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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RUBEN BARRIENTOS, JR.,

Plaintiff,

v.

DALE ALLAN WALKER, and DOES ONE through TWENTY, inclusive,

Defendants.

Case No. 1:23-cv-01432-JLT-SAB

UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO CERTIFY EMPLOYMENT UNDER THE FEDERAL TORT CLAIMS ACT (ECF 12)

Hearing on Motion

Date: December 13, 2023

Time: 10:00 a.m.

Location: Courtroom 9, Sixth Floor
United States Courthouse
2500 Tulare Street
Fresno, CA 93721

TABLE OF CONTENTS

Page

I. INTRODUCTION

This case arises from a car accident between Plaintiff Ruben Barrientos and Defendant Dale Walker, a construction supervisor working for the Tule River Indian Tribe. At the time of the accident, Walker alleges he was picking up supplies for the Tule River North Reservation Sewer Extension Project (the "Project"). The Project was the subject of a Memorandum of Agreement ("MOA") between the Tribe and the federal Indian Health Service ("IHS").

Under the MOA, IHS agreed to provide environmental review, engineering services and technical assistance with contract administration, construction inspection, supply and materials purchasing, construction staking, and funding through a contribution from the Environmental Protection Agency called a Clean Water Act Indian Set-Aside. The Tribe provided construction labor through a Tribal Force Account.

The MOA expressly states that "[t]he Tribe is responsible for all tort claims . . . resulting from its activities on this project," and that "a general public liability and property damage insurance policy shall be in force throughout the construction period." *See* Declaration of Jonathan Rash ("Rash Decl.") Ex. 1, at 5, 6. Likewise, the Tribal Force Account Documents for the Project state that "[t]he Tribe and its insurance carrier are liable for damages or injuries to third-parties." *See* Declaration of Charmaine McDarment ("McDarment Decl.," ECF 12-2) Ex H, at 89.

Despite these clear terms, Walker asks the Court to substitute the United States in his place and force the federal government to foot the bill for any potential judgment or settlement. *See* Memorandum of Points and Authorities in Support of Motion to Certify Employment and Substitute United States as Defendant ("Motion," ECF 12-1). Walker reasons that, at the time of the accident, he was carrying out a "self-determination contract" under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), a statute that creates a process for Tribes to "take over the administration of programs" operated by IHS and the Bureau of Indian Affairs. *Shirk v. United States*, 773 F.3d 999, 1002 (9th Cir. 2014); *Seneca Nation of Indians v. U.S. Dep't of Health & Hum. Servs.*, 945 F. Supp. 2d 135, 143 (D.D.C. 2013) ("[S]elf-determination contracts essentially allow Indian tribes to step into the shoes of certain United States government agencies in providing certain services to their members."). The MOA, however, is merely the legal instrument through which the Tribe *participated* in IHS's Sanitation

Facilities Construction Program. Nothing in the MOA suggests the Tribe "stepped into the shoes" of IHS and "took over" the program. The ISDEAA and its implementing regulations prescribe detailed terms and a specific process for the review and negotiation of proposals for self-determination contracts, and these requirements are entirely absent here. Nor has Walker satisfied his evidentiary burden of establishing that he was carrying out the MOA at the time the accident occurred at 4:40 p.m., and about 20 miles away from the Project site and the Tribe's reservation.

For these reasons and those further detailed below, Walker's Motion should be denied, and this case must be remanded to state court. *See* 28 U.S.C. § 2679(d)(3).

II. BACKGROUND

A. The Sanitation Facilities Construction Program

The Department of the Interior and the Department of Health and Human Services ("HHS") administer many programs that provide services and assistance to Tribes, including education, healthcare, housing, social services and financial assistance, and Tribal justice and legal services. *See generally* Cohen's Handbook of Federal Indian Law ch. 22 (2023). These programs include the Sanitation Facilities Construction ("SFC") Program administered by IHS.[1] *See* Pub. L. No. 86-121, 42 U.S.C. § 2004a. The SFC Program is sometimes referred to as "P.L. 86-121."

The SFC Program authorizes IHS to provide sanitation facilities to Tribes, such as domestic water supply, wastewater disposal, and solid-waste disposal facilities. *Id.* In turn, the MOA "is a legal instrument entered into by IHS and Tribes to create, fund, and sometimes construct, sanitation facilities authorized by Public Law 86-121." Indian Health Manual, pt. 5, ch. 2, Memorandum of Agreement [hereinafter IHM-MOA, *available at* https://www.ihs.gov/ihm/pc/part-5/p5c2] § 5-2.1E. The MOA "establishes a cooperative relationship among those interested parties in accomplishing work authorized under P.L. 86-121." *Id.* § 5-2.2A; *see id.* § 5-2.2H(1) (noting that the SFC Program's legislative history

[1] The SFC Program originally was administered by the United States Surgeon General, but this authority was transferred to HHS and IHS through presidential directives, redesignations, and delegations between 1966 and 1988. *See* 31 Fed. Reg. 8855 (June 25, 1966); 52 Fed. Reg. 47053 (Jan. 4, 1988); *see also* Pub. L. No. 96-88, § 509(b), 93 Stat. 668, 695 (1979).

"clearly indicates the intention of the Congress that the Federal Government seek contributions from the beneficiary or beneficiaries of the sanitation facilities project").[2]

B. The Indian Self-Determination and Education Assistance Act

The ISDEAA created a process by which tribes "could take over the administration of programs" operated by IHS and the Bureau of Indian Affairs ("BIA"). *Shirk v. United States*, 773 F.3d 999, 1002 (9th Cir. 2014); *see Fort McDermitt Paiute & Shoshone Tribe v. Becerra*, 6 F.4th 6, 7 (D.C. Cir. 2021) ("The [ISDEAA] allows Indian tribes to assume control over the health programs that IHS operates on their behalf."). "Title I of the statute allows tribes to assume control of specific programs by entering self-determination contracts with the federal government." *Fort McDermitt*, 6 F.4th at 7 (citing 25 U.S.C. § 5321(a)). "These contracts are commonly called '638 contracts,' in reference to the public law number of the ISDEAA." *Shirk*, 773 F.3d at 1002. The ISDEAA and its regulations provide specific and detailed terms and procedures that must be followed to propose and award such contracts. *See, e.g.*, 25 U.S.C. §§ 5321(a), 5329(a), (c); 25 C.F.R. Ch. 5, Pt. 900, Subpt. C, D, J; *see also, e.g.*, Declaration of Joseph Frueh ("Frueh Decl.") Ex. 5 (IHS, Technical Assistance Guide: Public Law 93-638 Construction (Oct. 2017) [hereinafter IHS, Technical Guide]) app'x II, pp. 34–52.

"[S]elf-determination contracts essentially allow Indian tribes to step into the shoes of certain United States government agencies in providing certain services to their members." *Seneca Nation of Indians v. U.S. Dep't of Health & Hum. Servs.*, 945 F. Supp. 2d 135, 143 (D.D.C. 2013); *see Navajo Nation v. U.S. Dep't of Interior*, 57 F.4th 285, 289 (D.C. Cir. 2023) (explaining that, under a self-determination contract, "the tribe assumes control over federally funded programs formerly administered by the federal government"). As such, for purposes of tort liability, Congress has passed legislation that "deems" Tribal employees to be employees of the federal Public Health Service, BIA, or IHS while carrying out self-determination contracts under certain circumstances. *See* 25 U.S.C. § 5321(d) (claims

[2] *See also Indian Sanitation Facilities: Hearings on Bills to Provide for Improvement of Indian Sanitation Facilities Before the Subcomm. on Health & Safety of the H. Comm. on Interstate & Foreign Com.*, 86th Cong. 45 (1959) (statement of Dr. John Porterfield, Deputy Surgeon General) ("In the construction of Indian sanitation facilities it is anticipated that . . . [c]ontributions of labor, materials, money or services would also be made by the Indians . . . ."). The plain text of Public Law 86-121 bears out this intention as well. *See* 42 U.S.C. § 2004a(a)(3) (authorizing IHS to "make such arrangements and agreements . . . with the Indians to be served by such sanitation facilities . . . regarding contributions toward the construction, improvement, extension and provision thereof").

arising from medical activities or operation of emergency vehicles); Pub. L. 101-512, § 314, 104 Stat. 1915, 1959 (1990) (claims against Tribes, Tribal organizations, Indian contractors, and Tribal employees carrying out 638 contracts). In those contexts, Tribal employees are immune from liability, and tort actions must be brought against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–80.

C. The Tule River North Reservation Sewer Extension Project

In June 2014, the Tule River Indian Tribe asked IHS to conduct a preliminary engineering report for improving sewage disposal for about 30 homes with septic tanks on the reservation. *See* Rash Decl. Ex. 3, at 3. IHS prepared a report recommending a sewer extension connecting these homes to the community's main sewer line. *Id.* Ex. 3, at 3.

In June 2017, the Tribe "requested IHS assistance under the provisions of P.L. 86-121 to construct an extension to the sewer system to serve an additional 30 existing tribal homes," per IHS's preliminary engineering report. *Id.* Ex. 2, at 2. The Project Summary stated that the Tribe would contribute construction labor through its Tribal Force Account. *Id.* Ex. 2, at 2. The Project Summary also stated that the Project would be funded through a Clean Water Act Indian Set-Aside contribution from the Environmental Protection Agency ("EPA"). *Id.* Ex. 2, at 4–5.

In July 2017, EPA notified the Tribe that the Project was selected for funding. Declaration of Loretta Vanegas ("Vanegas Decl.") Ex. 1. EPA's letter stated: "We plan to award these funds through an interagency agreement (IA) with the California Area Indian Health Service (IHS)." *Id.* Ex. 1, at 1. EPA explained that an interagency agreement "is a written agreement between EPA and Indian Health Service to complete the project identified in this letter." *Id.* Ex. 1, at 1. EPA further noted:

> By accepting the funds via an interagency agreement, the Tribe and IHS will work cooperatively to complete this project. IHS will assist with the administrative management of the project, including compliance with the National Environmental Policy Act (NEPA). The Tribe will work with IHS throughout the entire process and provide input on how the project will be completed within the confines of the accepted Scope of Work. [¶] If the above option is not acceptable, you may choose to reject the award or submit a request and justification for a direct grant.

Id. Ex. 1, at 1. EPA explained the "direct grant" option, describing it as "an agreement between the Tribe and EPA in which the funding for the project is provided directly to the Tribe." *Id.* Ex. 1, at 1.

EPA then outlined the Tribe's additional responsibilities under a direct grant, and further stated that, "by requesting a direct grant, it does not guarantee the Tribe will receive direct funding." *Id.* Ex. 1, at 1–2. EPA asked the Tribe to confirm "in writing that you wish to receive the award through an Interagency Agreement," or whether the Tribe "prefer[red] another option." *Id.* Ex. 1, at 2.

EPA also invited the Tribe to submit any "questions or concerns" and directed the Tribe to the website for the Clean Water Act Indian Set-Aside Program for more information. *Id.* Ex. 1, at 2. The website includes "Clean Water Act Indian Set-Aside Grant Program: Answers to Frequent Questions." Among other things, that document states:

> Tribes that have assumed the responsibility to implement the IHS Sanitation Facilities Construction program under the Indian Self-Determination Act (P.L. 93-638) can only receive CWISA funds through a direct grant with EPA. Tribes that have requested to have IHS administer and manage a project on their behalf require an IA [Interagency Agreement] between EPA and IHS.

Declaration of Joseph Frueh ("Frueh Decl.") Ex. 1, at 11.

About two weeks later, the Tribe responded to EPA in writing stating it would "accept this funding and condition set forth through the Interagency Agreement." Vanegas Decl. Ex. 2. EPA and IHS then executed the Interagency Agreement on September 20, 2017. *Id.* Ex. 3. The agreement stated that "[f]unds transferred by EPA to IHS under this IA may only be used in agreements authorized by [the] Indian Sanitation Facilities Act, 42 U.S.C. 2004a"; "EPA will not be a signatory on any Project Summaries or Memorandums of Agreement"; "EPA will consult with the IHS Area Office quarterly to discuss project status"; and "IHS shall implement and execute projects funded under this IA using its administrative policies and procedures as described in the Indian Health Manual, Part 5, Chapter 2, Memorandum of Agreement." *Id.* Ex. 3, at 4, 6.

In May and June 2018, IHS and the Tribe executed the MOA "under and pursuant to the provisions of Public Law 86-121." Rash Decl. Ex. 1, at 2. The MOA noted that the Tribe had "request[ed] assistance under Public Law 86-121 to serve the community in the construction of wastewater disposal facilities"; that the Tribe had "reviewed and concurs with the provisions of the attached Project Summary"; and that the MOA was intended to "carry out the project as set forth in the attached Project Summary dated June 2017." *Id.* Ex. 1, at 2.

Among other things, IHS agreed to provide environmental review, engineering services and technical assistance with contract administration, construction inspection, supply and materials purchasing, construction staking, and funding for the Project through the EPA's Clean Water Act Indian Set-Aside Program. *Id.* Ex. 1, at 7–8; *id.* Ex. 2, at 3; *see also id.* Ex. 2, at 4–5 (Project Summary noting EPA as the sole source of funding). The Tribe provided construction labor through a Tribal Force Account. *Id.* Ex. 1, at 5–6; *id.* Ex. 2, at 2.

The parties also agreed that "[t]he Tribe is responsible for all tort claims . . . resulting from its activities on this project," and that "a general public liability and property damage insurance policy shall be in force throughout the construction period." *Id.* Ex. 1, at 5, 6. The Tribal Force Account Documents likewise state that "[t]he Tribe and its insurance carrier are liable for damages or injuries to third-parties." McDarment Decl. (ECF 12-2) Ex H, at 89.

D. The Instant Personal-Injury Lawsuit

On September 2, 2020, Walker crashed into Barrientos after allegedly failing to yield at a stop sign. *See* McDarment Decl. (ECF 12-2) Ex. B, at 9. The accident happened at about 4:40 p.m. in unincorporated Tulare County, about 20 miles away from the Project site and the Tribe's reservation. *Id.* Ex. B, at 9; *see* Rash Decl. Ex. 3, at 4.

Barrientos sued Walker and the Tribe in Tulare County Superior Court for personal injuries and related damages. *See* Compl. (ECF 1-2). The court dismissed the Tribe "due to the Tribe's sovereign immunity and pursuant to the parties' stipulation," in which the parties agreed that the Tribe's insurance policy covered Walker and the accident. *See* McDarment Decl. (ECF 12-2) ¶ 6 & Ex. D, at 37.

The Tribe notified the United States about the case and asserted that Walker was "deemed" to be a federal employee at the time of the accident and that Barrientos's sole remedy was against the United States under the FTCA. *See id.* Exs. C, H. The United States disagreed and noted, among other things, that "a sanitation facilities construction project under Public Law 86-121 may, but need not be, carried out under the ISDEAA," and nothing in the materials presented by the Tribe indicated the MOA was a self-determination contract under the ISDEAA. *Id.* Exs. F, I.

Walker then moved the state court to determine his employment status under 28 U.S.C. § 2679(d)(3), and the United States removed the case to this Court to resolve the Motion. *See* Notice of

Removal (ECF 1). In his Motion, Walker argues he should be deemed a federal employee because, at the time of the accident, he was carrying out a self-determination contract under the ISDEAA. Motion 5–6; *see* Pub. L. 101-512, § 314, 104 Stat. 1915, 1959 (1990).[3]

III. LEGAL STANDARD

"When a federal employee is sued for wrongful or negligent conduct, the [FTCA] empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Osborn v. Haley*, 549 U.S. 225, 229–30 (2007) (quoting 28 U.S.C. § 2679(d)(1), (2)). "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee." *Id.* at 230; *see* 28 U.S.C. § 2679(d)(1), (2). If the Attorney General refuses to certify, the employee may petition the court to certify that he or she was acting within the course and scope of his or her federal employment. 28 U.S.C. § 2679(d)(3); *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) (per curiam).

The Attorney General's certification decision "is conclusive unless challenged." *Green*, 8 F.3d at 698. "[T]he party seeking review bears the burden of presenting evidence and disproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of the evidence." *Id.*

IV. ARGUMENT

A. The MOA is not a self-determination contract under the ISDEAA.

The SFC Program is one of the federal programs that a Tribe "could take over" through the process prescribed in the ISDEAA. *Shirk*, 773 F.3d at 1002; *see* 25 U.S.C. § 5321(a)(1)(C); *Navajo Nation v. Dep't of Health & Hum. Servs.*, 325 F.3d 1133, 1137–38 (9th Cir. 2003). To be clear, however, the ISDEAA did not repeal or eliminate preexisting programs and their award mechanisms. *See* Cohen's Handbook of Federal Indian Law § 22.02[1] (2023); IHM-MOA § 5-2.8C ("Tribes may *elect* to provide sanitation facilities under Title I of P.L. 93-638, . . . or, as it is commonly known, a '638

[3] Walker often cites 25 U.S.C. § 5321(d), and he seems to think it contains or was amended by Section 314 of Public Law 101-512. *See* Motion 5–6, 13–14. But Section 314 is a standalone provision that was codified as a statutory "note" to 25 U.S.C. § 450f (now 25 U.S.C. § 5321). *See Shirk*, 773 F.3d at 1003. Section 314 did not alter the text of 25 U.S.C. § 5321(d), which is a separate provision that concerns claims arising from medical activities and emergency vehicles.

contract.'" (emphasis added)); *id.* § 5-2.9B (explaining that "[a]n *alternative* to [the SFC Program] is the P.L. 93-638 Indian Self-Determination contract," and "the P.L. 93-638 construction contract is *another method* available to provide sanitation facilities" (emphasis added)); *see also* 42 C.F.R. § 137.272 ("Self-Governance Tribes also have the *option* of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the [ISDEAA], the Indian Health Care Improvement Act, Public Law 94-437, and Public Law 86-121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities." (emphasis added)).

Here, there is no evidence the MOA is a self-determination contract under the ISDEAA. Nor does the Tribe have a separate ISDEAA agreement for construction programs to which this MOA relates.[4] Declaration of Wesley Simmons ("Simmons Decl.") ¶¶ 2–4 & Exs. 1, 2. The MOA does not mention ISDEAA or Public Law 93-638, nor does it suggest the Tribe is assuming control over the SFC Program or any portion of it. The MOA merely "establishes a cooperative relationship" between IHS and the Tribe "in accomplishing work authorized under P.L. 86-121," including the Tribe's contribution of construction labor through a Tribal Force Account. *See* IHM-MOA §§ 5-2.2A, 5-2.2H(1).

Moreover, a basic feature of an ISDEAA contract is a "transfer of authority" from IHS to the Tribe, whereby the Tribe "take[s] over [a] program and operate[s] it as a contractor and receive[s] the money that [IHS] would have otherwise spent on the program." *Menominee Indian Tribe of Wisc. v. United States*, 614 F.3d 519, 522 (D.C. Cir. 2010); *Shirk*, 773 F.3d at 1002. Here, EPA funded the Project through a Clean Water Indian Set-Aside contribution, and IHS has no authority to award funds

[4] *See* IHM-MOA § 5-2.8C ("*If a tribe or tribal consortium obtains a 638 contract which includes the local administration of the Sanitation Facilities Construction Program*, the MOA may be used between IHS and the tribe to obligate funds to a sanitation facilities construction project." (emphasis added)); Frueh Decl. Ex. 5 (IHS, Technical Guide]) § 2, p. 2 ("*For Tribes that have assumed responsibility for the SFC program through an ISDEAA agreement* the project can be accomplished through the MOA instrument itself, or the work can be accomplished through other instruments such as a direct federal contract or a Title I subpart J construction contract or Title V Construction Project Agreement which are executed subsequent to the MOA or in some cases in place of the MOA."); *see also Farmer v. United States*, No. 13-251, 2014 WL 5419637, at *3 (E.D. Wash. Oct. 22, 2014) (referring to a 638 contract between IHS and a tribal consortium that included the SFC Program).

to Tribes under the ISDEAA that it does not administer. *See* Rash Decl. Ex. 2, at 4–5; Vanegas Decl. Ex. 3; Frueh Decl. Ex. 1, at 11.[5]

The MOA also does not contain the mandatory terms required for a self-determination contract for "construction programs," as prescribed by 25 U.S.C. § 5329(a) and (c). *See* 25 U.S.C. §§ 5304(a), 5329(a) ("Each self-determination contract entered into under this chapter shall . . . contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section . . . ."). Nor does the MOA contain the requisite terms for a Title I "construction contract," as prescribed by 25 C.F.R. Chapter 5, Part 900, Subpart J. *See id.* § 5304(m); 25 C.F.R. § 900.110; *see also* IHM-MOA § 5-2.2(I)(1) ("A Tribe may request to participate in a sanitation facilities construction project *using a contract authorized under Title I of P.L. 93-638*" (emphasis added); Frueh Decl. Ex. 5 (IHS, Technical Guide) § 2, p.2 (noting that such an agreement—if one existed—would be "executed subsequent to the MOA or in some cases in place of the MOA"). Such contracts are subject to "a special process for review and negotiation of proposals which is different than for other self-determination contract proposals," 25 C.F.R. § 900.122(a), and must include many specific provisions as required by regulation, which are then incorporated into the contract. *See id.* § 900.125; *see also* Frueh Decl. Ex. 5 (IHS, Technical Guide) app'x II, pp. 34–52 (providing a sample contract/proposal "which will meet the minimum requirements of Subpart J").[6]

Finally, the MOA expressly states that "[t]he Tribe is responsible for all tort claims . . . resulting from its activities on this project" (Rash Decl. Ex. 1, at 6), and this term is reiterated in the Tribal Force Documents. *See* McDarment Decl. (ECF 12-2) Ex H, at 89 ("The Tribe and its insurance carrier are

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[5] *See also* IHM-MOA § 5-2.2I(3) ("Funds that another agency has already awarded or allocated to Tribes, but then passed to the IHS to give to the Tribe are not considered to be 'administered by the Secretary.' The MOA is the only instrument that may be used to transfer funds to the Tribe, if the IHS accepts this type of contribution which is not administered by the Secretary.").

[6] Walker does not argue that the MOA is a "self-governance compact" or "construction project agreement" under Title V of the ISDEAA, *see* 25 U.S.C. §§ 5389(b), 5381(a)(2), which have their own requirements regarding proposals, negotiation, and contract terms. *See* 42 C.F.R. §§ 137.320–137.344. Instead, he relies on 25 U.S.C. § 5321(a)(1), which is located in Title I of the ISDEAA, and it is undisputed that the Tule River Indian Tribe is not a Self-Governance Tribe under Title V. *See* IHS, Self-Governance Tribes, https://www.ihs.gov/selfgovernance/tribes/ (last visited Nov. 15, 2023).

liable for damages or injuries to third-parties.").[7] Contrary to Walker's contention, this provision does not "disclaim congressionally mandated FTCA liability" in violation of the ISDEAA. Motion 4, 14. Rather, it confirms that the MOA is not a self-determination contract under the ISDEAA in the first place, which would have provided "the full protection and coverage" of the FTCA, and under which "the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage." Pub. L. 101-512, § 314, 104 Stat. 1915, 1959 (1990); 25 U.S.C. § 5321(c)(1).

Indeed, if the MOA were a self-determination contract, the Tribe's insurer would be required to "waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit" (*see* 25 U.S.C. § 5321(c)(3)(A)), yet the Tribe asserted such a defense in this action, which was accepted by the state court. *See* McDarment Decl. (ECF 12-2) ¶ 6. The parties also entered into a stipulation (adopted by the court) representing that the Tribe's insurance covered Walker's accident—even though the Tribe's insurance policy states it does not apply where the insured "is eligible for protection from tort liability under the Federal Tort Claims Act." *Id.* ¶ 6 & Ex. D, at 37; *see* Frueh Decl. Ex. 4, at 3. Walker cannot now be heard to argue he is eligible for FTCA coverage, contrary to these representations. *See generally Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (explaining that judicial estoppel precludes litigants from "playing fast and loose with the courts" and "gaining an advantage by taking inconsistent positions").

B. Walker's tortured reading of 25 U.S.C. § 5321(a)(1) must be rejected.

Despite the overwhelming evidence to the contrary, Walker contends the MOA is a self-determination contract under the ISDEAA because the Tribe purportedly "request[ed] . . . by tribal resolution, to enter into a self-determination contract . . . to plan, conduct, or administer" the SFC Program or portions thereof. *See* Motion 7 (quoting 25 U.S.C. § 5321(a)(1)). But Walker offers no evidence of such a request. He cites the MOA, which recounts that the Tribe "request[ed] assistance

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[7] *See also* IHM-MOA § 5-2.9A(1)(a), (3) (explaining that "[e]ach MOA party is responsible for resolving any tort claims against it," and "[t]he Tribe and its insurance carrier are liable for damages or injuries to third-parties"); *id.* § 5-2.3E(3) ("Each MOA party is responsible for damages due to its own negligence. For example, when a Tribe wants to construct a project using its own employees (Tribal force construction account); the Tribe assumes a significant liability (risk) for damages to public facilities and injuries to bystanders and workers. The Tribe must carry applicable liability insurance and workmen's compensation coverage (and should be required to carry such coverage in the MOA).").

under Public Law 86-121 to serve the community in the construction of wastewater disposal facilities." *See id.* at 7–8 (citing Declaration of Gary Whitten ("Whitten Decl.," ECF 12-3) Ex. J, at 114–17).

There is no evidence that the Tribe requested "to enter into a *self-determination contract*"—let alone pursuant to a "*tribal resolution*." 25 U.S.C. § 5321(a)(1) (emphasis added); *see Ford v. Moore*, 552 N.W.2d 850, 853 (N.D. 1996) ("The law mandates that a tribal organization must obtain a tribal resolution before entering into a self-determination contract."). Nor is there evidence of the requisite "proposal for a self-determination contract" under 25 U.S.C. § 5321(a)(2) or 25 C.F.R. Chapter 5, Part 900, Subpart J. *See* 25 C.F.R. §§ 900.8, 900.125. And the Tribe's contribution of construction labor does not mean the Tribe "plan[ned], conduct[ed], or administered" the SFC Program in lieu of IHS. 25 U.S.C. § 5321(a)(1). Such contributions are how Tribes *participate* in the SFC Program. *See* 42 U.S.C. § 2004a(a)(3); IHM-MOA § 5-2.2H(1) & *supra* note 2. Under Walker's reading, merely requesting assistance or participating in federal programs must be deemed a request to "assume[] control over" those programs. *Navajo Nation*, 57 F.4th at 289.

Walker insists his reading of § 5321(a)(1) is required by § 5321(g), which states that the ISDEAA "shall be liberally construed for the benefit of the Indian Tribe," and "any ambiguity shall be resolved in favor of the Indian Tribe." But that provision "does not license courts to rely on ambiguities that do not exist," and courts "cannot, under the guise of interpretation, . . . rewrite congressional acts." *See Malabed v. N. Slope Borough*, 335 F.3d 864, 871 (9th Cir. 2003). This argument is particularly strained given that the Tribe knows how to enter into self-determination contracts under the ISDEAA and has done so many times. *See* Simmons Decl. ¶¶ 2–3 & Exs. 1, 2; Frueh Decl. Ex. 2. These agreements look nothing like the MOA.

Nor is Walker's proffered reading of § 5321(a)(1) self-evidently "for the benefit of the Indian Tribe," as opposed to his own benefit and that of the Tribe's insurance carrier. 25 U.S.C. § 5321(g); *see* Cohen's Handbook of Federal Indian Law § 22.02 (noting that an ISDEAA contract imposes "numerous mandatory contract provisions" on a Tribe, as well as "obligations to provide services in a 'fair and uniform' manner, and significant accounting and auditing requirements," and that "self-determination contracts for construction may be subject to additional requirements, including, when appropriate, certain provisions of the Office of Federal Procurement Policy Act"). Only one Tribe in California has

elected to assume responsibility of the SFC Program under the ISDEAA. *See* Rash Decl. ¶ 6. IHS executes about 30 to 50 MOAs with California Tribes every year, and none occurs under the authority of the ISDEAA. *Id.* ¶ 7. Among other benefits, these Tribes avoid delays and substantial costs associated with professional-services contracts (project management, planning, environmental compliance, specialty-engineering services, design and construction management) that typically exceed the federal funding available if a Tribe were to manage such projects under the ISDEAA. *Id*. IHS can perform this work in-house or through its professional-services contracts at lower costs. *Id.*

C. Walker's appeal to legislative history is unavailing.

To prop up his reboot of § 5321(a)(1), Walker notes that, in a hearing on a bill that later became the ISDEAA, one of the bill's sponsors said that federal education programs for Tribes had "'vague' and 'inconsistent' administrative procedures regarding contracting and Indian input." *See* Motion 10. But this scrap of legislative history only undercuts Walker's position.

The ISDEAA and its implementing regulations now provide highly detailed terms and procedures through which a Tribe can enter into a self-determination contract. *See* 25 U.S.C. §§ 5304(a), (m), 5321(a), 5329(a), (c); 25 C.F.R. Ch. 5, Pt. 900, Subpts. C, D, J; *see also* Frueh Decl. Ex. 5 (IHS, Technical Guide) app'x II, pp. 34–52. It is Walker who seeks to ignore these procedures in favor of a "vague" regime in which a Tribe can fall into a self-determination contract merely by asking for assistance or participating in federal programs.

Walker also argues that a "primary purpose of Congress's extension of FTCA coverage to tribal contractors was to reduce their insurance costs and prevent using scarce program resources to pay for private insurance." Motion 12. But this is true only for Tribal contractors who step into the shoes of BIA or IHS and take over the administration of the agencies' programs through self-determination contracts under the ISDEAA. *Demontiney v. United States*, 255 F.3d 801, 805 (9th Cir. 2001) ("The ISDEAA's waiver of federal sovereign immunity is limited to 'self-determination contracts' . . . ."); *see FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995). Walker has not carried his burden to prove that the MOA is a self-determination contract, and "waivers of sovereign immunity are to be strictly construed against such surrender." *Manuel v. United States*, No. 14-665, 2014 WL

6389572, at *3, *10 (E.D. Cal. Nov. 14, 2014) (rejecting "an expansive reading of Section 314" of Public Law No. 101-512 because "waivers of sovereign immunity must be unequivocally expressed").

D. Walker fails to prove he was carrying out the MOA at the time of the accident.

Walker fails to prove not only that the MOA is a self-determination contract, but also that he was carrying out the MOA at the time of the accident. *Green*, 8 F.3d at 698 ("[T]he party seeking review bears the burden of presenting evidence and disproving the Attorney General's decision to grant or deny scope of employment certification . . . ."); *see Shirk*, 773 F.3d at 1006 (explaining that "courts must determine" (1) "whether the alleged activity is, in fact, encompassed by the relevant federal contract or agreement," and (2) "whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law"); *see also Manuel* 2014 WL 6389572, at *10 (finding insufficient evidence that an employee of the Tule River Indian Tribe was carrying out a self-determination contract at the time of a car accident).

Walker himself does not provide any testimony about what he was doing at the time of the accident. He instead offers the Tribe's Public Works Director, Gary Whitten, who attests that Walker "was paid with funds from the MOA" and "was [on] his way to pick up supplies for a sewer project under the MOA at the time of the incident." *See* Whitten Decl. (ECF 12-3) ¶¶ 4, 8. But Whitten previously testified that Walker "work[ed] on an hourly basis for the Tribe's public works department," which provides various services ranging from providing drinking water to maintaining roads to fire abatement. *See* Frueh Decl. Ex. 3 ¶¶ 3–4. Whitten stated that Walker was "on his way to purchase parts for a public works department project at the time of the collision." *Id.* Ex. 3 ¶ 5.

It is thus unclear whether Walker was carrying out the MOA or some other project or aspect of his employment at the time of accident. *See Shirk*, 773 F.3d at 1006. And even if Whitten had asked Walker to "pick up supplies for a sewer project under the MOA," it is entirely uncertain whether Walker was tending to that request at the time of the accident at 4:40 p.m. and 20 miles away from the reservation. *See Felix v. Asai*, 192 Cal. App. 3d 926, 933 (1987) (finding an employee was outside the scope of his employment when, after completing an errand for his employer, he was in an accident on the way to his parents' home). Only Walker can answer that question, and his silence is deafening.

At bottom, vague testimony from someone without personal knowledge of what Walker was doing at the time of the accident is insufficient. *Manuel*, 2014 WL 6389572, at *10 (finding "no detailed explanation as to how [an employee of the Tule River Indian Tribe] was carrying out any of the Tribe's self-determination contracts," and holding that "vague and general assertions" regarding how the employee "assisted the Tribe's performance of the self-determination contracts" was insufficient to "render[the defendant] a federal employee" under the ISDEAA). For this additional and independent reason, Walker's Motion must be denied.

V. CONCLUSION

For the foregoing reasons, Walker's Motion must be denied, and this action should be remanded back to Tulare County Superior Court. *See* 28 U.S.C. § 2679(d)(3).

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Respectfully submitted,

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