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*The Honorable LONNY R. SUKO*

UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF WASHINGTON

DANIEL A. FARMER,	)	<b>NO. CV-13-00251-LRS</b>
	)	
Plaintiff,	)	<b>UNITED STATES'</b>
	)	<b>REPLY MEMORANDUM IN</b>
vs.	)	<b>SUPPORT OF RULE 12(b)</b>
	)	<b>DISMISSAL FOR LACK OF</b>
UNITED STATES OF	)	<b>JURISDICTION</b>
AMERICA, and RONALD and	)	
REBECCA SHAFFER, husband and	)	
wife,	)	
	)	
Defendants.	)	

Defendant United States, through the undersigned Assistant U.S. Attorney, submits the following Reply memorandum in support of its Rule 12(b) Motion to Dismiss for lack of jurisdiction under the Federal Tort Claims Act.

**I. Salient Jurisdictional Narrative**

On October 25, 2011, the plaintiff Daniel Farmer was an employee and foreman of Jones Brothers Construction Co. and was working on the construction of a pole building garage at the Colville Indian Reservation's Tribal Fire and Rescue Center in Inchelium, WA. *See ECF 1*. Ron Shaffer is an emergency medicine technician (EMT) and fire fighter employed by the Confederated Colville Tribes' Emergency Medical Service (EMS). *Id.* The pole building construction project was the subject of a separate contract involving the Colville Tribes as the owner and Jones Bros. as the contractor. *See Ex. 210, Jones Bros. Construction Contract with Colville Tribes.* Jones Construction and the Plaintiff were behind on the project and Mr. Shaffer, while

1 on-duty at the time, “*took it upon himself*” to assist the Plaintiff in aligning-setting  
2 girder trusses. *ECF 1*, ¶3. While Mr. Shaffer was helping tap – align the girder-trusses  
3 with the sledgehammer, the Plaintiff slipped and moved his hand into the zone where  
4 Mr. Shaffer was swinging the 12 lbs. sledgehammer and a portion of the Plaintiff’s left  
5 hand was unintentionally struck and injured. *Id.*

6 On December 14, 2012, the Plaintiff filed a \$400,000 FTCA claim with the U.S.  
7 Department of Health and Human Services (HHS) claiming that he was injured as a  
8 result of the alleged negligent acts of Mr. Shaffer while he was on-duty as a Tribal  
9 EMT.<sup>1</sup> On July 9, 2013, the plaintiff filed the instant lawsuit. The United States  
10 answered and denied that the district court had jurisdiction over the Plaintiff’s claim.  
11 *ECF 6*. The parties made preliminary disclosures and on May 28, 2014, the United  
12 States provided the Plaintiff with its draft Motion-Memo in Support of Rule 12(b)  
13 dismissal. At the Plaintiff’s request, the parties thereafter engaged in some deposition  
14 discovery, designed to address questions about the scope of HHS’s - Colville Tribe’s  
15 Health Services - EMS Services grant/contract and Mr. Shaffer’s scope of  
16 employment. *See Ex. 207-209 (deposition excerpts)*. On August 11, 2014, the United  
17 States (HHS) filed its Motion to Dismiss. *ECF 14-15*. On August 13, 2014, Plaintiff  
18 filed a stipulated motion seeking to amend his Complaint to add Mr. and Mrs. Shaffer  
19 as individual defendants. On August 14, 2014, the Court granted the stipulated motion  
20 to amend Plaintiff’s Complaint. *ECF 16*. On August 14, 2014, the Plaintiff filed his  
21 response to the United States motion.  
22

23 In reply, the United States’ position remains that: 1) Mr. Shaffer’s volunteered  
24 construction activities were outside the scope of the HHS’s Public Health Service -

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25 <sup>1</sup> Mr. Shaffer denies negligently striking Plaintiff’s hand and claims that Plaintiff  
26 instructed him on when to swing the sledgehammer and after doing so, the Plaintiff slipped  
27 and accidentally moved his hand directly into the path of the intended strike; and that there was  
28 insufficient time to change the hammer’s path or to prevent it from hitting Plaintiff’s hand.

Emergency Medical Services (EMS) contract – grant to the Colville Tribes and therefore no FTCA jurisdiction is conferred on Plaintiff’s alleged FTCA lawsuit; and/or 2) Mr. Shaffer’s volunteer construction activities are outside the scope of his position as a partially HHS funded Tribal EMS’s EMT, which position involves *providing triage and first aid* on the reservation and/or at IHS facilities, and this too deprives the district court of jurisdiction over the Plaintiff’s FTCA claim for a construction site related injury.

**A. Plaintiff Cannot Dispute that Construction Activities Are Outside the Scope of U.S. Dept. of Health and Human Services Contract for Public Health Services.**

Plaintiff does not dispute that the scope of work for the Confederated Tribes of the Colville Indian Reservation’s (Tribes) EMS service contract-grant with HHS (the 638 ISDEAA contract) is set forth in Modification No. 30 to IHS Contract Number 248-89-0008, *Exhibit 203*. This contract explicitly states that “*the contractor [Tribes] will provide emergency medical services and ambulance coverage for the Colville Indian Reservation ...*”, *Id.* (emphasis added), and that the “*ambulance attendants (EMTs) will provide triage and first aid at the IHS health centers in Nespelem and Inchelium, when necessary.*” *Ex. 203 (ECF 15-3:42) (Modification No. 30, Contract Number 248-89-0008)*.

Importantly, the Indian Self Determination Act, 25 U.S.C. § 450f, providing for self-determination contracts, in discussing “deemed” employees to be covered for HHS funded claims, provides:

**(d) Tribal organizations and Indian contractors deemed part of Public Health Service.** For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims, by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by

1 Federal law or regulations for personal injury, including death, resulting from  
 2 the performance of medical, surgical, dental, or related functions, including the  
 3 conduct of clinical studies or investigations, or for purposes of section 2679, title  
 4 28, United States Code, with respect to claims by any such person, on or after  
 5 the date of the enactment of the Indian Self-Determination and Education  
 6 Assistance Act Amendments of 1990 [enacted Nov. 29, 1990], for personal  
 7 injury, including death, *resulting from the operation of an emergency motor*  
 8 *vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out*  
 9 *a contract, grant agreement, or cooperative agreement under sections [section]*  
 10 *102 or 103 of this Act [25 USCS § 450f or 450h] is deemed to be part of the*  
 11 ***Public Health Service in the Department of Health and Human Services while***  
 12 ***carrying out any such contract or agreement and its employees*** (including  
 13 those acting on behalf of the organization or contractor as provided in section  
 14 2671 of title 28, United States Code, *and including an individual who provides*  
 15 *health care services pursuant to a personal services contract with a tribal*  
 16 *organization for the provision of services in any facility owned, operated, or*  
 17 *constructed under the jurisdiction of the Indian Health Service) **are deemed***  
 18 ***employees of the Service while acting within the scope of their employment***  
 19 ***in carrying out the contract or agreement: Provided, that such employees***  
 20 ***shall be deemed to be acting within the scope of their employment in carrying***  
 21 ***out such contract or agreement when they are required, by reason of such***  
 22 ***employment, to perform medical, surgical, dental or related functions at a***  
 23 ***facility*** other than the facility operated pursuant to such contract or agreement,  
 24 but only if such employees are not compensated for the performance of such  
 25 functions by a person or entity other than such Indian tribe, tribal organization or  
 26 Indian contractor.

27 25 U.S.C. §450f(d) (emphasis added). Thus, to be deemed within the *Public Health*  
 28 *Service* funded activities by HHS, which entitles the involved Tribal employee to  
 coverage under the FTCA, it is not sufficient for the employee to *arguably* be within  
 the scope of his Tribal employment in carrying out the contract or agreement. Rather,  
 the scope of the contract – grant requires, as does that the activity for which the claim  
 is asserted must ***be the result of the performance of medical, surgical, dental, or***  
***related functions*** (such as the conduct of clinical studies or investigations) ***or result***  
***from the operation of an emergency motor vehicle.*** *See Id.*

1 Here, Mr. Farmer's claim clearly does not result from the performance of such  
 2 functions. *ECF 1*. Therefore, tribal employee Ron Schaeffer's allegedly negligent  
 3 construction worksite conduct is not covered under the 638 Contract – Grant or the  
 4 FTCA, regardless of whether the EMT Mr. Shaffer subjectively intended to further the  
 5 long term interests of his employer by helping a contractor who had fallen behind on  
 6 the performance of the Tribes' separate construction contract. *See Ex. 210 -*  
 7 *Confederated Colville Tribes' Construction Contract with Jones Constr. Co.*

8 Given the clear dichotomy of what contract Mr. Shaffer was engaged in  
 9 performing under at the time of the alleged (and disputed) negligent construction acts,  
 10 Plaintiff's claim cannot legally deemed to have been within the scope of HHS's Public  
 11 Health Service (EMS) contract, and therefore Plaintiff is not entitled to FTCA  
 12 coverage under the ISDEAA. *See 25 U.S.C. §450f(d) and Ex. 201-03, 206.*

13 **B. A Sledgehammer and Truss are not “Materials” and New Construction of a**  
 14 **Pole Building is not “Maintenance” Within the Context of H.H.S.'s Health**  
 15 **Services Contract.**

16 Plaintiff also suggests that the term “materials,” within the plain language of  
 17 HHS's Public Health Services contract, which provides funding for the Tribe's EMS –  
 18 Paramedic Ambulance “services,” should be interpreted to include the Tribe's EMT  
 19 Mr. Shaffer's use of non-medical “materials,” that is “materials” that are most  
 20 commonly used within the construction industry - i.e., a large wooden truss and a 12  
 21 lbs. sledgehammer. *ECF 22:4-5*. Logically, the use of materials to “construct” a pole  
 22 building garage for EMS vehicles - which pole building construction materials are the  
 23 subject of a completely separate contract between the Tribes and Jones Bros.  
 24 Construction – are not the same “EMS service” related “materials” contemplated under  
 25 HHS's EMS-Ambulance Services contract with the Tribes. *See Ex. 202-03.*

26 Plaintiff further argues that the testimony by the Tribes' EMS Chief Chris  
 27 McCuen that the Tribes could use HHS's EMS funds to provide “building  
 28

1 maintenance” also supports Plaintiff’s FTCA claim because the alleged negligent  
2 activity (i.e., accidental “construction worksite injury”) could fall within the HHS’s-  
3 Tribe’s ISDA health services contract as EMS “maintenance.” *ECF 22:4-5*. This  
4 assertion, like Plaintiff’s previous expanded interpretation of the term medical service  
5 “materials,” is creative but again falls completely outside the ordinary meaning of what  
6 the terms “materials” and “maintenance” mean in the context of HHS’s Public Health  
7 Services, EMS-Ambulance funding contract with the Tribes. *See e.g., Ex. 201-03; 206*.

8 Plaintiff ignores plain language in the subject matter and “scope of contract” that  
9 undermines his novel and expanded definition of “materials” and “maintenance.” *See*  
10 *IHS Contract Number 248-96-0001 (Ex. 201)*, and the Fiscal Year 2012 Annual  
11 Funding Agreement between the HHS and the Confederated Tribes of the Colville  
12 Reservation and Modification No. 30 to IHS Contract Number 248-89-0008 (*Ex. 202*).  
13 Thus, even under a strained interpretation, HHS’s Public Health Services (EMS)  
14 contract- grant’s terms “materials” and “maintenance” do not logically include a truss,  
15 a sledgehammer, or even “new construction” of a pole building garage, all of which are  
16 logically the subject matter of a completely separate contract between the Colville  
17 Tribes and Jones Construction Co. *See Ex. 210*.

18 An FTCA action can only be brought against the United States to the extent that  
19 the Government waives its sovereign immunity - *Blackburn v. United States*, 100 F.3d  
20 1426, 1429 (9th Cir. 1996). The “. . . waiver of sovereign immunity by the United  
21 States must be strictly construed and may not be extended by implication.” *Comes*  
22 *Flying v. United States through Bureau of Indian Affairs*, 830 F. Supp. 529, 530  
23 (D.S.D. 1993) (*citing United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)). As  
24 described below, the United States’ waiver of sovereign immunity in this instance is  
25 limited and, based on the grants - contracts involved; and the United States has not  
26 waived sovereign immunity under the circumstances set forth in Plaintiff’s Complaint.  
27  
28



**C. Mr. Shaffer's alleged Construction Worksite Negligence was not Within the Scope of his Employment as a HHS Funded EMT.**

The United States Stands on its opening briefing on whether Mr. Shaffer's alleged negligent construction activities logically fall within the scope of his EMT employment. *ECF 14:11-14*.

**II. CONCLUSION**

Our Supreme Court has properly observed that the United States' limited waiver of its sovereign immunity must be construed narrowly. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also U.S. v. Orleans*, 425 U.S. 807, 816 (1976) ("It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of 'beneficiaries.'").

Here, the ISDEAA deems Indian tribes, tribal organizations or Indian contractors and their employees to be members of the Public Health Service and, if so, qualified Indian employees are entitled to FTCA coverage, but 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). In addition, the Indian employee's acts must be within the scope of the employee's funded (EMT) position. Both elements are absent here and the United States is not liable to the Plaintiff and is not responsible for Mr. Shaffer's actions. *Id.*

Based on the foregoing, the United States respectfully requests the Court to its Rule 12(b) motion to dismiss the Plaintiff's action against the United States.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of September, 2014.

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*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