, Seneca's argument is that the certification failed to meet an *additional* requirement that Seneca says arises from the provisions of ISDEAA, namely that the employees were acting pursuant to a self-determination contract.

Seneca's attempt to nit-pick the wording of the certification must be rejected for at least three reasons. First, the U.S. Attorney's certification can fairly be read as certifying the very point that Seneca claims is missing. The certification expressly states that the U.S. Attorney reviewed, among other things, the Indian Self-Determination Agreement between USET and the United States. R1-20-1 (U.S. Attorney Certification, ¶ 1). It also states that the U.S. Attorney reviewed the Declaration of Daretia Hawkins. Id. Ms. Hawkins, an attorney with HHS, stated in her declaration that USET was a tribal contractor entitled to FTCA coverage. R1-22-2 (Attach. # 2 (Hawkins Decl., ¶ 5)).[3] Finally,

[3]Seneca incorrectly refers in his brief to the supposed "silence of HHS on the issue of substitution." Appellant's Br. at 25. In fact, HHS, through Ms. Hawkins, has stated its position very clearly that substitution is proper in this case. Moreover, the certification expressly states that the U.S. Attorney "obtained the position of the [HHS] that [the individual] defendants . . . were acting within the scope of their employment at the time of the events giving rise to Mr. Seneca's complaint." R1-20-1. Seneca points out that HHS is required by 28 C.F.R. 15.3(b) to send a

the certification states that the U.S. Attorney "obtained the position of [HHS] that [the individually named defendants] were acting within the scope of their employment at the time of the events giving rise to" the complaint. R1-20-1 (U.S. Attorney Certification, ¶ 1). The U.S. Attorney then concludes that, "bas[ed] on th[is] information," the individually named defendants "were acting within the scope of their employment as employees of the Government at the time of the events alleged." R1-20-2 (U.S. Attorney Certification, ¶ 2).

As Seneca himself admits, "only tribal employees performing under a self-determination contract can be considered federal employees and entitled to FTCA protection." Appellant's Br. at 14. In other words, the U.S. Attorney's certification that the individual defendants were acting "as employees of the Government," was the equivalent of a certification that the employees were acting pursuant to a self-determination contract. This point is confirmed by the fact that the certification is expressly based on the U.S. Attorney's review of, among other things, the USET self-

---

report to the U.S. Attorney addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose. Seneca suggests either that no such report exists or that, if it did, it would support his position. Because he never raised this issue before, the report is not in the record. See Dohrmann v. United State, 742 F.3d 1279, 1282 (11th Cir. 2006) (arguments raised for the first time on appeal are waived). In any event, the Hawkins Declaration necessarily reflects what the contents of that report are; namely, that HHS believes the individual defendants are covered by the FTCA.

determination contract. Seneca's linguistic objection thus boils down to the assertion that the certification should have added the words "under a self-determination agreement" after "employees of the Government," or perhaps have stated that the individual defendants were "acting under a self-determination agreement" rather than that they were acting as "employees of the Government." But, Seneca offers no authority for the proposition that a U.S. Attorney certification is insufficient unless it uses particular "magic words."

Second, Seneca has not and cannot provide any legal authority for his argument that ISDEAA imposes an additional certification requirement on the Attorney General.[4] That statute (discussed supra at 9-10) merely extends the United States' liability under the FTCA for the acts of tribal organizations and their employees in the circumstances described. See Adams v. Tunmore, 2006 WL 2591272, *2 (E.D. Wash. Sept. 8, 2006). Nothing in the ISDEAA purports to affect the U.S. Attorney's certification under 28 U.S.C. § 2679(d)(1) when a self-determination contract is at issue.

---

[4]Seneca cites to the Ninth Circuit's decision in Walker v. Chugachmiut, 46 Fed. Appx. 421 (9th Cir. 2002), but that case does not address the issue of whether ISDEAA imposes an additional certification requirement on the government. Instead, Walker merely holds that a U.S. Attorney's certification that apparently included such additional language was sufficient. Id. at 424. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1280 (11th Cir. 1999) (internal quotation marks and citation omitted).

As the district court explained, "although it is true that whether the employees were performing functions under a self-determination contract at the time Seneca's claims arose is a relevant inquiry, the ISDEAA does not impose an additional requirement on the U.S. Attorney to certify that fact." R2-34-7 (footnote omitted).

Third, and fundamentally, Seneca's argument is contrary to well established law regarding judicial review of certifications under 28 U.S.C. § 2679(d)(1). The U.S. Attorney's certification is, under the law, only prima facie evidence that the individual employees were acting within the scope of federal employment (Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996)), a determination that the district court is obligated to review de novo. See Gutierrez de Martinez, 515 U.S. at 421; S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1542-43 (11th Cir. 1990), cert. denied, 502 U.S. 813 (1991); Green, 8 F.3d at 698. Judicial review, however, "is not of the certification; it is of the underlying merits." Kimbro v. Velten, 30 F.3d 1501, 1508 (D.C. Cir. 1994). In fact, "it does not matter ... what the certification actually says" because the court must determine for itself whether substitution is appropriate as a substantive matter. Id. Even if the U.S. Attorney refused to certify, the individual defendants have a statutory right to demand a certification determination from the court. See 28 U.S.C. § 2679(d)(3). Thus, where, as here, a party

challenges the certification, the substitution question becomes one for judicial resolution on the merits.

Seneca has not cited a single case in which a court held that a certification under § 2679(d)(1) was facially invalid. Indeed, the United States Supreme Court has noted that it is "customary" for the certification to state simply that the individual defendants were acting within the scope of their employment without more. See Gutierrez de Martinez, 515 U.S. at 421. The U.S. Attorney's certification in this case was based on the Department of Justice's standard certification form and resembles those filed across the country, including in cases involving defendants deemed government employees as a result of the ISDEAA. See Martinez v. United States, 2007 WL 3357392, *1 (D. Ariz. Nov. 13, 2007); State Farm Mut. Auto. Ins. Co. v. Swan, 2002 WL 31973731, *2 n. 2 (D. Or. Aug. 22, 2002). It closely tracks the language of the certification statute, 28 U.S.C. § 2679(d)(1). There simply is no requirement that the U.S. Attorney state anything other (or different) than what was stated here to achieve substitution. See Osborn v. Haley, 549 U.S. 225, 127 S. Ct. 881, 897 (2007) (certification that "closely tracks the language of the Westfall Act" is "formally in order"). While Seneca is free to argue the merits of the U.S. Attorney's position as stated in the certification that the individual defendants were acting as government employees within the scope of their employment (as he

does in this appeal), his argument that the certification itself is somehow deficient is without merit.[5]

II. THE DISTRICT COURT'S SUBSTITUTION OF THE UNITED STATES AS DEFENDANT IN THIS CASE WAS PROPER.

Seneca next attacks the district court's determination on the merits that substitution was appropriate in this case. According to Seneca, substitution was not appropriate because (1) USET does not have a valid self-determination contract; and (2) his claims in this case do not arise out of USET's performance under its self-determination contract. The Court must consider Seneca's arguments in light of the well established principle that the party challenging the U.S. Attorney's decision regarding scope of employment certification "bears the burden of presenting evidence and disproving the [U.S. Attorney's] decision to grant or deny scope of employment certification by a preponderance of the

[5]Seneca suggests that the additional certification requirement is necessary because the certification as written would be "inappropriate" if the USET employees "were acting in the scope of their employment when they wrote the letters but outside the scope of the [self-determination contract]." Appellant's Br. at 16. Again, Seneca's argument is best addressed on a de novo review of the certification, not on a facial attack on the wording of the certification. See infra at 22-28. But in any event, as discussed above, the certification in fact addresses both issues – i.e., whether the individual employees were acting within the scope of their employment and whether they were acting under a self-determination contract. The second issue is addressed in the certification when the U.S. Attorney states that the individual defendants were acting "as employees of the Government." R1-20.

evidence." Green, 8 F.3d at 698; see S.J. & W. Ranch, Inc., 913 F.2d at 1543 (same).

A. The United States and USET Have A Valid Self-Determination Contract.

Seneca's first argument against the U.S. Attorney's certification decision is that USET does not have a valid self-determination contract with the United States. In the district court, Seneca asserted that USET's self-determination contract was invalid because it did not include any tribal resolutions authorizing USET to contract with the federal government. See R1-29-11.[6] The United States submitted the declaration of Brenda Shore, Director of Tribal Health Program Support for USET, wherein Ms. Shore states that USET's self-determination contract is supported by resolutions of 24 USET member tribes. R2-33 (Attach. # 1 (Shore Decl., ¶ 9)); see R2-33 (Attach. # 3 (Shore Decl. at Attach. B) (Tribal Resolutions)). These resolutions are more than sufficient to support USET's self-determination contract because

[6]Seneca also asserted that the self-determination contract was invalid because the services to be performed under it were not services that the government was "required by law to provide." R1-29-(11-12). He has waived this argument by not raising it in this appeal. See United States v. Gupta, 463 F.3d 1182, 1195 (11th Cir. 2006) (arguments made in the district court but not raised on appeal are waived), cert. denied, 127 S. Ct. 2446 (2007). In any event, the district court correctly held that there is no requirement in the ISDEAA that the services delegated to the tribal organization be those HHS is "required by law to provide." R2-34-4 n.4; see R2-33-(12-15).

the statute directs the Secretary to enter into such a contract as long as "any" tribe requests it by tribal resolution. 25 U.S.C. § 450f(a)(1); see R2-33-(10-12) (Reply Brief In Support of the United States Motion to Dismiss).

In this appeal, Seneca tries a new approach. He now says that the resolutions attached to the Shore affidavit do not support USET's self-determination contract because that contract became effective on October 1, 2001, whereas the resolutions are dated 1996. In addition, he asserts, the resolutions should have been, but were not, attached to the USET self-determination contract. See Appellant's Br. at 17.

Seneca's arguments, in addition to being made for the first time in this appeal,[7] fail for the same reasons his arguments in the district court failed. A "self-determination contract" is defined as a contract "entered into under Title I of this Act between a tribal organization and the appropriate Secretary [either the Secretary of HHS or the Secretary of the Interior] for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." Comes Flying v. United States, 830 F. Supp. 529, 530 (D.S.D. 1993) (internal quotation marks omitted) (quoting 25

[7]Because Seneca could have raised these arguments in the district court, the Court should not even consider them here. See Dohrmann, 442 F.3d at 1282 (refusing to address argument raised for the first time on appeal).

U.S.C. § 450b(j) and § 450b(i)). The record is undisputed that the Secretary of HHS entered into the USET self-determination contract. See R2-33 (Attach. # 2 (USET Self-Determination Agreement, p. 17). Moreover, the record shows that the agreement was and currently is in effect and was funded by the United States in the time-period in question. See R2-33 (Attach. # 1 (Shore Decl, ¶ 8); R2-33 (Attach. # 2 (USET Self-Determination Agreement, at Attach. # 2 (Fiscal Year 2006 Funding Agreement)). In short, neither the United States nor USET, the two contracting parties, question the validity of the USET self-determination agreement. In light of this fact, Seneca's attempt to raise questions regarding its validity fails to satisfy his burden of proof on this issue. See supra at 17-18.

In any event, Seneca's argument that the USET self-determination agreement is invalid rests on the assertion that the tribal authorizations are somehow inapplicable. The only basis for this assertion is Seneca's unsupported statement to that effect. In contrast, persons with actual knowledge regarding the validity of the contract state the opposite – that the tribal authorizations are valid and apply to the self-determination contract at issue. See R2-33 (Attach. # 1 (Shore Decl., ¶ 9)); R1-22 (Attach. # 2 (Hawkins Decl., ¶ 5)).

Moreover, the fact that the resolutions are dated prior to the effective date of the current self-determination agreement has no significance. The ISDEAA generally provides that a self-

determination contract is issued for a term of up to three years (25 U.S.C. § 450j(c)(1)(A)), except in the case of a "mature contract," the term of which is indefinite. See 25 U.S.C. § 450j(c)(1)(B). One of the requirements for "mature contract" status is that the tribal organization has continuously operated a self-determination contract for three or more years. See 25 U.S.C. § 450b(h). The contract issued to USET in 2001 is a "mature contract." See R2-33 (Attach. # 2 (Shore Decl. at Attach. A) (USET Self-Determination Agreement, p. 5, §(b)(1)). The USET self-determination agreement qualified for designation as a "mature contract" following its continuous operation of predecessor contracts for more than three years.

The "mature contract" status is authorized by the tribal resolutions, which expressly state that they continue in force indefinitely. See, e.g., R2-33 (Attach. # 3 (e.g., Alabama-Coushatta Tribal Council Resolution at 1 ("continuing until rescinded"); Catawba Indian Nation Resolution at 1 (same); Cayuga Nation Resolution at 2 (same); Micmac Band Council Resolution at 1 ("this resolution is in effect until such time that the Tribal Council chooses to withdraw or supplant this resolution"))). Therefore, those resolutions continue to support the authority of USET to enter into a self-determination agreement with the United

States, even if the self-determination agreement in question is a newer version of the original one.[8]

In short, the ISDEAA provides that the Secretary of HHS is directed to enter into such a contract "upon the request of any Indian tribe by tribal resolution." 25 U.S.C. § 450f(a). The record establishes that such requests were made and that the Secretary of HHS did in fact enter into a self-determination contract. The district court's determination that the USET self-determination contract is valid (R2-34-(4, n.4 and 10, n.8)) should be affirmed.

B. Seneca's Claims Result From The Original Defendants' Performance Of Functions Under The USET Self-Determination Contract.

Seneca's final challenge to the substitution of the United States is that, even if a valid self determination contract exists, his claims did not arise out of the performance of that contract. The statute states that the individual defendants are entitled to FTCA protection if the plaintiff's claims "result[] from the

---

[8]Seneca also asserts that the resolutions attached to the Shore affidavit were not included with the copy of the self-determination contract obtained by Seneca for purposes of this litigation. See Appellant's Br. at 17. The fact that the resolutions were not attached is legally irrelevant. Moreover, because Seneca fails to explain the supposed legal relevance of this fact, any argument he might make on this point is waived. Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 n. 6 (11th Cir. 1989) (a party waives an issue on appeal by making only passing reference to it and failing to make a specific argument on how the court erred).

performance of functions . . . under a[n Indian self-determination] contract . . . while carrying out any such contract . . . ." 25 U.S.C. § 450f, historical notes. Consistent with the statute, the self-determination agreement states that USET and its employees are covered by the FTCA "while performing programs, activities, functions or services under this Contract and the Annual Funding Agreement . . . ." R2-33 (Attach. # 2 (Attach. A to Shore Decl., p. 15)). The district court correctly held that Seneca failed to meet his burden of proof on this issue. See R2-34-(7-10).

First, Seneca concedes that the activities of USET that gave rise to his complaint related to the subject-matter covered by the self-determination contract, namely, the provision of Indian health services. See R2-33 (Attach. # 2 (Attach. A to Shore Decl.) (Self-Determination Agreement at p. 4) (the "[p]urpose" of the agreement is for USET to "provide the timely dissemination of health information to the Tribal Health Programs in the Nashville Area;. . . . and technical assistance to all area Tribes with regard to the continuing development of their health programs"). As Seneca states, his "claims against Defendants arose out of USET's testimonies before HHS in 2006." R1-29-3. Seneca concedes that the purpose of the two "Consultation Sessions" at which USET testified in 2006 was for the tribal population to inform the agencies and divisions of HHS "what public health issues it considers are most important and to propose funding for HHS'

upcoming fiscal year to combat those issues." R1-29-4 (emphasis added). He alleges that his claims arose when he contacted USET to help that organization prepare for its testimony, resulting in USET's complaining to ATSDR (which is part of HHS) about his interaction with its employees. R1-29-(4-5); see also R1-27-(3-7). In short, the USET employees were acting pursuant to the mandate in the self-determination contract when they engaged in budget discussions that would affect the implementation of Indian health services.

Second, the USET's activities in the budget consultation sessions fall within the broad category of administrative functions set forth in the self-determination agreement. The ISDEAA expressly includes administrative functions, including those administrative functions outside the specific service delivery programs provided for in the agreement, in the list of functions that are contractable under a self-determination agreement:

> "The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions."

25 U.S.C. § 450f(a)(1) (emphasis added). The agreement follows this statutory provision by including within USET's functions "administrative services in coordinating and facilitating the meetings, and activities of the Health Committee . . . ." R2-33 (Attach. # 2 (Attach. A to Shore Decl.) (Self-Determination Agreement at p. 4).

As the district court noted, "[t]here is no doubt that information-gathering and budget-formulation for the upcoming year are key administrative functions that further the substantive goals and programs HHS delegated to USET. As a result, USET's employees should, and do, enjoy FTCA coverage while performing these administrative functions in conjunction with HHS." R2-34-9. This is true particularly in light of the contractual statement that the provisions of the ISDEAA and of the USET self-determination contract "shall be liberally construed for the benefit of [USET] to transfer the funding and the . . . related functions, services, activities, and programs . . . including all related administrative functions, from the Federal Government to [USET]." R2-33 (Attach. # 2 (Attach. A to Shore Decl.) (Self-Determination Agreement at p. 4) (emphasis added); accord 25 C.F.R. § 900.3.

Third, in accordance with its obligations to provide health services and to assist tribes with health-related issues, USET's

self-determination contract imposes a related obligation on USET to "facilitate meaningful consultation" between HHS and tribes:

> "USET contracts to facilitate meaningful consultation between agencies of the Department of Health and Human Services and tribes. USET staff will be responsible for meeting planning/coordination including but not limited to selection of meeting location, selection and scheduling of presenters, travel arrangements and receipt of reimbursements through contract modification, if applicable."

R2-33 (Attach. # 2 (Shore Decl. at Attach. A) (USET Self-Determination Contract, at Scope of Work, p. 2).

To begin with, USET's written complaints to Seneca's agency (which Seneca claims were libelous) themselves served to "facilitate meaningful consultation" between tribes and HHS. R2-33 (Attach. # 1 (Shore Decl., ¶ 20); Attach. # 5 (Martin Decl., ¶¶ 9-10)). As USET explained in its complaint letters, it believed that Seneca's actions "negatively affected his interaction with Tribal representatives" and "may reflect negatively on the ATSDR [Seneca's HHS agency]." R1-1 (Attach. # 2 (also noting that Seneca's "reputation in Indian Country has suffered"). USET also was concerned that Seneca pushed his personal agenda over that of his agency's, and that his requests were not in accordance with tribal priorities. Id. By requesting that the agency take action to correct an employee who was adversely affecting the relationship between tribes and HHS, harming communication between them, and not advancing their priorities, USET was "facilitat[ing] meaningful

consultation between agencies . . . and tribes" under any reasonable interpretation of that term.

In any event, USET was "facilitat[ing] meaningful consultation" when it was preparing for and testifying before HHS at the budget "consultation sessions" giving rise to Seneca's claims. R2-33 (Attach. # 1 (Shore Decl., ¶¶ 13, 16); Attach. # 5 (Martin Decl., ¶ 7)). In helping to plan the consultation sessions, USET also was carrying out its contractual responsibility to coordinate meetings and schedule presenters. R2-33 (Attach. # 1 (Shore Decl., ¶¶ 13, 16)). Seneca's attempt to influence the content of USET's testimony and to obtain agenda time for himself directly implicates these contractual provisions. Thus, even assuming that USET's preparation for and performance of its testimony before HHS in spring 2006 was "on behalf of the entire American Indian population,"[9] that testimony still would "be encompassed in the delegated duties USET contracted to perform." R2-34-8 (footnote omitted).

In sum, Seneca has not met his burden of proving that the U.S. Attorney's certification that USET and its employees were acting "as employees of the Government" – in other words, under an Indian self-determination agreement – was incorrect. The provisions of the USET self-determination contract, including its scope and

[9]In fact, the USET testimony states that it was offered on behalf of the USET member tribes, not the entire Indian population. See R2-33 (Attach. # 1 (Shore Decl., ¶ 17)).

delegated duties, are, under the law and by the terms of the agreement itself, to be construed liberally in favor of USET. The inclusion of administrative functions and meaningful consultation under the self-determination agreement is more than sufficient, in light of this liberal construction rule, to bring USET's activities at issue in this case within the coverage of the FTCA.[10]

III. THE DISTRICT COURT PROPERLY DISMISSED SENECA'S TORT CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The United States and its agencies are immune from suit except insofar as Congress has enacted legislation unequivocally waiving the government's sovereign immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994); United States v. Testan, 424 U.S. 392, 399 (1976). Without such an unequivocal waiver, courts lack subject matter jurisdiction to entertain an action against the United States. United States v. Sherwood, 312 U.S. 584, 586 (1941). Where there is a waiver, it must be strictly construed in favor of the

[10]Once it is determined that USET was performing under its self- determination contract at the time of the events giving rise to Seneca's claims, it naturally follows that USET's employees were acting within the scope of their employment in carrying out the contract and thus entitled to FTCA immunity. See R2-33-(18-20). As the district court noted (R2-34-10 n.9), Seneca does not dispute that, assuming the individual defendants were acting pursuant to an Indian self-determination agreement, they were acting within the scope of their employment under that agreement. Having failed to dispute this issue in the district court, Seneca may not dispute it in this appeal. See Dohrmann, 447 F.3d at 1282. In addition, Seneca does not attempt to argue otherwise in this appeal, and therefore has waived the issue once again. See Gupta, 463 F.3d at 1195 (arguments not made on appeal are waived).

sovereign and may not be extended beyond the explicit language of the statute waiving immunity. United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992).

The FTCA, 28 U.S.C. § 1346(b)(1), § 2671 et seq., "'is a specific, congressional exception' to the United States' sovereign immunity for tort claims, under which the government may 'be sued by certain parties under certain circumstances for particular tortious acts committed by employees of the government.'" Turner v. United States, 514 F.3d 1194, 1200 (11th Cir. 2008), quoting Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994) (per curiam); see Dolan v. United States Postal Serv., 546 U.S. 481, 484-85 (2006); JBP Acquisitions, LP, 224 F.3d at 1263. In general, the FTCA permits the United States to be sued in tort "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); see 28 U.S.C. § 2674. Congress, however, expressly placed several conditions on the waiver of sovereign immunity found in the FTCA.

One such condition is administrative exhaustion. Section 2675 of title 28 provides that a claimant must first present the tort claim to the federal agency before filing suit in court:

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death . . . 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 in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant anytime thereafter, be deemed a final denial of the claim for purposes of this section."

28 U.S.C. § 2675(a); see McNeil v. United States, 508 U.S. 106, 110-13 (1993). The statutory requirement of filing an administrative claim with the appropriate agency is jurisdictional and not subject to waiver. Id.; Dalrymple v. United States, 460 F.3d 1318, 1324 (11th Cir. 2006).

Seneca did not file an administrative tort claim with HHS. R1-22 (Attach. # 2 (Hawkins Decl., ¶ 4)). Under § 2675 and McNeil, therefore, this action is barred by sovereign immunity and the district court properly dismissed the case for lack of subject matter jurisdiction.

Seneca's only response is to assert that he provided sufficient notice of his claims to the agency in an affidavit he submitted to ATSDR in support of an administrative grievance he filed to combat his reassignment. Appellant's Br. at 30. According to Seneca, the agency knew about his libel claim because his affidavit states that USET's claims against him are false. Id. at 31. In addition, Seneca asserts, his affidavit asked for attorneys' fees as part of his personal relief, and, based on that

request, the agency "could easily calculate or estimate the monetary damages" he suffered. Id.

Seneca's argument that the affidavit he submitted in support of his administrative grievance met the exhaustion requirements of the FTCA is contrary to established law. To comply with the exhaustion requirement, a plaintiff must file with the appropriate agency "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property." 28 C.F.R. § 14.2(a); see 28 U.S.C. § 2675(a). Seneca does not contend that he filed the Standard Form 95. Moreover, the affidavit he submitted to contest his reassignment in no way informs the agency that he was asserting a tort claim against the government. As this Court held in Rease v. Harvey, 238 Fed. Appx. 492, 495 (11th Cir. June 28, 2007), wherein the plaintiff had made a request to the Army for correction of his military records, a "request, which did not mention the FTCA or indicate potential damages, put Defendants on no notice of a FTCA claim." Accord Vanderberg v. Carter, 523 F. Supp. 279, 282-83 (N.D. Ga. 1981)(a claim for benefits under a government health program is not the equivalent of a "claim" under the FTCA), aff'd without opinion, 691 F.2d 510 (11th Cir. 1982).[11]

[11]See also Lundstrum v. Lyng, 954 F.2d 1142, 1145 (6th Cir. 1991) ("The February 24 letter was not a claim for damages under the FTCA; rather, it was a request for a reconsideration of the denial of eligibility for a loan."); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (plaintiff's request for a hearing

Seneca's affidavit does not mention the FTCA, does not state that he has a legal claim for libel or other tortious conduct, does not demand money damages for any alleged tort, and does not place the agency on notice that he was seeking damages for tortious conduct. R1-27 (Attach. # 1 (Seneca Decl., at Ex. H). Instead, Seneca's affidavit avers that his reassignment was unwarranted (R1-27 (Attach. # 1 (Seneca Decl., at Ex. H, ¶ 10)), and demands rescission of the discipline he received, removal of the reprimands received, training, reinstatement (or reassignment), and attorney's fees and costs (Id., ¶¶ 88-89). Unsurprisingly, HHS did not interpret Seneca's grievance affidavit as an FTCA claim and did not process it as such. R1-22 (Attach. # 2 (Hawkins Decl., ¶ 3)).

"is devoid of any reference to a possible tort claim against the government"); Best Bearings Co. V. United States, 463 F.2d 1177, 1179 (7th Cir. 1972) (the plaintiff's inquiries and request for return of the ball bearings was not presentation of his claim to the government agency as required by statute).; Fischer v. Federal Bureau of Prisons, 2007 WL 2702341,*5 (M.D. Fla. Sept. 14, 2007) ("Plaintiff's argument that his prison administrative remedy requests and appeals satisfy the administrative tort claim requirements under the FTCA is without merit[]" because those "requests do not state that he is filing a claim pursuant to the FTCA . . . ."); Decker v. United States, 603 F. Supp. 40, 43 (S.D. Ohio 1984)("Even should the Court assume that a written claim had been filed with the Army, the Court finds no reason from the evidence on record to expect the Army to have realized that plaintiff was accusing it of a tortious conduct."); Shubert Constr. Co., Inc. v. The Seminole Tribal Housing Authority, 490 F. Supp. 1008, 1011 (S.D. Fla. 1980) ("While the report shows that a HUD employee was aware of the construction problems arising under the contract, it does not show that plaintiff intended to assert a tort claim.").

Moreover, even apart from the fact that Seneca's affidavit does not alert the agency to his tort claims in this case, the affidavit also fails to provide a "sum certain" in damages. "The sum certain requirement serves a valuable purpose; it informs the government of the maximum amount of a claim enabling the government to evaluate whether to settle a claim or proceed to trial." Turner, 514 F.3d at 1200. When, as in this case, "the sum certain is omitted, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the district court without jurisdiction to hear the case." Suarez, 22 F.3d at 1065.

Seneca's grievance affidavit contains no demand for monetary relief but seeks only to have his reassignment overturned. Seneca relies on this Court's comment in Dalrymple, 460 F.3d at 1325 (internal quotations and citations omitted), that it takes a "somewhat lenient" approach to the "sum certain" requirement. See Appellant's Br. at 30. Seneca ignores the fact that Dalrymple actually held, notwithstanding the above-quoted language, that the "sum certain" requirement was not met in that case. As this Court explained, the sum certain requirement can be satisfied, for example, by providing "medical bills and repair estimates" containing "specific information as to the alleged damages" that the plaintiff is seeking. Id. Seneca's grievance affidavit, however, does not attach any medical bills or other documents from

which alleged tort damages could be calculated. Indeed, it does not demand compensatory or monetary damages of any kind, let alone damages for USET's alleged tortious conduct. R1-27 (Seneca Decl., at Ex. H, ¶¶ 88-89). Even the "attorneys' fees and costs" requested in the affidavit presumably relate to recovering the fees and costs Seneca incurred in grieving his reassignment, not those incurred, if any, as the result of USET's alleged tortious conduct. Even now Seneca does not state what the "sum certain" amount of damages allegedly demanded in his affidavit was.

Seneca's affidavit was insufficient to notify the agency that he had a tort claim against the government under the FTCA. It also was insufficient to notify the agency of the damages to which he believed he was entitled for the tortious conduct he alleges here. Therefore, the district court properly dismissed Seneca's complaint for lack of subject matter jurisdiction.

CONCLUSION

For the above and foregoing reasons, the Appellee respectfully requests that this Court affirm the order and judgment of the district court.

Respectfully submitted,

DAVID E. NAHMIAS
UNITED STATES ATTORNEY

S/ LYNN D. THESING
LYNN D. THESING
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains approximately 8156 words.

S/ LYNN D. THESING
LYNN D. THESING
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States Mail a copy of same in an envelope with correct postage for delivery. This is also to certify that the foregoing document was this day uploaded to the Court's website.

William Chen
JAECKLE, FLEISCHMANN & MUGEL, LLP
12 Fountain Plaza
Buffalo, NY 14202

This 3rd day of June 2008.

S/ LYNN D. THESING
LYNN D. THESING
ASSISTANT UNITED STATES ATTORNEY