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5
6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 GREGORY CHALLINOR and
9 SHANDA JENNINGS, as Personal
Representatives of the ESTATE OF
10 TYLER CHALLINOR, deceased,

11 Plaintiffs,

12 vs.

13 THE UNITED STATES OF
AMERICA,

14 Defendant.

NO. CV-11-3099-EFS

DEFENDANT'S REPLY TO
PLAINTIFFS'
MEMORANDUM IN
OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS

15 The United States of America, by and through Michael C. Ormsby, United
16 States Attorney, and Frank A. Wilson, Assistant United States Attorney, submit
17 this memorandum in reply to Plaintiffs' Memorandum in Opposition to
18 Defendant's Motion to Dismiss.

19 INTRODUCTION

20 Plaintiffs argue that the Federal Employees' Compensation Act (FECA), 5
21 U.S.C. §§ 8101, *et. seq.*, "does not shield the United States from liability because
22 of the relationship between the BIA, Department of Interior, and YFP and the
23 particular facts giving rise to the instant dispute, *sub judice*." (Plaintiffs'
24 Memorandum in Opposition to Defendant's Motion to Dismiss ("Pl. Memo."),
25 page 2, lines 17-21). Plaintiff further argues that "[w]hile the Plaintiffs' exclusive
26 remedy *against the* DOL may be FECA, their remedies under the FTCA remain
27 intact with regard to BIA negligence." (Pl. Memo., page 3, lines 5-8). However,
28 Plaintiffs' analysis misses the mark and attempts to persuade the court to ignore

1 the crucial factors in this case: (1) The FTCA action is and can only be against
2 the United States; and (2) Tyler Challinor was a Job Corps enrollee and his
3 injuries are covered by FECA because he is considered a federal employee
4 pursuant to 5 U.S.C. § 8143. Accordingly, the analysis begins, and ends, with
5 FECA. As shown below FECA is the exclusive remedy for federal employees (5
6 U.S.C. § 8116 (c)), and Plaintiffs cannot avail themselves of Federal Tort Claims
7 Act (FTCA) jurisdiction, even where more than one federal agency may be
8 involved.

9 THE FEDERAL EMPLOYEES' COMPENSATION ACT

10 The Federal Employees' Compensation Act (FECA) establishes a
11 comprehensive and exclusive workers' compensation program for federal
12 employees. Under FECA, "[t]he United States shall pay compensation . . . for the
13 disability or death of an employee resulting from personal injury sustained while
14 in the performance of his duty." 5 U.S.C. § 8102(a). The program is administered
15 by the Secretary of Labor, who may prescribe rules and regulations necessary for
16 its administration and enforcement and who has the authority to administer and
17 decide all questions arising under FECA. 5 U.S.C. §§ 8145 & 8149. This authority
18 is delegated to the Director of the Office of Workers' Compensation Programs
19 (OWCP). 5 U.S.C. § 8145(2); 20 C.F.R. §10.1.

20 Congress provided a remedy in the FECA that is exclusively
21 administrative. 5 U.S.C. § 8116. If a claimant considers him/herself aggrieved by
22 OWCP's final determination, the claimant may: 1) within 30 days, request a
23 hearing before an OWCP hearing representative or request that such representative
24 review the written record, 5 U.S.C. § 8124, 20 C.F.R. § 10.616; 2) within one year,
25 request reconsideration, 5 U.S.C. § 8128, 20 C.F.R. § 10.607; or 3) within 180
26 days, file an appeal with the Employees' Compensation Appeals Board. 20 C.F.R.
27 § 501.3. However, any action of the Secretary of Labor and/or his or her designee
28 in allowing or denying payment pursuant to the FECA is final and judicial review

1 concerning all questions of law and/or fact is explicitly barred. 5 U.S.C. §
 2 8128(b). Section 8128(b) states:

3 The action of the Secretary or his designee in allowing or
 4 denying a payment under this subchapter is—

5 (1) final and conclusive for all purposes and with respect
 6 to all questions of law and fact; and

7 (2) not subject to review by another official of the
 8 United States or by a court by mandamus or
 9 otherwise.

10 5 U.S.C. §8128(b); *See also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90
 11 (1991) (“FECA contains an ‘unambiguous and comprehensive’ provision barring
 12 any judicial review of the Secretary’s determination of FECA coverage”);
 13 *Lockheed Aircraft Corp. v. U. S.*, 460 U.S. 190, 194 (1983). The Ninth Circuit has
 14 repeatedly recognized this preclusion of judicial review. *See Markham v. United*
 15 *States*, 434 F.3d 1185 (9th Cir. 2005); *Staacke v. United States*, 841 F.2d 278 (9th

16 Cir. 1988); *Rodrigues v. Donovan*, 769 F.2d 1344 (9th Cir. 1985)¹
 17 Furthermore, and most importantly in this case, remedies under FECA are
 18 exclusive of all other remedies against the United States for a job-related death or
 19 injury. 5 U.S.C. § 8116(c); *Lockheed Aircraft Corp. v. United States*, 460 U.S.

20
 21 ¹The Ninth Circuit recognizes two narrow exceptions to FECA’s explicit
 22 preclusion of judicial review for FECA claims determinations. The two
 23 exceptions to the Secretary’s exclusive authority to make FECA determinations
 24 are for substantial cognizable constitutional challenges, and claims for violation of
 25 a clear statutory mandate or prohibition. *See Staacke v. United States*, 841 F.2d
 26 278 (9th Cir. 1988); *Rodrigues v. Donovan*, 769 F.2d 1344 (9th Cir. 1985).

27 However, Plaintiffs’ raising of these exceptions are a red herring in this case and
 28 are not in anyway applicable to this FTCA case because Plaintiffs are not
 challenging any decision of the Secretary of Labor.

1 190, 194 (1983); *Moe v. United States*, 326 F.3d 1065, 1069 (9th Cir. 2003);
 2 *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995); *Figueroa v. United*
 3 *States*, 7 F.3d 1405, 1407 (9th Cir. 1993).² As FECA was enacted to provide
 4 immediate compensation to injured federal workers regardless of fault, if
 5 compensation is available under FECA, “all other statutory remedies arising under
 6 the same facts are preempted” and the federal employee loses the right to sue the
 7 United States. *Lockheed*, 460 U.S. at 193-94; *Moe*, 326 F.3d at 1068.

8 DISCUSSION

9 The facts in this case are dispositive. Plaintiffs admits that (1) the United
 10 States Department of Labor administered the Job Corps program (Complaint, page
 11 3, lines 1-4); (2) Tyler Challinor was a Job Corps enrollee (Complaint, page 3,
 12 lines 22-23); and (3) Tyler Challinor died from injuries sustained while in the
 13 performance of his duty (Complaint, page 4, lines 1-14). Pursuant to FECA, these
 14 facts are dispositive.

15 FECA’s “applicability turns on whether the injury was suffered in the
 16 performance of the employee’s duty.” *Farley v. United States*, 162 F.3d 613, 616
 17 n.3 (10th Cir. 1998); *Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir.
 18 2002). As 5 U.S.C. 8143 plainly states Job Corps students are considered federal
 19 employees and are thus, covered by the FECA. Moreover, the United States is the
 20 only proper party in litigation under the FTCA, 28 U.S.C. §§ 1346 (b)(1), 2679
 21 (a).

22 Furthermore, since Tyler Challinor was a federal employee, the Indian Self-
 23 Determination and Educational Assistance Act (ISDEAA) has little bearing. The
 24 Act simply brings Indian tribes and organizations within the purview of the FTCA.
 25 The affected individuals, here Tyler Challinor, are then treated in the same way

26 ²Section 8116(c) of the FECA provides that liability “is exclusive and instead of
 27 all other liability of the United States . . . to the employee . . . because of the injury
 28 or death . . . in a civil action, . . . or under a Federal tort liability statute.” 5 U.S.C.
 § 8116 (c).

1 that all federal employees are treated: (1) the United States assumes liability for
 2 the acts or omissions of its employees performed within the scope of their duty;
 3 (2) the FECA is the remedy for injured federal employees; and (3) the FTCA is the
 4 remedy of injured non-federal employees.

5 Plaintiffs' exhaustive reliance on the "plain language of section 450f" is
 6 misplaced. (Pl. Memo., pages 6, 13-17). Nowhere in Section 450f of the ISDEAA
 7 does it provide that "the full protection and coverage of the Federal Tort Claims
 8 Act" shall apply. (*Id.*). The Section 450f language Plaintiff continually references
 9 was deleted in 2000. The only reference in Section 450f to the Federal Tort
 10 Claims Act is in subsection (c), which reads

11 . . . In obtaining or providing such coverage [liability insurance or
 12 equivalent coverage], the Secretary shall take into consideration the
 13 extent to which liability under such contracts or agreements are
 covered by the Federal Tort Claims Act.

14 25 U.S.C. § 450f (c). But, as we show, the ISDEAA has no application here.

15 FECA is dispositive and exclusive when the injury is to a federal employee.

16 The waiver of sovereign immunity may not be enlarged beyond the requirements
 17 of the statute and is strictly construed. As Plaintiff so eloquently pointed out in
 18 his brief

19 If Congress intended to limit the applicability of the FTCA to
 20 situations such as presented in this case, Congress would have so
 21 stated. It is the cardinal canon of
 statutory interpretation that a court must begin with the statutory
 language. "[C]ourts must presume that a legislature says in a statute
 what it means and

22 means in a statute what it says there. When the words of a statute are
 23 unambiguous, then this first canon is also the last: judicial inquiry is
 24 complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112
 25 S.Ct. 1146, 117 L.Ed.2d 391 (1992)(internal citations and quotations
 omitted); see also *Price v. Del. State Police Fed. Credit Union*, 370
 F.3d 362, 368 (3d Cir. 2004) ("We are to begin with the text of a
 provision and, if its meaning is clear, end there.").

26 Where the statutory language is unambiguous, the court should
 27 not consider statutory purpose or legislative history. See *AT&T, Inc.*
 28 *v. F.C.C.*, 582F.3d 490, 498 (3d Cir. 2009). Here, the statutory
 language is unequivocal.

1 (Pl. Memo., pages 15-16.)

2 The statutory language here is unambiguous.

3 The liability of the United States under this subchapter . . . with
4 respect to the injury or death of an employee is exclusive and instead
5 of all other liability of the United States . . . to the next of kin . . . in a
6 civil action . . . or under a Federal tort liability statute.

7 5 U.S.C. § 8116 (c).

8 FECA is the exclusive remedy against the United States for any federal
9 employee whose injuries fall within the scope of the statute and precludes
10 recovery under the Federal Tort Claims Act. This has been the holding in
11 numerous cases in circuits across the country. *See Swafford v. United States*, 998
12 F.2d 837, 839 (10th Cir. 1993)(holding that “[a]cceptance of benefits under the
13 FECA is an injured employee’s exclusive remedy” where an injury “occurred in
14 the performance of his duties as a federal employee”); *Bruni v. United States*, 964
15 F.2d 76, 78 (1st Cir. 1992); *McDaniel v. United States*, 970 F.2d 194, 198 (6th
16 Cir. 1992)(holding that it is only when the Secretary “determines that the injury
17 did not occur in the performance of duty” that FECA does “not cover the injury”);
18 *Woodruff v. United States*, 954 F.2d 634 (11th Cir. 1992) (holding FECA provides
19 the sole remedy for work-related injuries of federal employees); *Gill v. United*
20 *States*, 641 F 2d 195, 197 (5th Cir. 1981).

21 “[I]f the employee was injured in the performance of duty, the Secretary’s
22 decision regarding coverage will be binding on the court, regardless of whether
23 compensation is actually awarded.” *Swafford v. United States*, 998 F.2d 837, 841
24 (10th Cir. 1993). Thus, when FECA applies, it is clear that the court lacks
25 jurisdiction over an FTCA claim arising under the same facts.

26 The FECA requires the Government to “pay compensation ... for the
27 disability or death of an employee resulting from personal injury sustained while
28 in the performance of his duty.” 5 U.S.C. § 8102(a). To qualify, the employee or
survivor must apply to the Secretary of Labor. 5 U.S.C. § 8145. FECA's
exclusivity provision bars recovery under the FTCA. 5 U.S.C. § 8116(c). In

1 other words, if compensation is available under the FECA, any other tort remedy
2 against the United States for claims arising under the same facts are
3 preempted. *See Moe v. U.S.*, 326 F.3d 1065, 1068 (9th Cir. 2003). “If a plaintiff
4 has a colorable claim under FECA, the federal courts should dismiss any action
5 arising under the same facts for lack of subject matter jurisdiction.” *Id.* The
6 Supreme Court explained Congress’s purpose in enacting 5 U.S.C. § 8116(c) as
7 follows:

8 [FECA] was designed to protect the Government from suits
9 under statutes, such as the Federal Tort Claims Act, that had been
10 enacted to waive the Government’s sovereign immunity. In enacting
11 this provision, Congress adopted the principal compromise-the-“quid
12 pro quo”-commonly found in workers’ compensation legislation:
employees are guaranteed the right to receive immediate, fixed
benefits, regardless of fault and without need for litigation, but in
return they lose the right to sue the Government.

13 *Lockheed*, 460 U.S. 193-94. The Ninth Circuit went on to state: “Congress
14 designed FECA to provide immediate compensation to federal employees,
15 regardless of fault, eliminating the need to litigate those claims. In return,
16 employees lose the right to sue the Government.” [footnotes omitted] *Moe*, 326
17 F.3d at 1069.

18 This action does not present a unique factual situation, nor is it a matter of
19 first impression. It is a simple matter. Tyler Challinor was a Job Corps enrollee.
20 Job Corps enrollees are federal employees whose injuries are covered by FECA.
21 His family, having used the FECA, cannot use the FTCA to sue the United States
22 for the same injuries or death arising under the same facts. The Indian Self
23 Determination Act does not preempt or override this. It is not a matter of first
24 impression but rather is a matter that has been seen time and time again by the
25 Ninth Circuit and the U.S. Supreme Court. There is no conflict between any laws
26 here.

27 Plaintiffs assert that this case is well within either of the two exceptions
28 recognized in *Markham v. United States*, but Plaintiff clearly mischaracterizes the

1 holding in *Markham* as those exceptions do not apply here. *See Markham*, 434
 2 F.3d at 1187. Any action of the Secretary or his or her designee in allowing or
 3 denying a payment pursuant to the FECA is final and review of any kind by a
 4 court is explicitly barred by section 8128(b) of the Act. However, some courts
 5 have, in very limited circumstances, permitted judicial review to determine
 6 whether a constitutional question is presented or a statutory mandate has been
 7 violated. *See Id.* ; *Staacke v. U.S.*, 841 F.2d 278 (9th Cir. 1988); *Rodrigues v.*
 8 *Donovan*, 769 F.2d 1344 (9th Cir. 1985). However, as we have shown, there is no
 9 clear statutory mandate that Plaintiffs are alleging the Secretary violated; nor are
 10 Plaintiffs asking the court to review the Secretary's decision in this case; and
 11 Plaintiffs cannot "transform a garden-variety administrative action into a case of
 12 constitutional magnitude," *Markham*, 434 F.3d at 1187, by mere allegations
 13 clothed in constitutional language. More importantly, Plaintiffs' constitutional
 14 argument, "[w]hen one federal statute mandates the full protection and coverage of
 15 the FTCA..." (Pl. Memo., page 19, line 4), fails, as it relies on a statute that does
 16 not exist, i.e., the deleted portion of 450f (Pl. Memo., page 6, lines 12 - 22) .

17 CONCLUSION

18 Plaintiffs argues that "[w]hile the Plaintiffs' exclusive remedy *against the*
 19 *DOL* may be FECA, their remedies under the FTCA remain intact with regard to
 20 BIA negligence." (Pl. Memo., page 3, lines 5-8). Plaintiffs' analysis misses the
 21 mark. The crucial factors in this case are that the FTCA action is and can only be
 22 against the United States; and that Tyler Challinor was a Job Corps enrollee and
 23 his injuries are covered by the FECA because he is considered a federal employee
 24 pursuant to 5 U.S.C. § 8143. Accordingly, the analysis begins, and ends, with
 25 FECA. The FECA is the exclusive remedy for federal employees (5 U.S.C. §
 26 8116 (c)), and Plaintiffs cannot avail themselves of FTCA jurisdiction.
 27 Furthermore, the entirety of Plaintiff's case rests on a portion of a statute that is no
 28

1 longer in effect. Thus, his action must fail. The United States respectfully
2 requests that it's motion to dismiss be granted and Plaintiffs' case dismissed.

3 DATED this 7th day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: n/a

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