

FILED

2019 OCT 31 PM 2:16
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
RIVERSIDE

1 MIN ZHANG
2 1045 Doyle Ave
3 Redlands, CA 92374
4 Tel: 626.525.9333

5 Plaintiff, IN PRO PER

6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA

9 MIN ZHANG,

10 Plaintiff,

11 vs.

12 GRAND CANYON RESORT CORP.,

13 ~~Tribal First Insurance,~~

14 ~~United States~~

15 Defendant

Case No.: EDCV19-00124SVW (SPX)
FIRST AMENDED STATEMENT OF
CLAIM

17
18
19 **FIRST AMENDED STATEMENT OF CLAIM**

20 **COMPLAINT**

21 **Trial by Jury Requested**

22
23 Comes now the Plaintiff, Min Zhang, and files this, her Complaint against the Defendant, Grand
24 Canyon Resort Corporation ("Grand Canyon Resort Corp"), and in support thereof would
respectfully show unto the Court the following facts to-wit:

25 **PARTIES**

- 26 1. Plaintiff, Min Zhang, is an adult resident citizen of San Bernardino County, California located
27 at 1045 Doyle Avenue Redlands, CA 92374
28 2. Defendant, Grand Canyon Resort Corp, is a business corporation believed to be organized and
existing under the laws of the Hualapai Reservation, State of Arizona and licensed to do

business in the State of Arizona. Process may be served in this cause on the defendant by serving it personally or via certified mail at its principle place of business located at 5001 Diamond Bar Road Peach Spring, Arizona 86434

- 3. ~~Defendant, Tribal First Insurance Company, a private liability Insurance Company, the carrier of liability insurance for Grand Canyon Resort Corporation~~
- 4. ~~Defendant, United States~~

JURISTITION AND VENUE

- 5. **This litigation is not foreclosed by previous decision in the state or Tribal Court. The slip and fall accident happened in the State of Arizona. Location was at Hualapai tribal land at Skywalk Bridge during a photo session by a hired photographer by Grand Canyon Resort Corp.** For tort caused by tribal employee (contractor) within his/her scope of employment, under Self-Determination Act is covered by Federal Tort Claim Act. Congress in crafting the FTCA, was explicitly unwilling to subject the United States tort liability based on other nation’s law. Courts deciding whether to apply tribal law can look to the FTCA’s statutory bar on liability for torts arising in foreign nations (see 28 U.S.C. 2680 (k) (2006).) Some of the same considerations apply when deciding if a when deciding if a domestic dependent’s laws will govern the United States’ liability in tort. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004) (suggesting the purpose of the foreign tort exception is to avoid the application of substantive foreign law because congress is not willing to subject the United States to another Country’s law.) Applying tribal law to FTCA cases raises the same concerns about predictability and variation that has given courts pause about applying foreign law. See *infra* notes 354-356 (discussing the difficulties in applying tribal law to FTCA cases).
- 6. **This federal court holds actual jurisdiction under over federal tort claims and controversies incurred on a dependent nation such as Hualapai Tribe.** Congress waved the United State’s sovereign immunity for torts arising from Self-Determination Act contracts.
- 7. In FTCA cases, federal courts apply the law of the place where the incident occurred. 28 U.S.C. 1346 (b)(1)(2006) The Supreme Court and virtually all other courts considering which law to apply in FTCA cases have interpreted the FTCA’s “law of the place” to **mean state law** (See *FDIC v. Myer*, 510 U.S..477-478 (1994); *Schwarder v. United States*, 974 F.2d 1118, 1124 (9th Cir. 1992)

1 (“Congress plainly intended to define the contours of a ‘tort claim’ by reference
2 to state law.”)

- 3 8. In 1990, the federal government permanently assumed the liability for accidents
4 or torts (civil wrong doing) caused by tribal employees when congress extended
5 Federal Tort Claim Act coverage to tribal contractors under Tribal Self
6 Determination Contracts. In addition, based on the GAO report of 2000 before
7 the Committee on Indian Affairs, U.S. Senate: “the other programs tribes
8 operate outside of the Self-Determination Act may include other federal
9 programs, such as federal housing assistance for Native Americans under the
10 Department of Housing and Urban Development, early childhood educational
11 and care programs under the department of education and of health and Human
12 and Services, and Tribal enterprises, such as gaming operations and smoke-
13 shops or convenient stores. These programs have generally not been extended
14 FTCA coverage. The tribes themselves are **liable for any injuries or damages**
15 **caused by these programs, and they may choose to protect themselves**
16 **against this liability by purchasing private liability insurance.”**

- 17 9. Ninth Circuit United State Court of Appeals has jurisdiction over further
18 disputes between a resident of California and business operates in tribal at the
19 State of Arizona.

20 FACTS

- 21 10. **Grand Canyon Resort Corporation is responsible for Plaintiff’s injury**
22 **sustained on January 22, 2017 due to a slip and fall on ice accident during a**
23 **professional photo session on Skywalk Glass Bridge.** Plaintiff suffered a
24 concussion on the spot, was not able to turn her neck on the same night within
25 hours after the fall, subsequently developed post-concussion syndrome
26 confirmed by medical examination on January 26th, 2019 by her primary doctor.
27 Plaintiff also developed post concussive POTS within two months after the
28 injury brought by the trauma (a central nervous system malfunction that
impacted heartrate, body temperature regulation, breathing, blood pressure, and
digest system malfunction.) Defendant’s employee- the professional
photographer, witnessed the accident and failed to report to security. Defendant
failed to provide any medical care on the spot despite of the fact that plaintiff

1 laid flat on the surface unable to get up for a while on the bridge surface.
2 Plaintiff's friend Liang Yan also witnessed the accident and provided eye
3 witness account of what she saw. Liang Yan could also testify that there was no
4 other accident between January 22, 2017 to January 26th, 2017 that could have
5 caused the said injury. She was with Plaintiff 24/7 between the said dates. The
6 photos taken immediately after the slip and fall injury showed fresh water stain
7 at the sites of the impacts. The injury sites were consistent with the symptoms
8 later developed as a consequent of the trauma including but not limited occipital
9 nerve pain on the lower left side causing severe headache and immediate
10 vestibular issues causing dizziness that requires 18 vestibular rehabs sessions to
11 correct in the course of one year.

- 12 **11.** On January 22, 2017 Plaintiff booked a tour to Grand Canyon South via Grand
13 Canyon Resort Corp website. The weather condition was extreme (worst
14 weather in 10 years based on weather forecast) on the morning of January 22,
15 2017 in Arizona. Grand Canyon South operation was shut down due to road
16 condition of snow. Arizona State declared a state emergency due to weather
17 condition the following day. Grand Canyon Resort Corporate operation decided
18 to keep the Grand Canyon West open despite of the weather condition.
19 Employees of Grand Canyon Resort Corp offered to move customers from
20 Grand Canyon South to Grand Canyon West tour. Plaintiff and her friend Yan
21 Liang were among those who were put on a bus towards Grand Canyon West
22 with the option to see the Skywalk. By the time the tour bus arrived at Skywalk,
23 due to dropping temperature and strong wind, small rain had started to freeze
24 and turned into snowflakes, making the bridge a safety hazard.
- 25 **12.** Upon arrival at Grand Canyon West Skywalk, Plaintiff was led to an icy glass
26 bridge (Skywalk owned and operated by Defendant) with **no warning sign**
27 **displayed, nor any verbal warning from the staff of the dangerous condition**
28 **of the bridge. The bridge was not maintained free of safety hazard due to**
the negligent operation of the staff at Grand Canyon Resort Corporation.
By the Defendant's policy, the Plaintiff was not permitted to take her own
photographic device onto the bridge. All photos were to be taken by a staff
photographer located on the bridge. Thus, the Plaintiff's ability to document the
accident was hindered. Plaintiff engaged the photographer and was directed by
the photographer to walk to the middle of the bridge where bridge surface was
covered in ice. Plaintiff fell backwards upon stepping onto the icy surface. The

1 middle of the bridge was extremely slippery with newly frozen ice on glass
2 which provided no traction for Plaintiff to maintain her balance despite wearing
3 flat walking boots designed for snow (see photos taken before and after the slip
4 and fall incident. The photos of Plaintiff and her friend Yan Liang documented
5 the surface condition of the bridge at the time of slip and fall. The photos are
6 online at: <http://skywalk.photogra.com/ephoto/skywalk/33799873534#> They
7 were sent to Plaintiff on January 22, 2017 at 2:20 pm via email per
8 photogra.com which hosted the photo taken by the staff photographer at
9 Skywalk with Skywalk logo.) Plaintiff lay on the bridge and attempted to rise
10 several times but was unable to do so due to the slippery condition of the bridge.
11 The photographer had to drag the Plaintiff by the coat to a mat on which he was
12 standing and it was only there the Plaintiff was able to stand. Photographer
13 witnessed the incident and the impact of her fall. The Photographer examined
14 the Plaintiff's head, clearing the hair with his hand and asked how she felt all
15 right. Photographer proceeded to completing taking pictures for plaintiff and her
16 friend Yan Liang and documented their stay on the bridge. They both posed on
17 the mat where the photographer stood as if they slipped and fall because
18 Plaintiff was just helped to stand up by the photographer. The captured pictures
19 also show water stain on the hat in area where the plaintiff fell and hit. Water
20 stain was also visible on the grey coat, where photographer grabbed and pulled
21 the plaintiff backwards to the safety of the mat.

22 **13.** Shortly after the slip and fall incident, Plaintiff was told by the photographer that
23 she could talk to security if she felt ill after the fall. Photographer also took
24 pictures of the Plaintiff at the spot where she first fell and stood up. Plaintiff was
25 not aware of any slip and fall procedure that the Defendant had. The
26 photographer noted she had hit her head during the fall. Because Plaintiff was in
27 a daze with a headache, she could not make good executive decisions at the
28 time. Plaintiff saw an ambulance parked outside the guest service center,
however, no one came to check her after her injury. The photographer left after
he finished the photo shoot. The Defendant's operation did not seem to have a
standard practice of reporting slip and falls after staff witnessed the incident that
even the photographer actually saw the accident, took pictures of the accident
location, but did not report to responsible party. There were also guards at the
end of bridge, who reasonable should have seen what happened on the skywalk
and they did not offer any assistant to the plaintiff.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14. Because Plaintiff sustained trauma at the lower back of her head on a glass surface, she was in a state of shock and confusion as to what had happened. She was not aware of the severity of her injury since she did not lose consciousness. She was also concerned about the difficulty to arrange for a ride if she were to be taken to the hospital in Arizona first. She opted to take the bus back to her hotel in Las Vegas and waited until she returned home to visit doctors at the Loma Linda University Medical Center. A few hours after the Plaintiff's slip and fall, Grand Canyon West was closed to all tourists.

15. As a direct proximate result of the negligent operation of the Defendant, Plaintiff fell and sustained a mild Traumatic Brain Injury on January 22, 2017 (commonly known as a concussion). As a result, Plaintiff suffered from persistent post concussion syndromes confirmed by medical doctor on January 26th, 2017. As the symptoms do take a few days to develop and the long term effects apparent over the months and years that followed. Plaintiff was disabled from work from March 28, 2017 until present time. She is still under long term disability, undergoing neurologist recommended treatments, and awaiting a full recovery. Plaintiff will show through her medical records that she suffered 22 symptoms of traumatic brain injury evaluated. Plaintiff experienced neck pain in the afternoon of January 22, 2017 and was later diagnosed by a neurologist as a sustained trauma to the lower left neck; the occipital nerve area. Plaintiff had to receive an occipital nerve block injection to alleviate the stabbing pain originated by the trauma to the back of the head. As indicated from the evidence of the photo, the water stain shown on the hat was at the left hand side close to the greater occipital nerve area, where the head landed. Among the many symptoms the Plaintiff suffered are as following but not limited to: vertigo, confusion, severe stabbing headaches, dizziness, sensitivity to light, sensitivity to sound, sensitivity to low intensity physical activities (activities such as walking at low speed and holding a bottle of water can trigger symptoms), difficulty of concentration, difficulty planning, blurry vision, difficulty with social settings because of the noise level, difficulty in driving due to nausea while turning head eyes from right to left, isolation, excessive crying, depression induced by disability from the fall, dizziness reading, not being able to maintain balance, difficulty turning from right to left, not being able to walk a straight line and sleep undisturbed. A further MRI test was ordered by the neurologist to evaluate the nerve damage in May 2018. Plaintiff could no longer work at her

1 regular analytical job at Parkview Medical Center as a senior decision support
2 analyst. She filed for short term disability by the State of California
3 Employment Development Department and long-term disability with Unum
4 through her employer. She sustained damages to her nerves that caused her
5 stabbing pain sensations triggered easily by stress, concentration, sound, and
6 mental processes. She suffers stabbing headaches daily and has to take
7 medication daily to control pain and sleep disturbances she is still suffering one
8 year after the incident.

9 **16.** Plaintiff was treated on January 26th, 2017 three days after the traumatic brain
10 injury by her family physician with a confirm post concussive syndrome
11 diagnosis. Plaintiff subsequently obtained care from countless specialists such as
12 neurologists, neuro-rehab specialists, cardiologists and other practitioners as she
13 tried to recover from the initial injury. Because of the severity and the
14 complexity of her traumatic brain injury, Plaintiff suffered prolonged pain,
15 complex vascular and multiple functional issues due to the harms to her central
16 nervous system from the injury. Plaintiff was on short term disability and seek
17 long term disability relief due to her medical conditions. The mental anguish of
18 having to live with post concussive POTS and many other conditions as a result
19 of a slip and fall yet not able to get any relief changed Plaintiff's life
20 dramatically. Plaintiff is expected to suffer more of the same in the future as a
21 result of the injuries she has sustained in this incident. Defendant's negligence
22 has directly caused the Plaintiff to have already incurred hospital, medical and
23 drug expenses, lost wages, and reasonably expects to incur further such
24 expenses in the future.

25 **17.** Plaintiff suffered significant changes to her life style and reduced activity level
26 due to the injury sustained. She also loss her ability to earn due to the prolong
27 recovery period. She was a silver medal winner in Hollywood Dance
28 competition in October of 2016. She also competed at the Holiday Classic
Dance competition at Las Vegas and placed 6th. After her accident on January
22nd, 2017, she was not able to turn left without feeling dizzy. She could not
walk a straight line. She could no longer compete and complete a four-minute
dance routine without rest in between and felt devastated. Plaintiff went through
18 neurological rehab sessions to learn techniques to reset her vestibular system.
Plaintiff was limited to bed rest for long periods of time without the ability to be
exposed and tolerate normal light and noise setting. She was isolated and

1 developed depression due to the long recovery time and long hours of headache,
2 dizziness, and other problematic symptoms. Plaintiff loss her ability to earn
3 because she could not consistently tolerate being in upright positions (other than
4 supine positions) due to unstable parasympathetic nerve functions that cause her
5 have heart palpitation upon standing. Her heart rate could be as high as 170
6 standing in room temperature environment without medication. This made
7 everyday chores such as doing laundry and cooking difficult. To obtain regular
8 employment which requires 4-8 hours of sitting or standing with long hours of
9 concentration would not be achievable with plaintiff's current condition.
10 Research conducted by Vanderbilt University Research Center on over 3300
11 POTS patients did show that 25 percent of the POTS patients were disable and
12 their life quality is comparable to those at end stage reno failure on dialysis.

NEGLIGENCE OF GRAND CANYON RESORT CORPORATION

- 13 18. The plaintiff charges defendant Grand Canyon Resort Corporation operated at
14 Grand Canyon West skywalk with gross and reckless negligence in failing to
15 keep and maintain a complete safe walking surface at skywalk in the winter
16 month, allowed ice accumulate on the glass bridge thus put plaintiff in the way
17 of danger; with reckless negligence in failing to keep and maintain standard
18 safety measures; with general negligence for failing to warn plaintiff of the
19 hazards in the walking area; with negligence in allowing photographer to direct
20 plaintiff to walk on slippery surface with no proper warning. Plaintiff charges
21 that as a direct and proximate result of the multiple acts of gross and reckless
22 negligence of the staff of skywalk operating on behalf of Grand Canyon Resort
23 Corporation, she was caused to suffer the aforesaid injuries and damages.
- 24 **19. Grand Canyon Resort Corporation is a tribal enterprise. Grand Canyon Resort**
25 **Corporation is not immune from suit as a sovereign Tribe for tort claims.**
26 **Federal government waives its immunity for tort claims caused by federal**
27 **employee working within the scope of his/her employment. As clearly**
28 **demonstrated in the GAO report on Federal Tort Claim Act Coverage and**
claims for Tribal Self-Determination Contracts under Self-Determination Act.
The bill Stated: [Any] Indian Tribe, tribal organization or Indian contractor...
and its employees are deemed employees of the [U.S. Government] while acting

1 within the scope of their employment in carrying out the contract or
2 agreement.... [Any] civil action or proceeding involving such claims brought
3 hereafter against any tribe, tribal organization, tribal contractor or tribal
4 employee covered by this provision shall be deemed to be an action against the
5 United States... and be afforded the full protection and coverage of the Federal
6 Tort Claims Act. Congress amended the Self-Determination Act in 1994,
7 attempting to provide clarity by formally directing the Secretary of the Interior
8 to promulgate on how the FTCA related to the Self Determination Act
9 regardless of whether the funding agreement specifically mentions this coverage
10 as a term. Furthermore, the regulation notes that the FTCA is the exclusive
11 remedy for tort claims resulting from Self-Determination Act Contracts. In
12 addition, the Compbell Act focuses on extending insurance to cover areas left
13 untouched by the FTCA (see S. 2097, 105th Cong. 201 (b) (1998) (improving
14 coordination between the tribes and the federal government on insurance issues);
15 cf. 2000 GAO REPORT, supra note 56, at 35 (noting ongoing uncertain about
16 the extent of FICA coverage.) ID. 1000.279. See Christie. Supra note, at 124
17 (observing that at least one tribal court has decided that it remains responsible
18 for certain cases.) Tribal members can still bring claims against tribal
19 corporation in tribal court. E.g., Wide Ruins Cmty. Sch., Inc. v. Stago, 281 F.
20 Supp. 2d 1086, 1088-90 (D. Ariz. 2003) (recognizing only cognizable claims
21 under the FTCA in federal court, but noting that these proceedings did not bar
22 tribal members from bringing additional claims under tribal law in Nvajo court.)

23 **20.** GAO Report also indicated that for torts resulted from activities of tribal
24 enterprise, the tribal entity is responsible and should render that to the private
25 liability insurance they carried if those activities were not covered by self -
26 determination contracts. Depending on the governmental structure, employees of
27 Grand Canyon Resort Corporation as long as being paid under the tribal fund,
28 will be qualified as federal employees. If their activities is within the scope of
their employment and caused tort should be covered by its liability insurance.
Congress required private insurance coverage to cover tort claims so that victims
can render the claims to the insurance companies so victims do not have to be
bar from suit for those type of cases.

21. Grand Canyon Resort Corporation carries private liability insurance Tribal First.
This liability insurance policy in itself is an evidence to prove that the company
is not immune from suit. If it were, the need for private liability insurance policy

1 is a waste. The purpose of buying the private liability insurance was to cover tort
2 claims such as this case. This fact can be further demonstrated by subpoena the
3 past payments summary paid by Tribal First insurance on behalf of Grand
4 Canyon Resort Corp. In fact, when Plaintiff first contacted Grand Canyon
5 Resort Corporation to seek relief, Plaintiff was first instructed to wait for an
6 insurance adjustor's contact. This fact indicates that Grand Canyon Resort
7 Corporation did have insurance to cover tort cases. The reason for lack of relief
8 was due to 1) Grand Canyon Resort Corporation Employees caused the injury
9 and failed to report 2) No incident report was filed as a consequence of failure to
10 report the accident. Though through discovery process, video camera footage on
11 January 22, 2017 can review the accident if Grand Canyon Resort Corp can be
12 subpoenaed and kept the footage 3) Insurance company adjustor believe there
13 was a good chance to fight the case therefore rejected the claim. 4) Plaintiff loss
14 cognitive and physically ability to discern the immediate course of action to
15 ensure relief legally. Symptoms showed up and worsen over time which
16 disabled plaintiff to seek relief right away and discern the right amount of legal
17 help to pursuit the right cause of action 5) Plaintiff was too naïve as to the long -
18 term effect of the injury. The subsequent results of the injury was so
19 unpredictable and hard to handle that plaintiff could not foresee at the time of
20 the injury.

21 **22.** In the past, Grand Canyon Resort Corporation have been sued by Grand
22 Canyon Skywalk Development LLC resulted in a settlement in 2015 awarded to
23 the developer of Skywalk Bridge (see 715 F 3d. 1196.)

24 **23.** In addition, federal court has long been applying the arm of tribe tests to
25 determine whether a tribal enterprise qualify for the arm status to share the tribal
26 immunity. Grand Canyon Resort Corporation does not qualify as an arm of the
27 tribe thus could not share the immune from suit status because 1)The tribal
28 council members and the board of directors of GCRC do not overlap 2) Tribal
leadership does not run GCRC's daily activities 3) The goals and mission
statements for GCRC and Hualapai tribe government are not the same 4) GCRC
shared 50 percent of its admission revenue with Grand Canyon Skywalk
Development LLC for 50 years in exchange for building the Skywalk. This
contract entered made it impossible for GCRC to contribute more than 50
percent of its revenue towards the governmental funding needs. A tight financial
relationship was among the key elements to share the arm of the tribe status.

DAMAGES

- 1
2
3
4
5
6
7
8
9
10
11
12
13
24. As a proximate result of the negligence alleged above, the plaintiff, Min Zhang, has suffered damages, including but not limited to, past pain, suffering and mental anguish, accrued medical expenses, lost earnings, travel expenses, and other special damages. Plaintiff, Min Zhang reasonably anticipates future damages, proximately caused by said negligence of defendants, including future medical expenses, future pain, suffering and mental anguish, future lost earnings, permanent physical impairment, permanent brain functional impairment, future travel expenses, and damages. The general and special damages from plaintiff's injury totaling \$4,049,311.52 were listed as following:
- a. Special Damage in the amount of \$3,049,311.52
 - i. Loss of ability to earn: \$2,187,024
 - ii. Medical Expenses: \$862,287.52
 - b. General Damage for past and future pain and suffering: \$1,000,000

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLAIMS FOR RELIEF

25. Plaintiff adopts by reference the foregoing paragraphs.
26. The defendant knew or should have known that reasonable safety measures and actions were needed for Grand Canyon Skywalk bridge and that the measures provided and actions of its employees were unreasonable and inadequate.
27. Plaintiff's injuries were proximately caused by the negligent and grossly negligent acts and/or omissions of the defendant or its agents or employees acting in the course and scope of their employment, making the defendant liable. The severe injury occurred as the result and proximate consequences of the Defendant's negligence, failure to warn of foreseeable dangerous condition, and failure to provide adequate safety measures of the premise. Plaintiff, Min Zhang is entitled to general and special damages of every typed and variety permitted by law, including but not limited to, past pain and suffering in the amount of \$1,000,000. Specific damage including but not limited to hospital and physician bills, rehab and diagnostic charges, psychology therapy charges, and lost wages in the amount of \$3,049,311.52. Total Damage in the amount of \$4,049,311.52.

1
2
3 WHEREFORE, PREMISES CONSIDERED, Plaintiff sues and demands
4 judgment of and from the defendant, Grand Canyon Resort Corporation, and
5 requests this Honorable Court award damages against the defendant to the
6 plaintiff for accrued and future medical expenses, past and future pain, suffering,
7 and mental anguish, past and future lost earnings, permanent physical and brain
8 function impairment, past and future pain relief remedy expense, past and future
9 travel expenses, and other damages both general and specific, in an amount to be
10 determined by court, reasonably believed to be in excess of this Court's
11 jurisdictional minimum. Plaintiff further seeks punitive damages due to the
12 grossly negligent actions of the defendant and plaintiff prays for general relief
13 along with attorney's fee, cost and expenses incurred in bringing in this action.

14
15 I declare under the penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct that that this declaration is executed on October 30th, 2019 at
17 Redlands, CA.

18
19 Executed on *Oct 30th, 2019*


20
21 
22 Min Zhang
23 Plaintiff In Pro Per
24
25
26
27
28

Exhibit A

United States General Accounting Office

GAO

Testimony

Before the Committee on Indian Affairs,
U.S. Senate

For Release on Delivery
Expected at 10:00 a.m.,
Tuesday, July 31, 2001

FEDERAL TORT CLAIMS ACT

Coverage and Claims for Tribal Self- Determination Contracts at the Indian Health Service

Statement of Barry T. Hill, Director,
Natural Resources and Environment



G A O

Accountability * Integrity * Reliability

Mr. Chairman and Members of the Committee:

The Indian Self-Determination and Education Assistance Act was passed in 1975 to encourage tribes to participate in and manage programs that for years had been administered on their behalf by the Department of Health and Human Services and the Department of the Interior. The act authorizes tribes to take over the administration of such programs through contractual arrangements with the agencies that previously administered them: Health and Human Services' Indian Health Service and Interior's Bureau of Indian Affairs.¹ For the Indian Health Service, the programs include mental health, dental care, hospitals, and clinics, and for the Bureau of Indian Affairs, the programs that can be contracted by tribes include law enforcement, education, and social services.

Under the first 15 years of the Self-Determination Act, tribal contractors generally assumed liability for accidents or torts (civil wrongdoings) caused by their employees. However, in 1990, the federal government permanently assumed this liability when the Congress extended Federal Tort Claims Act (FTCA) coverage to tribal contractors under the Self-Determination Act. Originally enacted in 1946, FTCA established a process by which individuals injured by federal employees could seek compensation from the federal government. As a result of extending this coverage to tribal contractors, individuals injured by tribal employees may, under certain circumstances, seek compensation from the federal government. For example, if a patient receives negligent care at a tribal health facility, administered under a self-determination contract, the injured party may be able to seek compensation from the federal government for their personal injuries.

¹Throughout this statement, the term "tribes" will refer both to tribes and tribal organizations eligible to contract programs under the Indian Self-Determination and Education Assistance Act. Also, the term "contracts" will refer to contracts, grants, self-governance agreements, cooperative agreements, or annual funding agreements entered into pursuant to the Indian Self-Determination and Education Assistance Act, as amended.

To gain a better understanding of how this coverage works, you asked us to review and report on various aspects of it. We provided this Committee with our report on July 5, 2000.² We testified before this Committee last year on the combined FTCA claims history for tribal self-determination contracts at the Indian Health Service and the Bureau of Indian Affairs and FTCA legal issues that are unique to tribal contractors.³ Our testimony today will focus solely on the Indian Health Service. Specifically, our testimony will (1) describe the process for implementing FTCA coverage for tribal self-determination contracts and (2) present the FTCA claims history for tribal self-determination contracts at the Indian Health Service for fiscal years 1997 through 1999. The status of the FTCA claims presented in this testimony has been updated since our July 2000 report and is current as of July 15, 2001.

In summary:

- Federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees or volunteers under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to an administrative review and determination by the federal agency whose actions gave rise to the claim. At the administrative level, the Department of Health and Human Services handles these claims for the Indian Health Service. If a claim is not resolved administratively, a lawsuit may be filed in federal court, where the Department of Justice would defend it. Administrative and legal settlements may be paid from agency funds, the U.S. Treasury, or tribes' private liability insurance if duplicative coverage exists.

²*Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts* (GAO/RCED-00-169, July 5, 2000).

³*Federal Tort Claims Act: Claims History and Issues Affecting Coverage for Tribal Self-Determination Contracts* (GAO/T-RCED-00-234, July 12, 2000).

- Data on FTCA claims involving tribal contractors are not readily available because the Department of Health and Human Services is not required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, the department identified 114 claims, filed from fiscal years 1997 through 1999, that arose from programs contracted from the Indian Health Service. Total damages claimed were \$487 million. Patient care activities and vehicle accidents of a few tribes gave rise to most of the claims. Although about half of the claims remain open, 58 (involving \$230 million in claimed damages) have been brought to closure at a cost of less than \$700,000. Of the claims brought to closure, 40 resulted in settlement payments and 18 were denied.

Background

The Federal Tort Claims Act was enacted in 1946 and provides a limited waiver of the federal government's sovereign immunity. It specifies the instances in which individuals injured by the wrongful or negligent acts or omissions of federal employees can seek restitution and receive compensation from the federal government through an administrative process and, ultimately, through the federal courts. The Department of Justice handles lawsuits arising from FTCA claims.

The Indian Self-Determination and Education Assistance Act of 1975 allowed Indian tribes to contract for administration of certain federal Indian programs. As originally enacted, tribal contractors assumed liability for torts caused by tribal employees performing official duties. The act authorized the Secretaries of Health and Human Services and the Interior to require that tribal contractors obtain private liability insurance. People injured by the actions of tribal contractors could file claims against tribal employees or their tribes.

By the late 1980s, the Congress recognized that some tribes were using program funds to purchase private liability insurance, which reduced the funds available to provide direct program services. Thus, the Congress amended the act in 1988 and required that

beginning in 1990 the Secretaries of Health and Human Services and the Interior obtain or provide liability insurance or equivalent coverage for the tribes. Also in the late 1980s, the Congress began to enact statutes extending FTCA coverage to tribal self-determination contracts. In 1990, this coverage was extended permanently, thus giving injured parties the right to file tort claims against and recover monetary damages from the federal government for injuries or losses resulting from the negligent actions of tribal employees.

Federal Indian programs that tribes can contract under the Self-Determination Act fall under the jurisdiction of the departments of Health and Human Services and the Interior. Within these departments, the primary agencies responsible for administering Indian programs are the Indian Health Service and the Bureau of Indian Affairs, which have a combined annual appropriation exceeding \$4 billion. Indian tribes administer about one-half of these programs, or about \$2 billion annually. As of March 2000, there were 556 federally recognized tribes. Agency officials estimate that nearly all of the federally recognized tribes administer at least one contract from the Indian Health Service or Bureau of Indian Affairs, either directly or as a member of a tribal consortium.

The Indian Health Service and the Bureau of Indian Affairs programs administered by a tribe under the Self-Determination Act may represent only a portion of that tribe's total activities. The other programs tribes operate outside of the Self-Determination Act may include other federal programs, such as federal housing assistance for Native Americans under the Department of Housing and Urban Development, early childhood educational and care programs under the departments of Education and of Health and Human Services, and tribal enterprises, such as gaming operations and smokeshops or convenience stores. These programs have generally not been extended FTCA coverage. The tribes themselves are liable for any injuries or damages caused by these programs, and they may choose to protect themselves against this liability by purchasing private liability insurance.

FTCA Regulations Prescribe Administrative and Judicial Review of Claims

The federal regulations implementing FTCA prescribe the process that federal agencies must follow in resolving claims arising from the negligent or wrongful acts of federal employees. With the extension of FTCA coverage to tribal contractors, tribal employees or volunteers under a self-determination contract are considered federal employees for the purpose of FTCA coverage. According to FTCA regulations, claims are subject first to administrative review and determination by the federal agency whose actions gave rise to the claim. Claims must include evidence and information about the actions giving rise to the injury and the injury sustained, and must be presented in writing to the responsible agency within 2 years. The claim must also request a specific amount of compensation. Once a claim has been filed, the agency has 6 months in which to review the claim before the claimant may file suit in federal court. The administrative review can result in a claim's being denied, settled, or undecided.

Claims arising from Indian Health Service programs are filed with the Department of Health and Human Services' Claims Branch in Rockville, Maryland. The Claims Branch reviews all claims for completeness and requests additional documentation as necessary. For nonmedical claims of \$10,000 or less, the Claims Branch can issue the initial administrative determination; those claims over \$10,000 are forwarded to the Office of General Counsel for a determination. A more rigorous review process exists for medical claims. Each medical claim must undergo three reviews: (1) a site review at the facility where the incident occurred; (2) an independent medical review from an off-site provider(s) in the pertinent field; and (3) a review by the Public Health Service's Quality Review Panel. The recommendations of the Quality Review Panel on the medical merits of the claim are then returned to the Claims Branch. The Claims Branch can issue the initial administrative determination for medical claims of \$10,000 or less, while claims over this amount are forwarded to the Office of General Counsel.

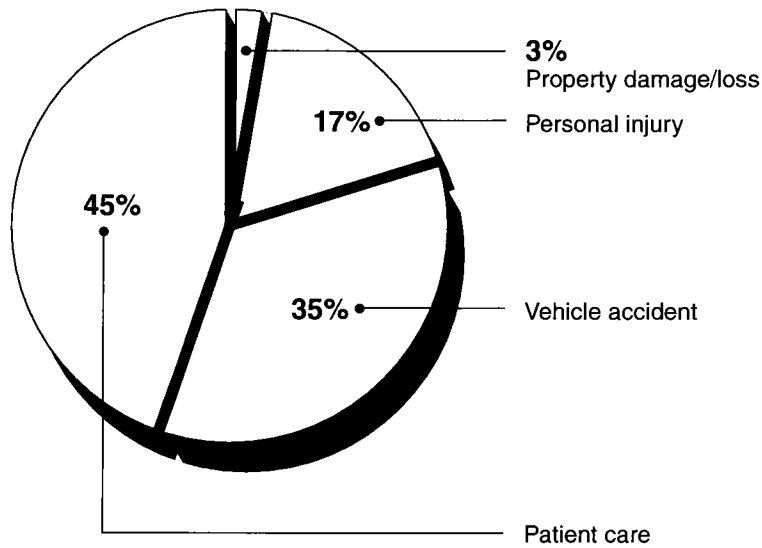
The claimant must go through the administrative claims process before filing suit in federal court. The Department of Health and Human Services can approve settlements of less than \$25,000. The Department of Justice must approve larger settlements. Settlements of \$2,500 or less are paid directly from agency funds, and larger settlements are paid from the Judgment Fund in the U.S. Treasury.⁴ Ultimately, if the claimant is dissatisfied with the administrative determination, the claimant may file suit in federal court. The Department of Justice handles lawsuits arising from FTCA claims. FTCA claims involving tribal contractors may be turned over, or “tendered,” to private insurers when tribes have private liability insurance policies that provide coverage for the same incidents covered under FTCA.

**Over One Hundred Claims Have Been Filed;
Most Involve Patient Care and Vehicle Accidents**

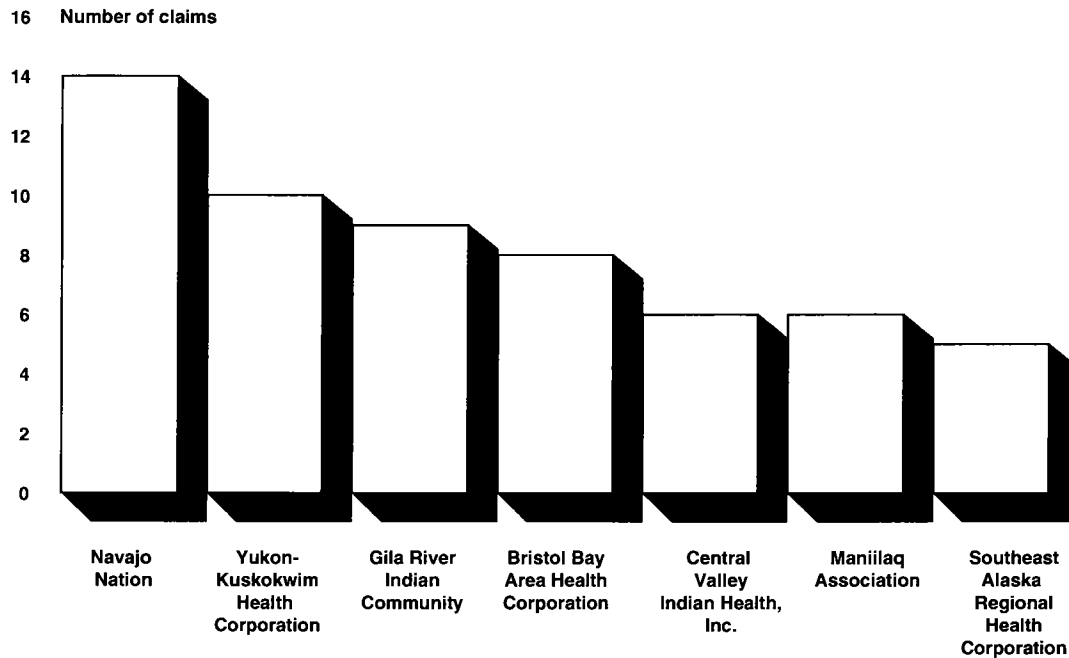
Data on FTCA claims involving tribal contractors are not readily available because the Department of Health and Human Services is not required to track these claims separately from FTCA claims involving federal employees. However, in response to our request for claims data, the department identified 114 claims filed from fiscal years 1997 through 1999 for programs contracted by tribes from the Indian Health Service. Total damages claimed were \$487 million. Patient care claims accounted for about 45 percent of all claims involving tribal contractors (51 out of 114 claims) filed during this period. Claims involving vehicle accidents constituted about 35 percent of the total, and personal injuries, about 17 percent (see fig. 1).

⁴The Judgment Fund is a permanent indefinite appropriation available to pay certain settlements and judgments against the federal government.

Figure 1: Claims Arising from Tribally Contracted Programs From the Indian Health Service by Type of Claim, Fiscal Years 1997-99



These claims involved tribally contracted programs for 40 contractors. The Indian Health Service contractor with the most claims—the Navajo Nation—had 14 claims, about 12 percent of the total. Seven contractors were involved with five or more claims during the 3-year period (see fig. 2).

Figure 2: The Seven Indian Health Service Contractors Involved With the Most Claims, Fiscal Years 1997-99

One of the reasons why so few of the 556 tribes had claims involving their self-determination programs is because FTCA coverage is still not well-known or understood by attorneys, tribes, or potential claimants, according to the agency officials that process these claims. Also, to the extent that tribes continue to carry duplicative private liability insurance, claimants may be referred to private insurers rather than to the federal government for compensation.

The damages claimed ranged from a low of \$75 to a high of \$100 million, with a median claim amount of \$1 million. The \$75 claim involved damages to a car that was parked adjacent to a tribally contracted facility. A tribal contract employee was treating a wooden fence with water sealant when some of the overspray damaged the finish on the claimant's car. The \$75 claim to remove the spray and to wax the car was paid in full. The \$100 million claim involved an alleged misdiagnosis that resulted in delayed treatment for breast cancer. This claim was denied because the evidence failed to establish that the claimant's condition was due to an act or omission of the tribal physician.

As of July 15, 2001, for the 114 FTCA claims filed from fiscal years 1997 through 1999 involving tribal self-determination contracts 40 resulted in settlement payments, 18 were ultimately denied and the final outcome of 56 claims is still pending either administratively or in litigation. The status of the claims filed changes frequently as new administrative determinations are made, lawsuits are filed, or settlement agreements are reached. The figures presented in this testimony have been updated since our July 2000 report. Overall, for the 40 claims that resulted in settlement payments 31 were settled administratively and 9 through litigation. Including the 18 claims that have been denied, a total of 58 claims have been brought to closure, or about 51 percent of the 114 claims. These 58 claims have been closed at a cost of about \$680,000 out of the \$230 million claimed in these cases. According to agency officials, the small, simple claims for minor incidents, such as a “fender bender,” are generally resolved quickly, while the large, complex claims may take longer to resolve. Although \$680,000 has been paid to date to resolve claims involving tribal contractors filed from fiscal years 1997 through 1999, this figure will likely increase as the remaining claims are resolved. For example, since our July 2000 report the total settlement amount has increased by about \$90,000. In aggregate, the percentage of tribal claims approved and the amount awarded are comparable with the resolution of other FTCA claims at the Department of Health and Human Services.

Mr. Chairman, this concludes my statement. We would be pleased to respond to any questions that you or other Members of the Committee may have at this time.

Contacts and Acknowledgments

For information about this testimony, please contact Chet Janik or Jeff Malcolm at (202) 512-3841.

(360120)