

Mitchell's tort claims against the Defendants are not covered by the Federal Tort Claims Act. There is no factual or legal basis for the Court's certifying federal employment status for the Defendants and there is no factual or legal basis for substitution of the United States as defendant in place of the Defendants. Defendants' Motion to Substitute and Defendants' Petition for Certification of Federal Employment should in all respects be DENIED.

I. BACKGROUND

While working as a volunteer at a federally-declared disaster site in Wimberley, Texas, San Antonio firefighter Matthew Mitchell was severely injured as a proximate result of Defendant Orico Bailey's negligently felling a tree with a chainsaw. Orico Bailey was working in Wimberley as a member of the AmeriCorps Hoopa Tribal Civilian Community Corps ("Hoopa Tribal CCC"), an arm of the northern California Indian tribe known as the Hoopa Valley Tribe. Defendants Orico Bailey and the Hoopa Valley Tribe have made the following erroneous assertions in an effort to avoid their being held accountable for Matthew Mitchell's bodily injuries: (a) At the time Matthew Mitchell was injured, Orico Bailey and the Hoopa Valley Tribe were acting as "deemed" employees of the United States pursuant to the Indian Self-Determination and Education Assistance Act; (b) as federal employees, their tortious conduct is covered by the Federal Tort Claims Act ("FTCA"); and (c) the United States must be substituted as Defendant pursuant to the Westfall Act, 28 U.S.C. § 2679. As will be discussed herein, these assertions are factually and legally without merit.

II. THE DEFENDANTS WERE NOT EMPLOYEES OF THE UNITED STATES AND MATTHEW MITCHELL'S TORT CLAIMS ARE NOT COVERED BY THE FTCA

The Defendants erroneously represent they were performing disaster relief activities in Wimberley, Texas pursuant to the following contracts with the U.S. Department of the Interior: (1) The Compact of Self Governance Between the Hoopa Valley Indian Tribe and the United

States of America (the “Compact,” which is attached as Exhibit C to Defendants’ Motion to Substitute and Petition for Certification of Federal Employment); and (2) the Hoopa Valley Tribe’s 2009 Annual Funding Agreement (“AFA”) with the U. S. Department of the Interior (which is attached as Exhibit D to Defendants’ Motion to Substitute and Petition for Certification of Federal Employment). The Defendants have injected the Compact and AFA into this case in a misguided effort to argue Orico Bailey, his Hoopa Tribal CCC supervisors, and the Hoopa Valley Tribe were acting as “deemed” employees of the United States pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301, *et seq.* (the “ISDEAA”) at the time Matthew Mitchell was injured. Contrary to Defendants’ representations, the Compact and AFA have nothing to do with the Hoopa Tribal CCC or its disaster response activities in Wimberley, Texas. As will be discussed in greater detail, *infra*, the Hoopa Tribal CCC was in Wimberley pursuant to a contract (the “Disaster Response Cooperative Agreement” or “DRCA”) between the Hoopa Tribal CCC and a federal agency, the Corporation for National & Community Service (“CNCS”)—**not** pursuant to the Hoopa Valley Tribe’s Compact or AFA with the Department of the Interior.

The ISDEAA was passed by Congress in 1975 to provide a mechanism for Indian tribes to assume responsibility for conducting activities previously performed *for the Indian tribes* by the United States Department of the Interior (through the Bureau of Indian Affairs or “BIA”) **and** by the United States Department of Health and Human Services (“DHHS”) (through the Indian Health Service or “IHS”). *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as 25 U.S.C. §§ 450, *et seq.*, which subsequently was renumbered and transferred to 25 U.S.C. §§ 5301, *et seq.* The ISDEAA authorizes the Secretary of the Department of the Interior and the Secretary of DHHS to enter into contracts with Indian tribes, at the tribes’ request, which provide

for the tribes' *assuming* control of programs, functions, services, and activities *previously provided to or for the tribes* by these two federal Departments. *See* discussion of ISDEAA in *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1028 (9th Cir. 2013).

In 1990, the ISDEAA was amended to provide that in those situations where an Indian tribe enters into a self-determination contract with DHHS and assumes responsibility for providing health care services *previously provided to the Tribe by the IHS*, the Tribe and its employees will be "deemed" to be employees of the United States with respect to the assertion of health care liability claims against them and those claims will be covered by the FTCA. *See* 25 U.S.C. § 5321(d). Subsequently, in 1994, federal regulations were promulgated that extended FTCA coverage to tort claims against Indian tribes concerning functions, services, and activities that had been *assumed* by the Indian tribes in their self-determination contracts with the Department of the Interior, which functions, services, and activities *previously were provided to the Tribes by the Department of the Interior* (acting through the BIA). *See* 25 CFR § 900.180(b).

Fatal flaws in the Defendants' erroneous argument that the Hoopa Tribal CCC and Orico Bailey were acting as deemed federal employees include the following: (a) the Defendants' disaster relief activities in Wimberley were performed pursuant to the DRCA with CNCS--*not* pursuant to a self-determination contract with the Department of the Interior; (b) these disaster relief activities *were not* activities that previously had been performed *for the Hoopa Valley Tribe* by the Department of the Interior; and (c) the funding for these disaster relief activities was provided by CNCS—*not* by the Department of the Interior.

CNCS was established in 1994 pursuant to the National and Community Service Trust Act of 1993, 42 U.S.C. §§ 12601, *et seq.* CNCS makes financial grants for the creation of AmeriCorps chapters around the country, including the AmeriCorps Hoopa Tribal CCC.

After undergoing the requisite training, an AmeriCorps chapter can apply to CNCS for eligibility to enter into a Disaster Response Cooperative Agreement (DRCA) with CNCS. If selected and allowed to enter into a DRCA, the AmeriCorps chapter becomes an AmeriCorps Disaster Response Team (“A-DRT”) and thereby becomes eligible to be deployed by CNCS to federally-declared disaster sites, where the A-DRT provides disaster relief services. *See* the CNCS publication at Appendix 1.

Attached at Appendix 2 is a copy of the Hoopa Tribal CCC’s formal application to enter into a DRCA with CNCS. The first several pages of the application form contain information concerning CNCS’ disaster response program and the eligibility requirements each AmeriCorps chapter must meet to become eligible to enter into a DRCA with CNCS.

Relying on the information provided by the Hoopa Tribal CCC, CNCS allowed the Hoopa Tribal CCC to enter into the DRCA with CNCS that is attached at Appendix 3.

Contrary to the Defendants’ erroneous representations regarding the Hoopa Tribal CCC’s being created pursuant to the Compact and AFA with the Department of the Interior, The Hoopa Tribal CCC was created pursuant to a grant of money by CNCS. *See* Notice of Grant Award by CNCS to the Hoopa Valley Tribe at Appendix 4. The Hoopa Valley Tribe has no illusion regarding the origin of the Hoopa Tribal CCC. In a publication on its web site promoting the Hoopa Tribal CCC to potential AmeriCorps applicants, the Hoopa Valley Tribe states the following: “AmeriCorps Hoopa Tribal Civilian Community Corps (Tribal CCC) *is a program of the Corporation for National and Community Service.*” (emphasis added). A copy of this publication by the Tribe is attached at Appendix 5. In the Hoopa Valley Tribe’s “Welcome Guide” for the Hoopa Tribal CCC’s new members, the Tribe has included a depiction of the chain of command for the “AmeriCorps Hoopa TCCC” that clearly shows it is a program of

CNCS. A copy of this chain of command is attached at Appendix 6. Nowhere in the Tribe's various publications regarding the Hoopa Tribal CCC is there any statement or representation that the Hoopa Tribal CCC is a program funded by or related in any manner to the U.S. Department of the Interior—those erroneous representations appear for the first time in the Defendants' Motion to Dismiss and in its Motion to Substitute and Petition for Certification of Federal Employment.

Attached at Appendix 7 is a copy of the Tribe's Application to CNCS for funding to continue operation of the Hoopa Tribal CCC over the time frame 09/01/2014 through 08/31/2016, which time frame encompasses the Hoopa Tribal CCC's providing disaster relief services in Wimberley. On page HVT000740 of the Tribe's funding application, the Tribe represented to CNCS that "TCCC [the Hoopa Tribal CCC] would not exist without CNCS funding." On page HVT000747 of the Tribe's funding application, the Tribe represented to CNCS that Hoopa Tribal CCC members "are required to wear uniforms that display the AmeriCorps logo." The AmeriCorps name and logo are registered service marks of CNCS and must prominently be displayed by AmeriCorps chapters on their websites, gear, and uniforms. (See CNCS publication attached at Appendix 8).

The funding of the Hoopa Tribal CCC's disaster relief activities in Wimberley was provided by CNCS--**not** the Department of the Interior. Attached at Appendix 9 is a copy of the pre-deployment budget submitted by the Hoopa Tribal CCC to CNCS when it applied for disaster response deployment to Texas in June of 2015. Attached at Appendix 10 is a copy the Hoopa Tribal CCC's post-deployment request to CNCS for reimbursement of the expenses it incurred in connection with its disaster response deployment to Wimberley. Attached at Appendix 11 is verification by the Tribe that it had received reimbursement from CNCS for the

Tribe's disaster deployment expenses.

III. THE FTCA IS INAPPLICABLE TO MATTHEW MITCHELL'S TORT CLAIMS

The AmeriCorps programs funded by CNCS include the following: (1) AmeriCorps Vista, a program focused on fighting poverty; (2) the AmeriCorps National Civilian Community Corps, a full-time residential program for men and women ages 18-24, which combines practices of civilian and military service; and (3) AmeriCorps chapters created by "States, subdivisions of States, territories, *Indian tribes*, public or private nonprofit organizations and institutions of higher education" with CNCS funding provided under the AmeriCorps State and National Program. *See* 42 U.S.C. § 12572; AmeriCorps National Civilian Community Corps Member Handbook, on web site of CNCS; "2015 Terms and Conditions for AmeriCorps State and National Grants, effective May 1, 2015" on CNCS website; and CNCS publication, "AmeriCorps Reaches One Million Members," taken from CNCS website. Congress passed legislation providing that the members of the AmeriCorps National Civilian Community Corps and AmeriCorps VISTA are deemed to be employees of the United States for purposes of the FTCA. *See* 42 U.S.C. § 12620 (AmeriCorps National CCC) and 42 U.S.C. § 5055 (AmeriCorps VISTA). With respect to the AmeriCorps chapters established under the AmeriCorps State and National grant program, which includes the AmeriCorps Hoopa Tribal CCC; Congress has not passed legislation deeming these AmeriCorps chapters and their members to be employees of the United States. For that reason, each CNCS grantee under the AmeriCorps State and National grant program is required by CNCS to obtain liability insurance coverage "for the organization, employees and members, including coverage of members engaged in on- and off-site project activities." *See* p. 12 of 2014 AmeriCorps State and National Grant Provisions, effective June 1, 2014, attached hereto as Appendix 12.

The Defendants have attached as Appendix G to their Motion to Dismiss the Declaration of Brandy Morton, the Hoopa Valley Tribe’s Chief Financial Officer. The Defendants have proffered this Declaration as allegedly supporting their erroneous representation that the Compact and AFA provide funds that are utilized to operate the AmeriCorps Hoopa Tribal CCC. A review of Brandy Morton’s “Declaration” reveals that the Tribe’s CFO merely states the Tribe has chosen to use some of the funds provided by the Department of the Interior to defray some of the operational expenses of the AmeriCorps Hoopa Tribal CCC—an entity that is not mentioned in the Compact or AFA. If the claimed diversion of funds actually took place, the Tribe’s use of Department of the Interior funds to pay some operational expenses of the Hoopa Tribal CCC does not make the Hoopa Valley Tribe and the Hoopa Tribal CCC’s program participants “deemed employees” of the United States with respect to the Hoopa Tribal CCC’s disaster relief activities in Texas and it does not make the United States liable for the Defendants’ tortious conduct in Texas. A hypothetical underscores this fact. Suppose an Indian tribe were to use (divert) some of the funds provided by the Department of the Interior pursuant to a self-determination contract or an ASA to defray some of the operational expenses of the tribe’s casino—an activity (gaming) not covered by the Compact or ASA with the Department of the Interior. The tribe’s decision to shift Department of the Interior funds to the operation of its casino does not *ipso facto* bring the tribe’s activities and tortious conduct in the operation of the casino within the ISDEAA; it does not make the tribe or the casino’s employees “deemed employees” of the United States under the ISDEAA; and it does not make the United States amenable to suit under the FTCA for torts occurring in the operation of the tribe’s casino. This legal reality is underscored by the various ISDEAA cases cited in the Defendants’ Motion to Dismiss, especially *Shirk v. United States*, 773 F.3d 999 (9th Cir. 2014) and *Colbert v. United*

States, 785 F.3d 1384 (11th Cir. 2015).

Shirk involved tort claims asserted against the United States concerning the off-reservation policing activities of two tribal police officers. Relying on the ISDEAA, the *Shirk* plaintiffs alleged the tribal police officers were “deemed employees” of the United States based on the fact that the Department of the Interior’s AFA with the Tribe expressly provided funds for “law enforcement.” The plaintiffs alleged the United States was answerable under the ISDEAA and the FTCA for the negligence of its “deemed employees” (the tribal police officers).

The United States denied the tribal police officers were acting as its “deemed employees” when they engaged on off-reservation policing activities and moved to dismiss the plaintiffs’ claims. The U.S. District Court agreed and held the Tribe’s officers were not covered by the ISDEAA and FTCA. On appeal, the Ninth Circuit held the determination whether the tribe’s police officers were acting as deemed employees of the United States at the time of their alleged tortious conduct required a two-step analysis. First, the trial court had to determine whether the tribal police officers were performing functions or activities under a self-determination contract or AFA between the tribe and the Department of the Interior, which is essential for application of the ISDEAA. Second, if the tribal officers were performing functions or activities under a self-determination contract or AFA with the Department of the Interior, the trial court had to determine whether the tribal officers were acting within the scope of their ISDEAA employment at the time of their challenged conduct—not merely whether they were acting in the scope of their employment with the tribe.

Mirroring *Shirk*’s detailed analysis is that set forth in *Colbert v. United States*, 785 F.3d 1384 (11th Cir. 2015), which involved a Tribal attorney’s involvement in an off-reservation vehicular collision. In *Colbert*, the 11th Circuit held that in order to be entitled to FTCA

coverage as a deemed employee of the United States, much more is needed than the mere fact that an Indian tribe receives funds from the Department of the Interior pursuant to an AFA. The Court held there must be proof of the following: (1) A self-determination contract (a “638” contract) between the Indian tribe and the Department of the Interior pursuant to which the Indian tribe has “stepped into the shoes” of the Department of the Interior and assumed responsibility and managerial control “of services and programs previously administered by” the Department of the Interior through the BIA, (2) the defendant must have been performing functions under the 638 contract at the time of his alleged tortious conduct; and (3) the defendant must have been acting in the scope of the 638 contract. Only in this very limited scenario does the ISDEAA provide that the Tribe or its employee will be “deemed” to be an employee of the Department of the Interior (the United States) and thereby entitled to coverage under the FTCA. None of these requirements can be met with respect to the Hoopa Tribal CCC’s disaster relief activities in Wimberley. Therefore, the ISDEAA has no applicability to Mitchell’s tort claims; Orico Bailey and his supervisors are not deemed employees of the United States; and the United States is not answerable under the FTCA for the Defendants’ tortious conduct.

IV. THERE IS A PROCEDURAL DEFECT THAT PRECLUDES THE COURT’S GRANTING DEFENEDANTS’ REQUEST FOR WESTFALL ACT RELIEF

If the Court were inclined to entertain the Defendants’ request that the United States be substituted as Defendant, Plaintiff objects that the United States has not made an appearance in this cause and has not been afforded an opportunity to be heard regarding the Defendants’ request for Westfall Act relief as required by 28 U.S.C. § 2679(d)(3). *See, e.g., Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995). Due to the absence of the United States, there currently is a procedural defect that precludes the Court’s ordering the United States to be substituted as Defendant under the Westfall Act.

VI. CONCLUSION

The Hoopa Tribal CCC and Orico Bailey were not acting as deemed federal employees at the time they were engaging in disaster relief activities in Wimberley, Texas. The Defendants' disaster relief activities in Wimberley were performed pursuant to the DRCA with CNCS--*not* pursuant to a self-determination contract with the Department of the Interior; these disaster relief activities *were not* activities that previously had been performed *for the Hoopa Valley Tribe* by the Department of the Interior; and the funding for these disaster relief activities was provided by CNCS—*not* by the Department of the Interior. There is no factual or legal basis for this Court's certifying that the Defendants were deemed employees of the United States with respect to the Defendants' tortious conduct in Wimberley, Texas that resulted in bodily injuries to Matthew Mitchell. The Defendants' tortious conduct is not covered by the Federal Tort Claims Act and thus there is no legal basis to substitute the United States as Defendant in the place of the Hoopa Valley Tribe and Orico Bailey. Plaintiff respectfully requests the Court to DENY in all respects the Defendants' Motion to Substitute the United States in Place of Defendants Pursuant to the Westfall Act and Defendants' Petition for Certification of Federal Employment Pursuant to the Westfall Act.

Respectfully submitted,



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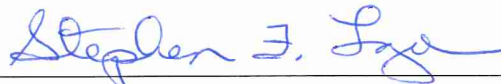
Certificate of Service

I do hereby certify that on this the 14th day of June, 2018, a true and correct copy of the above and foregoing pleading and its Appendices were forwarded to counsel for the Defendants, to-wit:

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