No. 20-35012

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Raju Dahlstrom, *Petitioner*
v.
United States of America et al, *Respondents*

ON APPEAL FROM UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

REPLY BRIEF

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I. INTRODUCTION

In its response brief the United States attempts to refute the argument raised in the opening brief, by first claiming that the acts for which Raju Dahlstrom (Dahlstrom) seeks relief, are not covered by the Federal Torts Claims Act because he failed to demonstrate that the acts complained of were covered by Section 314 of the act of Congress that was passed in 1990 to make the tribe a federal agency for the purpose of the FTCA.

The United States, then argues that if the court does not rule in favor of the government on this issue, then it wins on an alternative theory raised in the district court, which was not addressed by Judge Lasnik. It claims the discretionary function exception to the FTCA independently bars Dahlstrom's suit.

As shown by this reply brief, neither of these arguments have merit.

II. REPLY TO THE UNITED STATES "FACTUAL BACKGROUND"

The United States, in its response brief, utilizes a tactic where it attempts to convert a disputed issue of law, into an uncontested fact in its factual background to the case. On page 9 of its response, it asserts neither the contract nor the annual funding and scope of work agreements under the contract contain any provisions governing the Tribal Council's human resources decisions. In support of this conclusion, the government only points to a self-serving declaration by Rena Macy

who only makes a conclusory allegation in support of the conclusion. Belying her own conclusion, she cites to Attachment A which clearly requires the tribe to have "laws, policies, and procedures" which "shall provide for administrative due process (or the equivalent of administrative due process) with respect to the programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract".

The United States provided absolutely no evidence that it had retained the right to manage the employees with its own human resource department. In fact, it is beyond doubt that the tribe was to manage the employees because of the numerous references in the contract which refer to the tribe's management of the programs. ER 95 §a(2), ER-96 §b(3), ER-98 §b(7)(B&C), ER 99 §b(8)(B)(D), ER 100§b(8)(G), ER§(b)(11), ER 102§(b)(13), ER103§(b)(15)(B), ER 104§(c)(1,3,5). Thus, the United States has no argument that it did not transfer managerial functions to the tribe as part of contract.

Similarly, the United States provided no authority for its argument on page 9 and 10 of its brief, that "Like the HIS contract, the BIA contract and the annual-funding agreements under it contain no provision for programs, functions, services or activities relating to human resources actions taken by the Tribal Council." In support of this alleged "fact" the United States submitted another self-serving

conclusionary allegation by Cheryl Barnaby, which again fails to support the conclusion because she could not provide any evidence that the United States has retained the right to manage the employees or that it had not transferred this function to the tribe.

On page 20 of its brief, the United States represented to the court that in Dahlstrom's motion to amend or alter the judgment simply reiterated his previous argument that the United States had waived sovereign immunity because Dahlstrom's position was covered by the contract. In support of this "fact", the court referred to the court's finding in this regard.

However, an examination of the actual motion that was submitted, demonstrates that this is not true (FER 3-10). That motion clearly laid out, as was done in the opening brief for the appellant here, that the reason the United States had waived sovereign immunity was because the tribal council and the tribe itself had management functions transferred to it by the United States as part of the contract. As support for his argument, Dahlstrom cited to the specific terms of the contract itself. (FER 5, §§3, 5) (FER 6-7)

III. REPLY TO UNITED STATES ARGUMENT

A. Dahlstrom has met his responsibility of establishing subject matter jurisdiction under the FTCA.

In attempting to escape liability under the FTCA, the United States used the same tortured reasoning used by the trial court. As the United States itself points out, it is the responsibility of Dahlstrom to point out the provisions of the contract the tribe is accused of violating and to show it was carrying out the contract when they terminated him. They also do not apparently disagree with his assertion that he himself was carrying out the contract in his position with the tribe.

Dahlstrom clearly identified the contract in the record below, and in his opening brief. The contract clearly obligated the tribe to provide certain medical services that had previously been provided the United States government. There has been no evidence submitted nor even an allegation made, that the United States government retained or used its own human resource division to manage the employees.

They have conceded that to "carry out" the ISDEAA contract is "to put into execution." Obviously, in order to put into execution their responsibilities they have to hire employees and manage them in order to insure their obligations are met. Included in this management responsibility would be to discipline or terminate employees.

Instead, they claim that they can somehow absolve themselves of responsibility for the contract that they themselves signed and agreed to by acting like the clever monkey in Aesop's fable. They want to blame someone else, like a subordinate employee (i.e., the cat's paw), when they themselves assumed responsibility when they signed the contract.

They have supplied absolutely no authority in support of their argument. In Washington, where parties are represented by counsel, courts may assume that where no authority is cited, counsel has found none after search. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978). The Ninth Circuit Court of Appeals has made similar rulings: See *Acosta Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); see also *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Meehan v. County of L.A.*, 856 F.2d 102, 105 n.1 (9th Cir. 1988).

The United States includes in its argument a couple of strange statements. First, it says that Dahlstrom did not even attempt to meet his burden of establishing subject matter jurisdiction. Yet they concede that he established that his position was used to manage the contract provisions. The only thing left was to show was they also participated in managing the contract by assuming work that had previously been done by the United States, which should have been obvious by the terms of the contract. The court apparently did not realize the obvious, so Dahlstrom explained the obvious in his motion to set aside judgment which the court and the United States promptly ignored. It was pointed out at the court of appeals in the opening brief which the United States again ignores, and then inexplicably claimed Dahlstrom never addressed in its response.

The United States makes the following conclusions citing to no authority at all.

> If it were enough to satisfy the *Shirk* test that an employee of the Tribe was terminated from a job in which he had some responsibility for carrying out an ISDEAA contract, then no one could be fired from a program under an ISDEAA contract without turning the decision into one of potential FTCA liability.
>
> So?
>
> It does not make the United States liable for a tribe's employment decisions simply because the decision concerned someone working in one of these programs.
>
> Authority?
>
> In the district court, Dahlstrom did not even attempt to identify a provision of an ISDEAA contract that the Tribal Council was carrying out when it fired him. His opening brief on appeal also fails to identify any specific contract provision that the Tribal Council was carrying out.

These are untrue assertions. Dahlstrom clearly identified the contract and the tribe's responsibility to carry out the contract by managing the employees in both the district court and in his opening brief. He cannot be held responsible if the court and the United States ignores his arguments.

The United States cites to *Greenwood* v. *FAA* 28 F.3d 971, 977 (9th Cir. 1994), for the proposition that that an argument is waived if the plaintiff did not

argue for it on appeal. Dahlstrom argued it, the United States just ignored the argument.

B. Dahlstrom properly preserved his arguments that the tribal counsel in the district court served as supervisors.

On page 31 of its Response brief, the United States makes the claim that on appeal, Dahlstrom raised a "new argument" citing to his response to summary judgment. In fact, Dahlstrom on more than one occasion raised the supervisory liability issue several times and made reference to the fact that the tribal council was responsible for managing the contract.

For example, in his response to the motion for summary judgment on page 11 (1 SER 12) at footnote 39 he carefully explained his argument for tribal council liability by citing to *Colbert v. United States*, 783 F.3d 1384, 1390 (11th Cir. 2015):

> [A]n Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau Affairs in the Department of the Interior or Indian Health Service while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while carrying out the contract or agreement.

Here it should have been obvious, that the tribe was covered, as the contract could not be completed if it were not managed by someone, which in this case should have been the tribal council. When the court ignored this and concluded that somehow the contract did not cover oversight by the tribe, Dahlstrom pointed out that section (a)(2) of the contract required the tribe to provide certain services,

which they had assigned to the Health and Social Services director to oversee and manage. He argued that this position was logical and necessary for the contracted for projects to be completed.

> Even with only this, the Tribal Council would definitely be carrying out the contract when it hires, manages and/or terminates the Health and Social Service Director, thus waiving the sovereign immunity of the United States and making the federal government liable under the FTCA and 25 U.S.C. § 450f for any tortious actions committed in making such employment decisions. FER 5

He then went on to argue that another portion of the contract section (f)(2) made detailed listings of the functions that the tribe had contracted to provide and how these functions would necessarily require supervision by the tribe. (FER 6-7).

Finally, he argued that prior to the adoption of the ISDEAA in 1975, that the functions performed by the Health and Social Services Director and the tribal council were performed by federal employees directly as well the United States itself. He pointed out that the United States was liable under the FTCA directly, it made sense for the government to be held liable when the tribe performed those same functions.

Inexplicably, the court ignored all of these arguments and stated that Dahlstrom had merely made the same argument he had before. Even more inexplicably the United States argues he never made these arguments. As before, he made the arguments, the court and the United States ignored them.

Between page 27 and 29 of its response brief, the United States attempts to fashion some kind of arguments that cite to no authorities for their supposedly logical reasoning. As before, Dahlstrom's response is simply the same as argued above, that the tribal council carried out the supervision and management of its contracts as the contracts themselves required they should, and the termination of Dahlstrom was part of that. If they wanted to argue that his termination was for some other reason than retaliation, they are free to do so during trial, but whether their argument is true or is simply a pretext, is a question of fact that should have been decided by a finder of fact, not on summary judgment.

Also, on page 30, the United States attempts to argue that the fact that a substitution was not made by the government is prima facie evidence that the government was not liable under the FTCA, citing to *Billings* v. *United States*, 57 F.3d 797, 800 (9th Cir. 1995). In fact, *Billings,* said no such thing; *Billings* ruled just the opposite, that if a substitution was made than that was prima facie evidence that the government was liable. If what the government is saying is true, then it could escape liability simply by ignoring its responsibilities under the FTCA. The same could be said for the tribe's refusal to challenge the decision not to substitute.

C. The so-called discretionary function exception cannot be applied to this case.

The United States also raise the so-called "discretionary function exception" that it raised before the district court but was never fully addressed by the district court. According to the United States, this is an exception "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see also Chadd* v. *United States*, 794 F.3d 1104, 1108 (9th Cir. 2015) (explaining that the exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."). (United States Response brief p.33).

The United States point out that there is a two step process under *United States* v. *Gaubert*, 499 U.S. 315, 322-23 (1991) and conceded The United States bears the burden of showing that the discretionary function exception applies, citing *Bailey* v. *United States*, 623 F.3d 855, 859 (9th Cir. 2010).

The United States correctly points out that Dahlstrom argued that violations of the First, Fifth and/or Fourteenth Amendments were not an exercise of discretion that the exception was designed to allow and Judge Lasnik agreed:

> To the extent plaintiff is asserting a wrongful termination claim under state law, however, violations of the First, Fifth, and/or Fourteenth Amendments could be used to show that defendants exceeded their discretion and are therefore not protected by the discretionary function exception. See *Loumiet v. U.S.,* 828 F.3d 935, 942-46 (D.C. Cir. 2016). ER 21 (Reversed on other grounds at 948 F.3d 376 (2020).

So, what was the argument put forward by the United States to satisfy their burden of proof? A look at its brief reveals only one argument:

> But the Sauk-Suiattle Tribe is a separate sovereign from the United States and is not regulated by the First, Fifth, or Fourteenth Amendments. (United States Brief p. 38)

Really?

What is the authority for that? The United States lists no authority at all! As argued earlier, since the United States is represented by counsel, and no authority is given, the court should assume there is no authority exists. It is not for appellant nor the panel to make the arguments for them.

Courts have consistently held that the United States-specifically Congress-has plenary, or absolute, power over Indian tribes.[1] " The United States has not (and

[1] See *e.g., United States v. Wheeler*, 435 U.S. 313, 319 (1978) The power to govern and to legislate which arises from the fact of possession of territory was articulated by Chief Justice Marshall in *American Ins. Co. v. Canter,* 26 U.S. (1 Pet.) 511, 542-43 (1828). It was expressly applied to Indians, who were within the geographical limits of the United States, by the Court in *United States v. Kagama,* 118 U.S. 375, 379-81 (1886). The Court has also indicated that the basis of Congress' power over tribes and Indians is the Commerce Clause. *See McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 172 n.7 (1973).

cannot) explain how it can have plenary power over a supposedly separate sovereign.

Furthermore, Dahlstrom argues that Congress has embarked on a course of conduct that has assimilated the tribes into United States to such an extent that the bill of rights have to be applied to the tribes as well. Examples of this are laws that grant Indians citizenship[2], laws that allot Indian land[3], and laws that deny Indian tribes status as independent countries or nations.[4]

While Dahlstrom concedes that at some point in history the tribes may have been independent separate sovereigns, all of that was out the window by 1924 when all Indians achieved citizenship status. By that time the policy of the United States was to assimilate Indians into the United States. While the approach was piecemeal, the entire effect was to assimilate Indians into the rest of society. No further legislation was needed.

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[2] The Indian Citizenship Act of 1924, also known as the Snyder Act, (43 Stat. 253, enacted June 2, 1924) was an Act of the United States Congress that granted US citizenship to the indigenous peoples of the United States, called "Indians" in the Act. While the Fourteenth Amendment to the United States Constitution defines as citizens any persons born in the United States and subject to its jurisdiction, the amendment had previously been interpreted by the courts to not apply to Native peoples.

[3] *See* General Allotment Act, ch. 119, 24 Stat. 388, 390 (1887).

When Congress passed the Indian Reorganization Act of 1934, its purpose was to reverse this trend by granting some of the rights back to the tribes. In doing so, it started with a clean slate. In *Morton v. Mancari,* 417 US 535 the United States Supreme Court stated the purpose of the Indian Reorganization Act was as follows:

> Congress was seeking to modify the *then-existing situation* whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." *Morton*, 417 US at 542 (emphasis added).

Thus, by 1934 there had been a complete defeasance of tribal sovereignty. When Congress granted new rights through the Indian Reorganization Act[5], it allowed Indians to organize, to adopt constitutions and bylaws,"[6] and to have certain powers in addition to those vested by existing law."[7]' The Act further provided for tribal incorporation, which vested tribes with the power to purchase property, to conduct business, and to sell land.[8]" The Act gave the Secretary of the

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[4] After the Indian Appropriation Act of March 3, 1871, tribes were no longer regarded as sovereign nations
[5] 25 U.S.C. §§ 461-479 (1994).
[6] 25 U.S.C. § 476(a) (1994).
[7] 25 U.S.C. § 476(e) (1994).
[8] 25 U.S.C. § 477 (1994).

Interior the power to provide for new Indian reservations and to add land to existing reservations."[9]

In passing the Indian Reorganization Act, Congress started with a clean slate. The power for the tribal governments came directly from Congress.

But Congress can only create governments and courts that comply with and are subject to the constitution of the United States.[10] The United States treats territories in a similar fashion, and in *United States v. Kagama,* 118 U.S. 375, 379-81 (1886), the United States Supreme Court suggested that Congress' power over the territories and its power over the Indian tribes were the same.

The Supreme Court has consistently held that when Congress establishes governments and courts in territories it must require that the resulting government comply with the United States Constitution." In *Rassmussen v. United States,* 197 U.S. 516 (1905), the Court held that Congress, in establishing the Territory of Alaska, did not have the power to provide for a jury trial that did not comply with the Sixth Amendment." *Id* at 526-527. In its analysis the Court concluded that the Constitution was self-operative, and that the Constitution applied to the territories even if Congress did not so indicate. *Id* at 526-527.

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[9] 25 U.S.C. § 467 (1994).
[10] *Reid v. Covert*, 354 U.S. 1, 12-14 (1957).

The same should hold true for the tribes, whether the legislation explicitly states so or not. Therefore, the United States argument that the it is entitled to the so-called discretionary function exception fails for the same reason it lost in the district court. There is no argument that that the constitution can be ignored when a government is making a political or policy decision. As argued above, political or policy decisions which violate the United States Constitution are not the kind of decisions that discretionary function exception was designed to protect.

IV. CONCLUSION

For the reasons given in this reply brief, the decision of the District court should be reversed and the case remanded back for trial.

DATED this 19th day of June 2021

/S/ *John Scannell*

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DECLARATION OF SERVICE

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