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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

TERRYL T. MATT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 15-cv-00028
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR RELIEF FROM ORDER (UNOPPOSED)

COMES NOW Plaintiff, Terryl T. Matt, by and through her counsel, and respectfully requests relief from the Court's Order (Doc. #45) preventing discovery as to tribal officials and records based on tribal immunity because those officials are deemed to be federal employees pursuant to a contract between the United States and the Fort Belknap Community Council ("Council") discovered by Plaintiff.

I. Rule 60.

Fed.R.Civ.P. Rule 60(b) permits the Court to provide relief from a prior Order based on mistake, newly discovered evidence, misrepresentation, misconduct by an opposing counsel, or any other reason that justifies relief. Rule 60(b) "does not particularize the factors that justify relief; [instead] it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *United States v. Washington,* 98 F.3d 1159, 1163 (9th Cir. 1996) (quoting *Klapprott v. United States,* 335 U.S. 601, 614-15, 69 S.Ct. 384, 93 L.Ed. 266 (1949)).

II. The Council Failed to Disclose a Federal Indian Self-Determination and Education Assistance Act Contract Making Tribal Officials Agents of the United States and the Doctrine of Tribal Sovereign Immunity Inapplicable.

The Court's Order (Doc. #45) denied Plaintiff's Motion to Compel (Doc. #26), saying that without a waiver, tribal sovereign immunity protects the Fort Belknap Indian Community from suit and also protects Community officials from discovery requests. In the case at bar, the Council consented to discovery by stipulation in a Tribal Court proceeding, then refused to honor its stipulation (Doc. #44).

At the time of argument on Plaintiff's Motion to Compel, Plaintiff had reason to believe that tribal agents may have damaged her property in the course

of performing obligations under an Indian Self-Determination and Education Assistance Act (ISDEAA) contract with the Bureau of Indian Affairs (BIA). Where the facts at issue arise from such a contract, Congress has required tribes to maintain insurance and, to some extent, to indemnify the United States. *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir.1989). Where a federal tort claim implicates insurance coverage in this way, sovereign immunity will not defeat claims that trigger indemnity. *Id*. at 1346.

When tribal officials or employees act pursuant to an ISDEAA contract, they are federal actors. "For purposes of Federal Tort Claims Act coverage, the contractor and its employees . . . are deemed to be employees of the federal government while performing work under this contract." 25 CFR §900.186. *See also* 25 CFR §900.187 (FTCA applies to ISDEAA contracts even if the FTCA is not referenced in the contract itself). "[A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or [Indian Health] Service while acting within the scope of their employment in carrying out the contract or agreement . . .." Department of the Interior and Related Agencies Appropriations Act, 1991, Pub.L. No. 101-512, Title III, §314, 104 Stat. 1915,

1959-60 (1990) (codified at 25 U.S.C. §450f notes); *see also* 25 U.S.C. §450f(d); 28 U.S.C. §§1346(b), 2671-2680; *FGS Constructors, Inc.,* 64 F.3d 1230, 1234. *See generally* BIA Federal Tort Claims Act Coverage General Provisions, 25 C.F.R. §§900.180-188 (2007); *Cohen* §22.02[4] (2012 Edition). "Tort claims against tribes, tribal organizations, or their employees, that arise out of the tribe or tribal organization carrying out a self-determination contract, are considered claims against the United States and are covered to the full extent of the FTCA." *Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668 (8th Cir. 2008).

The Council acknowledged this rule, but said "the funding identified by plaintiff here is not under the ISDEAA . . .." (Doc. #42 at 7).

Plaintiff has discovered a copy of an ISDEAA contract (Exhibit A) with the Fort Belknap Community Council to maintain the road which crosses Plaintiff's property.[1] This road diverts the stream from its natural bed and creates on-going damage to Plaintiff's land, adjoining tribal lands, and the riparian zone. The contract is dated in 2010 and extended until 2014. Primary damage to Plaintiff's property occurred during high-water events in 2011[2] and 2013. At least one

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[1] *See* Doc. #1, Complaint, para. 24: "Defendant maintained BIA Route 113 in a way that obstructed and diverted a creek flow onto the Plaintiff's property."

[2] *See* Doc. #1, Complaint, para. 28: ". . . June, 2011, the Fort Belknap area experienced a high water event" and paras. 29-31.

federal deponent confirms that the Council has had such a contract in place for many years, including from the time Plaintiff's property was damaged to the present. (Exhibit B: Mike Toland deposition transcript pp. 6-11, 16-17, Dec. 21, 2015; *see also* Richard Taptto deposition transcript pp. 1, 5, 13-16, 28-29, 31-38 Dec. 22, 2015).

As the contracting party, this same information was known to the Council at the time the Court considered Plaintiff's Motion. The Council failed to inform the Court that tribal agents maintain and perform work on the road at issue pursuant to an ISDEAA (or "638") contract with the BIA. At the very least, the Court and the parties labored under a mistake of fact which justifies the relief Plaintiff seeks. As federal agents, tribal officials and employees are directly subject to the FTCA and the claims asserted in Plaintiff's Complaint. Federal employees are subject to discovery regarding the performance of their duties. Federal subpoenas routinely issue to federal employees to produce official records or appear and testify in court and are fully enforceable despite any claim of immunity. *See, e.g., Exxon Shipping Co. v. United States Dep't of Interior,* 34 F.3d 774, 778 (9th Cir. 1994). Even the President of the United States must comply with a federal subpoena. *United States v. Nixon,* 418 U.S. 683, 713, 94 S.Ct. 3090, 3110, 41 L.Ed.2d 1039 (1974).

III. Consultation.

Before filing this Motion, counsel for Plaintiff consulted with Mr. Adam Duerk, Defendant's counsel. Mr. Duerk stated that, consistent with the Defendant's previous position, the United States does not represent the person that is subject to this Motion, and does not know whether they have arguments to make under Fed. R. Civ. P. Rules 37(a)(2) or 45(e)(2)(A), and that the United States does not oppose this Motion. Counsel for Plaintiff has consulted with Mr. James Vogel, counsel for the Fort Belknap Council, and no response was received.

WHEREFORE, Plaintiff prays that the Court grant her the relief sought herein and grant her Motion to Compel (Doc. #26).

Respectfully submitted this 8th day of January, 2016.

By: /s/ *Mandi A. Vuinovich*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFF'S MOTION FOR RELIEF FROM ORDER (UNOPPOSED) was served upon the following by the methods indicated below on the 8th day of January, 2016:

W. Adam Duerk Special Assistant U.S. Attorney U.S. Attorney's Office 105 E. Pine Missoula, MT 59802	[ ] By Facsimile [ ] By U.S. mail, postage prepaid [ ] By Hand Delivery [ ] By Overnight Courier [X] Electronic Filing
James Vogel P.O. Box 525 Hardin, MT 59034	[X] By Facsimile [X] By U.S. mail, postage prepaid [ ] By Hand Delivery [X] Email [ ] Electronic Filing
Sam S. Painter Thompson Painter Law, P.C. 176 South 32nd Street West, Ste. 4 Billings, MT 59102	[ ] By Facsimile [X] By U.S. mail, postage prepaid [ ] By Hand Delivery [X] Email [ ] Electronic Filing

/s/ *Mandi A. Vuinovich*
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