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' REPLY IN SUPPORT OF THEIR 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, and file this Reply in Support of Their 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. In support hereof, Defendants respectfully show as follows:

I. Defendants' off-reservation activities are protected.

Plaintiff again baselessly contends that because the incident giving rise to his causes of action occurred off the Hoopa Valley Tribe's reservation, Defendants are not sovereignly immune. Despite the clear stance of the Supreme Court on this issue, Plaintiff now attempts to craft a fairy tale argument and, in doing so, relies entirely on dicta and dissenting opinions.

Contrary to Plaintiff's contentions, the United States Supreme Court reaffirmed the bedrock principles of tribal sovereign immunity, without regard to where the underlying incidents

may have occurred, in both *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). In *Bay Mills*, the State of Michigan sued a tribal casino in an attempt to prevent off-reservation gaming. Michigan argued that the Court should overturn *Kiowa* and limit tribal sovereign immunity. *Id.* at 2033-34. The Court reiterated that it is up to Congress, not the Court, to limit tribal sovereign immunity. *Id.* at 2038. The Court found that Congress had, in fact, considered abrogating sovereign immunity but declined and rejected any notion that it should limit sovereign immunity: "As in *Kiowa* – except still more so – we decline to revisit our case law[,] and choose instead to defer to Congress." *Id*. at 2039 (internal quotations omitted). The principle that an Indian tribe cannot be sued without its consent or an unequivocal waiver by Congress remains a bedrock principle of federal Indian law, regardless of whether the basis of a plaintiff's complaint occurred on or off-reservation. Moreover, none of the courts in the cases cited by Plaintiff in support of this argument (see e.g. footnote 3 at page 3) denied the tribe its sovereign immunity solely on the basis that the alleged torts occurred off-reservation, as Plaintiff now asks this Court to do.

Furthermore, Plaintiff mischaracterizes the content of footnote 8 in *Bay Mills*. In fact, the Supreme Court clearly declined to address the issue in footnote 8: "The argument that such cases would present a 'special justification' for abandoning precedent is not before us." *Id.* at 2036 n.8. The Supreme Court has not made a distinction based on where the tribal activities occurred or the type of activity involved. It remains that the Hoopa Valley Tribe is not deprived of it sovereign immunity merely because the incident made the basis of Plaintiff's suit occurred off-reservation.

II. Defendants have not waived their sovereign immunity.

Plaintiff cites no legal authority in support of his argument that an agreement to obtain some type of insurance equates to a waiver of sovereign immunity. Plaintiff's argument is a classic

red herring. Again, 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).

Moreover, the Disaster Response Agreement does not explicitly require HCCC to obtain and maintain liability insurance as Plaintiff has so alleged. Article IX, subsection B of the Disaster Response Agreement (Exhibit C to Defendants' Motion to Dismiss) only requires: "The Program(s) must have adequate safety training programs and liability insurance coverage (and/or including Workers' Compensation) for the organization and for individuals engaged in activities under the Grant to engage in disaster relief activities." Thus, if HCCC had Workers' Compensation coverage for the members, HCCC would have met the obligations of the Agreement, based on the "and/or" language of the Agreement itself. Regardless, an agreement to provide liability insurance is NOT an unequivocal waiver of sovereign immunity, and Plaintiff does not cite any legal authority to support this proposition.

III. Alternatively, Defendants are covered by the Federal Tort Claims Act.

Preliminarily, the Compact and Annual Funding Agreement have everything do to with Defendants' coverage under the FTCA. Under the Indian Self-Determination and Education Assistance Act of 1975 ("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 v. United States*, 785 F.3d 1384, 1390 (11th Cir. 2015) (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.")).

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.

Exhibit A to Defendants' Motion to Dismiss at 1-2. The AFA is incorporated into The Compact. *Id*. at 17. 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 to Defendants' Motion to Dismiss, 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.

As long as the services being performed by the Tribe and/or Bailey were being performed pursuant to the Compact, it is absolutely irrelevant where the funds came from for the activities being performed by Bailey at the time of Plaintiff's incident. Title 25, Section 900.197 of the Code of Federal Regulations, asks and answers the question:

> Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?
>
> Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

25 C.F.R. § 900.197; *see also Colbert*, 785 F.3d at 1390 n. 7. Thus, Plaintiff's contention that the funding of Bailey's activities came from the CNCS, and not the Department of Interior, are completely irrelevant. Indeed, Plaintiff's contentions in this regard are, again, not supported by any legal authority.

IV. Alleged procedural defect is being cured.

Plaintiff objects on the basis that the United States has not made an appearance in this cause and has not been afforded an opportunity to be heard regarding Defendants' request for Westfall Act relief. Defendants have petitioned the Court for certification under the Westfall Act, requesting that the United States be cited to appear and defend this matter. *See* Document No. 35.

Thus, the alleged procedural defect has been, or is in the process of being, cured. However, Defendants contend that same is not necessary because they are sovereignly immune from suit.

V. Federal question jurisdiction.

Defendants have always maintained that the Court lacks subject matter jurisdiction because they are sovereignly immune from suit. Defendants' Petition for Certification and/or Motion to Substitute the United States as a defendant in this case was explicitly filed subject to Defendants' contention that they are immune from suit and has always been an alternative basis for dismissal of Defendants from this lawsuit. More importantly, there has not been (and indeed never could be) any waiver of subject-matter jurisdiction in this case. *See United States v. Cotton*, 535 U.S. 625, 630 (2002).

WHEREFORE, PREMISES CONSIDERED, for the reasons stated above, Defendants pray Plaintiff's suit be dismissed 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

/s/ Mary Holmesly

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

On June 15, 2018, I hereby certify a true and correct copy of this pleading has been served upon each attorney of record.

/s/ Mary Holmesly
Mary Holmesly