IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NAVAJO AGRICULTURAL
PRODUCTS INDUSTRY,

Plaintiff,

v. Civ. No. 1:20-CV-01183 KK/JFR

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA'S MOTION TO DISMISS

Defendant United States of America moves to dismiss Plaintiff's claims under the Federal Tort Claims Act on the grounds that the suit is barred by the statute of limitations. In addition, even if timely brought, Plaintiff's claims are not cognizable under the Federal Tort Claims Act. Finally, Plaintiff has failed to exhaust claims for negligent hiring, training, and supervision and for vicarious liability, and, even if exhausted, such claims are subject to dismissal.

Counsel for Plaintiff was contacted and opposes this motion.

INTRODUCTION

This claim arises from a 2016 pipe failure within the Navajo Indian Irrigation Project (NIIP). On May 13, 2016, two 20-foot sections of Pipe 197 within the Kutz Siphon of the NIIP failed.[1] The pipe failure occurred upstream from Plaintiff Navajo Agricultural Products Industry's (NAPI) farm. Working cooperatively, the Bureau of Indian Affairs (BIA), the Bureau of Reclamation (BOR), Four Corners Construction Office (FCCO), and NAPI completed repairs

[1] The Kutz Siphon is a pre-stressed concrete pipe measuring 17.5 feet in diameter with a capacity of 1,800 cfs.

on the Kutz Siphon, Pipe 197 and waterflow through the pipeline resumed on June 10, 2016, less than a month after the pipe failed.

Plaintiff's suit alleges NAPI sustained significant damage due to the disruption in irrigation capacity. However, Plaintiff's administrative tort claim was filed on February 22, 2019 more than two years after the pipe failure. *See* SF-95, attached as Ex. 1. Therefore, Plaintiff's claims for negligence are untimely and should be dismissed for failure to meet the statute of limitations. *See* Federal Tort Claims Act (FTCA), 28 U.S.C. §2401(b).

Even if Plaintiff's suit were timely filed, Plaintiff's Complaint fails to set forth a cognizable claim for negligence. Inasmuch as the United States has not waived sovereign immunity except as set forth in the FTCA, Plaintiff's claims should be dismissed. In addition, Plaintiff has failed to exhaust its administrative remedies under the FTCA for negligent hiring, training, and supervision and for vicarious liability. Thus, Plaintiff's Counts II and III should be dismissed for lack of jurisdiction. Finally, even if exhausted, Plaintiff's Count II is subject to dismissal under the discretionary function exception to the FTCA, and Plaintiff's Count III exceeds the scope of waiver of sovereign immunity under the FTCA and should also be dismissed.

STANDARD OF REVIEW

I. Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) allows a party to raise the defense of the court's "lack of jurisdiction over the subject matter" by motion. Fed. R. Civ. P. 12(b)(1). The Tenth Circuit has held that motions to dismiss for lack of subject-matter jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject-matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*,

299 F.3d 1173, 1180 (10th Cir. 2002)(VanBebber, J.).

> On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a rule 12(b)(6) motion: the court must consider the complaint's allegations to be true. See *Ruiz v. McDonnell*, 299 F.3d at 1180; *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981). But when the attack is factual, a district court may not presume the truthfulness of the complaint's factual allegations. A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

Alto Eldorado Partners v. City of Santa Fe, 2009 WL 1312856, at *8-9 (D.N.M. Mar. 11, 2009)(Browning, J.)(citations omitted)). The United States Court of Appeals for the Fifth Circuit has stated:

> [T]he trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981)(Randall, J.)(quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). In those instances where the parties go beyond the pleadings, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a rule 56 motion for summary judgment. See *Holt v. United States*, 46 F.3d at 1003 (citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987). Where, however, the court determines that jurisdictional issues raised in a rule 12(b)(1) motion are intertwined with the case's merits, the court should resolve the motion either under rule 12(b)(6) or rule 56. *See Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir. 1999); *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997).

II. Fed. R. Civ. P. 12(b)(6)

Rule 12(b)(6) authorizes a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The sufficiency of a complaint is a question of law, and, when considering a rule 12(b)(6) motion, a court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007)("[O]nly if a reasonable person could not draw . . . an inference [of plausibility] from the alleged facts would the defendant prevail on a motion to dismiss."); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)("[F]or purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pled factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." (citing *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006)).

FACTUAL BACKGROUND

I. The Navajo Indian Irrigation Project [NIIP]

The Navajo Indian Irrigation Project is a network of irrigation facilities that takes water from the Navajo Dam and Reservoir located in the San Juan River Basin in northwest New Mexico.

In 1962, Congress authorized the Secretary of the Interior to "construct, operate, and maintain the Navajo Indian irrigation project for the principle purpose of furnishing irrigation water to approximately [110,630] acres of land, said project to have an average annual diversion of [508,000] acre-feet of water …." Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96

(1962), as amended (NIIP Act).[2] Pursuant to the NIIP Act, before water was delivered to NIIP project lands, the Navajo Nation and the United States were required to enter into a water delivery contract. *Id*. § 11(a), 76 Stat. at 99-100.

Construction on the NIIP project started in 1964. The Kutz Siphon is one of four large diameter siphons that BOR constructed between 1971 and 1975 for the NIIP. After construction, BOR transferred the NIIP facilities, including the Kutz Siphon, to the BIA. In 1976, the United States, through BOR, entered into an agreement with the Navajo Nation providing that the Commissioner of BOR "shall deliver water to the Navajo Nation" in accordance with the obligations set forth in the NIIP Act, and "such deliveries [are] to be made through the main canal headworks at Navajo Dam for the Navajo Indian Irrigation Project." Contract No. 14-06-W-269 (April 10, 1976). The first release of official water into the NIIP occurred in 1976 and was concurrent with the execution of the water delivery contract between the United States and the Nation.

Eventually, the BIA entered a contract with the Navajo Nation to transfer operation, maintenance, and rehabilitation responsibilities for the NIIP to the Nation through a contract pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"). *See e.g.* Contract A16AV00382. ISDEAA authorizes federally recognized tribes to take over government programs and services historically operated by the BIA. *See Shirk v. United States ex rel. Dept. of Interior*, 773 F.3d 999, 1002 (9th Cir. 2014). Under the ISDEAA, a tribe receiving certain BIA services may enter into a contract with the BIA to assume responsibility for that BIA service or program and "operate it as a contractor and receive the money the BIA would have otherwise

[2] In 2009, Congress amended the NIIP Act to describe that the diversion quantities identified in the original act are maximum amounts and to authorize the use of NIIP water for purposes other than irrigation. *See* Pub. L. No. 111-11, 123 Stat. 991 (March 30, 2009).

spent on the program." *Id*. (internal citation and quotation omitted). "These contracts are commonly called '638 contracts,' in reference to the public law number of the ISDEAA." *Id.* In 2016, the BIA and Plaintiff NAPI renewed the 638 contract that transfers operation and maintenance function for the NIIP from the BIA to NAPI. *See* Contract A16AV00382. The 638 contract with NAPI covers NIIP "Operations, Maintenance & Replacement, On Farm Development, [and] Agricultural Testing Research Laboratory Programs." The Scope of Work identifies the entirety of the NIIP, and under this Scope of Work, NAPI "*has authority and responsibility for the management, operation and maintenance of the Navajo Indian Irrigation Project,* including the authority to enter contracts." *Id.* (Annual Funding Agreement Contract No. A16AV00382, Attachment 1 Scope of Work, 1-3 (emphasis added)).

II. NAPI's Administrative Claim

The Navajo Nation Risk Management Program and Plaintiff NAPI, through counsel, filed an SF-95 dated February 22, 2019 and mailed March 7, 2019, more than two years after the pipeline failure on May 13, 2016. The claim states:

> A 17.5 foot diameter concrete cylinder pipe failed in the Navajo Indian Irrigation Project (NIIP) in Farmington, New Mexico. This pipe, installed in 1972, featured double-wire wrap with a 16-gauge steel liner. Electromagnetic inspections done by the Bureau of Reclamation (USBR) showed an increase from 30 wire breaks in 2002 to 60 breaks in 2010 in this section of pipe. In 2016, the pipe ruptured and blew concrete up to 200 feet away. 75,000 acres of irrigated land were out of service. In August 2017 Claimant learned from a report issued by the USBR that the USBR admits it was negligent in its inspections and maintenance.[3]

See SF-95, attached as Ex. 1. NAPI states that "the siphon is located in the canal system near the Kutz Pumping plant." *Id*. NAPI alleged property damage in the amount of $8,000,000 due to "loss of crop revenue, forced reductions in labor force, and loss of water access to community livestock, residences, and businesses." *Id*. Plaintiff's claim

[3] Defendant denies that the Bureau of Reclamation admits negligence in its inspections and maintenance.

was denied for failure to comply with the two-year limitations period set forth in 28 U.S.C. § 2401(b) on May 14, 2020. *See* Determination, dated May 14, 2020, attached as Ex. 2.

LEGAL ARGUMENT

I. The FTCA Statute of Limitations Bars NAPI's Claims

Claims under the FTCA can only be brought under the terms and conditions of that Act. *See McNeil v. United States*, 508 U.S. 106, 111, 113 S.Ct. 1980, 1983 (1993). "'[A] tort claim against the United States shall be forever barred unless it is presented to the appropriate Federal agency within two years after such claim accrues.'" *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (quoting 28 U.S.C. § 2401(b)). "The purpose behind 28 U.S.C. § 2401(b)—the limitations provision of the FTCA—is to require the reasonably diligent presentation of tort claims against the government." *Arvayo v. United States*, 766 F.2d 1416, 1418 (10th Cir.1985) (citing *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979)).

Federal law governs the point at which a claim accrues under the FTCA. *See Cannon v. United States*, 338 F.3d 1183 (10th Cir. 2003) (citing *Hoery v. United States*, 324 F.3d 1220, 1222 (10th Cir.2003)). While the FTCA itself does not speak to when a "claim accrues," the Supreme Court has stated, "the general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury." *United States v. Kubrick*, 444 U.S. at 120. In turn, the Tenth Circuit has held that "the general rule for accrual of an FTCA claim outside the medical malpractice context is the injury-occurrence rule.'" *Cannon*, 338 F.3d at 1190. In the Tenth Circuit, "an FTCA tort claim accrues on the date of the injury's occurrence." *Id*. (citing *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1267–68 (10th Cir.2002)). The Tenth Circuit will only apply a different rule, "the discovery rule," in "exceptional" cases "where a reasonably

diligent plaintiff could not immediately know of the injury and its cause." *Id*.

Under the discovery rule, "a claim does not accrue until the injured party knows of both the existence and cause of the injury." *Plaza Speedway Inc.,* 311 F.3d at 1267. The discovery rule is most commonly applied in medical malpractice cases to protect plaintiffs "'who are blamelessly unaware of their claim because the injury has not yet manifested itself or because the facts establishing a causal link between the injury and the medical malpractice are in the control of the tortfeasor or otherwise not evident.'" *Id*. (quoting *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir. 1999)). The Tenth Circuit has explained that the discovery rule applies in "an exceptional case in which the plaintiffs could not have immediately known of the injury." *Id*. at 1268. The party claiming the benefit of the discovery rule bears the burden of showing that he is entitled to it. *Osborn v. United States*, 918 F.2d 724, 731 (8th Cir. 1990). The party must show that due diligence was exercised and that critical information, reasonable investigation notwithstanding, was undiscoverable. *Gould v. U.S. Department of Health and Human Services*, 905 F.2d 738, 745-46 (4th Cir. 1990).

In this case, NAPI filed its administrative clam in March 2019, nearly three years after the Kutz Siphon failed on May 13, 2016. In its claim, NAPI stated, "[i]n August of 2017, Claimant learned from a report issued by the USBR that the USBR admits it was negligent in its inspections and maintenance." *See* SF-95, Ex. 1. With this statement, NAPI appears to be advocating for application of the discovery rule to this claim, which would have tolled the FTCA statute of limitations until NAPI knew of both the fact of its injury and its cause. *See Plaza Speedway*, 311 F.3d at 1267. This is not however, the "exceptional case" in which the discovery rule should apply. *Cannon*, 338 F.3d 1190. And, even if applicable, the discovery rule should not toll the two-year limitations period.

The Tenth Circuit has explained that the "discovery rule should be applied only when the injury is unknowable by its very essence, i.e., its existence at the critical moment simply cannot be ascertained." *Dahl v. U.S.*, 319 F.3d 1226, 1229 (10th Cir. 2003) (internal citation and quotations omitted). In *Dahl*, the court held that there was no basis to depart from the general rule to save the plaintiffs' claim that the BLM wrongfully destroyed plaintiffs' stockpile of mineral ore on their mining claim. The court found that plaintiffs' claim, filed three years after the BLM destroyed the stockpile, was untimely. The court rejected the plaintiffs' argument that the discovery rule should be applied to their claim because plaintiffs' mining claim was remotely located, and plaintiffs were unaware of the BLM's actions. In rejecting application of the discovery rule, the court described, "[t]he injury was neither inherently unknowable nor latent. Plaintiffs could have discovered what had happened at any time after the leveling." *Id*. at 1229 (internal citations and quotations omitted). The court explained, "[t]he fact that a plaintiff happens to be ignorant of a potential claim, whether because the plaintiff was not diligent in monitoring its land or because observing the taking would extract a hardship on plaintiff in terms of money, manpower, time and effort is not enough to justify application of the discovery rule." *Id*.

As in *Dahl*, NAPI's alleged injury was neither unknowable nor latent. It is difficult to imagine a more obvious injury than the failure of a 17-foot pipe. NAPI was also immediately on notice of its injury – the interruption of water flow. In fact, NAPI describes that the occurrence "ruptured [the pipe] and blew concrete up to 200 feet away. 75,000 acres of irrigated land were out of service." *See id.* Similarly, Plaintiff had direct knowledge of when the water resumed its flow, even participating in the repair effort. Therefore, the Court should reject any argument that NAPI did not know the cause of the injury until the BOR produced a report in 2017. At the time

of the pipe failure, NAPI knew of its injury and that the injury caused a significant failure in the NIIP system. The statute of limitations should not have been tolled while NAPI investigated the legal cause of its claim or waited for the Government to identify potential negligence. For FTCA purposes, "[a] claimant is aware of the injury once ... apprised of the general nature of the injury. Lack of knowledge of the injury's permanence, extent, and ramifications does not toll the statute." *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir.1981) (medical malpractice claim); *see also Robbins v. United States*, 624 F.2d 971, 973 (10th Cir.1980) (uncertainty as to the "ultimate damage" does not toll § 2401(b)).

Finally, the FTCA places a burden on plaintiffs to exercise reasonable diligence to determine whether they have a cause of action. Where—as in this case—the cause of action is obvious, "[t]here is no injustice in adhering to the two-year limit" in the FTCA. *Dahl*, 319 F.3d at 1229. Here, NAPI had sufficient knowledge that an injury had occurred, and was on sufficient notice to initiate an inquiry into the cause of the pipe failure. *Plaza Speedway Inc. v. United States*, 311 F.3d at 1262. The two years thereafter was adequate time for them to initiate inquiry into any possible harm. *See id*. at 1270.

Plaintiff's claim accrued on May 13, 2016 with the failure of the Kutz Siphon, Pipe 197. Alternatively, Plaintiff's claim accrued no later than June 10, 2016, when waterflow resumed. Because Plaintiff's administrative claim was filed more than two years after that date, the district court should dismiss Plaintiff's claim for lack of subject matter jurisdiction.

II. The United States Has Not Waived Sovereign Immunity Under the FTCA For Plaintiff's Claims

Even if Plaintiff's suit meets the statute of limitations under 28 U.S.C. § 2401(b), Plaintiff's Complaint should be dismissed for failure to state a claim.

Plaintiff's Complaint asserts three causes of action related to the inspection and

maintenance of the NIIP, all sounding in negligence. The essence of Plaintiff's negligence claims is that the United States had a duty to provide water and because of negligence failed to provide that water. Plaintiff claims it sustained agricultural losses because water was not delivered through the NIIP while it was under repair, but a governmental failure to deliver water does not give rise to a tort claim. Plaintiff cannot set forth any duty on the part of the United States to deliver water outside of the statutory duty under the NIIP Act, Pub. L. No. 87-483, 76 Stat. 96, and its amendments, Pub. L. No. 111-11, 123 Stat. 991, or related water agreements. An alleged breach of statutory or contractual obligations is not covered by the FTCA. As sovereign, the United States "can be sued only to the extent that it has waived its immunity" from suit. *United States v. Orleans*, 425 U.S. 807 (1976). Absent a waiver of sovereign immunity, a federal court does not have subject-matter jurisdiction over cases against the United States. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA waives sovereign immunity for "tort claims … in the same manner and to the same extent as a private individual under like circumstances …." 28 U.S.C. § 2674. The FTCA was enacted to address ordinary torts under state law committed by federal employees. The FTCA "was not intended to redress breaches of federal statutory duties." *Zelaya v. United States*, 781 F.3d 1315, 1323-24 (11th Cir. 2015); *see also United States v. Agronics Inc*., 164 F.3d 1343, 1345 (10th Cir. 1999). Additionally, "[t]he FTCA does not extend subject matter jurisdiction over breach of contract claims." *Haney v. Castle Meadows, Inc*., 868 F.Supp. 1233, 1237 (D. Colo. 1994) (citing *Davis v. United States*, 961 F.2d 53, 56 (5th Cir.1991)).

Here, Plaintiff cannot identify a private party duty to deliver water, and therefore, cannot state a claim for negligence for which the United States has waived its sovereign immunity. To the extent NAPI is alleging the United States failed to meet its statutory obligation to deliver water pursuant to the NIIP Act, such a claim is clearly not cognizable under the FTCA. As the

Tenth Circuit explained in *Agronics Inc.,* "[i]t is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs." 164 F.3d at 1345 (internal citations and quotation omitted).

In addition, the Tucker Act, 28 U.S.C. § 1491(a)(1), governs contract claims against the United States, not the Federal Tort Claims Act. If the claim is against the United States for breach of contract, the Court of Federal Claims "would have exclusive jurisdiction over the matter." *Wagner v. United States and Dep't. of Hous. and Urban Dev.*, 835 F.Supp. 953, 958 (E.D.Ky.1993) (citing *Matthews v. United States*, 810 F.2d 109, 111 (6th Cir.1987)).

NAPI's claims for damages arising from the United States' failure to deliver water should be barred because they give rise to contract, not tort claims under state law. *Haney*, 868 F.Supp. at 1237 ("Where an action is essentially for breach of an obligation imposed by contract and liability, if any, depends wholly on the government's promise, the action is barred under the FTCA."). In New Mexico, a claim based on an alleged failure to deliver a good or service sounds in contract not tort—even when the failure to deliver is based on the defendant's negligence. For example, in *Kreischer v. Armijo*, 1994-NMCA-118, 884 P.2d 827, the plaintiff alleged that the defendant was grossly negligent in construction work, rendering the plaintiff's house unsafe and unusable. Although the plaintiff claimed that the defendant's performance constituted wanton negligence, the court held that the plaintiff had not alleged a tort claim. *Kreischer*, 1994-NMCA-118, ¶ 6 ("the mere titling of the cause of action as one for gross negligence did not change its nature"). The court found that the defendant's obligation to construct a house was created by a contract and was not a general obligation imposed by law, as required to support a tort action. *Id*.

Similarly, in this case, the United States has no general obligation under the law to deliver

water to NAPI. Instead, the Government's water delivery obligation—if any—was created by the NIIP Act or the corollary water delivery agreements between the United States and the Navajo Nation.

Courts reviewing similar tort allegations in other irrigation cases have concluded that such claims are not cognizable under the FTCA. For example, in *Olson v. United States*, 2015 WL 1865589 (E.D. Wash. 2015), the court found that the Government's failure to deliver water, resulting in the plaintiffs' agricultural losses, did not support an FTCA claim. The *Olson* plaintiffs were landowners within the Yakima Indian Reservation, which is served by the Wapato Irrigation Project (WIP). The BIA owns, operates, and maintains the WIP to provide water to Indian and non-Indian users. The BIA levied assessments and collected dues from water users, including the *Olson* plaintiffs, to cover WIP operation and maintenance costs. When WIP facilities experienced multiple pump failures, preventing water deliveries, the *Olson* plaintiffs filed suit under the FTCA, alleging that the BIA's negligent maintenance of WIP pumps caused the plaintiffs to suffer crop losses. *Id*. at *3. Although the plaintiffs presented their claims as tort claims, the court held that plaintiffs' claims were in essence contract claims. *Id*. The court found that the BIA had a contractual duty to deliver water and failed to do so even though the plaintiffs had fulfilled their reciprocal obligation to pay dues for maintenance and operation of the irrigation system. *Id*. The court found that the plaintiffs had not identified an independent tort duty because the negligence alleged "did not result in any direct damage to plaintiffs' property. . . . [Instead], Plaintiffs' claimed damages were only caused by the failure to supply irrigation water, a contractual obligation." *Id*. at *4-5. Accordingly, the court dismissed the plaintiffs' FTCA claim based on failure to deliver water. *Id*. at *5.

The court reached a similar conclusion in *Rice v. United States*, 2008 WL 11415915 (D.

Mont. 2008). The plaintiff in *Rice* was a farmer, leasing land within the Blackfeet Irrigation Project, administered by BIA. The plaintiff brought a claim pursuant to the FTCA for crop loss damages allegedly arising from the BIA's mismanagement and supervision of the irrigation project and its negligent failure to deliver water. *Id*. at *1. The Court found,

> [s]tripped to bare essentials, Plaintiff's claims are, in substance, that he was entitled as a lessee of land located within the project, upon payment of requisite charges, to receive water from the project. Any breaches of obligations arising from that arrangement are *ex contractu*, grounded in contract not in tort.

Id. at *2. Accordingly, the court found that the United States was entitled to summary judgment dismissing all the plaintiff's claims.

While the contractual obligations related to the Blackfeet Irrigation Project and the WIP are unique to those irrigation projects, the courts' findings in *Rice* and *Olsen*—that the United States' failure to deliver water does not give rise to a tort claim—is analogous to the facts of this case. Any allegations based on the United States' failure to deliver water through the NIIP do not support a tort claim under the FTCA.

III. Plaintiff Has Failed to Exhaust Its Administrative Remedies With Respect To Counts II And III

"The jurisdictional statute, 28 U.S.C. § 2675(a), requires that claims for damages against the government [first] be presented to the appropriate federal agency by filing (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Trentadue v. United States*, 397 F.3d 840, 852 (10th Cir. 2005) (citations omitted). The notice requirement's purpose is to "'allow the agency to expedite the claims procedure and avoid unnecessary litigation by providing a relatively informal nonjudicial resolution of the claim.'" *Id*. (quoting *Mellor v. United States*, 484 F. Supp. 641, 642 (D. Utah 1978)). In accordance with that purpose, although a plaintiff's administrative claim

"need not elaborate all possible causes of action or theories of liability," it must provide notice of the "facts and circumstances" underlying the plaintiff's claims. *Trentadue v. United States*, 397 F.3d at 852.

Here, Plaintiff's administrative claim makes no reference to separate claims for hiring, training and supervision. Read broadly, Plaintiff's SF-95 notice asserts only that Defendant United States' acts caused damages. But, the notice provides no information to suggest that the problem was the result of bad hiring, training, or supervision, as opposed to a one time accident or failure to act. *Cf. Kikumura v. Osagie*, 461 F.3d 1269, 1302 (10th Cir. 2006) (overruled on other grounds by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as explained in *Robbins v. Oklahom*a, 519 F.3d 1242, 1246-47 (10th Cir. 2008) (concluding that, where an inmate filed a notice of claim alleging an employee's direct liability, the claim "fail[ed] to mention the possibility that his injuries were caused by the inadequate training and supervision" so did not exhaust the plaintiff's administrative remedies). Similarly, Plaintiff does not include any information in the SF-95 to suggest a separate claim for vicarious liability, separate from any underlying negligent act or failure to act. Therefore, Counts II and III should be dismissed for failure to exhaust Plaintiff's administrative remedies.

IV. Plaintiff's Count II and Count III Fail to State a Claim for Relief

Even if properly exhausted, which is denied, Plaintiff's Counts II and III should be dismissed.

A. Plaintiff's Count II for Negligent Hiring, Training, and Supervision is Barred by the Discretionary Function Exception to the FTCA

The second count of NAPI's Complaint alleges that the United States and BOR were "negligent in hiring, contracting of, training, supervision and retention of its directors, officers,

administrators, engineers, employees, agents, and staff in regard to [NIIP][4] and the Kutz Siphon." Complaint, ¶ 44. Such claims are barred by the discretionary function exception to the United States' waiver of sovereign immunity under the FTCA.

The FTCA excludes waiver of sovereign immunity for claims 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). This "discretionary function" exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). "If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity and the district court lacks subject matter jurisdiction to hear the suit." *Domme* v. United States, 61 F.3d 787, 789 (10th Cir. 1995).

A party seeking to invoke federal jurisdiction has the duty to establish that such jurisdiction is proper. *Basso v. Utah Power & Light Co*., 495 F.2d 906, 909 (10th Cir. 1974). Since federal courts have limited jurisdiction, there is a presumption against its existence. *Id*. at 909. Where raised, a Plaintiff must establish the absence of this exception as part of their overall burden to establish subject-matter jurisdiction. *Aragon v. United States*, 146 F.3d 819, 23 (10th Cir. 1998); *Smith v. United States*, 546 F.2d 872, 875-76 (10th Cir. 1976); *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) ([t]he party who sues the United States bears the burden of pointing to ... an unequivocal waiver of immunity.) Finally, since the discretionary function exception applies without regard to whether the discretion

[4] Plaintiff's Complaint uses "NAPI" but it is assumed that Plaintiff meant to reference "NIIP."

involved was abused or the product of negligence, evidence of such negligence is immaterial. *Aragon*, 146 F.3d 819, 822-23. "Application of this exception is therefore a threshold issue—a jurisdictional issue which precedes any negligence analysis." *Johnson v. United States*, 949 F.2d 332, 335 (10th Cir. 1991); *see also Garcia v. United States Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008).

A two-step analysis is applied in considering the discretionary function exception. First, for the discretionary function exception to apply, the acts or omissions must be "discretionary in nature, acts that 'involve an element of judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz by Berkovitz v. United States*, 486 U.S. at 536). An action is not discretionary where a statute, regulation, or policy mandates certain conduct, because the employee has "no room for choice." *Gaubert*, 499 U.S. at 324.

Here, Plaintiff cites no statute, regulation, or policy mandating particular requirements for the hiring, training, and supervision of employees over the NIIP. Neither the NIIP Act, nor the Navajo Settlement, nor any other water delivery agreements mandate the conduct of personnel activities. Moreover, the NIIP Act alone is insufficient to give rise to such duties. Although a statute or regulation may charge an agency with a responsibility in general terms, such a statute does not negate the agency's discretion in how it must fulfill its responsibility absent specific directives. *See e.g., Domme v. United States*, 61 F.3d at 790 (concluding that a regulation which provides that an agency must "provide and maintain a safe workplace" did not negate the agency' discretion as to how it fulfilled that charge). Plaintiff cannot identify any statute, regulation, or policy mandates certain conduct with respect to hiring, training, and supervising employees who work on or are involved in the NIIP.

Second, for the discretionary function exception to apply, the conduct must be "'based on

considerations of public policy.'" *United States v. Gaubert*, 499 U.S. at 323 (quoting *Berkovitz by Berkovitz v. United States*, 486 U.S. at 537). Courts generally hold that decisions regarding employment, supervision, retention, and termination are inherently discretionary. *See Richman v. Straley et al*., 48 F. 3d 1139, 1146 (10th Cir. 1995); *Sydnes*, 523 F.3d 1179, 1183 (2008); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995)("[i]ssues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception")(citations omitted). Each of these decisions involve a federal agency's "choice between several potential employees" and "the weighing of individual backgrounds, office diversity, experience and employer intuition" and that such decisions "require the balancing of competing objectives." *Tonelli*, 60 F.3d at 496. For this reason, Courts have concluded that "permitting FTCA claims involving negligent hiring would require this court to engage in the type of judicial second-guessing that Congress intended to avoid." *Id*.

Likewise, the District of New Mexico has previously concluded hiring, training and supervision involve careful discretion and delicate policy considerations. *See e.g., Gonzagowski v. United States*, 2020 WL 5209470, at *56 (D.N.M. Sept. 1, 2020)(citing cases); *see also Garcia v. United States*, 709 F. Supp. 2d 1133, 1151-52 (D.N.M. 2010). Decisions regarding what skills to train and how extensively to do so involve budgetary and other cost-benefit calculations. *See Tew v. United States*, 86 F.3d 1003, 1006 (10th Cir. 1996)(holding that budget considerations constitute considerations of public policy, justifying application of the discretionary-function exception); *Domme v. United States*, 61 F.3d at 792-93 (holding considerations of how to manage limited resources was an appropriate policy consideration).

The plaintiff in *Garcia* brought an FTCA claim based upon the off-duty conduct of a tribal police officer. The plaintiff's claims included negligent supervision and training of the

tribal employee. However, the court found that the discretionary function exception protects the training and supervision of employees, describing that, "a police department's training of its officers involves substantial policy considerations." *Garcia v. U.S.*, 709 F.Supp.2d at 1151. Therefore, the court dismissed the plaintiff's FTCA claims of negligent training and supervision. *Id*.

Like the police department in *Garcia*, the BOR uses professional judgement in hiring, training, supervising and retaining employees. As noted by the court in *Garcia*, decisions regarding training and supervision cost money and require the balancing of competing interests. Such decisions require the exercise of discretion and are thus protected by the FTCA's discretionary function exception.

B. Plaintiff's Count III for Vicarious Liability Exceeds the Scope of The United States' Waiver of Sovereign Immunity under the Federal Tort Claims Act

The limit of the United States' vicarious liability is set forth in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and §§ 2671-2680. The FTCA defines the scope of waiver of the United States' sovereign immunity for claims arising out of injuries caused by the negligence of governmental employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1); *Tsosie v. United States*, 452 F.3d 1161, 1163 (10th Cir. 2006).

However, claims asserted against the United States' employees do not automatically invoke liability of the United States. "[E]ven if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment . . . the government's FTCA liability remains limited to employee conduct within the scope of employment, as defined by state law." *Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) (emphasis added), cert. denied, 528 U.S. 1154 (2000); *cf. Faragher v. City of Boca Raton*, 524 U.S. 775,

801 (1998) (distinguishing between scope-of-employment analysis and "entirely separate category" of vicarious liability based on apparent authority). The FTCA provides jurisdiction only for torts committed by government employees acting within the scope of their employment. *See* 28 U.S.C. § 1346(b)(1); *Sheridan v. United States*, 487 U.S. 392, 401 (1988). Because the FTCA provides the exclusive remedy against the government for torts, *see* 28 U.S.C. § 2679, a plaintiff must prove a negligent act or failure to act by a government employee acting within the scope of his employment. *See Elder v. United States*, 312 F.3d 1172, 1176-1177 (10th Cir. 2002) (plaintiff has burden to show that alleged conduct is within FTCA's waiver of sovereign immunity); *Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998). Thus, under the framework of the FTCA, there is no separate cause of action for vicarious liability, *respondeat superior*, or agency. To the extent Plaintiff states a claim for negligence under the FTCA, which is denied for the reasons set forth herein, Plaintiff's Count I encompasses any such activity and Plaintiff's Count III should be dismissed.

CONCLUSION

For the reasons set forth herein, Plaintiff's Complaint should be dismissed for failure to meet the statute of limitations, or, in the alternative, for failure to state a claim under the Federal Tort Claims Act.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that March 20, 2021, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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