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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RUBEN BARRIENTOS, JR.,

Plaintiff,

v.

DALE ALLAN WALKER and DOES 1-20,

Defendants.

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

REPLY IN SUPPORT OF MR. WALKER'S MOTION TO CERTIFY

Judge: Hon. Jennifer L. Thurston
Magistrate Judge: Hon. Stanley A. Boone

Hearing Date: December 13, 2023
Hearing Time: 10:00 a.m.

Defendant Dale Allan Walker ("Defendant" or "Mr. Walker") hereby submits the following Reply Brief in Support of his Motion to Certify Employment Under the Federal Tort Claims Act, Substitute the United States as Defendant, and Dismiss Mr. Walker ("Motion") and in response to the United States' Opposition ("U.S. Oppo.") and Plaintiff's Opposition ("Pl. Oppo." and with the U.S. Oppo., the "Oppositions").[1]

I. SUMMARY OF LEGAL DISCUSSION

Plaintiff Ruben Barrientos, Jr. ("Plaintiff") filed an action in state court to recover for injuries he allegedly sustained after a collision between Mr. Walker and

[1] Capitalized terms not defined herein shall have the meaning set forth in the Motion.

Plaintiff while Mr. Walker was employed by the Tule River Indian Tribe of California ("Tribe") (the "Incident"). Subsequently, Plaintiff filed a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), which the United States denied. Mr. Walker timely moved before trial to certify his employment under the FTCA in state court, and shortly thereafter, the United States removed the action to this Court. Mr. Walker may petition for certification at any time before trial that he was acting within the scope of his employment. 28 U.S.C. § 2679(d)(3).[2] Certification is appropriate here because the Tribe entered a Memorandum of Agreement ("MOA") with the Indian Health Service ("IHS") that was in place at the time of the Incident. The MOA meets the statutory definition of a self-determination contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* ("ISDEAA"), and as such, the Tribe is deemed a federal agency and Mr. Walker is deemed a federal employee for purposes of the FTCA. 25 U.S.C. § 5321(d). Mr. Walker was acting within the scope of his employment at the time of the Incident. Thus, Mr. Walker respectfully asks the Court to grant his Motion.

II. LEGAL DISCUSSION

A. The MOA is a Self-Determination Contract Under the ISDEAA Warranting FTCA Coverage.

The plain text of the ISDEAA establishes that the MOA is a self-determination contract. If statutory ambiguity exists, the legislative history supports this conclusion as well and any ambiguity must be construed in favor of the Tribe as required by the ISDEAA. The United States' and Plaintiff's arguments to the contrary are unavailing.

[2] Plaintiff misrepresents the record and the FTCA by implying this is Mr. Walker's third attempt at FTCA certification. Pl. Oppo. at 3. No court has determined whether Mr. Walker was acting within the scope of his employment under the FTCA. Rather, after Plaintiff served the Tribe and Mr. Walker with his lawsuit, they notified the federal government, and Plaintiff filed an FTCA claim administratively. 28 U.S.C. § 2679(c); 25 C.F.R. § 900.188(b); McDarment Decl. ¶¶ 4, 5, Exhs. B, C. Once the federal government issued its decision, Mr. Walker for the first time sought judicial review by petitioning the state court to certify his employment eight months before trial, as permitted by the FTCA. 28 U.S.C. § 2679(d)(3); McDarment Decl. ¶ 11, Exh. I; Dkt. No. 1-2. Shortly thereafter, and without the state court having ruled, the federal government removed the action to this court and Mr. Walker may petition this court to certify his employment under the FTCA. 28 U.S.C. § 2679(d)(3); Dkt. No. 1.

1. *The ISDEAA's Plain Text Establishes that the MOA is a Self-Determination Contract.*

The ISDEAA's plain language establishes the MOA is a self-determination contract. The Oppositions do not meaningfully analyze the ISDEAA's plain language. "Interpretation of a statute must begin with the statute's language." *Mallard v. United States District Court of Iowa*, 490 U.S. 296, 300 (1989) (citations omitted).

The ISDEAA expressly **directs** the Secretary to enter into a "self-determination contract" when a tribe requests to plan, conduct, or administer programs (or portions thereof) provided by the Secretary under the Sanitation Act:

> The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs— . . . (C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. 2001 *et seq.*] [the "Sanitation Act"] 25 U.S.C. § 5321(a)(1)(C).

A "self-determination contract" is defined under the ISDEAA as "a contract (or grant or cooperative agreement utilized under section 5308 of this title) entered into under subchapter I of this chapter [**which includes contracts entered into under 26 U.S.C. § 5321 above**] between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." *Id.* § 5304(j) (emphasis added).

Therefore, the ISDEAA's plain text is clear that the Secretary **must** enter a self-determination contract when a tribe requests to enter a contract "to plan, conduct, and administer programs, or portions thereof . . . provided by the Secretary [] under [the Sanitation Act]" (i.e., a "self-determination contract"). *Id.* § 5321(a)(1)(C). Here, the Tribe requested to construct wastewater disposal facilities on behalf of the federal government with the Tribe's employees under the Sanitation Act. Dkt. No. 12-3 at 6–9. As such, the MOA, which is the contract entered into subsequent to the Tribe's request, is a self-determination contract under the ISDEAA.

If the Secretary need not enter a "self-determination contract" under the ISDEAA when requested by a tribe for planning, conducting, or administering programs (or portions thereof) provided under the Sanitation Act, the language directing the Secretary to enter a self-determination contract would be superfluous, which is to be avoided. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014).

The United States contends that the Tribe did not submit a resolution to enter such contract, U.S. Oppo. at 10–11, implying that the resolution must take a specific form, which the United States does not define. However, Title I of the ISDEAA merely requires that the Secretary enter a self-determination contract "upon the request of any Indian tribe by tribal resolution." Nothing in the ISDEAA defines the term "resolution." The regulations do not define the term either. *See* 25 C.F.R. § 900.6 (definitions). In the absence of a statutory definition, courts look to dictionary definitions around the time the statute was enacted.[3] *See, e.g.*, *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017). Webster's defines "resolution" as "the act or result of resolving something" or "a formal statement of opinion or determination by an assembly, etc." Webster's New World Compact School and Office Dictionary 411 (4th ed. 2002). The term "resolution" does not require a specific form.

There is no question the Tribe resolved to enter the MOA, a self-determination contract, as the MOA provides that "[t]he Tribe, acting through the Chairperson, submitted a project proposal/letter to the IHS, dated June 2017, requesting assistance under Public Law 86-121 to serve the community in the construction of wastewater disposal facilities." Dkt. No. 12-2 at 68. The United States does not dispute the authenticity of the MOA, which speaks for itself and which acknowledges the Tribe's resolution/determination to conduct construction of wastewater disposal facilities under Public Law 86-121. *See* 25 U.S.C. § 5321(a)(1)(C).

To the extent the ISDEAA is ambiguous, the ISDEAA instructs that such

[3] The "resolution" language was added to the ISDEAA under Public Law 103-413 (Oct. 25, 1994).

ambiguities be "liberally construed for the benefit of the Indian Tribe . . . and any ambiguity shall be resolved in favor of the Indian Tribe." *Id.* § 5321(g).

The United States further claims that the ISDEAA did not repeal or eliminate preexisting programs and their award mechanisms, citing Cohen's Handbook of Federal Indian Law § 22.02[1] (2023) ("Cohen's Handbook"), the Indian Health Manual, pt. 5, ch. 2, Memorandum of Agreement (the "IHM-MOA"), *available at* https://www.ihs.gov/ihm/pc/part-5/p5c2] §§ 5-2.8C, 5-2.9B, and 42 C.F.R § 137.272. U.S. Oppo. at 7. None of these authorities support this conclusion.

Nowhere in Cohen's Handbook § 22.02[1] does it state that the ISDEAA did not "repeal or eliminate preexisting programs and their award mechanisms." *See* U.S. Oppo. at 7. To the contrary, Cohen's Handbook § 22.02[1] discusses the ISDEAA generally and the reasons that IHS may deny a self-determination contract. The United States also relies on the IHM-MOA, but its statements are conclusory as it does not engage in any statutory interpretive analysis, it has not underwent notice-and-comment rulemaking, and it is not entitled to deference. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). The United States also cites regulation 42 C.F.R. § 137.272 as support. U.S. Oppo. at 7. These Part 137 regulations interpret statutory provisions under the "Tribal Self-Governance Amendments of 2000," which fall under Title V of the ISDEAA for Self-Governance Tribes. The regulations do not interpret Title I of the ISDEAA, which is the Title at issue here and therefore the Part 137 regulations are inapplicable. Moreover, the Tribe is not a Self-Governance Tribe, which the United States recognizes. U.S. Oppo. at 9 n.6; *see also* 42 C.F.R. § 137.10.[4]

[4] The regulations the government cites are not necessarily inconsistent with the statutory text, because such regulations acknowledge that Title V regulations do not govern projects entered into under Title I, including those under the Transfer Act, as amended by Public Law 86-121 (Public Law 86-121 is not expressly mentioned in Title I of the ISDEAA, but is included as an amendment to the Transfer Act). However, to the extent the regulations are inconsistent with Title I, such regulations are unenforceable. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984)

Finally, the United States claims nothing in the MOA suggests the Tribe stepped into the shoes of the United States to plan, conduct, or administer the sanitation facilities construction program. U.S. Oppo. at 1–2. The federal government's claims here imply that to enter a self-determination contract, the Tribe must perform **all** of the federal government's duties under the program. *Id.* Yet the plain text of the ISDEAA contradicts this, as it allows tribes to enter self-determination contracts for conducting a federal program, "or portions thereof." 25 U.S.C. § 5321(a)(1). The Tribe need not perform all of the federal government's duties for the agreement to constitute a self-determination contract. The Tribe did step into the shoes of the federal government here and conducted the construction of the sewer project, as the United States acknowledges, a project which the federal government would have otherwise constructed for the Tribe. Dkt. No. 12-3 at 5–15, 24–25; U.S. Oppo. at 6.

In sum, the MOA is a self-determination contract because it meets the statutory definition of a self-determination contract under the plain terms of the ISDEAA.

2. *The ISDEAA Legislative History Supports the Conclusion that the MOA is a Self-Determination Contract.*

If the plain text of the ISDEAA is unclear, the legislative history and purpose supports the conclusion that the MOA is a self-determination contract. The ISDEAA must be read against the backdrop of federal Indian policy and history. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 661, 666 (9th Cir. 1975). As noted in Mr. Walker's moving papers, vague and inconsistent administrative procedures regarding contracting and Indian input led to passage of the ISDEAA. *Indian Self-Determination and Education Program: S. 1017 and Related Bills: Hearing Before the S. Subcomm. on Indian Affairs*, 93rd Cong., 1-2 (1973) (statement of Sen. James Abourezk). And the purpose of the ISDEAA is to promote tribal input in and control over federal programs for the benefit of Native people. 25 U.S.C. § 5301(a).

("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

The legislative history demonstrates that Congress passed the ISDEAA to require the Secretary to enter self-determination contracts when tribes requested to perform all or a portion of the government's duties under the Sanitation Act and provides parameters for when the Secretary may decline to do so. *Compare* 25 U.S.C. § 5321(a)(2), *with* 42 U.S.C. § 2004a(a)(3).

The United States discusses legislative history for the Sanitation Act *before* the ISDEAA was enacted. U.S. Oppo. at 2–3 & n.2. But such legislative history is irrelevant in determining Congress' intent when enacting the ISDEAA. The Oppositions cite no legislative history contradicting Mr. Walker's arguments.

3. *The Oppositions' Other Arguments Fail.*

First, the United States concedes that FTCA claims under the ISDEAA are not limited to medical activities. U.S. Oppo. at 3–4.

Next, the United States asserts that IHS has no authority to award funds to tribes under the ISDEAA that IHS does not "administer," but it cites no statutory authority for this assertion. U.S. Oppo. at 8–9. Rather, the United States cites the IHM-MOA, which conclusively states that funds are not considered "administered" by the Secretary of IHS if they are passed through IHS to tribes from another agency, and the EPA's Frequently Asked Questions page, which also conclusively states, without any citation to authority or analysis, that tribes must enter a direct grant with the EPA to receive Clean Water Act Indian Set-Aside funds under the ISDEAA.

The above does not answer the question at issue here, which is whether the MOA is a self-determination contract under the plain terms of the ISDEAA. Nothing in Title I of the ISDEAA requires that IHS "administer" the funds at issue in order for the contract for such funds to be considered a self-determination contract. Rather, the ISDEAA directs the Secretary "to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, . . . provided by the Secretary of Health and Human Services under the [Sanitation Act]." 25 U.S.C. § 5321(a)(1)(C). This Sanitation Act provision in Title

I contrasts with the provision immediately below it, which *does* use the term "administer": it directs the Secretary "to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, . . . administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior." *Id.* § 5321(a)(1)(D). The United States' argument here misses the mark and is unsupported by the ISDEAA's statutory text.

The United States further continues to assert that the MOA does not contain all terms required under the ISDEAA and that the Tribe agreed to be responsible for torts. U.S. Oppo. at 1, 2, 9; *see also* Pl. Oppo. at 3, 4. Yet the Oppositions do not address Mr. Walker's argument that the contract must be interpreted against the United States as the drafter with the superior bargaining position, *Hunt Wesson Foods Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987), or that the United States cannot contractually disclaim congressionally-mandated liability. *See, e.g.*, *Aretz v. United States*, 604 F.2d 417, 430–31 (5th Cir. 1979).

The United States additionally claims the Tribe would be required to waive the defense of sovereign immunity, but that the Tribe did not. U.S. Oppo. at 10. The ISDEAA section cited by the United States provides that "[a]ny policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe . . . ." 25 U.S.C. § 5321(c)(3)(A) (emphasis added). The Secretary did not obtain or provide the Tribe's insurance policy here. Moreover, if the FTCA does not apply, Mr. Walker is not entitled to sovereign immunity if he is the real party in interest instead of the Tribe. *See Lewis v. Clarke*, 581 U.S. 155, 163 (2017).

Next, the United States misrepresents the stipulation between the parties, which did not include the United States, and which provides that "[a]ny recovery by Plaintiff in this Action will be limited to the insurance policy or policies issued to [the Tribe]

or to Defendant Dale Allen Walker that is applicable to the Incident and was in effect at the time of the Incident." Dkt. No. 12-2 at 41 (emphasis added). The insurance policies are not applicable if the FTCA applies.

Overall, the MOA is a self-determination contract under the ISDEAA warranting FTCA coverage.

B. Mr. Walker Was Acting Within the Scope of His Employment Under the FTCA.

"The Attorney General's decision regarding scope of employment certification is subject to *de novo* review in both the district court and on appeal." *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) (per curiam). "The 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.* (emphasis added). A preponderance of the evidence standard is a "more likely than not" standard. *Mansfield v. Pfaff*, 719 F. App'x 583, 585–86 (9th Cir. 2017) (mem.).

The Attorney General has not disputed until now that Mr. Walker was picking up supplies for his employer. McDarment Decl. ¶¶ 8, 11, Exhs. F, I. Nevertheless, Mr. Walker presented sufficient evidence by a preponderance of the evidence that he was acting within the scope of his employment. The Incident took place between the Tule River Tribe Reservation (where Mr. Walker worked) and Bakersfield (where specialty parts houses were located). Dkt. No. 15 at 15; Smith Decl. ¶ 3, Exh. N at 139–40. Plaintiff's counsel asked Mr. Walker nearly three years after the Incident whether he "had any scheduled stops between the reservation and [his] home on the afternoon of [the Incident]" to which he responded he was "en route to a parts house to pick up some parts for my boss Gary Whitten." Smith Decl. ¶ 3, Exh. N at 146–47. Mr. Whitten, also submitted a declaration that he "requested that Mr. Walker pick up [] supplies" which were "for a sewer project under the MOA at the time of the incident." Whitten Decl. ¶ 8; Smith Decl. ¶ 3, Exh. N at 138. Although Mr. Walker

could not recall the name of the parts house, Mr. Walker stated the houses where he would pick up supplies were located "in Bakersfield." Smith Decl. ¶ 3, Exh. N at 148.

Plaintiff makes several speculations to contradict Mr. Walker's evidence, but none are convincing. First, Plaintiff claims that Mr. Walker has not submitted evidence aside from his own testimony. Pl. Oppo. at 3. Yet Mr. Walker submitted his supervisor's declaration as support. Whitten Decl. ¶ 8. Second, Plaintiff speculates that Mr. Walker was heading home after work because Mr. Walker lives in Bakersfield where the parts houses were also located. Pl. Oppo. at 5. Yet no evidence supports this conclusion. Third, Plaintiff asserts that "[b]etween the location of the crash and [Mr. Walker's] home, there are no commercial businesses that would offer for sale supplies to be used in the completion of a sewar [sic] project." Pl. Oppo. at 5. But Plaintiff provides no citation for this broad statement. Mr. Walker was on his way to a parts house in Bakersfield and the Incident occurred between the Reservation and Bakersfield. Bakersfield is a town of over 400,000 in population, making it highly unlikely it has "no commercial businesses." Moreover, in response to Plaintiff's counsel's question of whether he went to a "specialty parts house" and "**not** a Home Depot or an Ace Hardware," Mr. Walker responded, "Correct." Smith Decl. ¶ 3, Exh. N at 148. Fourth, Plaintiff asserts that because parts were "typically" delivered to the Reservation that Mr. Walker was not picking up parts on the day of the Incident. Pl. Oppo. at 5. That parts were sometimes delivered does not mean Mr. Walker was not en route to pick up parts. Smith Decl. ¶ 3, Exh. N at 148–49; Whitten Decl. ¶¶ 8–9.

The United States' only argument here is that Mr. Walker did not submit his own testimony regarding his actions, yet such testimony has been submitted. U.S. Oppo. at 13–14; Dkt. No. 15 at 10; *see also* Smith Decl. ¶ 3, Exh. N.

Plaintiff and the United States have offered no evidence to dispute Mr. Walker's statement and Mr. Whitten's declaration besides mere speculation, which does not create a factual dispute. See *Nelson v. Pima Cmty. College*, 83 F.3d 1075, 1081 (9th Cir. 1996) ("[M]ere allegation and speculation do not create a factual dispute . . . .").

Regardless, assuming Mr. Walker was on his way home instead of picking up supplies, because Mr. Walker was provided with the vehicle so he could purchase supplies before or after work (Smith Decl. ¶ 3, Exh. N at 140–41; Whitten Decl. ¶ 9), his use of the vehicle provided an incidental benefit to his employer such that his commute constitutes acting within the scope of his employment. *See Lazar v. Thermal Equip. Corp.*, 148 Cal. App. 3d 458, 461 (1983) (holding employer derived benefit from employee's commute because employee used company vehicle for after-hours calls). The intersection where the Incident occurred was along Mr. Walker's usual route home between the Reservation and Bakersfield. Smith Decl. ¶ 3, Exh. N at 149.

Mr. Walker has presented sufficient evidence to establish by a preponderance of the evidence that he was acting within the scope of his employment.[5]

III. CONCLUSION

For the above reasons, and those in his moving papers, Mr. Walker respectfully requests the Court to grant his Motion to certify employment under the FTCA, substitute the United States as the defendant, and dismiss the action as to Mr. Walker.

DATED: November 27, 2023

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Racheal M. White Hawk
Racheal M. White Hawk
Attorney for Defendant
DALE ALLAN WALKER

[5] If the Court believes a true dispute in fact exists, "the court, in its discretion, can order an evidentiary hearing to determine its own jurisdiction." *Farmer v. United States*, No. CV-13-0251-LRS, 2014 WL 5419637, at *1 (E.D. Wash. Oct. 22, 2014) (citing *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987)).

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2023, I electronically filed the foregoing (1) **REPLY IN SUPPORT OF MR. WALKER'S MOTION TO CERTIFY; and** (2) **DECLARATION OF MATTHEW C. SMITH IN SUPPORT OF MR. WALKER'S MOTION TO CERTIFY EMPLOYMENT UNDER THE FTCA, SUBSTITUTE THE UNITED STATES AS DEFENDANT, AND DISMISS MR. WALKER** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Racheal M. White Hawk
Racheal M. White Hawk