

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

MATTHEW MITCHELL	§	
Plaintiff	§	
	§	
	§	
vs.	§	CIVIL ACTION NO. 5:17-CV-00411-DAE
	§	
	§	
ORICO BAILEY and HOOPA VALLEY	§	
TRIBE, d/b/a AMERICORPS HOOPA	§	
TRIBAL CIVILIAN COMMUNITY CORPS	§	
Defendants	§	

ORICO BAILEY and HOOPA VALLEY	§	
TRIBE	§	
Petitioners	§	
	§	
vs.	§	CIVIL ACTION NO. 5:17-CV-00411-DAE
	§	
	§	
UNITED STATES OF AMERICA	§	
Respondent	§	

**DEFENDANTS’ MOTION TO SUBSTITUTE THE UNITED STATES IN PLACE OF
DEFENDANTS PURSUANT TO THE WESTFALL ACT
AND/OR
PETITION FOR CERTIFICATION OF FEDERAL
EMPLOYMENT PURSUANT TO THE WESTFALL ACT**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Defendants/Petitioners, ORICO BAILEY and the HOOPA VALLEY TRIBE, d/b/a AMERICORPS HOOPA TRIBAL CIVILIAN COMMUNITY CORPS, to file this Motion to Substitute the United States in Place of Defendants pursuant to The Westfall Act and/or Petition for Certification of Federal Employment Pursuant to The Westfall Act, complaining of the UNITED STATES OF AMERICA, hereinafter sometimes referred to as “United States” or

“Respondent.” Defendants hereby respectfully petition this Court to certify pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(3), that Defendants were “employee[s] of the Government . . . acting within the scope of [their] . . . employment” when the events giving rise to the above-captioned action occurred and, accordingly, to order that the United States “be substituted as the party defendant” in place of Defendants. In support thereof, Defendants respectfully show as follows:

I. INTRODUCTION

1. Defendants file this Motion/Petition as a supplement to its Motion to Dismiss for Lack of Subject Matter Jurisdiction [D.E. #32]. To the extent that the Court finds that Defendants are not sovereignly immune from suit, and dismissal is warranted on that basis alone, Defendants respectfully petition for review by this Court, pursuant to the Westfall Act, 28 U.S.C. § 2679(b)-(e) and the Indian Self-Determination and Educational Assistance Act (herein after referred to as "ISDEAA"), 25 U.S.C.S. § 5301 *et seq.*, to certify that Defendants were covered by the Federal Torts Claims Act (“FTCA”), as the claims arise out of performance of functions under the Hoopa Valley Tribe’s Self-Governance Compact or that the claims arise from allegations of negligent conduct of the Hoopa Valley Tribe’s member(s), which are deemed employees of the Government acting within the scope of employment. The performance of functions by a Tribe under a Self-Governance Compact are properly against the United States under the FTCA. *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); *M.J. ex rel. Beebe v. United States*, 721 F.3d 1084 (9th Cir. 2013); *Kvasnikoff v. United States*, 2018 U.S. Dist. LEXIS 40602, 2018 WL 1309842 (D. Alaska March 13, 2018).

2. "Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of [Title 28] and

all references thereto, and the United States shall be substituted as the party defendant." *Id.* § 2679(d)(3).

II. PARTIES

3. Plaintiff, Matthew Mitchell ("Plaintiff" or "Mitchell") has made appearance in this cause and is before the Court.

4. Defendants/Petitioners, Orico Bailey ("Bailey") and the Hoopa Valley Tribe d/b/a Americorps Hoopa Tribal Civilian Community Corps ("HCCC") (collectively, "Defendants"), have made appearances in this cause and are before the Court.

5. The Respondent is the United States of America.

III. JURISDICTION

6. This Motion to Substitute the United States in Place of Defendants pursuant to The Westfall Act and/or Petition for Certification of Federal Employment Pursuant to the Westfall Act is brought pursuant to and in compliance with 28 U.S.C. § 2679(d)(3) and 28 U.S.C. § 1331, which vest subject matter jurisdiction of petitions for certification of federal employment in Federal District Courts. Therefore, this Federal District Court has jurisdiction of this Petition.

7. Nothing in this Motion/Petition shall be construed as a waiver of Defendants' arguments with respect to the Court's lack of subject matter jurisdiction over Plaintiff's claims against Defendants, as argued in Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the alternative, Motion for Summary Judgment [D.E. #32].

IV. SERVICE OF PROCESS

8. The United States of America may be served with process by serving copies of the Summons and this Petition for Certification of Federal Employment on the following persons:

United States Attorney John F. Bash, United States Attorney for the Western District of Texas, by certified mail, return receipt requested, at the United States Attorney's mailing

address, **601 NW Loop 410, Suite 600, San Antonio, Texas 78216, to the attention of the Civil Process Clerk; and**

Jefferson Sessions III, Attorney General of the United States, by certified mail, return receipt requested, at the Office of the Attorney General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, **to the attention of the Civil Process Clerk.**

V. JURISDICTIONAL PREREQUISITES

9. On or about May 9, 2017, Mitchell filed his Original Complaint, which asserted tort causes of action against Bailey and HCCC. After the summons and Original Complaint were served on Defendants, Petitioner Hoopa Valley Tribe timely presented to the United States Department of the Interior administrative notification that Mitchell had instituted suit and was asserting claims against Defendants, which suit was premised upon Mitchell's claiming to have been injured as a result of alleged negligence by Bailey, working in the course and scope of his membership in the HCCC and as a result of the alleged negligence of the Hoopa Valley Tribe, acting through the HCCC. Such notification was provided by Petitioner pursuant to 25 CFR § 1000.277. *See* Exhibit A.

10. On April 16, 2018, Veronica Rowan, Assistance Regional Solicitor, Office of the Solicitor, U.S. Department of the Interior, sent an email to Elizabeth Turner, Risk Manager for the Hoopa Valley Tribe, advising that the Office of the Solicitor "will not be taking any further action on this claim." Exhibit B. Although Ms. Rowan's email does not expressly deny Mitchell's claim, or make any findings with respect to whether the Hoopa Valley Tribe should be sovereignly immune from suit or Bailey should be "deemed" and employee of the United States, Petitioners have no option other than to treat such response as a denial of their request for certification, as contemplated by 28 U.S.C. § 2679(d)(3).

11. Petitioners have complied with all jurisdictional prerequisites and conditions precedent to the commencement and prosecution of this Petition for Certification of Federal Employment Pursuant to the Westfall Act.

VI. BACKGROUND AND FACTS

12. 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.

13. 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.

14. 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 volunteers 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 aid and then air lifted for further medical treatment.

15. The Hoopa Valley Indian Tribe is a federally recognized Indian tribe. In the 1970's the United States government developed a new federal Indian policy of self-determination. Passed in 1975, the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA") provided a mechanism for Tribes or Tribal Organizations to conduct activities previously performed by the U.S. Department of the Interior. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C.S. § 5301 *et seq.*). The Act directs the Secretary of the Interior to enter into Contracts and Compacts with Tribes/Consortiums, to allow the Tribes to assume administration of these U.S. programs, functions and activities, while also allowing the Tribes to "redesign" such to meet the needs of the specific Tribes. 25 U.S.C § 5321.

16. Pursuant to the ISDEAA, the Hoopa Tribe entered into a Compact of Self Governance with the United States of America in 1993 ("The Compact"). Exhibit C. 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 D. 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

17. 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. HCCC 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. As part of that goal, 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>.

18. 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 E. 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 F.

19. The Hoopa Tribe utilizes funding from the Department of the Interior received through the AFA, to pay for operations of the HCCC. *See* Exhibit G. 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.*

20. 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.

21. 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 H.* 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 I.* 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.

22. Bailey was a member of HCCC on or about June 20, 2015. *See Exhibit J.* 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 K.*

VII. ARGUMENT AND AUTHORITY

23. 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)¹). The self-determination contracts are frequently known as “638 contracts” because the ISDEAA was enacted by Public Law No. 93-638.

24. 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 C. The purpose of The Compact is three-fold:

This Compact is to carry out an unprecedented Self-Governance Demonstration Project, authorized by Title III of the Indian Self Determination and Education Assistance Act, as amended, which is intended as an experiment in the areas of planning, funding and program operations within the Government-to-Government relationship between Indian Tribes and the United States. The Demonstration Project encourages experimentation in order to determine how to improve this Government-to-Government Relationship and promote the perpetuation of the Tribe. The outcome of the experiments can not be known in advance, and each

¹ The ISDEAA is now codified at 25 U.S.C.S. § 5301 *et seq.*

experiment, as reflected in each specific Compact, binds no party beyond the terms of each specific compact.

This 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 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.

This Compact is to enable the United States to maintain and improve its unique and continuing relationship with and responsibility to the Hoopa Valley Tribe through the establishment of a meaningful demonstration policy and project for tribal self-governance as proposed by the Hoopa Valley Tribe which will allow the Tribe to: take its rightful place in the family of governments in the federal constitutional system: remove federal obstacles to effective self-governance; reorganize tribal government programs and services; and provide a documented example for the development of future Federal-Indian policy. This policy of tribal self-governance shall permit an orderly transition from federal domination of programs and services to allow Indian tribes meaningful authority to plan, conduct, and administer those programs and services to meet the needs of their people. To implement the Self-Governance Project, the Department of the Interior and Indian Health Service are also expected to reorganize, restructure, or take other action to provide the same level of service to other tribal governments and demonstrate new policies and methods to provide improved service delivery to address tribal needs. In fulfilling its responsibilities under the Compact, the Secretaries hereby pledge that their Departments will conduct all relations with the Tribe on a government-to-government basis.

Id. at 1-2. The AFA is incorporated into The Compact. *Id.* at 17. Equally important to the purpose of The Compact is that it specifically provides that:

[T]he Tribe shall be fully covered by all liability coverage under the Federal Tort Claims Act that is made available to the Secretary or an authorized representative or to P.L. 93-638 contractors and their employees under federal law, as the same may be amended from time to time, and shall be responsible in the same manner as P.L. 93-638 contractors.

Id. at Section 3, page 16. The Compact and The AFA were in effect when the incident that gave rise to Plaintiff's suit occurred.

25. 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 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 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.")).

26. 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.

27. 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).

28. The Hoopa Tribe submitted Plaintiff’s claim to the Department of the Interior on December 8, 2017. *See* Exhibit A. The Hoopa Tribe requested for the United States to provide a defense in this lawsuit, pursuant to the Funding Agreement, Compact, federal regulations, and controlling case law. The Office of the Solicitor for the Department of the Interior has advised The Hoopa Tribe that the Department of Interior “will not be taking any further action on this claim.” Exhibit B. The issue of certification under the Westfall Act is thus ripe for this Court’s consideration.

29. The Westfall Act provides for substitution of the United States as a defendant in an action against a federal “employee,” as that term is defined in the statute, when the claim “arises or results from the negligent or wrongful act or omission of (1) an “employee of the Government” (2) while “acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1). Both of these prerequisites are plainly satisfied in this case.

30. 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 J and K, 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. Moreover, as a member of HCCC, Bailey was gaining valuable training, experience, and life skills while performing the volunteer work in Wimberley, Texas. Because Bailey's work falls squarely within the identifiable functions of the Compact and the AFA, Defendants must be deemed employees of the United States, dismissed from this action, and the United States substituted as defendant in their place.

31. This was contemplated by the United States in The Compact:

[T]he Tribe shall be fully covered by all liability coverage under the Federal Tort Claims Act that is made available to the Secretary or an authorized representative or to P.L. 93-638 contractors and their employees under federal law, as the same may be amended from time to time, and shall be responsible in the same manner as P.L. 93-638 contractors.

Exhibit C at Section 3, page 16.

32. Accordingly, Defendants petition the Court in accordance with 28 U.S.C. § 2679(c), to require the Attorney General of the United States to defend the civil action for personal injuries and money damages that has been brought by Plaintiff. Since Defendants were acting as deemed employees of the United States, the exclusive remedy available to Plaintiff is the remedy against the United States that is provided by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2672, and any civil action or proceeding against Defendants arising out of or relating to the matters made the subject of Plaintiff's lawsuit is precluded. Defendants are thus entitled to

dismissal. *See* 28 U.S.C. § 2679.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Orico Bailey and the Hoopa Valley Tribe pray that the United States of America be cited to appear and answer herein and, on a final hearing hereof, that the Court certify Orico Bailey and the Hoopa Valley Tribe, acting through the Hoopa Tribal CCC, were acting as deemed employees of the United States at all times material to the tort claims asserted by Matthew Mitchell; that the Court Order the Attorney General of the United States to defend the civil action for personal injuries and money damages that has been brought by Matthew Mitchell against Orico Bailey and the Hoopa Valley Tribe; that the Court Order dismissal of Orico Bailey and the Hoopa Valley Tribe as defendants in this lawsuit; that the Court Order substitution of the United States of America as Defendant; and that the Court grant such other and further relief to which Orico Bailey and the Hoopa Valley Tribe show themselves to be justly entitled.

Respectfully submitted,

TRIBBLE | ROSS

/s/ Mary Holmesly

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

On May 31, 2018, I hereby certify a true and correct copy of this notice has been served upon each attorney of record in accordance with the Federal Rules of Civil Procedure.

/s/ Mary Holmesly

Mary Holmesly