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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

LUCINDA MANUEL,)	Case No. 1:14-cv-00665 LJO/BAM
)	
Plaintiff,)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF
v.)	UNITED STATES' MOTION TO
)	DISMISS
THE UNITED STATES OF AMERICA and)	[Fed. R. Civ. P. 12(b)(1)]
DOES 1 through 50, inclusive,)	
)	Date: November 12, 2014
Defendants.)	Time: 8:30 a.m.
)	Ctrm: 4
)	Honorable Lawrence J. O'Neill

I.

INTRODUCTION

This lawsuit seeks to impose liability on Defendant United States for the actions of Tule River Tribe employee, Francis Hammond, arising from a motor vehicle accident. However, under the Federal Tort Claims Act ("FTCA") a court lacks subject matter jurisdiction over a claim against the United States unless the alleged negligence resulted from a federal employee's acts within the scope of her federal employment. Francis Hammond was not a federal employee, she was not performing work under a Tribal self-determination contract with the United States, and her tribal position was not federally funded. Therefore, her actions do not trigger a waiver of sovereign immunity under the FTCA.

Accordingly, this Court lacks subject matter jurisdiction over plaintiff Lucinda Manuel's FTCA lawsuit and this case should be dismissed, with prejudice.

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II.

STATEMENT OF FACTS

A. Plaintiff's Allegations Against Tribal Employee Francis Hammond

This is the second lawsuit filed by Plaintiff. She initially sued the Tule River Indian Tribe, the Tule River Tribal Council, and Francis Hammond, individually, in Tulare County Superior Court “arising from the same accident,” asserting that “Tule River Tribal Council and Tule River Indian Tribe were the employers of Defendant Hammond at the time of the accident.” (Exhibit “1” to Request for Judicial Notice). The insurer for the Tule River Tribe is defending Ms. Hammond in the state court action. (Exhibit “2” to Request for Judicial Notice).

Concurrently with the state court action the Plaintiff has now sued the United States in this action alleging that Francis Hammond, “while acting in the course and scope of her employment with the Tule River Tribal Council and the Tule River Indian Tribe,” was involved in a motor vehicle accident on November 16, 2012. (Complaint, Dkt. No. 2 at ¶ 12; see also 1:19-22 (Hammond was “on-the job [as an] employee for the Tule River Tribal Council and the Tule River Indian Tribe”).) According to Plaintiff, “Tribal employee Frances Lynn Hammond was employed in a community liaison position given charge with putting out the Tribal newsletter.” (Dkt. No. 2 at ¶ 4). It is alleged that Ms. Hammond works out of the “administration building at the Tribal headquarters” and she is “part of the central Tribal administration.” (Dkt. No. 2 ¶ 5). It is further alleged that at the time of the accident, Ms. Hammond was off the reservation and travelling to “purchase a SIM card for her camera in preparation for covering an event in the city of Porterville later that evening in order to write an article related thereto for the newsletter.”¹ (Dkt. No. 2 at ¶ 4).

Without attaching any applicable contract Plaintiff avers that the Tribe is funded through an “Annual Funding Agreement” with the Federal Government that “includes various general administrative expenses and reimbursement for indirect costs” that allegedly covered “Ms. Hammond’s community liaison position.” (Dkt. No. 2, ¶ 5; see also ¶ 14). Again without reference to any particular

¹ This event was the Kenny Wayne Shepherd and the Robert Cray Band concert at the Eagle Mountain Casino. (Declaration of Matthew Mingrone, ¶ 2)

1 program or contract, she further alleges that the government “funds numerous other programs and
 2 budget for the Tribe, all of which are served by the newsletter and Ms. Hammond’s community liaison
 3 position.” (Id. at ¶ 5.)

4 Apparently based on these broad, unsupported allegations Plaintiff asserts that jurisdiction over
 5 this lawsuit is based on the “Federal Tort Claims Act (FTCA), found at 28 USC Sec. 1346(b), 20410(b),
 6 and 2671-80.” (Dkt. No. 2 at ¶ 1, 3).

7 Contrary to Plaintiff’s allegations, Mr. Peyron, Chairman of the Tule River Tribal Council, and
 8 the Mr. Sarmiento, Chief Financial Officer of the Tribe, have verified that no self-determination contract
 9 exists for the community liaison position held by Ms. Hammond. (Declaration of Neil Peyron, ¶ 3-4;
 10 Declaration of Froilan Sarmiento, ¶ 5; Declaration of Claude DeSoto, Jr., ¶ 2) Additionally, no federal
 11 funds are used to prepare the Tule River Tribe newsletter; rather, the funding for the newsletter comes
 12 from the Tule River Tribe’s general fund and other non-federal sources. (Peyron Decl., ¶ 5; Sarmiento
 13 Decl., ¶ 6) Finally, the Indian Self-Determination Officer of the BIA verifies that the Tule River Tribe’s
 14 CTGP self-determination contract contained nine components, none of which cover the position of a
 15 tribal community liaison. (Declaration of Victoria May ¶ 7).

16 **B. The Operations of the Tule River Tribe**

17 The Tule River Indian Tribe of the Tule River Reservation is a federally recognized tribe of
 18 Native Americans. The Tule River Tribe runs several economic enterprises that allow it to operate as a
 19 self-sufficient entity improving the everyday lives of its members. The enterprises include the Eagle
 20 Mountain Casino, Tule River Aero Industries, Eagle Feather Trading Post I and II, and the Oak Pit
 21 Steakhouse. (Declaration of Froilan Sarmiento, ¶ 2). The income and expenses of these economic
 22 enterprises are deposited in the Tule River Tribe’s general fund and it exercises independent discretion
 23 on how to use the proceeds from these economic enterprises. (*Id.*)

24 The Tule River Tribe uses a portion of its general fund to pay the salaries of certain tribal
 25 employees. (Declaration of Froilan Sarmiento, ¶ 3). One of the positions funded by the Tribe’s general
 26 fund is that of “tribal community liaison,” the position held by Francis Hammond in 2012 at the time of
 27 this motor vehicle accident. (Sarmiento Decl., ¶ 4). As noted in the personnel action notice regarding
 28

Ms. Hammond's position at the pertinent time, the funding for her position came exclusively from tribal funds. (Exhibit "A" to Peyron Declaration).

The Tule River Tribe also enters into contracts with the United States Department of the Interior, Bureau of Indian Affairs ("BIA") which provide for the Tribe to perform services traditionally performed by the BIA. (Declaration of Victoria May, ¶ 1-2). These contracts, entered into on an annual basis and authorized by the Indian Self-Determination and Education Assistance Act, are commonly referred to as "self-determination" or "638 contracts." (25 U.S.C. § 450 *et seq.*; Declaration of Victoria May, ¶ 1-2; Exhibit "A" to Declaration of Victoria May; *see also* 25 C.F.R. § 900.8).

These self-determination contracts require the Tribe to submit a "workplan," defined as an explanation of the programs and services to be performed, and specific information relating to costs of "personnel (differentiating between salary and fringe benefits), materials and supplies, travel, subcontracts, [and] other appropriate items of cost" relating to the contract. (Exhibit "H" to May Decl., at p.6 ("WORKPLAN") through p.8 (h)(2)); 25 C.F.R. § 900.8(g); 25 C.F.R. § 900.8(h)(2).

At the time of this accident the Tule River Tribe had seven self-determination contracts with the BIA. (Exhibits "A"-"G" to May Decl.) Six of the self-determination contracts are for specific programs such as noxious weeds, road maintenance, and programs expressly authorized under the Indian Child Welfare Act. (Exhibits "B"-"G" to May Decl.) These programs clearly do not relate to Ms. Hammond's position of tribal community liaison. The remaining self-determination contract in effect at that time was the "Consolidated Tribal Government Program Year 2012 Contract No. CTJ51T55337" ("CTGP FY 12"). (Exhibit "A" to May Decl.) A closer examination of this contract is necessary to determine that it, too, does not involve the tribal liaison position.

In CTGP FY 12 the Tribe requested, and the Secretary of the Interior approved, federal funds covering a category of funds for "aide to tribal government."² (Exhibit "A" to May Decl., p. 33; Exhibit "H" to May Decl., p. 4). Specifically, the CTGP FY 12 covered nine "components:"

² This contract is also called the "Annual Funding Agreement," with a contract term of January 1, 2012 to December 31, 2012 (Exhibit "A" to May Decl. p. 12).

- (1) Aide to Tribal Government
- (2) Forestry
- (3) Agriculture & Range
- (4) Forestry Development
- (5) Wildlife & Parks
- (6) Scholarships
- (7) Adult Education
- (8) Johnson O'Mally
- (9) Community Fire.³

(Exhibit "A" to May Decl., p. 33; Exhibit "H" to May Decl., p. 4).

The Tule River Tribe prepared a budget asking for federal funding for personnel in two specifically identified "components:" (1) the Forestry component, and (2) the "Other Aide to Tribal Government—BIA Funding" component. The first of these two components, Forestry, on its face does not relate to the tribal community liaison position. The second, "Other Aide to Tribal Government – BIA Funding" component, again requires a harder look. The budget request identified the following positions in that component for which it requested federal funding: "Contracts Grants Manager, two Secretaries, and a Records Director." (May Decl., ¶ 3; Exhibit "A", p.34, Exhibit "H", p. 13). Francis Hammond's position of tribal community liaison is not included.

The conclusion that Ms. Hammond's position was not included in the self-determination contract is further supported by an examination of Section C of the CTGP, entitled "Statement of Work." (Exhibit "A" to May Decl., p. 12-13). That section states the "terms, conditions and work to be performed under the contract," and specifically references the funding section, in which the Tule River Tribe expressly requested funding only for the positions of a contacts grant manager, two secretaries and a records director in the "aide to tribal government" component, regarding the CTGP.⁴ (Exhibit "A" to May Decl., p. 12, 34).

Section 11 of the CTGP FY 12, entitled Federal Tort Claims Act, provides that "the Contractor and its employees are deemed employees of the Federal government *while performing work under this*

³ The budget also references ICWA and Real Estate Services, but these are separate contracts from the funding provided in CTGP FY 12. (Exhibit "H" to May Decl. p. 4).

⁴ It is understood that Plaintiff does not contend that Ms. Hammond is covered under the Forestry component.

1 *contract.*” (Exhibit “A” to May Decl., p. 26) (emphasis added). Francis Hammond was not, at any time
 2 pertinent to this lawsuit, performing work under that contract.

3 **III.**

4 **ARGUMENT**

5 **A. Standard on Motion to Dismiss for Lack of Subject Matter Jurisdiction**

6 Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so
 7 by the Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).
 8 An issue of subject matter jurisdiction is properly decided under Rule 12(b)(1). *See White v. Lee*, 227
 9 F.3d 1214, 1242 (9th Cir. 2000); *Ass’n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th
 10 Cir. 2000). “A federal court is presumed to lack jurisdiction in a particular case unless the contrary
 11 affirmatively appears.” *A-Z Int’l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citations omitted).
 12 Thus, “[w]hen subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure
 13 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion.” *Tosco*
 14 *Corp. v. Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001); *see also Thornhill Publ’g*
 15 *Co. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

16 The district court should not presume the truthfulness of the plaintiff’s allegations in the context
 17 of a motion to dismiss under Rule 12(b)(1), *White*, 227 F.3d at 1242, but may look to evidence
 18 submitted by the moving party. *St. Clair v. Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *Thornhill*, 594
 19 F.2d at 733. Ultimately, courts are limited in their authority and must dismiss a claim whenever the
 20 court concludes that it lacks subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env’t*, 523
 21 U.S. 83, 93 (1998) (courts must resolve jurisdictional issues before considering the merits of a dispute);
 22 *see also High Country Res. v. FERC*, 255 F.3d 741, 747 (9th Cir. 2001) (where court concludes that it
 23 lacks jurisdiction, it must dismiss action without reaching merits of complaint).

24 A challenge to jurisdiction under Rule 12(b)(1) “can be either facial, confining the inquiry to
 25 allegations in the complaint, or factual, permitting the court to look beyond the complaint.” *Savage v.*
 26 *Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039-1040, fn. 2 (9th Cir. 2003); *see also*
 27 *White*, 227 F.3d at 1242. In a factual Rule 12(b)(1) challenge, “the district court is not restricted to the
 28 face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual

disputes concerning the existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside evidence did not convert Rule 12(b)(1) motion into one for summary judgment.)

The district court also need not presume the truthfulness of plaintiffs’ allegations. *White*, 227 F.3d at 1242. In fact, “[o]nce the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage*, 343 F.3d at 1039-1040, fn. 2.

On a factual attack, “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). The evidence presented in affidavits from the parties may overcome the “generic allegations” in the complaint regarding subject matter jurisdiction. *See, e.g., Robinson v. Gov’t of Malaysia*, 269 F.3d 133, 137–38, 146 (2d Cir. 2001) (testimony and affidavits overrode “generic allegations” in the complaint attempting to establish subject matter jurisdiction under the FSIA). In such cases, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

Here, Plaintiff’s “generic allegations” that Ms. Hammond’s position is federally funded is overridden by the testimony of those with personal knowledge establishing that the job duties of the Tule River Tribe’s tribal community liaison are not in furtherance of any self-determination contract, nor is the funding from a BIA contract. Hence, Ms. Hammond is not “performing work under” a self-determination contract of the Tule River Tribe so as to be deemed an employee of the United States, the FTCA does not waive the United States’ sovereign immunity, and this Court lacks subject matter jurisdiction to hear this case.

B. Ms. Hammond’s Community Liaison Position with the Tule River Tribe is Not a Position Supporting Any Contract with the United States.

As sovereign, the United States “‘is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define the court’s jurisdiction to entertain the suit.’” *Lehman*

1 *v. Nakshian*, 453 U.S. 156, 160 (1981), *quoting United States v. Testan*, 424 U.S. 392, 399 (1976).
 2 Consent to suit must be expressly given and may not be implied. *Id.* “A party bringing a cause of action
 3 against the federal government bears the burden of showing an unequivocal waiver of immunity.”
 4 *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). The FTCA “is a limited waiver of sovereign
 5 immunity, making the Federal Government liable to the same extent as a private party for certain torts of
 6 federal employees acting within the scope of their employment.” *United States v. Orleans*, 425 U.S.
 7 807, 813 (1976).

8 The FTCA’s waiver of the United States’ sovereign immunity is limited to claims based on the
 9 “negligent or wrongful act or omission of any employee of the government while acting within the scope
 10 of his office or employment.” “The FTCA does not... entirely waive the sovereign immunity of the
 11 United States: the federal government may only be held liable for damages caused by the negligent or
 12 wrongful act or omission of a government employee.” *Brandes v. United States*, 783 F.2d 895, 896 (9th
 13 Cir. 1986); *see also United States v. Orleans*, 425 U.S. 807 (1971) (the FTCA only extends to
 14 government employees; it was “never intended ... to reach employees or agents of all federally funded
 15 programs that confer benefits on people); 28 U.S.C. § 1346(b)(1). Whether an individual is a
 16 government employee for purposes of the FTCA is a question of federal law. *Brandes*, 783 F.2d at 896.
 17 The FTCA defines the term “[e]mployee of the government” to include “persons acting on behalf of a
 18 federal agency in an official capacity.” 28 U.S.C. § 2671. Although in some circumstances tribal
 19 employees may be deemed federal employees for purposes of the FTCA, Ms. Hammond is not such an
 20 employee.

21 Congress authorized federal agencies to contract with Indian tribes “upon the request of any
 22 Indian tribe by tribal resolution,” for programs or activities previously performed by the federal
 23 government on the reservation by enacting the Indian Self Determination and Education Assistance
 24 (“ISDEAA”). 25 U.S.C. § 450f *et seq.* A “Self-Determination Contract” is one “between a tribal
 25 organization and the appropriate Secretary for the planning, conduct and administration of programs or
 26 services which are otherwise provided to Indian tribes and their members pursuant to Federal law....” 25
 27 U.S.C. § 450b(j). Self-determination contracts provide for federal funding of the contractible program at

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1 a level roughly equivalent to the level the government would need to administer the program itself. *See*
 2 25 U.S.C. § 450j-1

3 Congress has specifically consented to suit under the FTCA for certain claims arising out of the
 4 performance of self-determination contracts. *Hinsley v. Standing Rock Child Protective Services*, 516
 5 F.3d 668, 672 (8th Cir. 2008). But not every tribal employee is a federal employee for purposes of
 6 coverage under the FTCA. *Dinger v. United States*, 2013 WL 1001444 *3-4 (D. Ka. 2013);⁵ *Serrano v.*
 7 *United States*, 2008 WL 343490, *2-3 (S.D. Fla. 2008).⁶ Only when the person is “carrying out the
 8 contract” between the tribe and the BIA, is the individual a federal employee for purposes of the FTCA.
 9 25 U.S.C.A. § 450f; *see Bob v. United States*, 2008 WL 818499, at *2-*3 (D.S.D. 2008) (“tribal officers
 10 were not, at the time of the incident, federal law enforcement officers for the purpose of the FTCA” and
 11 granting the United States motion to dismiss for lack of subject matter jurisdiction).⁷ The determination
 12 of whether Francis Hammond, as the community liaison for the Tule River Tribe, is a federal employee
 13 for the purposes of the FTCA is dependent on the scope of the particular contracts between the Tribe and
 14 the BIA.

15 Plaintiff fails to identify a specific contract between the Tribe and the BIA covering the actions
 16 of Ms. Hammond in her position as the Tule River Tribe’s community liaison. As verified by both the
 17 Tule River Tribal Council and the BIA, no self-determination contract exists for the community liaison
 18 position held by Ms. Hammond. (Declaration of Neil Peyron, ¶ 4; Declaration of Claude DeSoto, Jr., ¶
 19 1-2, 4; Declaration of Victoria May, ¶ 7) Additionally, self-determination contract funds are not used to
 20 prepare the tribal newsletter. (Peyron Decl. ¶ 5; Sarmiento Decl., ¶ 6) Funding for the newsletter
 21 comes from the Tule River Tribe’s general fund, and other non-BIA sources. (Peyron Decl. ¶ 5;
 22 Sarmiento Decl., ¶ 6). In fact, according to Plaintiff’s own allegations, Ms. Hammond was travelling for
 23 supplies to report on a concert at the Eagle Mountain Casino, which is an economic enterprise funded by
 24 the Tribe. Dkt. No. 2 at ¶ 4; Peyron Decl. ¶ 2; Sarmiento Decl., ¶ 2; Mingrone Decl., ¶ 2. Therefore,
 25

26 ⁵ See Exhibit “1” to Appendix of Unpublished Cases.

27 ⁶ See Exhibit “2” to Appendix of Unpublished Cases.

28 ⁷ See Exhibit “3” to Appendix of Unpublished Cases.

1 Plaintiff cannot meet her burden of establishing federal subject matter jurisdiction because the evidence
2 establishes that she was not an employee of the United States.

3 Interpreting the CTGP in its entirety also leads to the conclusion that Ms. Hammond did not
4 perform work under any approved self-determination contract. Because Congress requires that the
5 Tribe's application for a self-determination contract include express budget item requests for "personnel
6 (differentiating between salary and fringe benefits)," - the contract's FTCA provision deeming tribal
7 employees to be federal employees "while performing work under this contract" is intended for those
8 positions approved by the Secretary of the Interior in the execution of the self-determination contract.
9 25 C.F.R. § 900.8(h)(2). Any other reading of the application requirement to identify the salary and
10 fringe benefits of personnel with the limited deeming of "federal employees" as those "performing work
11 under *this* contract," renders meaningless the obligation of the Tribe to specifically identify any
12 personnel that it seeks to have federally-funded. (Exhibit "A" to May Decl., p. 26) (emphasis added);
13 *See generally, Purvis v. United States*, 344 F.2d 867, 870 (9th Cir. 1965) (writings should be interpreted
14 and applied so that they may have effect rather than be destroyed); *New Valley Corp. v. United States*,
15 119 F.3d 1576, 1580 (Fed.Cir. 1997) (interpretation that gives a reasonable meaning to all parts of the
16 Membership Interest Purchase Agreement is preferred to one which leaves a portion of the agreement
17 inoperative, void, meaningless, or superfluous).⁸

18 Without a self-determination contract covering Ms. Hammond's position or activities, there is no
19 waiver of sovereign immunity under the FTCA for her alleged negligence. Plaintiff's conclusory
20 allegations that the government "funds numerous other programs and budget for the Tribe, all of which
21 are served by the newsletter and Ms. Hammond's community liaison position" is not supported by the
22 evidence and she fails to meet her burden of proof of establishing federal subject matter jurisdiction.
23 Dkt No. 2 at ¶ 5; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (*quoting*
24 *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (court does not accept the "truth of legal
25 conclusions merely because they are cast in the form of factual allegations.")).

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27 ⁸ The declarations of Tribal Chairman Peyron and CFO Sarmiento confirm that Ms. Hammond's
28 position is not supported by any self-determination contract fund expenditures. (Peyron Decl., ¶ 3-5;
Sarmiento Decl., ¶ 1-5).

CONCLUSION

For the foregoing reasons, Plaintiff's lawsuit against the United States should be dismissed with prejudice.

Respectfully submitted,

Dated: October 2, 2014

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