IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MATTHEW MITCHELL,	§	
Plaintiff	§	
	§	
	§	
	§	
VS.	§	**CIVIL ACTION 5:17-cv-00411-DAE**
	§	
ORICO BAILEY and HOOPA VALLEY	§	
TRIBE, d/b/a AMERICORPS HOOPA	§	
TRIBAL CIVILIAN COMMUNITY CORPS	§	
Defendants	§	

DEFENDANTS' 12(b)(1) MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISIDICTION, or IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Orico Bailey and Hoopa Valley Tribe d/b/a Americorps Hoopa Tribal Civilian Community Corps file this Motion to Dismiss Plaintiff's suit for lack of subject-matter jurisdiction, as authorized by Federal Rule of Civil Procedure 12(b)(1), or, in the alternative, Motion for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56. Defendants' Motion should be granted on the following bases:

1) The Hoppa Valley Tribe d/b/a Americorps Hoopa Tribal Civilian Community Corps is immune to suit; and

2) Plaintiff's claims against Bailey are subject to the Federal Tort Claims Act and as such, the United States should be substituted in his place.

In support hereof, Defendants respectfully show as follows:

I. BACKGROUND AND FACTS

This is a personal injury case that Plaintiff, Matthew Mitchell ("Plaintiff") has brought against Defendants Orico Bailey ("Bailey") and Hoopa Valley Tribe, d/b/a Americorps Hoopa Tribal Civilian Community Corps ("HCCC" or "Hoopa Tribe d/b/a HCCC") for personal injuries

Plaintiff alleges to have sustained while assisting with disaster relief efforts in Wimberley, Texas, in June 2015.

Plaintiff alleges that on June 20, 2015, he and two fellow firemen traveled to Wimberley, Texas to assist with disaster relief efforts following massive flooding of the Blanco River that had occurred on May 25 and 26, 2015. The flooding had uprooted trees and done other damage along the riverbank of the Blanco River.

At or about the same time, HCCC was also deployed to Wimberley, Texas to assist with clean-up operations resulting from the May 2015 flooding. On June 20, 2015, Bailey was assigned to a work crew which included workers from other agencies. The crew's mission for the day was debris removal by the river area located at or near 1200 Flite Avenue, Wimberley, Texas.

Bailey, an HCCC member, noticed an unstable tree leaning against another tree, and discussed with his Team Leader Bishop Rivas the dangers of the unstable tree, who then went to Plaintiff to point out the potential danger of the unstable tree and advised that it should be pushed over to avoid injury to others and clear the potential tree for safety purposes. Plaintiff insisted that the brush around the unstable tree should be cut down prior to the tree removal so that it was easier to work around. As Plaintiff walked towards the brush piles, Bailey walked to the other side of the unstable tree and continued to work. Once Bailey turned around he noted that the unstable tree was falling. The fallen tree pinned Plaintiff to the ground. Bailey and other volunteer immediately tried to move the tree from Plaintiff, but the tree was quite heavy. Team Leader Bishop Rivas then used Bailey's saw to cut the tree in half, which allowed for the extraction of Plaintiff from underneath. Plaintiff was administered first aide and then air lifted for further medical treatment.

The Hoopa Valley Indian Tribe ("Hoopa Tribe") is a federally recognized Indian tribe. The Hoopa Tribe entered into a Compact of Self Governance Between the Hoopa Valley Indian Tribe

and the United States of America in 1993 ("The Compact"). Exhibit A, Compact of Self Governance Between the Hoopa Valley Indian Tribe and the United States of America. Pursuant to The Compact, The Hoopa Tribe entered into an Annual Funding Agreement ("AFA") with the Secretary of the Department of the Interior for the United States of America. Exhibit B, Annual Funding Agreement. The AFA covers a broad number of programs, functions, and services related to self-governance as well as maintaining and improving the Hoopa Valley land and its people, and includes the activities of the HCCC. *See id*. Pursuant to Section 2 of the AFA, the Hoopa Tribe agreed to provide various "programs, activities, functions, and services" which include but are not limited to the following categories:

- Social/Human Services
- Adult Education
- Employment Assistance
- Adult Vocational Assistance
- Community and Economic Development

The HCCC is a program administered by The Hoopa Tribe, pursuant to The Compact and the AFA. The HCCC is a residential, national service program for adults ages 17-24, designed to meet the needs of those with little or no life skills. HCC is based in northern rural California on the Hoopa Indian Reservation, from which members perform community service. Members work in teams of 8-10 members, supervised by a leader. The goal of the program is to assist communities and/or organizations that need help in environmental and unmet human needs. Members receive training and experience from the work they perform. HCCC members conduct service projects that help 1) meet needs in education; 2) protect the environment; 3) promote public safety; 4) and respond to natural disasters. *See generally:*

https://my.americorps.gov/mp/listing/viewListing.do?id=7865.

The HCCC entered into an agreement ("Disaster Response Cooperative Agreement") with the United States of America represented by the Corporation for National and Community Service ("CNCS") pursuant to the National and Community Service Act of 1990, and the Domestic Volunteer Service Act of 1973. Exhibit C, Disaster Response Cooperative Agreement. As part of the agreement, CNCS and other partners, including the Federal Emergency Management Agency ("FEMA"), agreed to support disaster response and related activities as part of a program with numerous pre-screened and carefully selected grantees. CNCS would deploy members of the National Civilian Community Corps (NCCC) in response to disaster relief requests from FEMA. See id. In 2015, under this program, HCCC received a grant from the CNCS as an Americorp Indian Tribe. *See* Exhibit D, Notice of Grant Award.

The Hoopa Tribe utilizes funding from the Department of the Interior received through the AFA, to pay for operations of the HCCC. See Exhibit E, Declaration of Brandy Morton. The Hoopa Tribe also uses grant funds from other sources, such as the CNCS and FEMA to fund the operations of the HCCC. *See id*.

May 2015 will go down in history as one of the wettest months across the State of Texas, especially in Central Texas. By the time Memorial weekend arrived, much of the region was at least 2-4 inches above normal. Approximately 10 to 13 inches of rain fell across southern Blanco County, most of which fell from Saturday afternoon into the overnight hours of early Sunday morning, leading to a rapid rise in the Blanco River. The Blanco River at Wimberley rose from approximately 5 feet at 9 o'clock p.m. to near 41 feet by 1 o'clock a.m. Between 10:45pm to 11:45pm, the Blanco River rose 5 feet every 15 minutes. This equates to a 20 foot rise along the

river within a one hour time frame. As a result of this devastating weather event, FEMA designated areas of Texas as a Major Disaster Declaration on May 29, 2015.

FEMA then issued a Mission Assignment, requesting the activation of the CNCS to deploy to the State of Texas to perform emergency relief duties in accordance with the FEMA-CNCS Memorandum of Understanding. *See* Exhibit F, FEMA Mission Assignment. The State of Texas had requested a team of 50 individuals to assist with volunteer and donations management, as well as chainsaw and mucking crews. *See id*. Pursuant to the Compact, the AFA, the Disaster Response Cooperative Agreement, and the grant provided by CNCS, the CNCS then deployed HCCC to the State of Texas, in accordance with the Mission Assignment issued by FEMA. *See* Exhibit G, Disaster Budget and Deployment Form. It is pursuant to this line of agreements and funding that HCCC and Bailey were in Wimberley, Texas on June 20, 2015, to assist with clean-up operations resulting from the May 2015 flooding.

Bailey was a member of HCCC on or about June 20, 2015. *See* Exhibit H, CNCS Member Information and Americorps Application. As such, he was deployed to Wimberley, Texas, on that date to serve as a member of HCCC, which had been deployed by CNCS to provide the disaster relief so desperately needed in the area. *See* Exhibit I, Scope of Employment Statement.

Plaintiff has sued Defendants for negligence and, interestingly, breach of contract. In his Original Complaint, Plaintiff also claims that this Honorable Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332, diversity jurisdiction, and 28 U.S.C. § 1367, supplemental jurisdiction. *See* Document No. 1. To that end, Plaintiff alleges diversity jurisdiction as to Bailey and supplemental jurisdiction as to HCCC. *See id*.

Ultimately, however, for the reasons argued below, neither basis for jurisdiction exists and Plaintiff's claims against HCCC and Bailey must be dismissed. Alternatively, summary judgment in favor of HCCC and/or Bailey should be entered.

II. SUMMARY JUDGMENT EVIDENCE

Defendants contend this issue is properly considered pursuant to Rule 12(b)(1) of the Federal Rule of Civil procedure.[1] However, should the Court decide to convert this Motion to a summary judgment motion, and consider it pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants submit the following summary judgment evidence in support of same, which is incorporated herein by reference:

Exhibit A	Compact of Self Governance Between the Hoopa Valley Indian Tribe and the United States of America
Exhibit B	Annual Funding Agreement
Exhibit C	Disaster Response Cooperative Agreement
Exhibit D	Notice of Grant Award
Exhibit E	Declaration of Brandy Morton
Exhibit F	FEMA Mission Assignment
Exhibit G	Disaster Budget and Deployment Form
Exhibit H	CNCS Member Information and Americorps Application
Exhibit I	Scope of Employment Statement

[1] When subject matter jurisdiction is not intertwined with the underlying merits of the plaintiff's cause(s) of action, the attachment of exhibits to a Rule 12(b)(1) motion does not convert it into a motion for summary judgment, as would happen with a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Torres-Negron v. J&N Records, LLC*, 504 F.3d 151, 162-63 (1st Cir. 2007).

III. ARGUMENT AND AUTHORITY

A. Federal Court Jurisdiction.

The federal courts are courts of limited jurisdiction, possessing only such power as authorized by the Constitution or by statute. *Energy Mgmt Servs., LLC v. City of Alexandria*, 739 F.3d 255, 257 (5th Cir. 2014) (citing *Kokkonen v. Guardian Lide Ins. Co. of Am.*, 511 U.S. 375 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. (quoting *Kokkonen*, 511 U.S. at 377, 114 S. Ct. 1673). In a case that does not concern a federal question, which would establish jurisdiction pursuant to 28 U.S.C. § 1331, the party seeking to invoke federal jurisdiction bears the burden of establishing jurisdiction based on diversity of citizenship in accordance with 28 U.S.C. § 1332. *Garcia v. Koch Oil Co. of Tex. Inc*., 351 F.3d 636, 638 (5th Cir. 2003).

In the context of a Rule 12(b)(1) motion to dismiss on the basis of sovereign immunity, the party asserting subject matter jurisdiction has the burden of proving its existence, *i.e.* that immunity does not bar the suit. *Pistor v. Garcia,* 791 F.3d 1104, 1111 (9th Cir. 2015). A district court's determination of whether it has subject matter jurisdiction will be reviewed *de novo.* *Gupta v. McGahey*, 709 F.3d 1062, 1064-65 (11th Cir. 2013). The district court's interpretation or construction of a statute is also subject to *de novo* review. *Bankston v. Then*, 615 F.3d 1364, 1367 (11th Cir. 2010).

B. The Hoopa Tribe d/b/a HCCC is immune from suit.

Indian tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 8 L.Ed. 25 (1831)). They are subject to plenary control by Congress, yet they remain "separate sovereigns pre-existing the Constitution."

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024, 2030 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). Thus, unless and "until Congress acts, the tribes retain" their historic sovereign authority. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Among the core aspects of sovereignty that tribes possess is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. That sovereign immunity from suit, as well as a tribe's other governmental powers and attributes, are in the hands of the United States Congress. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Thus, as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998).

Immunity from suit applies without drawing a distinction based on where the tribal activities occurred. *Id.* Tribal immunity applies equally to suits brought by states or by individuals. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2015). Furthermore, tribal sovereign immunity does not depend on the character or purpose of the tribal activities in question. *Id.* at 2037. The Supreme Court has made clear that the only power that can limit tribal immunity, absent a waiver from the tribe itself, is an act of Congress. *Id.*

By 2015, Congress had clearly decided not to limit tribal sovereign immunity from claims of breach of contract or negligence.

> Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular – drafted by the chair of the Senate Appropriations Subcommittee on the Interior – expressly referred to *Kiowa* and broadly abrogated tribal immunity for most torts and breaches of contract. But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either

> to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval.

Id. at 2038 (internal citations omitted).

Courts continue to apply the doctrine of tribal sovereign immunity in tort cases, despite the harsh consequences for unsuspecting litigants. *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians,* 259 F.Supp.3d 713, 719 (W.D. Mich., 2017) (citing *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012) (holding that the tribe was entitled to sovereign immunity on a wrongful death claim where the tribe knowingly served excessive amounts of alcohol to the plaintiff's daughter)); *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568 (W.D. Okla. Oct. 27, 2010) (holding that the tribe was entitled to sovereign immunity in a slip-and-fall accident that occurred on the tribe's casino premises); *Doe v. Oneida Indian Nation of N.Y.*, 278 A.D.2d 564 (N.Y. App. Div. 2000) (holding that the tribe was entitled to sovereign immunity on a claim for damages that resulted from the plaintiff being pierced by a hypodermic needle left in a bed at the tribe's hotel); *Gallegos v. Pueblo of Tesuque*, 132 N.M. 207 (N.M. 2002) (holding that the tribe was entitled to sovereign immunity on the plaintiff's claim for damages that resulted from the wind blowing a tribal trash can that struck the plaintiff in the face)).

Plaintiff will no doubt attempt to narrow the scope of tribal sovereign immunity by claiming it does not apply to off-reservation activities and does not apply to tort cases. Many courts have held tribal sovereign immunity does apply to torts and non-contractual cases, whether off-reservation or not:

- *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) (landowner's complaint seeking injunctive relief against Indian Tribe dismissed based on sovereign immunity despite allegations of off-reservation harassment and threats of physical violence);
- *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 426, 443 P.2d 421, 422 (1968) (case dismissed on sovereign immunity when Indian tribe committed a tort outside of the boundaries of its reservation);

- *Furry v. Miccosukee Tribe of Indians of Florida*, 685 F.3d 1224 (11th Cir. 2012) (holding that the tribe was entitled to sovereign immunity on a wrongful death claim where the tribe knowingly served excessive amounts of alcohol to the plaintiff's daughter);

- *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 2:16-CV-232, 2017 WL 1505329, at *4 (W.D. Mich. Apr. 27, 2017) (tort case dismissed on sovereign immunity and holding "[d]espite the harsh consequences that tribal sovereign immunity can cause unsuspecting litigants, courts continue to apply the doctrine in tort cases.").

Indeed, the Supreme Court has done nothing to limit the tribal sovereign immunity "because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity". *Bay Mills,* 134 S. Ct. at 2027. As such, HCCC is immune from Plaintiff's suit and must be dismissed.

Additionally, Hoopa Valley has not waived its tribal immunity. To waive sovereign immunity, the tribe's waiver must be "clear." *Potawatomi*, 498 U.S. at 509. A strong presumption exists against waiver of tribal sovereign immunity. *Demontiney v. United States ex rel. Dep't of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 811 (9th Cir. 2001). A tribe's waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). The requirement that the waiver of sovereign immunity be "unequivocally expressed" is not a "requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "In the absence of a clearly expressed waiver by either the tribe or Congress, the Supreme Court has refused to find a waiver of tribal sovereign immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

A tribe does not waive sovereign immunity just by agreeing to abide by the rules of a state or agency. "There is a difference between the right to demand compliance with state laws and the

means to enforce them." *Kiowa*, 523 U.S. at 755; *see also Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1153 (10th Cir. 2011) (holding a tribe's agreement to comply with Title VII of the Civil Rights Act of 1964 did not constitute an unequivocal waiver of immunity); *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001) ("The fact that the Tribes agreed to act in accordance with state law to some degree and in essence adopt state law is simply not an express waiver of their tribal sovereignty with respect to their actions taken under that law."); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001) (holding a tribe's contractual promise to comply with an anti-discrimination provision of the Rehabilitation Act merely conveyed a promise not to discriminate); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 380 (Minn. Ct. App. 1996) (holding a tribal corporation did not waive its sovereign immunity by registering as a foreign corporation and thereby agreeing to be subject to the laws of Minnesota); *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 371 (Okla. 2013) (holding a tribe did not waive its sovereign immunity by applying for and accepting a liquor license – requiring the tribe to agree not to violate federal, state or municipal law – because by doing so the tribe merely promised to comply with those laws, not to subject itself to lawsuits).

Because Hoopa Tribe d/b/a HCCC has not waived its sovereign tribal immunity, and because Congress has not limited tribal sovereign immunity for the claims asserted, Hoopa Tribe d/b/a HCCC should be dismissed from this matter with prejudice for lack of subject matter jurisdiction.

C. Alternatively, or in addition to HCCC's tribal immunity, both HCCC and Bailey are protected from suit under the Federal Tort Claims Act.

The Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA") created a system by which tribes and tribal organizations can enter into agreements with the United States providing for the tribe or organization to assume responsibility for programs or services to Indian

populations that otherwise would be provided by the Federal government. *Colbert v. United States*, 785 F.3d 1384, 1385 (11th Cir. 2015); *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013). These "self determination contracts" are contracts "between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law. The self-determination contracts provide for the allocation of federal funds to the tribe or organization assuming responsibility for these programs or services. *Colbert*, 785 F.3d at 1385 n.2 (quoting 25 U.S.C. § 450b(j)-(l)[2]). The self-determination contracts are frequently known as "638 contracts" because the ISDEAA was enacted by Public Law No. 93-638.

As indicated above, The Hoopa Tribe entered into The Compact with the United States of America in 1993, pursuant to the authority of the ISDEAA. Exhibit A. At least one purpose of The Compact is to:

> enable the Hoopa Valley Indian Tribe to redesign programs, activities, functions, and services of the Bureau of Indian Affairs and the Indian Health Service: to reallocate funds for such programs, activities, functions, or services according to its tribal priorities; to provide such reallocate[d] funds for such programs, activities, functions, or services according to its tribal priorities; to provide such programs, activities, functions, and services, as determined by its tribal priorities; to enhance the effectiveness and long term financial stability of its tribal government; and to reduce the Federal-Indian service bureaucracy.

Id. at 1-2. The AFA is incorporated into The Compact. Id. at 17. The Compact and The AFA were in effect when the incident that gave rise to Plaintiff's suit occurred.

The Federal Tort Claims Act ("FTCA") provides for a limited waiver of sovereign immunity by granting federal district courts jurisdiction over "civil actions on claims against the

[2] The ISDEAA is now codified at 25 U.S.C.S. § 5301 *et seq*.

United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). Under the Indian Self-Determination and Education Assistance Act (ISDEAA), "Congress provided that Indian tribes, tribal organizations, Indian contractors, and their employees, may be deemed employees of the BIA for purposes of the FTCA when they are carrying out functions authorized in or under a self-determination contract." *Colbert*, 785 F.3d at 1390 (citing 25 U.S.C. § 5321 note (Civil Action Against Tribe, Tribal Organization, etc., Deemed Action Against United States) ("[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 or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and **its employees are deemed employees** of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement . . . . [A]fter September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.")).

Congress' purpose in extending FTCA coverage to Indian tribes carrying out self-determination contracts was to (1) allow the federal government to maintain the same level of exposure associated with the operation of federal Indian programs, such as health care and law enforcement, that it had before the enactment of the ISDEAA and (2) give the tribes the protective benefit of the FTCA. *See* S. Rep. No. 100-274, 100th Cong. 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.S.N. 2620, 2646—2647.

When a federal employee is sued for a wrongful or negligent act, 28 USCS § 2679 [the Westfall Act] empowers the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419-20 (1995). "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the [FTCA.]" *Osborn v. Haley*, 549 U.S. 225, 230 (2007). The Westfall Act provides that "[i]n 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 certify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3).

In *Shirk v. US ex rel. Dept. of Interior*, 773 F.3d 999, 1002 (9th Cir. 2014), the Ninth Circuit established a two-part test for determining whether a particular claim falls within the scope of Section 314 of the ISDEAA, which generally provides that that tribal organizations and their employees are covered by the FTCA. Under *Shirk*, the first step is to determine whether the alleged activity that gave rise to the claim is encompassed within the relevant agreement. The second step is to determine whether the action falls within the scope of the alleged tortfeasor's employment. *Id*. at 1006.

There is no dispute in this case that Bailey was, at the time of the incident made the basis of this suit, an employee of the HCCC. *See* Exhibits H and I, as well as Document No. 1, Plaintiff's Original Complaint. There is equally no dispute that Bailey was performing work pursuant to The Compact at the time of the incident that gave rise to this suit. Furthermore, it is equally clear that HCCC was performing the disaster relief pursuant to The Compact, The AFA, the Disaster Response Cooperative Agreement, and the grant provided by CNCS, and in accordance with the

Mission Assignment issued by FEMA. Because Bailey's work falls squarely within the identifiable functions of the Compact and the AFA, Bailey must be deemed an employee of the United States, dismissed from this action, and the United States substituted as defendant in his place.

C. The Court equally lacks diversity jurisdiction.

Plaintiff admits that the Hoopa Tribe d/b/a HCCC is a stateless party. *See* Document No. 1, Plaintiff's Original Complaint. Tribes are viewed as "stateless" entities that may not sue or be sued in federal court under § 1332. *See Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 692-93 (7th Cir. 2011) (7th Cir. 2011) ("[M]ost courts agree that Indian tribes are not citizens of any state for purposes of the diversity statute and therefore may not sue or be sued in federal court under § 1332."); *Miccosukee Tribe of Indians of Florida v. Kraus–Anderson Constr. Co.*, 607 F.3d 1268, 1276 (11th Cir. 2010) ("[T]he majority view—followed by every court of appeals that has addressed the issue—is that unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C. § 1332(a)(1) because they are not citizens of any state."), cert. denied, —— U.S. ——, 131 S. Ct. 3022, 180 L. Ed. 2d 844 (2011); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) ("T]he presence of an Indian tribe destroys complete diversity" because "[a]n Indian tribe ... is not considered to be a citizen of any state" and consequently "is analogous to a stateless person for jurisdictional purposes."); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) ("[A]n Indian tribe is not a citizen of any state...."); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) ("Indian tribes are not citizens of any state for purposes of diversity jurisdiction."); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) ("[I]t is clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity

jurisdiction...."); *see also Victor v. Grand Casino–Coushatta*, Civ. No. 2:02–CV–2348 (W.D. La. June 27, 2003)("[A]n Indian tribe is not considered to be a citizen of any state for purposes of diversity jurisdiction."); 13D Charles Alan Wright et al., Federal Practice and Procedure § 3579 (3d ed. 2011) ("Ordinarily, it will be difficult for cases involving Indian tribes to invoke diversity of citizenship jurisdiction under 28 U.S.C.A. § 1332(a)(1), because the better view—adopted by every court of appeals to address the question—is that a tribe is not a citizen of any state."). Accordingly, this Court lacks diversity jurisdiction with respect to the Hoopa Tribe d/b/a HCCC.

However, "[w]hen a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for each defendant or face dismissal," *Newman–Green, Inc. v. Alfonzo–Larrain*, 490 U.S. 826, 828 (1989); and the presence of a "stateless" party operates as a "jurisdictional spoiler" that destroys complete diversity, *id*. at 829-30, 109 S. Ct. 2218. *See Frazier v. Brophy*, 358 Fed. App'x 212, 213 (2d Cir. 2009) (holding that "[b]ecause an Indian Tribe is not a citizen of any state, the Oneida Nation's presence as a party bars a federal court from hearing the matter under its diversity jurisdiction" as the mere presence of one stateless party destroys diversity jurisdiction); *Ninigret Dev. Corp*., 207 F.3d at 27 (holding that "notwithstanding the joinder of other diverse parties, the presence of an Indian tribe destroys complete diversity"); *Grand Canyon Skywalk Dev. LLC v. Hualapai Indian Tribe of Arizona*, 966 F. Supp. 2d 876, 881 (D. Ariz. 2013) (same); *Inglish Interests, LLC v. Seminole Tribe of Florida, Inc.*, No. 2:10–cv–367–FtM–29DNF, 2011 WL 208289, at *3 (M.D. Fla. Jan. 21, 2011) (stating that "the presence of an Indian tribe as a party—essentially a 'stateless' entity—destroys diversity jurisdiction."); *CTGW, LLC v. GSBS, PC*, No. 09–cv–667–bbc, 2010 WL 2739963, at *2 (W.D. Wis. July 12, 2010) (holding that since "[a] court does not have diversity jurisdiction over a case in which a real party in interest is not a citizen of any state", "[i]t follows that, notwithstanding the

presence of other diverse parties in a case, the presence of an Indian tribe that is a real party in interest destroys complete diversity."). In this case, the Hoopa Tribe is not a mere nominal party but is a real party in interest. Consequently, there can be no diversity jurisdiction and dismissal pursuant to Rule 12(b)(1) is proper.

D. Alternatively, summary judgment is proper.

Again, although Defendants contend this matter is properly before the Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendants alternatively move for dismissal of Plaintiff's claims pursuant to Rule 56. Summary judgment is proper in a case in which there is no genuine dispute of material fact. FED. R. CIV. P. 56. A defendant who seeks summary judgment on a plaintiff's claim must demonstrate the absence of a genuine dispute of material fact by either (1) submitting summary-judgment evidence that negates the existence of a material element of the plaintiff's claim or (2) showing there is no evidence to support an essential element of the plaintiff's claim. *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996).

There is no genuine issue of material fact as to the status of The Hoopa Tribe, the HCCC, or Bailey's employment by the HCCC. Accordingly, summary judgment is appropriate in this matter and judgment must be entered in favor of Defendants.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, for the reasons stated above, Defendants pray Plaintiff's suit be dismiss with prejudice for lack of subject-matter jurisdiction, or in the alternative, the Court grant Defendants summary judgment in their favor.

Respectfully submitted,

TRIBBLE | ROSS

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CERTIFICATE OF SERVICE

On May 2, 2018, I hereby certify a true and correct copy of this notice has been served upon each attorney of record.

/s/ Mary Holmesly
Mary Holmesly