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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANIEL A. FARMER,	)	NO. CV-13-00251-LRS
	)	
Plaintiff,	)	UNITED STATES MOTION &
	)	MEMO TO DISMISS FOR
vs.	)	LACK OF JURISDICTION
	)	
UNITED STATES OF	)	
AMERICA,	)	
	)	Hearing: October 16, 2014
Defendant.	)	2:30 p.m. – Yakima

Defendant United States, through its counsel Michael C. Ormsby, United States Attorney, and the undersigned Assistant U.S. Attorney, moves to dismiss Plaintiff's FTCA lawsuit based on the lack of jurisdiction. *See* Fed. R. Civ. Pro. 12(b)(1). Provided below is the United States' memorandum in support of dismissal and other relevant materials are attached.

**I. PLAINTIFF'S ALLEGATIONS & SALIENT JURISDICTIONAL FACTS**

This case involves allegations of negligence against an employee of the Colville Confederated Tribes, a tribal organization having a contract under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450 et seq., with the U.S. Department of Health and Human Services (HHS), administered by its agency, the Indian Health Service (IHS). The following facts are based on the

1 Complaint, administrative claim, and the current contract between the HHS and the  
 2 Colville Confederated Tribes, the Fiscal Year 2012 Annual Funding Agreement  
 3 between the HHS and the Confederated Tribes of the Colville Reservation and  
 4 Modification No. 30 to IHS Contract Number 248-89-0008. *See Exhibits 201-02.*

5 **A. Colville Confederated Tribes' Contract with U.S. Dept. of Health and**  
 6 **Human Services (HHS) administered by Indian Health Service (IHS).**

7 On October 1, 1995, the Colville Confederated Tribes entered into a contract  
 8 with HHS to perform or provide certain programs, functions, services and activities  
 9 (PFSAs), IHS Contract Number 248-96-0001. *See Exhibit 201* (incorporated herein).  
 10 The contract provides that the contractor, i.e. Colville Confederated Tribes, would  
 11 perform or provide the following PFSAs: health administration, community health  
 12 representative, maternal child health, community health nurse, nutrition, mental health,  
 13 alcohol and substance abuse, youth rehabilitation and aftercare, environmental health  
 14 services, health education, engineering technician, *emergency medical services*,  
 15 Inchelium ambulatory clinic. IHS Contract Number 248-96-0001. The scope of work  
 16 for each of the programs would either be negotiated or the provisions of IHS Contract  
 17 Number 248-89-0008 would apply. *See* IHS Contract Number 248-96-0001, ¶ b(3).  
 18

19 IHS Contract Number 248-96-0001 (*Ex. 201*) provides for an effective date of  
 20 October 1, 1995 and states that it will remain in effect for an indefinite term. It further  
 21 provides for an annual funding period, which was to be determined by the fiscal year  
 22 unless otherwise agreed to by HHS and the contractor. *See* IHS Contract Number 248-  
 23 96-0001, ¶ b(1) (*Ex. 201*). The contract incorporates an Annual Funding Agreement  
 24 (AFA), which would include a description of the PFSAs to be performed under the  
 25 agreement. *Id.* at ¶ (f)(2). The AFA for fiscal year (FY) 2012 estimates the funding  
 26 that would be available to perform the PFSAs during that fiscal year and provides the  
 27 scope of work for the PFSAs in Contract Number 248-96-0001. *See* FY 2012 Annual  
 28 Funding Agreement, IHS Contract Number 248-96-0001, *Exhibit 202*. The AFA for

1 FY 2012 specifies that the scopes of work for the PFSAs included in IHS Contract  
2 Number 248-89-0008 would apply to IHS Contract No. 248-96-0001 until the parties  
3 amended the contract. *Id.*

4 The scope of work for the Colville Confederated Tribes EMS service is set forth  
5 in Modification No. 30 to IHS Contract Number 248-89-0008, *Exhibit 203*. The scope  
6 of work states that *the contractor will provide emergency medical services and*  
7 *ambulance coverage* for the Colville Indian Reservation, seven days per week. *Id.*  
8 The scope of work states that the contractor shall provide five standard ambulances and  
9 qualified ambulance attendants. *Id.* The ***scope of work*** provides that *ambulance*  
10 *attendants (EMTs) will provide triage and first aid at the IHS health centers in*  
11 *Nespelem and Inchelium, when necessary.* Modification No. 30, Contract Number  
12 248-89-0008 (*Ex. 203*).

13 **B. Plaintiff's Claim against the United States.**

14 On October 25, 2011, the plaintiff Daniel Farmer was an employee and foreman  
15 of Jones Brothers Construction Co., which was working on a construction project at the  
16 Colville Indian Reservation in Inchelium, Washington. *See ECF 1*. Jones Brothers  
17 Construction was constructing a pole style building for the Fire Hall/EMT unit. *ECF*  
18 *1*. Ronald L. Shafer is an emergency medicine technician (EMT) employed by the  
19 Confederated Colville Tribes' Emergency Medical Service (EMS) and was on-duty at  
20 the time, and "took it upon himself" (*ECF 1*, ¶3) to assist the Plaintiff in constructing  
21 the pole building. Plaintiff was up on a ladder setting girder trusses and Mr. Shafer,  
22 reportedly through his own initiative, climbed up on a ladder to assist, and allegedly  
23 swung a sledgehammer that unintentionally hit and injured a portion of the plaintiff  
24 Farmer's left hand. *Id.*

25 On December 14, 2012, plaintiff filed an administrative tort claim with HHS  
26 alleging that he had sustained an injury as a result of the negligent actions of Mr.  
27 Shafer. On July 9, 2013, plaintiff filed the instant suit alleging that Mr. Shafer was an  
28

1 on-duty EMT for the Colville Confederated Tribes' EMS and elected, through his own  
 2 initiative, to assist the Plaintiff with his construction duties (which assistance was  
 3 apparently accepted, until time of injury). *ECF #1, ¶ 3*. Plaintiff further alleges that  
 4 Mr. Schafer negligently swung the sledgehammer and injured his left hand.<sup>1</sup>

5 It is the United States' position that Mr. Shafer's volunteered construction  
 6 activities are outside the scope of the HHS's Emergency Medical Services (EMS)  
 7 contract - grant to the Colville Tribes and therefore no FTCA jurisdiction is conferred  
 8 on Plaintiff's alleged FTCA lawsuit. The United States also submits that Mr. Shafer's  
 9 volunteered construction activities outside the scope of his employment as a Tribal  
 10 EMT, which position involves *providing triage and first aid* on the reservation and/or  
 11 at IHS facilities, which also deprives jurisdiction of the Plaintiff's FTCA claim for  
 12 money damages for injuries sustained while working on a construction site.

## 13 **II. LAW & ARGUMENT**

### 14 **A. Rule 12(b)(1) and (h) Dismissal Standards.**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) addresses  
 16 the court's subject matter jurisdiction and is derived from the case or controversy  
 17 clause of Article III of the U.S. Constitution. Federal courts are limited in jurisdiction  
 18 and it is presumed that a case lies outside the jurisdiction of the federal courts unless  
 19 Plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511  
 20 U.S. 375, 376 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir.  
 21 1993); *Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d  
 22 730, 733 (9th Cir. 1979). "Once challenged, the party asserting subject matter  
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24 <sup>1</sup> Mr. Shafer denies negligently striking the Plaintiff's hand. Rather, Mr. Shafer has  
 25 testified that Mr. Farmer instructed him on when to swing the sledgehammer and that after  
 26 doing so, Plaintiff slipped and accidentally moved his hand directly in front of the intended  
 27 strike location, and that he did not have sufficient time to stop the swing or to change the  
 28 hammer's path.

1 jurisdiction has the burden of proving its existence.” *Robinson v. United States*, 586  
2 F.3d 683, 685 (9th Cir. 2009) (quoting *Rattlesnake Coal v. E.P.A.*, 509 F.3d 1095,  
3 1102 n. 2 (9th Cir. 2007).

4 In its Rule 12(b)(1) motion to dismiss for lack of jurisdiction, the United States  
5 submits that Plaintiff’s Complaint and factual elements are both “facially” and  
6 “factually” deficient. A “factual attack” takes issue with the sufficiency of jurisdiction  
7 allegations in Plaintiff’s Complaint and a “factual attack” takes issue with jurisdiction  
8 on a factual basis. *See Thornhill Publishing Co., id.* at 730, 733; *Mortensen v. First*  
9 *Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir.1977). In reviewing the United  
10 States’ facial attack, the Court must consider the factual allegations of Plaintiff’s  
11 Complaint to be true. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.1981);  
12 *Mortensen*, 549 F.2d at 891. However, a court does not assume the truth of legal  
13 conclusions in a pleading merely because they are cast in the form of factual  
14 allegations. *Western Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (citations  
15 omitted).

16 A properly pled complaint must provide a “short and plain statement of the  
17 claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atl.*  
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
19 factual allegations to establish jurisdiction, Rules 8 and 12 demand more than “labels  
20 and conclusions” or even a “formulaic recitation of the elements of a cause of action.”  
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Factual allegations must be enough to  
22 rise above the speculative level.” *Twombly*, 550 U.S. at 555. To survive a motion to  
23 dismiss under Rules 8 and 12, a complaint must facially “contain[ ] enough facts” to  
24 properly state jurisdiction and a claim for relief. *Iqbal*, 556 U.S. at 696 (internal  
25 quotation marks and citation omitted). “Determining whether a complaint states a  
26 plausible claim for relief will ... be a context-specific task that requires the [district]  
27 court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.  
28

1 The presumption is that a federal court does not have jurisdiction in a particular  
 2 case unless it is affirmatively demonstrated otherwise in the complaint. *Fifty Assocs.*  
 3 *V. Prudential Ins. Co.*, 446 F.2d 1187, 1190 (9th Cir. 1970); see also *CNA v. United*  
 4 *States*, 535 F.3d 132, 140, 146-50 (3rd Cir. 2008) (whether a government employee  
 5 was acting “within the scope of his office or employment” is jurisdictional because it is  
 6 included in the section granting jurisdiction over FTCA claims) (citing *Sheridan v.*  
 7 *U.S.*, 487 U.S. 392, 397-41 (1988)); *Bell Atlantic v. Twombly*, 550 U.S.544 (2007) (to  
 8 survive a motion to dismiss, a complaint must contain sufficient factual matter,  
 9 accepted as true, to “state a claim to relief that is plausible on its face.”); *Ashcroft v.*  
 10 *Iqbal*, 556 U.S. 662, 678-79 (2009) (Complaint’s conclusory allegations insufficient to  
 11 withstand motion to dismiss). Since, Plaintiff’s Complaint does not facially articulate  
 12 required jurisdictional facts, it must be dismissed under Rules 12(b)(1) (facial attack),  
 13 (b)(6), and 8(a).<sup>2</sup>

14 In addressing the United States’ Rule 12(b)(1) factual attack, however, there is  
 15 no presumption of truthfulness in the Plaintiff’s allegations and the burden remains on  
 16 the Plaintiff to clearly establish the court’s jurisdiction. See *Thornhill Publishing Co.,*  
 17 *Inc. v. General Telephone and Elec. Corp.*, *id.* Further, in addressing a factual attack  
 18 motion on jurisdiction the Court is not restricted to the face of the pleadings. *Robinson*  
 19 *v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *Land v. Dollar*, 330 U.S. 731, 735  
 20 n. 4 (1947), overruled on other grounds by *Larson v. Domestic & Foreign Commerce*  
 21 *Corp.*, 337 U.S. 682 (1949). Rather, the court may consider declarations or other  
 22 evidence to resolve factual questions bearing on the jurisdictional issue without  
 23 converting the motion into a motion for summary judgment. *McCarthy v. United*

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24 <sup>2</sup> When a facial motion to dismiss is granted, leave to amend should be freely granted  
 25 where it is possible that further factual allegations will cure the alleged defect. See *Somers v.*  
 26 *Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013) (“[A] district court should grant the plaintiff  
 27 leave to amend if the complaint can possibly be cured by additional factional allegations...”).  
 28



1 *States*, 850 F.2d 558, 560 (9th Cir. 1988) (citing *Land*, 330 U.S. at 735 n.4; *Biotics*  
 2 *Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of  
 3 material outside the pleadings does not convert a Rule 12(b)(1) motion into one for  
 4 summary judgment)); *Thornhill*, 594 F.2d at 733 (“no presumptive truthfulness  
 5 attaches to plaintiff's allegations, and the existence of disputed material facts will not  
 6 preclude the trial court from evaluating for itself the merits of jurisdictional claims.”)  
 7 (quoting *Mortensen*, 549 F.2d at 891). The burden is not on the United States to  
 8 disprove jurisdiction, rather it remains the Plaintiff’s burden to prove that “jurisdiction  
 9 does in fact exist.” *Mortensen*, *id.*; see also *Kokkonen v. Guardian Life Ins. Co. of*  
 10 *America*, 511 U.S. 375 (1994) (The court presumes a lack of jurisdiction until the party  
 11 asserting jurisdiction competently proves otherwise.).

12 Similarly, Rule 12(h)(3) provides: “Whenever it appears by suggestion of the  
 13 parties or otherwise that the court lacks jurisdiction of the subject matter, the court  
 14 shall dismiss the action.” As this court is aware, an action can only be brought against  
 15 the United States to the extent that the Federal Government waives its sovereign  
 16 immunity - *Blackburn v. United States*, 100 F.3d 1426, 1429 (9th Cir. 1996) - and  
 17 where there is no waiver of sovereign immunity, it is appropriate for the Court to  
 18 dismiss an action for lack of subject matter jurisdiction. *Gilbert v. Da Grossa*, 756 F.2d  
 19 1455, 1458 (9th Cir. 1985).

## 21 **B. Sovereign Immunity of the United States.**

22 Federal courts are courts of limited jurisdiction. *Mendoza v. Zirkle Fruit Co.*,  
 23 301 F.3d 1163, 1174 (9th Cir. 2002). As such, federal courts are empowered to hear  
 24 only those cases that are authorized by the U.S. Constitution and statutes enacted by  
 25 Congress. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).  
 26 Because of these limitations, *the party initiating a suit in federal court must*  
 27 *affirmatively allege facts in the complaint to show that the federal court has*  
 28 *jurisdiction to hear the case.* *Fifty Assocs. V. Prudential Ins. Co.*, 446 F.2d 1187, 1189

1 (9th Cir. 1970) (emphasis added). The presumption is that a federal court does not  
2 have jurisdiction in a particular case unless it is affirmatively demonstrated in the  
3 complaint. *Id.* at 1190.

4 Federal Courts generally lack the authority to consider and grant relief against  
5 the United States unless Congress explicitly waives sovereign immunity. It is well  
6 settled that “[t]he United States, as sovereign, is immune from suit save as it consents  
7 to be sued[.]” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United*  
8 *States v. Sherwood*, 312 U.S. 584, 586 (1941)). When the United States has consented  
9 to suit in certain matters, the court’s jurisdiction to entertain the suit is defined by the  
10 terms of the United States’ consent. *Ghandi v. Police Dept. of City of Detroit*, 747  
11 F.2d 338, 342 (6th Cir. 1984) (quoting *Sherwood*, 312 U.S. at 586). Congress provided  
12 just such a limited waiver of sovereign immunity under the Federal Tort Claims Act  
13 (“FTCA”) for any claim founded on negligence of an employee of the United States  
14 that is acting within the scope of her/his employment. 28 U.S.C. §§ 2671, 2674;  
15 *United States v. Orleans*, 425 U.S. 807, 813 (1976).

16  
17 However, “[a] waiver of sovereign immunity by the United States must be  
18 strictly construed and may not be extended by implication.” *Comes Flying v. United*  
19 *States through Bureau of Indian Affairs*, 830 F. Supp. 529, 530 (D.S.D. 1993) (citing  
20 *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)). “The requirement that  
21 jurisdiction be established as a threshold matter ‘springs from the nature and limits of  
22 the judicial power of the United States’ and is ‘inflexible and without exception.’”  
23 *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (internal  
24 punctuation omitted) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382  
25 (1884)). “‘Without jurisdiction the court cannot proceed at all in any cause.  
26 Jurisdiction is power to declare the law, and when it ceases to exist, the only function  
27 remaining to the court is that of announcing the fact and dismissing the cause.’” *Id.* at  
28 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514, 7 Wall. 506, 514 (1868)).



1 As described below, the United States' waiver of sovereign immunity in this  
2 instance is limited and, based on the grants - contracts involved, the United States has  
3 not waived sovereign immunity under the circumstances set forth in Plaintiff's  
4 Complaint. Therefore, the United States respectfully submits that subject matter  
5 jurisdiction is missing and that dismissal is appropriate.

6 **C. Statutory Framework of the Indian Self-Determination and**  
7 **Education Assistance Act (ISDEAA).**

8 Plaintiff alleges that the United States is liable for the negligence of the EMT  
9 Mr. Shafer by operation of the FTCA and the Indian Self-Determination and Education  
10 Assistance Act of 1975 (ISDEAA).<sup>3</sup> Plaintiff alleges simply that because Mr. Shafer  
11 was an "on-duty" employee for the Colville Confederated Tribes EMT unit, the United  
12 States is liable for his negligence. *See ECF 1*.

13 "The ISDEAA promotes the long-standing federal policy of fostering Indian  
14 self-determination by giving Indian tribes control over the administration of federal  
15 programs benefiting Indians." *FGS Constructors v. Carlow*, 64 F.3d 1230, 1234 (8th  
16 Cir. 1995). "Under a self-determination contract, the federal government supplies  
17 funding to a tribal organization, allowing the tribal organization to plan, conduct and  
18 administer a program or service that the federal government otherwise would have  
19 provided directly." *Id.* (citing 25 U.S.C. § 450f). The Act allows a tribal organization  
20 to contract with either the Secretary of Health and Human Services or the Secretary of  
21 the Interior. 25 U.S.C. § 450(b)(i) and (j); *FGS Constructors*, 64 F.3d at 1234.

22 The ISDEAA provides that an Indian tribe, tribal organization or Indian  
23 contractor, and its employees are deemed to be part of the Public Health Service in the  
24 Department of the Health and Human Services, while acting within the scope of their  
25 employment in carrying out the applicable contract, grant agreement, or cooperative  
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<sup>3</sup> *See* Pub. L. No. 93-638.

1 agreement under the Act with respect to claims for personal injury or death resulting  
2 from the performance of medical, surgical, dental, or related functions or resulting  
3 from the operation of an emergency motor vehicle. 25 U.S.C. § 450f(d).

4 Any civil action against a tribal organization, or one of its employees acting  
5 within the scope of employment, for tort claims resulting from the carrying out of an  
6 ISDEAA contract “shall be deemed to be an action against the United States” under the  
7 FTCA. *See* Department of the Interior and Related Agencies Appropriations Act of  
8 1991, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (Nov. 5, 1990)  
9 (codified as amended at 25 U.S.C. § 450f note). The Public Health Service Act,  
10 provides that the remedy provided against the United States by §§ 1346(b) and 2672 of  
11 Title 28 shall be exclusive of any other civil action or proceeding, for claims of  
12 personal injury, including death, resulting from the performance of medical, surgical,  
13 dental or related functions, including the conduct of clinical studies or investigation, by  
14 any commissioned officer or employee of the Public Health Service while acting  
15 within the scope of his office or employment. 42 U.S.C. § 233(a).

16 The Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680, referenced  
17 above in the Public Health Service Act, provides that the United States may be liable  
18 for the negligent or wrongful actions or omissions of federal employees *within the*  
19 *scope of their funded employment*, to the same extent as a private person in similar  
20 circumstances in accordance with the law of the place where the act or omission  
21 occurred. Thus, the ISDEAA extends FTCA coverage here to actions and omissions of  
22 employees of the Tribe, tribal organizations, or contractors, when they’re acting within  
23 the scope of the ISDEAA contract, are acting within their funded employment position,  
24 and *provided* that the claim arises from the performance of medical, surgical, dental or  
25 related functions, or from the operation of an emergency motor vehicle. *Id.*  
26  
27  
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**D. United States is Not Liable to Plaintiff Under the FTCA Because Plaintiff's Claim is Not Covered under the ISDEAA.**

The ISDEAA deems Indian tribes, tribal organizations or Indian contractors and their employees to be members of the Public Health Service and thus entitled to FTCA coverage only with respect to claims arising from the performance of medical, surgical, dental or related functions or with the operation of an emergency motor vehicle. 25 U.S.C. § 450f(d); *see also* 42 U.S.C. § 233(a). As clearly indicated in Plaintiff's administrative claim and Complaint, his claim does not fall within these provisions. Thus, the United States is not liable for Mr. Shafer's actions. *Id.*

**E. United States Not Liable Under FTCA Since Mr. Shafer Was Not Carrying Out Duties-Functions Within Scope of HHS and the Colville Confederated Tribes' Grant - Contract.**

According to Plaintiff's allegations, the incident giving rise to this claim occurred when Mr. Shafer, an EMT with the Tribes' EMS department, "took it upon himself" to assist plaintiff in constructing a building on the reservation. *ECF 1, ¶ 3.* The scope of work for the tribal EMS service does not include *any* construction activity. As stated above, the contract provides that the Tribe is responsible for providing emergency medical services to *members of the tribe*, including providing fully equipped ambulances and qualified EMTs to provide appropriate first aid and triage services. Here, Mr. Shafer was not providing first aid or triage services, thus he was not carrying out the contract under the ISDEAA between HHS and the Colville Confederated Tribes at the time of this incident.

**F. United States Not Liable Under FTCA Since Mr. Shafer Was Not Acting Within Scope of Waiver of Sovereign Immunity.**

When the facts of a case are undisputed, the scope of employment issue is suitable for determination as a matter of law. *Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Scope of employment for FTCA

1 purposes extends liability only “under circumstances where the United States, if a  
 2 private person, would be liable to the claimant in accordance with the law of the place  
 3 where the act of omission occurred.” 28 U.S.C. § 1346(b)(1); *see generally Hartzell v.*  
 4 *United States*, 786 F.2d 964, 966 (9th Cir. 1986).<sup>4</sup>

5 In Washington, the test for determining whether an employee is acting within the  
 6 scope of his employment has been defined as, “whether the employee was, at the time,  
 7 engaged in the performance of the duties required of him by his contract of  
 8 employment, or by specific direction of his employer, or, as sometimes stated, whether  
 9 he was engaged at the time in the furtherance of the employer’s interest.” *Dickinson v.*  
 10 *Edwards*, 105 Wash. 2d 457, 467, 716 P.2d 814 (1986) (citing *Greene v. St. Paul-*  
 11 *Mercury Indem. Co.*, 51 Wash. 2d 569, 573, 320 P.2d 311 (1958)).

12 In *Kuehn v. White*, 24 Wash. App. 274, 277, 600 P.2d 679 (1979), Washington’s  
 13 Court of Appeals observed that when “a servant steps aside from the master’s business  
 14 in order to effect some purpose of his own, the master is not liable.” *Kuehn v. White*,  
 15 *id.* In this vein, the court in *Nelson* found that when an employee and his girlfriend  
 16 were engaged in an argument while the employee was driving a company vehicle, even  
 17 though it occurred during working hours and on the employer’s property, the employee  
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19 <sup>4</sup> At least one Circuit has recognized that “... FTCA claims are strictly limited to a scope  
 20 of employment analysis, regardless of state law doctrines of respondeat superior and apparent  
 21 authority.” *See Johnson v. U.S.* 534 F.3d 958, 963 (8<sup>th</sup> Cir. 2008) (citing *Primeaux v. United*  
 22 *States*, 181 F.3d 876, 878, (8th Cir.1999), cert. denied, 528 U.S. 1154 (2000) (“even if state  
 23 law extends a private employer's vicarious liability to employee conduct not within the scope  
 24 of employment, the government's FTCA liability remains limited to employee conduct within  
 25 the scope of employment, as defined by state law”)). Thus, “if state law extends a private  
 26 employer's vicarious liability to employee conduct not within the scope of employment, the  
 27 government's FTCA liability remains limited to employee conduct within the scope of  
 28 employment, as defined by state law.” *Primeaux*, 181 F.3d at 878.

1 was not furthering the employer's business when he engaged in an argument with his  
2 girlfriend, and therefore he was not acting within the scope of employment when the  
3 girlfriend was injured by the car during the argument. *Nelson v. Broderick & Bascom*  
4 *Rope Co.*, 53 Wash. 2d 239, 242, 332 P.2d 460 (1958); *see also Johnson v. Central*  
5 *Bldg. Co.*, 35 Wash. 2d 299, 303-04, 212 P.2d 796 (1949) (employer not liable where  
6 employee, who had left office on a mission in furtherance of employer's business,  
7 stepped aside from that business when he undertook to shove elevator doors open to  
8 the injury of elevator operator, since the acts of the employee had no connection to  
9 furthering the employer's business). Mr. Shaffer's conduct here *was not of the kind he*  
10 *was employed to perform.* ECF #1. ¶3.

11 According to plaintiff's Complaint, Mr. Shaffer "took it upon himself" to assist  
12 plaintiff in in his construction duties. *Id.* By assisting Plaintiff's construction crew,  
13 Mr. Shafer was not furthering the business of his employer, he was not engaged in the  
14 performance of duties required of him by his contract of employment, and he was not  
15 performing duties at the specific direction of his employer. *Dickinson*, 105 Wash. 2d  
16 at 467, 716 P.2d 814. In fact, Mr. Shafer stepped aside from acting in his employment  
17 scope as an EMT and engaged in an activity to effect his and the Plaintiff's own  
18 purpose; not his employer's. *See Kuehn*, 24 Wash. App. at 277, 600 P.2d 679. Thus,  
19 he was acting on *his own initiative*, not at the direction of his employer, and therefore  
20 was not performing duties which were required under the terms of the HHS EMS grant  
21 and/or his EMT employment. As such, the United States cannot be held liable for Mr.  
22 Shafer's actions under the FTCA since he was not acting within the scope of his  
23 employment.  
24

25 Further, because Congress provided only a limited waiver of immunity under the  
26 FTCA, the United States cannot be held liable for Mr. Shafer's actions. "The FTCA  
27 waives sovereign immunity only for claims alleging 'the negligent or wrongful act or  
28 omission of any employee of the government while acting within the scope of his

office or employment.” 28 U.S.C. § 1346(b)(1); *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 858 (9th Cir. 2011) (emphasis omitted). Where the government employee is not acting within the scope of employment, the door to the United States’ waiver of sovereign immunity closes. Having established that Mr. Shafer was not acting within the scope of the ISDEAA contract and his employment, the United States has not consented to be sued and is therefore immune and cannot be held liable to Plaintiff under the FTCA. *U.S. v. Mitchell*, 445 U.S. at 538 (It is well settled that the United States, as sovereign, is immune from suit save as it consents to be sued).

**G. Plaintiff’s Action Must be Dismissed For Lack of Jurisdiction.**

Having established that the United States has not waived its sovereign immunity for employees acting outside the scope of the subject emergency medical services grant – contract and the scope of EMT employment, the Plaintiff has both failed to properly allege subject matter jurisdiction in the Complaint and has also failed to factually establish that this Court has jurisdiction over Plaintiff’s case. Therefore, Plaintiff’s claims must be dismissed. *Steel Co.*, 523 U.S. at 94 (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

**III. CONCLUSION**

Based on the foregoing, the United States respectfully requests the Court to dismiss the Plaintiff’s action against the United States for the absence of jurisdiction.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of August, 2014.

MICHAEL C. ORMSBY  
UNITED STATES ATTORNEY

s/ *Tim M. Durkin*  
Timothy M. Durkin  
Assistant U.S. Attorney  
Attorneys for the United States



*Certificate of ECF Service*

I hereby certify that on the date that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System that the Court's ECF system will send notification of such filing to the following, and/or I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant(s):

Rodney K. Nelson: [rnelson@abeytanelson.com](mailto:rnelson@abeytanelson.com)

And to the following non-ECF party: N/A

s/ Tim M. Durkin

Timothy M. Durkin, AUSA