UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 19-2124, -2129, -2130, -2163

GERALD OHLSEN, et al.,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants- Appellees.

CONSOLIDATED REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

On Appeal from the United States District Court
for the District of New Mexico
The Honorable James O. Browning, District Judge
[Nos. 1:17-cv-1161, 1:18-cv-096, 1:18-cv-367, 1:18-cv-496, 1:19-cv-237]

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ORAL ARGUMENT IS REQUESTED.

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REPLY ARGUMENT

The United States Government seeks to avoid liability for the negligence of the Forest Service which resulted in a fire which caused substantial harm to over 50 private citizens by the destruction of 56 structures, including homes, personal property, vehicles, farm implements, and many acres of private land, along with personal injury to some of the plaintiffs.

I. Congress Created a Unique Cooperator-Forest Service Relationship in the CFDA, and Specifically Defined When Cooperators Would Be "Government Employees" Under the FTCA.

The Government's disclaimer of liability is directly contrary to the intent of Congress expressed in the Cooperative Funds and Deposits Act (CFDA). In enacting that statute, Congress granted the Forest Service the right to enter into special cooperative relationships "[t]o facilitate the administration of the programs and activities of the Forest Service." 16 U.S.C. § 565a-1 (1975). A cooperative project is authorized by the CFDA when the Forest Service determines that "the public interest will be benefitted and there exists a mutual interest other than monetary considerations." *Id.*

Congress created a unique relationship between the Forest Service and the cooperator and its employees. This relationship is not an independent contractor relationship, where, as this Court noted, "the government's role [is] limited to the payment of sufficiently high rates to induce the contractor to do a good job." *Logue*

v. United States, 412 U.S. 521, 529 (1973). Unlike independent contractors, cooperators are selected primarily on the basis of their shared interest in the Forest Service's work. Neither price nor merit are dispositive, as they are in selecting an independent contractor. There is no bidding, a requirement for entering into an independent contract with the government. Neither is there a competitive, civil service application and vetting process, a requirement for government employment.

Payment of the cooperator and its employees does not require either a government grant or an appropriation. Instead, cooperators are paid out of the Forest Service's budget. Federal billing and auditing requirements are suspended. The federal government reimburses the cooperator dollar-for-dollar for the amount of the cooperator's expenses. Although the cooperator does the paperwork for paying its employees and fronts social security and employment taxes, it is understood that those expenses will be reimbursed dollar-for-dollar out of the Forest Service's budget.

As set forth in Appellant's Opening Brief ( ), these statutory provisions make the cooperator arrangement created by the CFDA unique. The cooperator relationship looks more like employment by the Forest Service than like an independent contractor hired for money to achieve a particular result, but left free to control its own operations. *See Logue,* 412 U.S. 521, 529; *United States v. Orleans*, 425 U.S. 807, 818 (1976) (local entities are independent contractors because they ave complete control over operations of their own programs with the Federal Government

supplying financial aid, advice, and oversight only to assure that federal funds not be diverted to unauthorized purposes). There are, however, differences from government employment as well.

Congress was well aware that it was creating a special hybrid category of "cooperators" who were not subject to the ususal requirements applicable to either independent contractors or employees of the government. Rather than leave the confusion created by 16 U.S.C. § 565a-1 over the status of cooperators to be puzzled out by the courts, Congress chose to directly address the status of cooperators with regard to federal law governing employment and independent contracting. Congress provided where the cooperative work is done "under the supervision of the Forest Service," then the cooperators and their employees will be "deemed to be Federal employees" for the purposes of coverage under the Federal Tort Claims Act (FTCA), for negligent injuries to others, and under the Federal Employees' Compensation Act (FECA), for injuries to the cooperators and their employees.

Federal employee status of cooperators:

> In any agreement authorized by section 565a-1 of this title, cooperators and their employees may perform cooperative work under supervision of the Forest Service in emergencies or otherwise as mutually agreed to, but shall not be deemed to be Federal employees other than for the purposes of chapter 171 of Title 28 and chapter 81 of Title 5.

16 U.S.C.A. § 565a-2 (1975).

Congress specifically rejected treatment of cooperators as Federal employees for other purposes, such as pension accruement, health insurance, civil service requirements.

Providing federal coverage for those injured by negligence is consistent with the purpose of the CFDA, which is to allow the Forest Service to employ firefighters year-around so that they are available in an emergency to protect our forests. Congress was well aware that fire prevention is dangerous work, both in terms of injuries to the firefighters and injuries to members of the public. Designating cooperators and their employees as "Federal employees" for purposes of the FTCA and the FECA ,when the work is under the supervision of the Forest Service, expresses Congressional intent to cover negligent injuries to the public and injuries to cooperators and their employees from this dangerous work when the government has the authority to control the details of the work.

By addressing directly the Federal employee status of cooperators for purposes of the FTCA, Congress bypassed the question addressed in the first paragraph of 28 U.S.C. § 2671, the FTCA definitions section which defines the term "Federal agency." It is that section that distinguishes entities acting as instrumentalities or agents of the United States from independent contractors, creating the independent contractor exception to government liability. That provision states as follows:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

The second paragraph of 28 U.S.C. § 2671 defines the term "employee of the government."

> "Employee of the government" includes (1) officers or employees of any federal agency, ... and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation,

28 U.S.C. § 2671.

Based on the plain language of the CFDA, 16 U.S.C. § 565a-2, it is apparent that Congress wanted to avoid a debate in federal court about whether cooperators and their employees are "independent contractors." Congress decided that they are "cooperators." 16 U.S.C. § 565a-2 does what its heading says: it describes the "Federal-employee status of cooperators." For purposes of the FTCA, they are Federal employees of the Forest Service when they work under the supervision of the Forest Service. The cooperator need not fit the definition of "Federal agency": it is apparent that the Forest Service is a Federal agency, and Congress has provided that the cooperators are employees of the Forest Service when they work under the supervision of the Forest Service.

The Forest Service argues in its response brief that "if Congress intended to displace the independent contractor test, it could have done so explicitly." *Response Brief,* p. 15. Congress did explicitly replace the independent contractor test; it substituted for cooperators the "work under supervision of the Forest Service" test. Where the Forest Service enters into a cooperator agreement that meets the requirements of the CFDA (serving a mutual interest and benefitting from the Act's exceptions to both the civil service employment rules and the independent contractor bidding selection procedure, and being paid directly from the Forest Service's budget), then whether the cooperator and its employees are treated as employees of the Forest Service for purposes of FTCA coverage depends solely on whether the Forest Service supervises the cooperative project.

To apply the "independent contractor exception" and the complicated law developed long after the CFDA was enacted to distinguish "independent contractors" from employees of an entity which meets the definition of a "federal agency" ignores the plain language of the CFDA.

II. The CFDA's Legislative History Supports the Plaintiff's Reading of the Act's Plain Language.

To the extent that language is considered at all confusing or ambiguous by this Court, it is appropriate to look to the precedent at the time the CFDA was passed as an aid to understanding Congressional intent. *See Cannon v. Univ. of Chicago,* 441

U.S. 677, 698-99 (1979) ("our evaluation of congressional action in 1972 must take into account its contemporary legal context"); *Lorillard v. Pons,* 334 U.S. 575, 580-81 (1978) (Congress is presumed to have had knowledge of the interpretation at the time of any incorporated law, "at least insofar as it affects the new statute"). The Government argues that relying on precedent at the time of passage is inappropriate, but cites not a single case to support that argument. Appellee's Response Brief, at 14.

At the time the CFDA was passed, Congress had recently addressed the precedent construing the FTCA and had urged the federal courts to focus on the common law test for employment. The common law defines an employment relationship primarily by the degree of control the government has over the manner and method by which the work is done; in other words whether the government has supervisory authority.

United States v. Logue, a 1973 Supreme Court case, reviewing and applying the common law definition of employment, was decided in 1973, just two years before the enactment of the CFDA. *Logue,* 412 U.S. at 527-28. *United States v. Logue,* the most recent statement of the law by the United States Supreme Court prior to the enactment of the CFDA, and therefore the precedent relied on by the Congress, explored the FTCA's definition of "employee of the government" found in the second paragraph of the Definitions section of the FTCA. *Logue* noted the differences between the definition of "federal agency" in the first paragraph (which includes the

exception for independent contractors) and the definition of "employee of the government" in the second paragraph. The Court held that the key element of the definition of an "employee of the government" was that the physical performance of the employees of a contractor be subject to government supervision. *Logue,* 412 U.S. at 531-32. This language squares nicely with the use of the term "supervision" by Congress in the CFDA just two years later.

III. Daily Presence at the Job Site is Not Required.

The district court's construction of "supervision over the day-to-day operations" of the crews by the Forest Service to require "daily" or "day-to-day" on-site presence misconstrues the law interpreting the supervision required to establish an employment relationship by the common law and *Logue*.

The term "day-to-day operations" is used in *Logue* to describe the work being done by the workers. The requirement of the law is that the employer have "authority to physically supervise the conduct of the ... employees." *Logue*, 412 U.S. at 530. There is no requirement that the supervision take place daily. It is the right to control the manner and method of reaching the Project's goal that is key. Indeed, this Court has held that the control of the government over the manner and method of the work need not apply to all of the details of the work; it need only extend as to some details. *Jones v. Goodson,* 121 F.2d 176, 179 (10th Cir. 1941). The question posed by *Goodson* and *United States v. Page,* 350 F.2d 28(10th Cir. 1965), both cases decided

prior to the enactment of the CFDA, is whether the workers are free to perform the work independently: free to choosing an approach in opposition to the wishes of the Forest Service.

The cases relied on by the Government in its Response Brief confuse this issue. The Response Brief relies on *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989), *Lurch v. United States,* 719 F.2d 333 (10th Cir 1983), and *Bird v. United States,* 949 F.2d 1079 (10th Cir. 1991). In addition to being decided long after the enactment of the CFDA, all of these cases are medical malpractice cases. This Court in each case is struggling to apply the independent contractor exception in the highly regulated and specialized world of medicine. The nature of medical practice means that nurses and technicians often, by law, are required to be supervised constantly on-site, often in the same room, by a doctor. They are not permitted to practice without this level of supervision. *See Bird v. United States*, 949 F.2d at 1081 (recognizing that regulations require a nurse-anaesthetist to work "under the direct supervision and control of a licensed physician"). The *Bird* court's comment (quoted out of context in the Appellee's Response Brief at page 14) refers to *Lilly* and *Lurch* as helpful "interpretative authority" in applying *Logue* and *Orleans* principles to the specialized world of medical malpractice.

Reading the discussion in *Lilly, Lurch* and *Bird* to require direct on-site daily supervision of workmen performing manual labor is inconsistent with *Logue,*

Goodson and *Page,* and with the principles of the common law of employment. It is apparent that the undisputed examples of intervention by the Forest Service in this case direct the Pueblo and its crews as to the manner and method by which their work must be performed. The Pueblo and its employees were not free to reject the Forest Service's direction as to how their work was to be done. This was not merely directing the results. The results of this Project were measured by the number of trees left per acre, their relatively even spacing, and the depth of the slash or masticated material left on the ground. The Forest Service, however, went well beyond checking to see if these results were achieved. It directed the crews as to how to fell trees, as to how to cut the slash so the required depth would be achieved; as to how to masticate, directing them to vary the size of the materials in a particular way, and as how to trim each individual tree. This is a much different than giving a contractor specifications on the location and slope of the road to be cut and the number and location and number of drainage ditches and letting the contractor do the work when and how that contractor sees fit, inspecting only the results. *See Curry v. United States*, 97 F.3d 412 (10th Cir. 1996). It is different as well from contracting with a corporation to manage a prison, charging the contractor with the safekeeping, care and subsistence of the prisoners, but reserving no authority to control how the contractor runs the prison to accomplish the directed result. *See Logue,* 412 U.S. at 527-28.

IV. Congress Intended to Allow Suit Against the Government; the Forest Service's Disclaimers Conflict with that Intent.

Rather than accepting the plain language of the CFDA and accepting Congress's policy decision to impose liability on the Forest Service for the negligence of cooperators and their employees when the work is performed under the supervision of the Forest Service, the Forest Service has done everything it can at every stage of this Project (including before this Court) to disclaim liability. The Forest Service's lawyers drafted a form to be used for every cooperator agreement. The boilerplate language denies that the Forest Service has any supervisory authority.

> NON-FEDERAL STATUS FOR COOPERATOR PARTICIPANT LIABILITY.
>
> The Pueblo agree(s) that any their employees. volunteers, and program participants shall not be deemed to be Federal employees for any purposes including Chapter l71 of Title 28, United States Code (Federal Tort Claims Act) and Chapter 81 of Title 5 United States Code (OWCP), as the Pueblo hereby willingly agrees to assume these responsibilities....
>
> The Pueblo shall also supervise and direct the work of its employees. volunteers. and participants performing under this agreement.

3 App. 546.

The same form contract is used by the Forest Service for all of its cooperative projects. The Forest Service draws no distinction between cooperative agreements for projects assisting in the primary forest-management work of the Forest Service, where Service officials have special expertise and closely control and supervise the

work, and other cooperative projects (installing sewer systems or sanitary landfills for example) that do not draw on the Forest Service's central expertise and do not require Forest Service supervision.

The Forest Service's strategy of putting very specific instructions in writing, handing the written instructions out on-site directly to the crew members, marking the areas for work on the ground, color-coding each tree to direct how the worker should cut or prune it, are all strategies to reduce the need to visit the site every day to supervise the workers, without giving up control over the manner and method of the work.

Even with these methods of distanced, but still tight control over the details of the work, the Forest Service admitted that it regularly visited the job site to give directions to the crew on how to do the work. The official whose role was identified as "on-site administrator for agreement implementation" (3 App. 554), Aaron Johnson, and whose job was described as "to work on the ground with the Pueblo and crew and manage the operational on-the-ground activities," (2 App. 537), testified that he was on-site with the crew around 50 times or more (2 App. 486) – enough so that he could not recall the number. Mr. Johnson, repeatedly admitted that he directed the workers on *how* to do their work. 2 App. 481, 494-05; 6 App. 1556-57. The crew members confirmed that Johnson had the authority to direct the details of their work and that he exercised that authority frequently. This was not simply review and

correction of the results. That job – inspector – belonged to another Forest Service official. Johnson asserted and exercised the right to control the manner in which the job was accomplished.

As the district court held, disclaimers are ineffective if the cooperator and the crew are otherwise government employees based on the statutory provisions. This Court has agreed. *See Bird v. United States*, 949 F.2d at 1087 (the government disclaimer of liability for the negligence of the contractor, as referred to by the trial court, would be an ineffectual provision as to one otherwise determined to be an employee).

One further point merits mention. The Forest Service in its Response Brief relies on the clause in the Cooperator Agreement quoted above which attempts to transfer liability for any negligence to the Pueblo, stating that "the Pueblo hereby willingly agrees to assume these responsibilities." The Government then criticizes the Plaintiffs for failing to sue the Pueblo directly. Response Brief, 7, 8, 20, 29.

This criticism is not well-founded. As the Government must know, the Pueblo is a sovereign nation, immune from suit. *Kiowa Tribe of OK v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("[a]s 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). The Agreement's terms, as construed by the Government, thus provide no recourse for the members of the public who were severely injured by this

negligently sparked fire. This, of course, is contrary to the clear intent of Congress to protect the public where the cooperative work is performed under the supervision of the Forest Service.

V. The Failure of Forest Service Employees to Require the Pueblo to Correct the Detected Violation of the 18-Inch Slash Depth Safety Requirement is Not Protected by the Discretionary Function Exception.

The Forest Service argues that it placed the burden of inspecting and complying with the 18-inch limit in Unit 4, where the fire started, on the Pueblo and that the decision to do so was protected by the discretionary function exception. Appellee's Response Brief states that "the agreement's prescriptions about slash depth did not apply to the Forest Service, but applied to Isleta Pueblo." *Response Brief,* at 24-25.

The Government ignores the fact that a Cooperator Agreement binds both the Forest Service and the Cooperator to shared objectives. The shared objectives for this Project were approved by the Forest Service at a high level. 6 App. 1354-55. The 18-inch slash depth was imposed as a mandatory limit after the Forest Service weighed the policy concerns and made a decision that fire safety required this limit. The eighteen-inch cutoff kept the fuel load created by the slash on the ground within the standard used by the Forest Service for acceptable wildfire risk. 6 App. 1352 at ¶ 5.

This is not a case where the Forest Service reserved a right to inspect, but made a discretionary decision to leave compliance to the contractor. The Forest Service assumed a mandatory obligation to inspect the work and did so regularly, requiring that areas of non-compliance be corrected before the crew was allowed to move on to the next Unit. *Opinion* at 63 and fn 106, 7 App. 1558. It was undisputed that the Forest Service inspected Unit 4, where the fire started, at the conclusion of the thinning work and that the Forest Service knew that the 18-inch limit had been exceeded by almost double the allowed amount. The Forest Service nonetheless approved the work on Unit 4. *Opinion,* at 71, fn 122, 7 App. 1566. It is also undisputed that the Forest Service decided not to perform its planned prescribed burn in Unit 4 out of concern that the deep slash on the ground would start a wildfire. *Opinion* at 72, fn 125, **7** App. 1567. It was the excessive depth of the slash that made a spark from the masticator turn almost instantly into a conflagration which could not be approached or stopped by the operator.

The decision that is challenged here is the decision of lower level Forest Service employees not to enforce the mandatory Agreement provision which had been adopted by the Forest Service at a high level to govern the cooperative project. Plaintiffs contend that the facts found to be undisputed by the district court establish that 18-inch depth was set by the Forest Service as the safety limit for this Project. Setting this safety limit was admittedly a discretionary policy decision. Once adopted

by the Forest Service and placed in writing in the Agreement, however, it could not be ignored by Forest Service employees assigned to implement the Project. An "employee has no rightful option but to adhere to the directive." *Berkovitz v. United States*, 486 U.S. 531, 535 (1988); *Faber v. United States,* 56 F.3d 1122 (10th Cir. 1995).

In *Domme v. United States,* this Court held that a specific contract requirement that inspections be made, like the mandatory requirement to inspect in this Cooperator Agreement, meant that the Army Corps of Engineers conduct in failing to inspect and enforce safety requirements was not a matter of discretion and did not meet the first prong of the *Berkovitz* discretionary function test. *Domme,* 61 F.3d 787, 791 fn3 (10th Cir. 1995). *Domme* adopts the Eleventh Circuit's analysis in *Phillips v. United States*, 956 F.2d 1071, 1076 (11th Cir. 1992). *Phillips* holds that where the Army Corps of Engineers assumed substantial, mandatory responsibilities for insuring a safe working environment, negligent performance of that contractual obligation was not a matter of discretion. *Phillips* distinguishes this contractually-assumed obligation from the "spot checks" for safety violations found by the Supreme Court in *Varig Airlines* to be a permissible exercise of discretion. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819 (1984).

The Government's argument here fails for the same reason as it did in *Domme:* this was a mandatory safety standard set by the Forest Service and the Service's

employees lacked the discretion to disregard it. Therefore, the decision of Forest Service employees to allow the detected violations of a safety requirement to remain without correction is not protected as a discretionary function exception. Forest Service employees had no choice but to comply with the Service's mandatory policy.

Plaintiffs renew the arguments made in their *Opening Brief* on the Forest Service's failure to enforce compliance with the 18-inch limit, the failure to post or require the Pueblo to post a fire guard on the day of the fire and the failure to locate a water truck near the mastication. *See Opening Brief*, at 47-49. If this Court agrees that these decisions or any one of these decisions made by Forest Service employees are not protected by the discretionary function exception, then remand for trial on the questions of fact found to be in dispute by the district court is required.

VI. The Plaintiffs Fully Satisfied the Notice Requirement of the FTCA.

The Government mounts no effective challenge to the adequacy of the Ohlsen Plaintiffs' notice, and therefore, the Ohlsen Plaintiffs' argument will not be repeated here. *See Opening Brief* at 49-53.

As to the Notices of Claim provided by C' de Baca, Cianchetti and Sais Plaintiffs, the Government argues that notice cannot be provided by the attachment and incorporation of one or more documents into the body of the Notice.

Perhaps if the documents attached were irrelevant to the claims made or so voluminous that review was impractical, the Government would have a point. Here, however, the documents attached were the results of the Forest Service's own investigation of the causes of the fire. The first document is the Forest Service's report on the Dog Head Fire. The second document is the newspaper's summary of the meeting held by the Forest Service to release the report where the Forest Service answered the questions and addressed the concerns of the community, including those of the Plaintiffs. The Forest Service was thus intimately familiar with the contents of the attachments.

In addition, it is normal legal practice to include attached documents as part of a complaint. Rule 10(c)of the Federal Rules of Civil Procedure provides that attachments to a complaint are part of the complaint for all purposes: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Why this widely accepted practice would not be true in a Notice of Claim is not explained by the Government.

The two-page newspaper article attached to the Notice of Claim put the Forest Service on notice that the C' de Baca, Cianchetti and Sais Plaintiffs were challenging both the negligence of the Forest Service and that of the Pueblo and crews in allowing the slash to accumulate. App. 1069-1070. The article cites the depth of the logging slash in letting the fire quickly become too large to fight, it also discusses the lack of

firefighting equipment on hand and the absence of a water tender, as well as the absence of fire restrictions. App. 1070. The Forest Service report describes the fire starting when the masticator hit a rock, igniting the deep slash. *Id.*

This was more than enough to put the Forest Service on notice of the Plaintiffs' claims that the Pueblo or the Forest Service negligently allowed undergrowth and slash to accumulate and that the Forest Service failed to provide proper fire extinguishment tools.

CONCLUSION

This Court should reverse the judgment of the district court dismissing this action for lack of jurisdiction and remand for trial on the merits of Plaintiffs' negligence claims. If this Court decides that the claims against the Pueblo and its crews are barred either because the crews were not supervised by the Forest Service or because the notices of claim were insufficient, this matter should nonetheless be remanded for trial on the merits of any claims against the Forest Service officials found not barred by the discretionary function exception.

ORAL ARGUMENT IS REQUESTED

Oral argument is requested in order to clarify the complex jurisdictional issues in this case and to answer any questions the Court may have.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,745 words. (Less than 6,500)

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Date: June 30, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of June, 2020, filed the foregoing pleading electronically with the United States Court of Appeals for the Tenth Circuit, causing the same to be electronically served on all counsel of record.

/s/ Jane B. Yohalem
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Reply Brief for Plaintiffs-Appellants has been scanned for viruses with the Microsoft Windows Defender Anti Virus Program, updated June 30, 2020, and, according to the program, is free of viruses.

In addition, I certify all required privacy redactions have been made.

Dated: June 30, 2020.

/s/Jane B. Yohalem
Jane B. Yohalem