**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

NAVAJO AGRICULTURAL
PRODUCTS INDUSTRY,

Plaintiff,

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

UNITED STATES OF AMERICA,

Defendant.

**UNITED STATES OF AMERICA'S REPLY TO ITS MOTION TO DISMISS**

Plaintiff NAPI's Response, filed May 17, 2021 (Doc. 8) falls short of overcoming the grounds for dismissal presented in the United States' Motion to Dismiss, filed March 20, 2021 (Doc. 4).

## I. THE STATUTE OF LIMITATION BARS PLAINTIFF'S CLAIMS UNDER THE FTCA

Plaintiff's Response does not dispute that the injury was incurred over two years before its claim. Instead, Plaintiff asserts that it was not aware of the *cause* of the injury, and thus, equitable tolling should be permitted. However, Plaintiff's Response fails to establish that this is the exceptional case in which the discovery rule should apply. *Dahl v. U.S.*, 319 F.3d 1226, 1229 (10th Cir. 2003).

The United States' acknowledges Plaintiff's argument that "the FTCA's time bars are nonjurisdictional and subject to equitable tolling." *United States v. Kwai Fun Wong*, 575 U.S. 402, 420 (2015). However, "when the dates given in the complaint make clear that the right sued upon has extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc.,* 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). "Under

'long-settled equitable-tolling principles, generally a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.'" *Reid v. United States,* 626 F. App'x 766, 768 (10th Cir. 2015) (quoting *Barnes v. United States*, 776 F.3d 1134, 1150 (10th Cir. 2015)). Thus, despite Plaintiff's urging to the contrary, it is Plaintiff that bears the burden to establish that accrual of its claim did not occur until August 2017. Plaintiff cannot meet its burden.

**A. It Is Undisputed That Plaintiff Did Not Bring Its Claims Within Two Years of the Injury**

Under the FTCA, "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues[.]" 28 U.S.C. § 2401(b). 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. 111, 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.'" *See Cannon v. United States*, 338 F.3d 1183, 1190 (10th Cir. 2003).

Here, Plaintiff's Complaint alleges that "a 17.5 foot diameter prestressed cylinder pipe (PCCP) failed in the NIIP in Farmington, New Mexico, on **May 13, 2016**. The pipe, designed by USBR and installed in 1972, featured double-wire wrap with a 16-gauge steel liner." Complaint, ¶ 21 (emphasis added). Plaintiff further describes the injuries that allegedly occurred when the pipe failed. Specifically, "[wh]en the pipe ruptured, it blew concrete 100 to 200 feet away, with debris damaging an overhead powerline," Complaint, ¶ 23, and "NAPI and its farmers has [sic] just planted their crop, and 75,000 acres of irrigated land were suddenly out of service due to the

pipe breach." Complaint, ¶ 26. Plaintiff even acknowledges that pipe was out of service for some weeks, as "[r]epairs were not able to be completed and service restored on the Kutz Siphon until mid-June, 2016." Complaint, ¶ 27. In sum, Plaintiff acknowledges in its Complaint that the Kutz Siphon, designed and installed by the United States Bureau of Reclamation, failed in May 2016 causing Plaintiff injury until it was repaired in June 2016. Thus, Defendant's affirmative defense of the statute of limitations is readily apparent on the face of the Complaint.

**B. Plaintiff's Response Fails to Establish That This is the Exceptional Case that Warrants Application of the Discovery Rule and Equitable Tolling of the Statute of Limitation**

Defendant having met its burden to establish that the statute of limitations has not been met, it is up to Plaintiff to establish that the discovery rule should act to delay accrual of the claim. *Osborn v. United States*, 918 F.2d 724, 731 (8th Cir. 1990). Plaintiff's Response fails to meet this burden.

Application of the discovery rule is intended to be the exception, not the rule. *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1268 (10th Cir. 2002). Plaintiff asserts that despite knowledge that the Kurtz Siphon ruptured, it was not aware of the cause of its injury, and thus no claim accrued until August 2017 when "a report was issued by an engineer with the USBR Technical Service Center in which the USBR admitted it was negligent in its inspection and maintenance of the NIIP." Complaint, ¶ 30. However, Plaintiff's argument goes to the sufficiency of the evidence to support its claims, not whether it knew of the existence of its claims.[1] Courts have declined to find extraordinary circumstances when a plaintiff knows of his or her cause of action but lacks direct knowledge of all evidence. *See Bennett v. Coors Brewing Co*., 189 F.3d 1221, 1235 (10th Cir. 1999) (finding that "[e]quitable tolling is not warranted

[1] Defendant disagrees with Plaintiff's characterization of the cited report and accepts Plaintiff's representation only for the purposes of this motion to dismiss.

where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose") (internal quotation marks and citation omitted); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 695 (10th Cir. 1981) (examining the equitable tolling doctrine and finding that discovery of the fraud, not the possession of hard evidence, begins the statute of limitations); *see also Ryan v. United States*, 534 F.3d 828, 832 (8th Cir. 2008) (extraordinary circumstances not present when twins who were switched at birth in 1946 and had suspected the switch since the 1970s could have discovered the basis for their claims by conducting an inquiry and filing their FTCA claim before 2002).

In addition, the standard is an objective one; in order to toll the statute of limitations pursuant to the discovery rule, the factual basis for the cause of action must have been "inherently unknowable," *see Barrett v. United States*, 689 F.2d 324, 327 (2d Cir.1982), or latent, *see Plaza Speedway*, 311 F.3d at 1267 (interpreting *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)). Here, Plaintiff was immediately aware that the Kutz Siphon ruptured resulting in cessation of flow, and damaging crops. The failure of the siphon was an unusual and unexpected outcome which a person could reasonably believe might give rise to a cause of action sounding in tort. That Plaintiff took no effort to ascertain the possible reason for the failure is insufficient grounds to delay accrual of its claim.

Even if Plaintiff established that the cause was not immediately known, it must also show that due diligence was exercised and that critical information, reasonable investigation notwithstanding, was undiscoverable. *See e.g., Gould v. U.S. Department of Health and Human Services*, 905 F.2d 738, 745-46 (4th Cir. 1990). As set forth in its Complaint, Plaintiff took no action whatsoever between the incident, and the issuance of the report in August 2017, over a

year later. Complaint, ¶ 7. Thereafter, Plaintiff took no action to file the administrative claim until February 22, 2019. Complaint, ¶ 8. Plaintiff cites no facts, nor any law to demonstrate that it attempted to diligently pursue its claim during the 16 months following the issuance of the report, and/or that critical evidence remained yet undiscoverable.

Equitable tolling is not applicable where the plaintiff knows of the elements of his cause of action. *See Baker v. Board of Regents of Kansas*, 991 F.2d 628, 633 (10th Cir.1993) ("[To toll] the statute of limitations, ... [something must actually] prevent[ ] discovery of the cause of action.") (internal quotation marks omitted). This is not an exceptional case in which Plaintiff could not have immediately known of its claim or injury. Because their administrative claim was filed more than two years after the pipe allegedly failed, this action is untimely and must be dismissed for failure to meet the statute of limitations. *Dahl v. United States*, 155 F. Supp. 2d 1298, 1300 (D. Utah 2001).

## II. PLAINTIFF'S CLAIMS FOR NEGLIGENT HIRING, TRAINING, AND SUPERVISION AND FOR VICARIOUS LIABILITY SHOULD BE DISMISSED

### A. Plaintiff's Response Does Not Establish Exhaustion of its Claims for Negligent Hiring, Training, and Supervision and for Vicarious Liability

Plaintiff's response fails to identify facts or law sufficient to demonstrate that it exhausted claims for negligent hiring, training, and supervision, and for vicarious liability. Therefore, those claims should be dismissed.

Plaintiffs bear the burden to prove they complied with the FTCA exhaustion requirements. *Wagner v. Jones*, No. CV-13-771 CG/WPL, 2014 WL 12789015, at *7 (D.N.M. Aug. 5, 2014). The exhaustion requirement is jurisdictional and cannot be waived. *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016); *see also Barnes*, 776 F.3d at 1139 ("The administrative-exhaustion requirement applicable to FTCA claims 'bars claimants from bringing

suit in federal court until they have exhausted their administrative remedies.'" (citing *McNeil v. United States*, 508 U.S. 106, 113 (1993))); *Lurch v. United States*, 719 F.2d 333, 335, n.3 (10th Cir. 1983) ("Bringing an administrative claim is a prerequisite before suit can be brought in United State District Court under the FTCA.")

Plaintiff urges the Court to consider its assertions that the USBR was negligent in its inspections and maintenance of the Kutz Siphon to encompass claims of negligent hiring, training and supervision, along with vicarious liability. While courts "should liberally construe the universe of facts that the FTCA claimant provides...[t]hat does not mean, however, that courts should augment those facts to conform to the claimant's subsequent civil complaint." *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016)). Negligent hiring, training, and supervision are generally considered separate and apart from other acts of negligence. *See Bethel v. U.S. ex. rel Veterans Admin. Med. Ctr. of Denver, Colorado*, 495 F. Supp. 2d 1121 (D. Colo. 2007). Plaintiff's notice of claim lacks sufficient information to enable the agency to investigate any such claims and therefore, they should be dismissed.

### B. The Discretionary Function Bars Plaintiff's Claims for Negligent Hiring, Training, and Supervision

The discretionary function exception also applies to bar Plaintiff's claims for negligent hiring, training, and supervision unless Plaintiff can identify a "specific and mandatory" statute, regulation, policy, or contract provision demanding government action. Plaintiff must identify what mandatory statutes, regulations or directives have allegedly been violated with specificity. *See United States v. Gaubert*, 499 U.S. 315, 329-330 (1991); *Daigle v. Shell Oil Company*, 972 F.2d 1527, 1539-1540 (10th Cir. 1992). A mere allegation that some undefined and undescribed "mandatory" policies or requirements have been breached is insufficient. *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) ("Of course, there is also the possibility that such a

regulation might exist in the copious directives of the Department of Defense and plaintiffs have, despite their admirable diligence in pursuing this case, just missed it. But the burden under our case law to present evidence of a discretion-constraining regulation or policy resides with the plaintiffs"); *ALX El Dorado, Inc. v. United States*, 36 F.3d 409 (5th Cir. 1994) (per curiam); *Johnson v. United States*, 47 F. Supp. 2d 1075, 1080) (S.D. Ind. 1999) ("[p]laintiffs... failed to link their claims with any facts or specific regulatory or policy guidelines that would call into doubt the discretionary nature of the Marshal's actions").

Thus, to avoid dismissal under Rule 12(b)(6), plaintiff must allege facts that place this FTCA claim facially outside the discretionary function exception. However, Plaintiff does not point to any allegations set forth in the Complaint, nor does it identify any potential sources in its Response.

The absence of any applicable directives is not surprising. Courts generally hold that decisions regarding employment, supervision, retention, and termination are inherently discretionary and covered by the FTCA's discretionary function exception. *See Richman v. Straley et al*., 48 F. 3d 1139, 1146 (10th Cir. 1995); *Sydnes*, 523 F.3d at 1183. *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*.

**C. The Court Should Deny Discovery on the Discretionary Function**

Nevertheless, Plaintiff entreats the Court to allow it discovery to determine the existence of any mandatory directives. However, Plaintiff's reliance on *Doe v. United States*, 16-2162, 2017 U.S. Dist. LEXIS 72049 (D. Kan 2017) to support its request for discovery is misplaced. The plaintiff in *Doe* did not seek, nor did the Court permit plaintiff, discovery to identify other or different policies. In *Doe*, Plaintiff sued the United States under the Federal Tort Claims Act for an improper or unnecessary physical examination and for eliciting unnecessary private information while he was being treated by a Physician's Assistant at a VA Medical Center in Leavenworth, Kansas. In addition to his claims that Defendant violated the state Physician Assistant Licensure Act (PALA), Kan Stat. Ann. §65-28a01, the plaintiff in *Doe* asserted claims for negligent supervision, retention, and hiring. *Doe*, at *4. To support his claims, Plaintiff identified various directives issued by the VA setting forth applicable federal policy mandating review and renewal of Physician's Assistant's performance and certification. The Court held that the plaintiff in that case identified a directive sufficient to survive the motion to dismiss as to the plaintiff's claims for negligent supervision, but that the directives permitted the VA discretion with respect to continued employment and clinical privileges, precluding plaintiff's claims for negligent hiring and training. *Doe*, at *23-24. In other words, the plaintiff in *Doe* identified "specific and mandatory" policies, alleged to have been violated, which the Court evaluated to be sufficient to state a claim for negligent supervision, but insufficient to state a claim for negligent hiring and training. *Cf. 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's discretion as to how it fulfilled that charge). Here, Plaintiff has identified no applicable

policies or directives, let alone that they set forth any specific or mandatory duty which is alleged to have been violated.

Nor does Plaintiff identify any *potential* sources for which discovery could be beneficial, or steps that could be taken to discovery such policies. Although Defendant's motion is brought pursuant to Rule 12(b), Plaintiff's request would be appropriately denied even if considered under the requirements set forth for motions for summary judgment. Defendant denies that the motion should be considered as a Motion for Summary Judgment, but, the factors considered under Federal Rule of Civil Procedure 56(d) are informative. Fed. R. Civ. P. 56(d) allows for limited discovery relating to a motion for summary judgment only "when facts are unavailable to the nonmovant." Fed. R. Civ. P. 56(d). [2] The Rule is based on the general principle that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). Although Rule 56(d) enables a party to obtain discovery in order to respond to a motion for summary judgment, it "is not a license for a fishing expedition," *Lewis v. Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990), and there is no requirement that all discovery be completed before summary judgment may be entered. *See Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 784 (10th Cir. 2000). In addition, to obtain discovery under Rule 56(d), "[t]he nonmoving party . . . must expressly invoke Rule 56[(d)]'s protections and, in so doing, must satisfy certain requirements." *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006). Specifically, the party must "identify [ ] the probable facts not available and what steps have been taken to obtain these facts." *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). Whether additional discovery will be permitted under Rule

[2] Fed. Rule Civ. P. 56(d) was previously codified at Rule 56(f). Thus, many of the cases discussing the Rule 56 affidavit refer to Rule 56(f).

56(d), is solely within the trial court's discretion. *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984). While an application under this Rule is treated liberally, "if the party filing the Rule 56[(d)] affidavit has been dilatory, or the information sought is either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1553–54 (10th Cir. 1993).

Here, Plaintiff has neither identified any applicable directives, under Fed. R. Civ. P. 12(b)(6), nor made any effort to identify the steps taken to discover them in order to obtain discovery under Rule 59 or Rule 12(b)(1). In sum, Plaintiff appears to be asking to be allowed time to conduct a "fishing expedition," which the Court should deny.

**D. Plaintiff Fails to State a Separate Claim for Vicarious Liability**

Plaintiff's Response fails to offer grounds to support a separate claim of vicarious liability. It is black letter law that 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). Plaintiff's Count I encompasses any such activity. To the extent Plaintiff alleges a separate claim in Count III, Plaintiff fails to cite any facts or law to support a finding of liability beyond the limits imposed by sovereign immunity, except as waived by the FTCA. Therefore, Plaintiff's Count III should be dismissed.

**III. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE FTCA**

In its Response, Plaintiff denies that it asserts Defendant violated a duty to provide water, claiming instead that the United States "violated its duty to properly maintain the Kutz Siphon" resulting in a failure to deliver water and associated agricultural losses. Response, p. 6. The distinction is illusory. Indeed, Plaintiff goes on to spend significant time discussing its understanding of the United States' obligation to deliver water based on the "reserved right of

the Navajo Nation to water necessary to accomplish the purposes of the reservation." *See* Response, p. 6-8. However, NAPI's discussion of the United States' alleged obligation to deliver water based upon the Navajo Nation's tribal sovereignty is irrelevant to any FTCA claim. Liability under the FTCA must be premised on a breach of state law.

Under the FTCA, the United States has only waived sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Supreme Court has "consistently held that § 1346(b)'s reference to the 'law of the place' means the law of the State - the source of substantive liability under the FTCA." *FDIC v. Meyer*, 510 U.S. 471, 477-478 (1994). Thus, under what is sometimes referred to as the State source requirement, liability under the FTCA must be premised on violations of State law: it cannot be premised on violation of a federal law, or of the United States Constitution, or on the breach of a duty allegedly found therein. *Id*.; *United States v. Agronics Inc*., 164 F.3d 1343, 1345 (10th Cir. 1999). Thus, Plaintiff's reliance on tribal water rights, treaty provisions, or the reserved rights doctrine is misplaced, as they cannot as serve the basis for a FTCA claim. *See Skokomish Indian Tribe v. U.S.*, 410 F.3d 506, 510–11 (9th Cir. 2005) (finding that the Skokomish Tribe's allegation that the United States violated its treaty obligations by allowing the continued operation of an environmentally damaging water project failed to state a tort claim under the FTCA).

Because FTCA claims are based on state law, New Mexico law controls whether NAPI has a cognizable tort claim. As discussed in the United States' Motion, in New Mexico, negligence that results in a failure to deliver a good or service does not sound in tort where the source of the obligation was based on contract, not on a general obligation imposed by law. *See*

*Kreischer v. Armijo*, 1994-NMCA-118, 884 P.2d 827. Whether Plaintiff asserts a cause of action for failure to deliver water, or failure to maintain the Kutz Siphon, Plaintiff must identify a duty alleged to have been breached. In this case, Plaintiff cannot identify any duty other than that arising from the NIIP Act or the corollary water delivery agreements between the United States and the Navajo Nation under which the Kutz Siphon was created. Any potential duty to maintain the Kutz Siphon is defined by and arises out of those agreements, and as such, is contractual and not tort based. *See Olson v. United States*, 2015 WL 1865589 (E.D. Wash. 2015).

Plaintiff argues that *Olson* concerned both a tort and a contract claim and therefore does not apply. Indeed, in *Olson*, plaintiffs alleged both a tort claim for failure to maintain the irrigation systems, resulting in a burst pipe, as well as a claim for breach of contract to provide irrigation water. *See id.* However, in addressing plaintiffs' tort theory, the court held plaintiffs did not identify a duty imposed independently of the contract. In essence, the Court found that plaintiffs' tort claim and contract claim arose from the same duty - as set forth in the contract. Because the *Olson* plaintiffs failed to identify a separate tort duty, they had no remedy under the FTCA. *Id.* Plaintiff's attempt to avoid the outcome reached in *Olson* by declining to bring a contract claim here does not alter the analysis. The United States has no general duty to provide water to NAPI, and failure to deliver water, even if caused by negligent maintenance, does not support a tort claim against the United States. *C.f. Rice v. United States*, 2008 WL 11415915 (D. Mont. 2008).

## 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 claims under the Federal Tort Claims Act, for which this Court would have jurisdiction.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that July 16, 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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