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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCINDA MANUEL, Plaintiff, v. THE UNITED STATES OF AMERICA and DOES 1 through 50, inclusive, Defendants.	Case No. 1:14-cv-00665 LJO/BAM **REPLY TO OPPOSITION TO UNITED STATES' MOTION TO DISMISS** [Fed. R. Civ. P. 12(b)(1)] Date: November 19, 2014 Time: 8:30 a.m. Ctrm: 4 Honorable Lawrence J. O'Neill

I. INTRODUCTION

This Court lacks subject matter jurisdiction over Plaintiff's Federal Tort Claims Act ("FTCA") lawsuit. Both the United States and the Tule River Tribe agree that Frances Hammond did not perform any functions under any self-determination contract, and that she was not a federal employee at the time of the accident. The FTCA does not apply, and the United States is immune from suit.

II. PLAINTIFF'S REQUEST FOR CERTIFICATION SHOULD BE DENIED

As discussed in the United States' opening Memorandum and below, Hammond was not an employee of the United States at the time of this accident, and thus she cannot be certified as having acted within the scope of her "federal employment." Even if she were found to be an employee, Plaintiff may not challenge a determination by the United States Attorney's office that she was not acting within the scope of federal employment. The plain text of the Westfall Act, 28 U.S.C. § 2679, does not permit a plaintiff to challenge the government's conclusion that an employee was not acting within the scope of federal employment for purposes of FTCA liability. *See, Booten v. United States*, 233 F. Supp.2d 227, 229 (D. Mass. 2002). That statute explicitly limits the ability to challenge a denial of certification to the subject employee, here Hammond: "In the event that the Attorney General has refused to certify scope of office or employment under this section, *the employee* may at any time before trial petition the court to find and verify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3) (emphasis added). *Adams v. Tunimore*, 2006 WL 2591272 (E.D. Wa. 2006), cited by Plaintiff, follows this statutory precept. In *Adams*, the request for certification was made not by the plaintiff, but by the employee. Plaintiff's request for certification should be denied.

III. PLAINTIFF'S MATTERS "NOT IN DISPUTE"

Contrary to Plaintiff's assertions, some of the matters listed by Plaintiff as "not in dispute" are, in fact, disputed by the United States.

1. The United States does dispute that Hammond "caused the subject accident." It does not, however, dispute Plaintiff's assertion that Hammond was "employed by the Tribe."

2. The United States does not dispute that Hammond's payroll checks were paid by the Tribal General Fund.

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3. The United States does not dispute that there was no self-determination contract in effect at the time of the accident which identified Hammond as an employee. However, to the extent that Plaintiff implies that such a contract may yet exist, the United States disputes such implication.

IV. ARGUMENT

Plaintiff is seeking to impose liability on the United States under the FTCA for the alleged negligence of a tribal employee. But only when a tribal employee is performing work under a self-determination contract will that person be deemed a federal employee for purposes of the FTCA. (Exhibit "A" to May Decl., p. 26, Dkt. No. 12-1); *Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668, 672 (8th Cir. 2008); *Dinger v. United States*, 2013 WL 1001444 *3-4 (D. Ka. 2013); *Serrano v. United States*, 2008 WL 343490, *2-3 (S.D. Fla. 2008); *Bob v. United States*, 2008 WL 818499, at *2-*3 (D.S.D. 2008). Absent the FTCA's waiver of sovereign immunity, the United States is immune from suit, and this Court has no jurisdiction to hear Plaintiff's claims. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981).

"A party bringing a cause of action against the federal government bears the burden of showing an unequivocal waiver of immunity." *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). Plaintiff has not met her burden. Plaintiff has pointed to no evidence that Hammond was a federal employee. No self-determination contract exists covering the community liaison position held by Hammond. (Declaration of Neil Peyron, ¶ 4, Dkt. No. 11-6; Declaration of Claude DeSoto, Jr., ¶ 1-2, 4, Dkt. No. 11-4; Declaration of Victoria May, ¶ 7, Dkt. No. 12). The United States has sovereign immunity from suit, this Court lacks jurisdiction and the action should be dismissed with prejudice.

A. Liberal Construction of The Agreement Cited By Plaintiff Does Not Make Hammond A Federal Employee.

Plaintiff selectively provided a phrase from one paragraph of a single page of an Agreement between the Secretary of the Interior and the Tribe, which states, in part, that the Agreement is to be liberally construed for the benefit of the Tribe. This particular Agreement had a contract term of "October 1, 2010 to September 20, 2011" and specifically related to the "Tule River Tribe Scope of Work, FY 2010 BIA Water Program." (Dkt. No. 16-1, Exh. "C"; Dkt. No. 2, Complaint, ¶ 12). The

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subject of the contract was entirely unrelated to Hammond's work as a community liaison. Additionally, the Agreement expired more than a year before the subject November 16, 2012, accident.

In any event, Plaintiff cannot show that a construction of the Agreement which does not confer federal employment on Hammond is not for the benefit of the Tribe. Both the United States and the Tribe agree that Hammond was not an employee of the United States at the time of the accident, and that she was not performing services under any self-determination contract, including the subject agreement. What Plaintiff is in reality asking the Court to do is to construe the Agreement for her own benefit, which is certainly inappropriate and not called for by the contract.

Nor does Plaintiff's citation to the term "all related administrative functions" in this Agreement somehow confer federal employee status on Hammond. The paragraph that Plaintiff quotes states:

> (2) PURPOSE. Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including *all related administrative functions*, from the Federal Government to the Contractor: Consolidated Tribal Government Program (CTGP).

(Dkt. No. 16-1, Exh. "C")(emphasis added). Again, this Agreement expired before the accident involving Plaintiff, and dealt with the FY 2010 BIA Water Program. Even if Plaintiff had shown that Hammond performed "administrative functions," she cannot show that those functions were somehow related to the "functions, services, activities, and programs" covered by the Agreement. The Agreement by its own terms was not in effect at the time of the accident and did not relate Hammond's work performance. Thus, this Agreement did not confer federal employee status on Hammond.

B. Hammond Was Not Paid With Federal Funds, And Her Position Was Not Covered By Any Of The Self-Determination Contracts.

In arguing that the source of funds for Plaintiff's salary is irrelevant to the determination of whether she is a federal employee, Plaintiff cites, out of context, another phrase from the self-determination contracts: "This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits…" That quote is preceded by another sentence taken from Section E (11), entitled "Federal Tort Claims Act," stating that "the Contractor and its employees are deemed employees of the Federal government *while performing work under this contract.*" (Ex. A to

May Decl., p. 26, Dkt. No. 12-1)(emphasis added). Thus, the "status" referred to is the status of an employee while performing work under a particular self-determination contract. Hammond did not perform work under any of the contracts. (Peyron Decl. ¶ 5, Dkt. No. 11-6; Sarmiento Decl. ¶ 6, Dkt. No. 11-7) Thus, the phrase quoted by Plaintiff is inapposite.

The Tribe only requested and was approved for four "personnel" positions under the pertinent contract, the CTGP: "Contracts Grants Manager, two Secretaries, and a Records Director." (May Decl., ¶ 3, Dkt. No. 12; May Decl., Exhibit "A", p.34, Dkt. No. 12-1; May Decl., Exhibit "H", p. 13, Dkt. No. 12-8). The Tribe's application for a self-determination contract required an express designation of "personnel (differentiating between salary and fringe benefits)," and Hammond's position of tribal community liaison is not included. (May Decl., ¶ 3, Dkt. No. 12; May Decl., Exhibit "A", p.34, Dkt. No. 12-1; May Decl., Exhibit "H", p. 13, Dkt. No. 12-8). Hammond was not "performing work under" any self-determination contract at the time of the accident, and there is no waiver of sovereign immunity under the FTCA for her alleged negligence.[1]

C. Hammond's Position Was Not an "Indirect Cost" Under The Self-Determination Contracts.

Plaintiff's attempt to bring Hammond's community liaison position within the definition of "indirect costs" covered by the self-determination contracts is unavailing. The term "indirect costs" under the contract "[m]eans costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved." (May Decl., Exh. "A", p. 6, Dkt. No. 12-1). The contracts further provide that "indirect costs" are payable only as invoiced by the Tribe for "allowable indirect costs incurred in performance of this contract" and acts "performing this contract."[2]

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[1] The United States has not contended that Hammond was a casino employee, or an employee of any of the "for-profit" ventures of the Tribe, as set out in ¶¶ 3 and 4 of Plaintiff's "Key Arguments." Rather, it has pointed out that Hammond was paid from monies funded by such ventures.

[2] The pertinent contract provisions are as follows:

> **Contract Payment**. For *performing this contract*, the Contractor shall be reimbursed for its allowable direct and *indirect costs*, not to exceed the total budgeted amount of the contract. (Exh. "A", p. 20, Dkt. No. 12-1).

(May Decl., Exh. "A", p. 20, 23-24, Dkt. No. 12-1). The Tribe's community liaison does not perform any functions under the CTGP, so any "indirect costs incurred in performance of *this* contract" are not applicable. *See Serrano*, 2008 WL 343490, *2-3 (Only when the person is "carrying out the contract" between the tribe and the BIA, is the individual a federal employee for purposes of the FTCA).[3] Indeed, the Tribe has confirmed that "indirect costs" from the Tule River Tribe's self-determination contracts are not used to fund any portion of the duties of the Tribe's community liaison position. (Reply Declaration of Froilan Sarmiento ¶ 3).[4]

Again, it is relevant that Hammond's position was paid by the Tribe's general fund, and not paid under the "indirect costs" provision of any of the self-determination contracts. (Dkt. No. 16, 3:11-16; Sarmiento Reply Decl., ¶¶ 2, 3).[5]

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> (e) The Contractor is to be reimbursed for all allocable and allowable *indirect costs* incurred *in performance of this contract*, subject to any statutory limitations applicable.
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> (Exh. "A", p. 26 Sec. 5(e), Dkt. No. 12-1).
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> **Billings for Indirect Cost.** The Contractor shall bill for *Indirect Cost* earned on his voucher/invoice showing the following, for the period covered by the voucher/invoice.
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> (Exh. "A", p. 26 Sec. 6, Dkt. No. 12-1)(emphasis added).

[3] Exhibit "2" to Appendix of Unpublished Cases, Dkt. No. 11-2.

[4] It is unclear why Plaintiff relies on the listing of "secretaries" as included in "indirect costs." Hammond was not a secretary, and the fact that the contract listed specific covered personnel but omitted her position is further evidence that she was not performing work under the contract. (Dkt. No. 16, 5:14-15). The Tribe sought and obtained federal funding for four (4) specifically designated positions, and the Tribe's community liaison position was not requested by the Tribe to be funded by the government. (May Decl., ¶ 3, Dkt. No. 12; May Decl., Exh. "A", p.34, Dkt. No. 12-1; May Decl., Exh. "H" p. 13, Dkt. No. 12-8).

[5] The fact that monetary amounts in the contracts have been redacted does not preclude ruling on the United States' motion. Plaintiff concedes that Hammond's position was paid out of the Tribe's general fund, which the United States has established did not contain any federal monies paid pursuant to any self-determination contract. Plaintiff has not shown that any redacted amount is "significant," or "form[s] part of the basis for plaintiff's action." (Dkt. No. 16, p. 1:21-23) Additionally, the entire Consolidated Tribal Government Program was provided as Exhibit "A" to the May Declaration, Docket No. 12-1. It is unclear why Plaintiff contends the "complete contract" was not provided. (Dkt. No. 16-1, 3:1-5).

D. Plaintiff Has Presented No Evidence That Hammond Was Performing Work Under Any Self-Determination Contract At The Time Of The Accident.

The additional documents provided by Plaintiff do not support her argument that Hammond was a federal employee. For example, Plaintiff provides two pages from the budget for the Wildland Fire Preparedness Program. While these pages discuss the newly hired CFO and Tribal Administrator, they do not refer to the Tule River Tribe's community liaison position held by. Hammond.[6] (See Dkt 16-1, Exhibits "A" and "B"; Dkt. No. 12-2, Exhibit "B" to May Decl.).

Similarly, the one-page NEPA "Exception Checklist for BIA Categorical Exclusions" dated October 11, 2012, for "Nature of Proposed Action: FY 2013" does not establish that Hammond was performing under a self-determination contract. (Dkt. No. 16-1, Exh. "D"). Plaintiff's characterization of this document is inaccurate; it does not say that "examples of *contracted* activities may include program and project administration/management, Tribal operations, etc." (Dkt. No. 16, p. 6:16-19)(emphasis added). Rather, it lists a number of Tribal activities, including "new and ongoing operations, maintenance, human resources programs and service, administration *and* self-determination *and* self-governance activities during calendar year 2011", and states that:

> [e]xamples of these activities include non-ground disturbing actions such as: normal facility operations, upkeep, and repair/maintenance; information technology services; educational services; training; employment assistance; program and project administration/management; *BIA and tribal operation*; credit, financing and contractual administration/management; management of trust funds/assets, budget, finance, estate planning, probate, wills and appraisals; *and* issuance of Self-Determination Act contracts and grants for programs listed as categorical exclusions, or programs in which environmental impacts are adequately addressed in earlier NEPA analysis.

(Dkt. No. 16-1, Exh. "D")(emphasis added). This list encompasses all Tribal activities, including operations and programs other than those covered in any extant self-determination contracts. To the extent that Plaintiff implies that all of the activities listed are "contracted" activities under a self-determination contract, the plain language of the document refutes that implication. In any event, a NEPA analysis done by an "Environmental Protection Specialist" cannot be determinative of the issue of whether Hammond performed work under a self-determination contract.

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[6] The Wildland Fire Preparedness Program Contract is Exhibit "B" to the May Decl. (Dkt. No. 12-2).

E. Applicable Case Law Supports The United States' Argument.

Plaintiff argument that three of the cases cited by the United States in its Memorandum in motion to dismiss are distinguishable also fails. In *Dinger v. United States*, 2013 WL 1001444 (D. Ka. 2013), a tribal employee was involved in an accident with plaintiff's decedent. As Plaintiff explains, in *Dinger*, the tribal employee's job duties could not be connected to any self-determination contract, and so the FTCA did not apply. The United States cited this case for the broad proposition that "not every tribal employee is a federal employee for purposes of coverage under the FTCA." (Dkt. No 11-1, p. 9:1-2) This is exactly what the *Dinger* court held. That case did not discuss, and was not decided on the premise that the employee was funded through a third-party source. Rather, it was decided on the fact that, just as in this case, the employee was not performing under a self-determination contract.

Similarly, *Serrano v. United States*, 2008 WL 343490 (S.D. Fla. 2008) involved a motor vehicle accident between plaintiff and a tribal employee. Again, the United States cited the case for the proposition that "not all Indian tribe employees are considered government employees under the FTCA." *Id.* at * 3; (Dkt. No. 11-1, p. 9:1-2) Certainly in *Serrano* the suit was dismissed because plaintiff failed to identify any job duties of the employee that fell within the contours of any self-determination contract. But neither has the Plaintiff in this case. As in *Serrano*, Hammond was not "performing work" under the Tribe's self-determination contracts at the time of the accident.

Finally, *Bob v. United States*, 2008 WL 818499 (D.S.D. 2008), relied upon the legal determination of whether an employee's acts were performed under a self-determination contract. The fact that the employee was a law enforcement officer does not preclude the applicability of the case's acknowledgement that the issue of whether a tribal employee is also a federal employee for purposes of the FTCA is dependent upon whether he performs work under a self-determination contract. *Id.*, at *2.

The case law cited by the United States establishes that if Hammond was not performing under one of the self-determination contracts, which both the United States and the Tribe agree was the case, then she was not a federal employee, the FTCA has not waived the United States' sovereign immunity for this action, and this Court lacks subject matter jurisdiction to proceed.

The cases cited by Plaintiff do not mandate a different conclusion. The case of *Big Crow v. Rattling Leaf*, 296 F. Supp.2d 1067 (D.S.D. 2004), holds that a tribal employee who was performing

services under one self-determination contract while being paid under a second self-determination contract may still be deemed a federal employee under the FTCA. The holding that the employment was federal was based on the fact that the employee was being paid under a self-determination contract.

In *Adams*, 2006 WL 2591272, the case did not concern self-determination contracts. Rather, the court interpreted another law, Public Law 101-512, which provided that employees of a school operated under a TCSA Grant are considered employees of the BIA and can be sued under the FTCA. The court held in that case that a school volunteer who received a monthly stipend to participate in school activities was a federal employee for purposes of the FTCA. Although not decided with regard to the kind of self-determination contracts at issue here, *Adams* is helpful, because the court's analysis concerned whether the subject "employee" was "performing functions" under the specific federal grant.

In *Garcia v. United States*, 709 F. Supp.2d 1133 (D.N.M. 2010), the subject employee was admittedly a federal employee. The question was not whether there was federal employment, but whether at the time of the incident the employee was acting within the scope of that employment. Because the question decided by that case is not on point, it is not applicable here.

Finally, *Big Owl v. United States*, 961 F.Supp.1304 (D.S.D. 1997) addressed whether tribal officials were federal employees, not under a self-determination contract, but under the Tribally Controlled Schools Act of 1988 (TCSA). In *Big Owl*, the court determined without discussion that members of a tribal school board were deemed federal employees for purposes of the FTCA when the school was operated under a TCSA grant. The case is factually distinguishable, and since the court did not discuss how it reached its conclusion on this issue, it is unhelpful to the analysis before the Court.

No authority provided by Plaintiff challenges the conclusion that Hammond had to perform under a self-determination contract to be considered a federal employee for purposes of the FTCA.

F. Hammond's Deposition Is Not Admissible, And Does Not Establish Federal Employment.

Plaintiff's request for judicial notice of Hammond's deposition testimony should be denied. A deposition transcript is not a proper matter for judicial notice. *See Provencio v. Vazquez*, 258 F.R.D. 626, 638 n. 4 (E.D.Cal. 2009) ("a deposition ... [is] not judicially noticeable under Federal Rule of Evidence 201(b)"); s*ee also Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer*) 95 B.R.

143, 147 (B.A.P. 9th Cir. 1988) (court properly refused to take judicial notice of facts set forth in deposition testimony). Plaintiff's citations to the deposition of Ms. Hammond in the state court action (for which the United States' counsel was not present), should not be considered on this motion.

Even if the deposition were admissible evidence presented on this motion, the testimony that Ms. Hammond's community liaison position has an "office … located near the Fire Environmental & Education Departments," and that she attends the Tribe's "business meetings," or "writes about Tribal activities" has no bearing on whether her position "perform[s] work under" any of the Tribe's self-determination contracts. (Dkt. No 16, 9:2-18). Nor is Plaintiff's burden of demonstrating that Hammond was "performing work" under a self-determination contract met by the conclusory allegation that she "inform[s] the Tribe as to the activities of the Tribe." (Dkt. No. 16, 9:20-22); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) *(quoting W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (court does not accept the "truth of legal conclusions merely because they are cast in the form of factual allegations.").[7]

G. Discovery Is Not Necessary.

Jurisdictional discovery is denied when "further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989) (*quoting Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977)). Discovery is also denied when the request for discovery is "based on little more than a hunch that it might yield jurisdictionally relevant facts." *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008 (*citing Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (affirming denial of discovery request where additional facts would be immaterial because jurisdiction did not exist "[a]s a matter of law"); *Razore v.*

[7] Plaintiff's own conduct bears out the conclusion that she did not consider Hammond to be a federal employee at the time the deposition was taken in the state court lawsuit. Where a party to a lawsuit seeks deposition testimony from an employee in a case in which the United States (or its agencies) are not a party, that testimony cannot be given until the requesting party has followed the procedures outlined by the Supreme Court in *United States ex rel v. Touhy*, 340 U.S. 462, 468 (1951) and the agencies applicable regulations. In this case, the procedures for procuring the testimony of BIA employees is set forth in 43 C.F.R. § 280 et seq. Plaintiff did not follow these procedures in procuring Hammond's deposition testimony. (Reply Declaration of Victoria May, ¶ 2-3).

Tulalip Tribes of Wash., 66 F.3d 236, 240 (9th Cir. 1995) ("Additional discovery would not affect the jurisdictional analysis.").

Plaintiff has not shown that discovery would provide her with facts demonstrating that Hammond was a federal employee at the time of the accident. Plaintiff's "belief" or "hunch that [discovery] might yield jurisdictionally relevant facts" is simply not an adequate showing. *See Butcher's Union Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535 (9th Cir. 1986); *see Locke v. United States*, 215 F.Supp.2d 1053, 1038-39 (D.S.D. 2002) ("Discovery will not remedy the flaw in plaintiff's argument. Rather, it would only prolong the inevitable dismissal."). Plaintiff fails to cite any specific self-determination contract that Ms. Hammond was performing functions under. Both parties to the self-determination contracts, the United States and the Tribe, agree that she was not performing work under any such contract. Plaintiff acknowledges that Hammond was not paid with federal funds, and her position is not one of the enumerated positions in any of the self-determination contracts. There is no ambiguity in any of the contracts or other documents submitted for the Court's review. Dismissal of this action is required as jurisdiction is lacking as a matter of law. *See Pebble Beach Co.*, 453 F.3d at 1160 (affirming denial of discovery request where additional facts would be immaterial because jurisdiction did not exist "[a]s a matter of law").

V. CONCLUSION

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

Respectfully submitted,

Dated: November 12, 2014

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