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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 TOWNSEND RANCH LLC, a Washington
limited liability corporation; ESTATE OF
9 DAVID TOWNSEND; EDWARD
TOWNSEND; DANIEL TOWNSEND;
10 WILLIAM TOWNSEND; NATHAN
TOWNSEND; MALCOLM and KELLY
11 TOWNSEND, husband and wife;
TOWNSEND BROTHERS LLC, a
12 Washington limited liability corporation;
and T3 RANCH LLC, a Washington limited
13 liability corporation,

14 Plaintiffs,

15 vs.

16 UNITED STATES OF AMERICA, acting
by and through the DEPARTMENT OF
17 INTERIOR and BUREAU OF INDIAN
AFFAIRS,

18 Defendant.

19
20 ///

21 ///

Case No. 2:23-cv-00170-TOR

UNITED STATES' MOTION TO
DISMISS PURSUANT TO RULES
12(b)(1) AND 12(h)(3)

Without Oral Argument
April 26, 2024

I. INTRODUCTION

1
2 This Federal Tort Claims Act (“FTCA”) action arises from a wildfire that burned
3 portions of Plaintiffs’ real property. Plaintiffs allege that the fire originated at a lumber
4 mill in Omak, Washington, which is owned by the Colville Tribal Federal Corporation
5 (“CTFC”), a business arm of the Confederated Tribes and Bands of the Colville
6 Reservation (“Colville Tribe”). Plaintiffs’ theory of liability is that CTFC negligently
7 maintained a “slash pile” consisting of wood chips and other byproducts from the mill,
8 and that the Colville Tribe negligently failed to remediate the wildfire risk that the
9 slash pile allegedly posed.

10 The Court lacks jurisdiction over the case. As Plaintiffs recognize, their only
11 path to establishing jurisdiction under the FTCA is to show that the negligent acts
12 attributed to CTFC and/or the Colville Tribe were performed pursuant to an Indian
13 Self-Determination and Education Assistance Act contract—a so-called “638
14 contract.”

15 The two 638 contracts cited in Plaintiffs’ complaint do not cover the allegedly
16 negligent conduct at issue. The first 638 contract deals with forest management. The
17 scope of the contract is limited to maintaining healthy forests and generating revenue
18 from the sale of harvested timber. The contract does not extend to the manufacturing
19 of finished lumber products by a for-profit corporation after the timber has been sold.
20 The alleged negligence by CTFC in disposing of wood chips and other manufacturing
21 waste at the mill property is beyond the scope of the contract and therefore not

1 actionable under the FTCA.

2 The second 638 contract deals with firefighting and fire protection services for
3 the Town of Nespelem, Washington. The contract does not cover firefighting or fire
4 protection services for the Omak area, where the mill is located. The alleged
5 negligence by the Colville Tribe in failing to remediate the fire danger allegedly posed
6 by the slash pile is beyond the scope of the contract and therefore not actionable under
7 the FTCA.

8 To the extent Plaintiffs intend to rely on *other* 638 contracts not cited in their
9 complaint, their efforts must fail. Although the mill property is within the exterior
10 boundaries of the Colville Reservation, it is **owned by CTFC in fee simple**. Property
11 records confirm that the parcels on which the slash pile sits are under the sole
12 jurisdiction of Okanogan County Fire District No. 3—not BIA. Because the land is not
13 under BIA jurisdiction, it is necessarily excluded from the scope of any 638 contract
14 for firefighting or fire protection services.

15 **II. BACKGROUND FACTS¹**

16 The operative Second Amended Complaint (“SAC”) paints a picture of a
17 catastrophic wildfire spontaneously erupting from a “slash pile” at the Omak Mill on
18

19 ¹ The facts in this section are provided for background purposes only. To the
20 extent any facts in this section are disputed, the dispute is not material to the
21 jurisdictional issues raised in this motion.

1 September 7, 2020. ECF No. 15 at ¶¶ 1.1, 4.7-4.11. Respectfully, that picture is
2 distorted. As outlined below,² there were at least two fires that burned in the
3 immediate vicinity of the Omak Mill and Plaintiffs’ property before the slash pile
4 allegedly erupted. The first fire was started by squatters on July 18, 2020. That fire
5 burned onto the Omak Mill property and ignited the slash pile in question,
6 necessitating a multi-jurisdictional response. The second fire was started by an
7 arsonist on September 6, 2020—the day before the slash pile allegedly erupted. That
8 fire quickly spread to tens of thousands of acres and is believed to have burned a
9 substantial portion of Plaintiffs’ property.

10 **A. Rodeo Trail Fire (July 18, 2020)**

11 A fire known as the “Rodeo Trail Fire” started on July 18, 2020, “in or near a 20
12 [foot] camp trailer located near 342 Rodeo Trail Road and spread to grass and sage
13 burning approx[imately] 34 acres.” *Taylor Decl.*, Ex. A. The fire started at a
14 “squatters” compound located off Rodeo Trail Road, southwest of the Omak Mill Site.
15 *Taylor Decl.*, Ex. B. It then burned uphill onto the Omak Mill property and into the old
16 woodchip storage area where the mill historically disposed of woodchips. *Taylor*

17
18 ² On information and belief, Plaintiff Edward Townsend is the Chief of
19 Okanogan County Fire District No. 8. Mr. Townsend lives just a few miles south of
20 the Omak Mill site. Mr. Townsend and the other Plaintiffs are presumably aware of
21 these two prior fires.

1 Decl., Ex. A, B. The location of the fire start at 342 Rodeo Trail Road and woodchip
2 pile are shown below:



14 Several different firefighting agencies responded to the Rodeo Trail Fire,
15 including Okanogan County Fire, Washington State Department of Natural Resources,
16 and Colville Agency Mount Tolman Fire Center (“Mount Tolman”). *Taylor Decl.*, Ex.
17 C, p. 3. Okanogan County Fire was first on scene and reported that the Police
18 Department was also present and had the “responsible party in custody.”³ *Id.* Despite

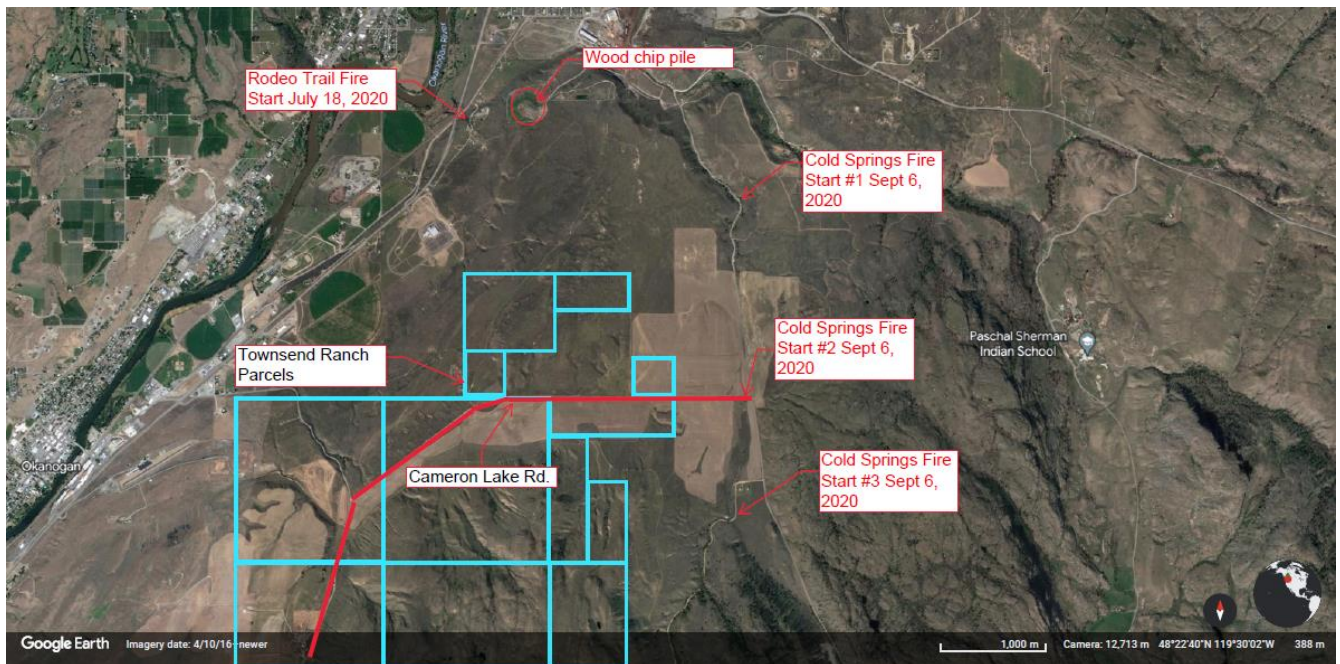
19 _____
20 ³ It is currently unknown who started the July 18, 2020, Rodeo Trail Fire that
21 originally ignited the woodchip pile.

1 the firefighters’ best efforts, the fire continued to smolder in the slash pile long after
 2 the wildfire was extinguished. *Taylor Decl.*, Ex. A.

3 **B. Cold Springs Fire (September 6, 2020)**

4 Over a month later, on September 6, 2020, an arsonist started a series of fires
 5 along the Columbia River Road, a short distance from the Omak Mill site and
 6 Plaintiffs’ property. *Taylor Decl.*, Ex. D. There were several fire start locations all
 7 along various aspects of the road, and those starts ultimately turned into the fire known
 8 as the Cold Springs Fire. *Id.* The fire spread to the southwest quickly due to extreme
 9 winds coming from the north and northeast. *Id.*

10 The Cold Springs Fire eventually jumped the Columbia River, and the fire on
 11 the south side of the river was then called the Pearl Hill Fire. *Id.* The fires burned more
 12 than 400,000 acres. *Id.* A picture of the approximate fire start locations, as well as the
 13 Omak Mill wood chip pile, and Plaintiffs’ property is below:



C. Alleged Omak Mill Fire (September 7, 2020)

Plaintiffs allege that on September 7, 2020, the day after the Cold Springs Fire ignited and ran south through their properties, high winds carried “burning embers” from the slash pile at the Omak Mill into dry grasses and started a new wildfire. ECF No. 15 at ¶ 4.9. Plaintiffs claim this new fire “swept southward, destroying thousands of acres of land and buildings.” ECF No. 15 at ¶ 4.10.

Although the Rodeo Trail Fire and the Cold Springs Fire played an outsized role in the alleged destruction of their property—the former by burning into the slash pile and igniting the embers alleged to have caused the September 7, 2020 fire, and the latter by presumably burning large swaths of their property the day prior—Plaintiffs’ allegations focus solely on the September 7, 2020 fire and the alleged negligence of the Tribe and CTFC in failing to prevent the same.

III. JURISDICTIONAL FACTS

A. The Omak Mill

The Omak Mill property is located in Omak, Washington, just outside Omak city limits. Until the events at issue in this case, the site was a lumber mill that manufactured plywood and wood veneer products. *Taylor Decl.*, Ex. E. The mill historically sourced timber from around the northwest, including from forest lands on the Colville Reservation.

Although the Omak Mill property lies within the external boundaries of the Colville Reservation, it is **owned in fee simple** by CTFC. *Taylor Decl.*, Exs. E, F, G,

1 H. CTFC's predecessor entity purchased the property from the bankruptcy estate of a
2 private business for \$3.4 million in 2001. *Id.* The predecessor entity transferred the
3 property to the Colville Tribe in 2012, which then transferred the property to CTFC in
4 2013 and 2014. *Id.* CTFC pays property taxes on the property, including a fire
5 protection levy to Okanogan County Fire Protection District No. 3. *Taylor Decl., Ex G.*
6 In 2020, CTFC paid \$579.74 in property taxes on the two parcels on which the "slash
7 pile" sit. *Id.* \$22.10 of that amount was for "2020 FIRE DISTRICT #3 GENERAL
8 PROPERTY TAX." *Id.*

9 **B. The 638 Contracts**

10 Passed in 1975, the Indian Self-Determination and Education Assistance Act
11 ("ISDEAA") "created a system by which tribes could take over the administration of
12 programs operated by the BIA." *Los Coyotes Band of Cahuilla & Cupeno Indians v.*
13 *Jewell*, 729 F.3d 1025, 1033 (9th Cir. 2013). The statute authorizes tribes to "provide
14 services such as education and law enforcement that otherwise would have been
15 provided by the Federal Government." *Salazar v. Ramah Navajo Chapter*, 567 U.S.
16 182, 185 (2012). To avail itself of this opportunity, "a tribe that is receiving a
17 particular service from the BIA may submit a contract proposal to the BIA to take over
18 the program and operate it as a contractor and receive the money that the BIA would
19 have otherwise spent on the program." *Los Coyotes Band of Cahuilla & Cupeno*
20 *Indians*, 729 F.3d at 1033. These contracts are known as "638 contracts," in reference
21 to the Public Law that created them. *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d

1 999, 1002 (9th Cir. 2014) (citing Pub. L. 93-638, 88 Stat. 2203 (Jan. 4, 1975)).

2 The SAC cites two 638 contracts under which Plaintiffs are attempting to hold
3 the United States liable for the alleged negligence of the Colville Tribe and/or CTFC
4 under the FTCA. ECF No. 15 at ¶¶ 4.14–4.17. Both contracts are described below.

5 **1. Cooperative Forest Management (A20AV00089)**

6 The first cited contact, Contract A20AV00089, is for cooperative forest
7 management services (the “Forest Management 638 Contract”). *Taylor Decl.*, Ex. H.
8 The parties to the contract are Bureau of Indian Affairs (“BIA”) and the Colville Tribe.
9 *Id.* The contract was executed on November 25, 2019, for a term of three years. *Id.*

10 The services to be provided by the Colville Tribe are set forth in an Annual
11 Funding Agreement (“AFA”) appended to the contract. *Taylor Decl.*, Ex. H, at p. 17.
12 In broad strokes, the contract provides that the Colville Tribe will assume from BIA
13 the responsibility for managing the health of forest lands on the Colville Reservation
14 and generating revenue from the sale of harvested timber. *See United States v.*
15 *Mitchell*, 463 U.S. 206, 219–28 (1983) (explaining federal government’s fiduciary duty
16 to manage forest lands held in trust for Indian tribes); 25 U.S.C. § 3104(a) (provision
17 of National Indian Forest Resources Management Act of 1990 authorizing federal
18 government to engage in forest management through 638 contracts); 25 U.S.C. §
19 3104(b) (listing “management objectives” for Indian forest land management). The
20 contract states that the Colville Tribe will provide forest management services in seven
21 enumerated areas—Forestry, Forest Administration, Forest Management Planning,

1 Timber Sale Administration, Forest Development, Forest Protection, and Woodlands
2 Management—and lists specific tasks to be performed within each area. *Id.* at p. 30-
3 32.

4 Importantly for jurisdictional purposes, the Forest Management 638 Contract
5 neither requires nor contemplates that the Colville Tribe will engage in a for-profit
6 enterprise to turn harvested timber into manufactured wood products. Simply put, the
7 Colville Tribe’s duties under the contract are limited to managing the forest and selling
8 timber. Once the timber has been sold, the Colville Tribe’s performance under the
9 contract is complete.

10 **2. Fire Protection (A20AV00075)**

11 The second contract cited in the SAC, Contract A20AV00089, is for fire
12 protection services (the “Fire Protection 638 Contract”). *Taylor Decl., Ex. I.* The
13 parties to the contract are BIA and the Colville Tribe. *Id.* The contract was executed
14 in October 2019, for a term of three years. *Id.*

15 As with the Forest Management Contract 638 Contract, the services to be
16 provided by the Colville Tribe under the Fire Protection 638 Contract are set forth in
17 an AFA appended to the contract. *Taylor Decl., Ex. I* at 17-29. In a section titled
18 “Scope of Work,” the AFA states that the Colville Tribe will provide “essential
19 firefighting and fire protection services” under a memorandum of agreement (“MOA”)
20 with the Town of Nespelem. *Id.* at 29. The MOA, which is also appended to the
21 contract, calls for the Colville Tribes’ Emergency Services Department to lease a “Fire

1 Hall Facility” owned by the Town of Nespelem for a period of 25 years and respond to
2 “all fire[s] within the Town of Nespelem, Agency Campus area, and surrounding
3 Nespelem area.” *Id.* at 36-37. Neither the Scope of Work nor the MOA mentions fire
4 protection *outside* of the Nespelem area.

5 IV. APPLICABLE LAW

6 A. Rule 12(b)(1) and 12(h)(3) Dismissal Standard.

7 Under Fed. R. Civ P. 12(b)(1) and (h)(3), a district court must dismiss an action
8 where it lacks subject matter jurisdiction. *See Weirich v. Bd. of Governors*, No. CV-10-
9 5031-EFS, 2010 WL 4717211, at *3 n. 3 (E.D. Wash. Nov. 15, 2010) (citing *Augustine*
10 *v. United States*, 704 F.2d 1074, 1075 n.3 (9th Cir. 1983)); *see also Hamidi v. Serv.*
11 *Emps. Int’l*, 386 F. Supp. 3d 1289, 1294 (E.D. Cal. 2019). An attack on subject matter
12 jurisdiction may be either facial or factual. *Safe Air for Everyone v. Meyer*, 373
13 F.3d1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the
14 allegations contained in a complaint are insufficient on their face to invoke federal
15 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the
16 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.* The
17 United States brings this factual attack challenging jurisdiction.

18 In resolving a “factual attack on jurisdiction, the district court may review
19 evidence beyond the complaint without converting the motion to dismiss into a motion
20 for summary judgment.” *Safe Air*, 373 F.3d at 1039; *St. Clair v. City of Chico*, 880
21 F.2d 199, 201 (9th Cir. 1989); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)

1 (citation omitted). Thus, no presumptive truthfulness attaches to plaintiff's allegations,
2 and the existence of disputed material facts will not preclude the trial court from
3 evaluating for itself the merits of jurisdictional claims. *Anderson v. United States*, No.
4 1:18-cv-3011-SAB, 2022 WL 2136086, at *6 (E.D. Wash. June 10, 2022); *Thornhill*
5 *Pub. Co., Inc. v. GT&E Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). In fact, the Court is
6 authorized to “resolve factual disputes where necessary” and is free to weigh the
7 evidence to satisfy itself that it has authority to hear the case. *Robinson v. United*
8 *States*, 586 F.3d 683, 685 (9th Cir. 2009) (cleaned up); *Mortensen v. First Fed. Sav. &*
9 *Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977).

10 **B. Subject Matter Jurisdiction under the FTCA**

11 Jurisdiction is a threshold issue, and the separation of powers doctrine requires
12 the court to determine at the earliest possible stage whether it has jurisdiction. *Steel Co.*
13 *v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). A party seeking to invoke
14 federal jurisdiction bears the burden of establishing that jurisdiction exists for “each
15 claim” made and “each form of relief sought.” *Daimler Chrysler Corp. v. Cuno*, 547
16 U.S. 332, 352 (2006).

17 “The United States has sovereign immunity and cannot be sued without its
18 consent.” *Lam v. United States*, 979 F.3d 665, 671 (9th Cir. 2020). As this Court is
19 aware, the FTCA, 28 U.S.C. § 2671 et seq., provides a limited waiver of the United
20 States’ sovereign immunity for torts committed by federal employees acting within the
21 scope of their employment, but only under circumstances where the United States, if a

1 private person, would be liable in accordance with the law of the place where the act
2 occurred. *See* 28 U.S.C. § 1346(b)(1); *United States v. Olson*, 546 U.S. 43, 44 (2005);
3 *Tekle v. United States*, 511 F.3d 839, 851-53 (9th Cir. 2007).

4 Federal courts are required to strictly construe waivers of sovereign immunity
5 and resolve all ambiguities in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192
6 (1996). Further, the “waiver of sovereign immunity must be ‘unequivocally expressed’
7 in statutory text.” *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (citations omitted). It is
8 the plaintiff’s burden to show Congress’s unequivocal waiver of sovereign immunity
9 and jurisdiction over the tort action. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
10 U.S. 375, 377 (1994); *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992).

11 **C. Waiver of United States’ Sovereign Immunity for Negligent Acts** 12 **Undertaken Pursuant to 638 Contract**

13 As explained above, the ISDEAA allows Indian tribes to enter into “638
14 contracts” with BIA to take over the administration of programs that BIA would
15 otherwise provide on the tribes’ behalf. *Los Coyotes Band of Cahuilla & Cupeno*
16 *Indians*, 729 F.3d at 1033. Congress has waived the government’s sovereign immunity
17 for claims “resulting from the performance of functions” under such contracts. 25
18 U.S.C. § 450f (note)). This waiver of sovereign immunity effectively treats tribal
19 employees as employees of BIA for purposes of the FTCA when they are carrying out
20 functions authorized in a 638 contract. *See* Pub. L. No. 101-512, § 314, 104 Stat. 1915
21 (1990). This is commonly referred to as a “Section 314” waiver, in reference to the

1 Public Law that created it. *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1003
2 (9th Cir. 2014).

3 The scope of a Section 314 waiver is limited to “an Indian tribe, tribal
4 organization or Indian contractor . . . while carrying out any such [638 contract] or
5 agreement [and] while acting within the scope of their employment in carrying out the
6 contract or agreement.” *Id.* (quoting Pub. L. No. 101-512, § 314, 104 Stat. 1915
7 (1990)). As the party invoking the court’s jurisdiction, the plaintiff bears the burden of
8 establishing that sovereign immunity has been waived under Section 314 by
9 “identify[ing] which contractual provisions the alleged tortfeasor was carrying out at
10 the time of the tort.” *Id.* at 1006.

11 Courts in the Ninth Circuit apply a two-part test to determine whether sovereign
12 immunity has been waived under Section 314:

13 At the first step of the § 314 inquiry, courts must determine whether the
14 alleged activity is, in fact, encompassed by the relevant federal contract or
15 agreement. The scope of the agreement defines the relevant “employment”
16 for purposes of the scope of employment analysis at step two.

17 Second, courts must decide whether the allegedly tortious action falls
18 within the scope of the tortfeasor’s employment under state law. If both of
19 these prongs are met, the employee’s actions are covered by the FTCA.

20 *Id.* at 1006 (emphasis added) (formatting altered).

21 A negative answer at either step defeats subject matter jurisdiction. *Id.* at 1006–
07. If the 638 contract “does not encompass the activity that the plaintiff ascribes to
the employee, or if the agreement covers that conduct, but not with respect to the

1 employee in question, there is no subject matter jurisdiction.” *Id.* at 1007.

2 As discussed below, the negligent acts Plaintiffs attribute to the Colville Tribe
3 and CFTC are plainly outside the scope of the two 638 contracts on which Plaintiffs
4 rely. The case must therefore be dismissed for lack of jurisdiction.

5 V. ARGUMENT

6 A. Neither 638 Contract Covers the Alleged Tortious Conduct.

7 The operative SAC cites two 638 contracts under which Plaintiffs are attempting
8 to establish a waiver of sovereign immunity under Section 314: the Forest
9 Management 638 Contract and the Fire Protection 638 Contract. ECF No. 15 at ¶¶ 1.1,
10 2.15, 2.18–2.19, 4.14–4.17, 5.2. As explained below, neither contract covers the
11 alleged tortious conduct.

12 **1. The Forest Management 638 Contract is limited to forest management 13 and timber sales; it does not encompass the manufacture of finished 14 lumber products or the disposal of manufacturing waste.**

14 While not entirely clear, Plaintiffs’ theory of jurisdiction under the Forest
15 Management 638 Contract appears to be that the production of finished lumber
16 products by CTFC at the Omak Mill—and the alleged disposal of wood chips and
17 other byproducts from the manufacturing process into a “slash pile” at the back of the
18 property—was undertaken pursuant to the Colville Tribe’s forest management
19 responsibilities under the contract. ECF No. 15 at ¶¶ 1.1, 2.18, 4.17, 5.2. Plaintiffs also
20 appear to suggest that this contract required CTFC and/or the Colville Tribe to take
21 unspecified “fire management” precautions at the Omak Mill. ECF No. 15 at ¶ 4.16.

1 A cursory review of the Forest Management 638 Contract defeats these theories.
2 As its title suggests, the contract is geared toward *forest management*. The contract
3 was entered into under the auspices of the National Indian Forest Resources
4 Management Act of 1990, 25 U.S.C. § 3101, *et seq.* (“NIFRMA”), which imposes
5 specific “management objectives” that are designed to ensure that Indian forest land is
6 managed on par with how public forest land is managed by the U.S. Forest Service and
7 the U.S. Bureau of Land Management. 25 U.S.C. §§ 3101, 3104. The contract
8 requires the Colville Tribe to implement “program specific standards” set forth in
9 NIFRMA’s implementing regulations, 25 C.F.R. Part 163, which are geared toward
10 maintaining healthy forests and generating revenue from the sale of harvested timber.
11 *Taylor Decl.*, Ex. H at p. 30.

12 Simply put, the Forest Management 638 contract is limited to forestry and
13 timber sales. Nothing in the contract requires or contemplates that the Colville Tribe
14 will engage in a commercial enterprise to manufacture finished lumber products after
15 the timber is harvested and sold. To the contrary, the contract makes clear that the
16 Colville Tribe’s contractual duties are at an end once the timber has been harvested and
17 sold:

18 **Timber Sale Administration:**

- 19 1. Provide for layout, administration, follow-up and monitoring of specific
20 resource plans, particularly as they pertain to forest management
21 activities (timber sales, forest documents, road management, etc.).

- 1 2. Layout, mark, and cruise as necessary the timber sale harvest portions
2 of resource management plans. Activities may include locating
3 property corners, locating and marking property/unit boundaries,
4 marking timber according to prescriptions, surveying and flagging in
5 roads, cruising timber as needed, appraisal of timber, and preparation of
6 timber sale contract and forest officer reports.
- 7 3. Activities may include designation of yearly operation plans, locating
8 skid trails, monitoring road construction and maintenance, waste
9 scaling progress reports, and coordination with forest development
10 activities.

11 Taylor Decl., Ex. H at pp. 31-32.

12 The Colville Tribe is certainly free to sell its timber to CTFC if it chooses. And
13 CTFC is free to convert that timber into finished lumber products to be sold at a profit.
14 But the fact that the timber was sold pursuant to a 638 contract does not make the
15 federal government liable under the FTCA for whatever the purchaser does with it.
16 For jurisdiction to lie under the FTCA, the purchaser must have been “acting within the
17 scope of [its] employment in carrying out the contract.” *Shirk*, 773 F.3d at 1003. That
18 requirement is not met here because (1) CTFC was not a party to the 638 contract; and
19 (2) its actions are outside the scope of the contract. Any negligence by CTFC in
20 disposing of manufacturing waste does not result in a waiver of the United States’
21 sovereign immunity.

 Any suggestion that the contract required the Colville Tribe to mitigate a
wildfire risk posed by the disposal of manufacturing waste (ECF No. 15 at ¶ 4.16) is
equally unavailing. Once again, the Colville Tribe’s responsibilities under the Forest
Management 638 contract end when the timber is harvested and sold. The Colville

1 Tribe—and, by extension, the United States—is not responsible for how the purchaser
2 disposes of manufacturing waste. The fact that the timber was sold to a business entity
3 chartered by the Colville Tribe (CTFC), does not change the result. Had the timber
4 been sold to a non-tribal business, which then disposed of manufacturing waste in the
5 manner alleged, there would be no good-faith basis for alleging that the Colville Tribe
6 is liable for the purchaser’s negligence. The same holds true here. Plaintiffs have not
7 alleged, much less demonstrated, that there is a colorable basis for imputing the
8 purchaser’s alleged negligence to the seller. *See Dahlstrom v. United States*, 858 Fed.
9 Appx. 208, 209 (9th Cir. 2021) (affirming dismissal of an FTCA claim where the
10 appellant failed to “identify a single specific contractual provision that the [tribe] was
11 carrying out when it terminated his employment”); *see also Medina v. United States*,
12 No. CV-11-0280-LRS, 2012 U.S. Dist. LEXIS 72158 at *20 (E.D. Wash. May 22,
13 2012) (holding that a 638 Forestry contract did not create a duty for BIA to oversee a
14 third-party contractor hired by the Confederated Tribes to perform biomass reduction
15 by thinning trees on the Colville Reservation.)

16 Finally, the history of the ISDEAA sheds light on why the 638 contracts at issue
17 do not encompass the alleged negligent activity in this case. The ISDEAA was
18 designed to allow Indian tribes to take over management of programs that the BIA
19 historically managed. *Shirk*, 773 P.3d at 1002; *Colbert*, 785 F.3d at 1385 (“Congress
20 created a mechanism for Indian Tribes and tribal organizations to enter into agreements
21 with the United States providing for the tribe or organization to assume responsibility

1 for programs or services to Indian populations *that otherwise would be provided by the*
2 *Federal government.*”) These programs included law enforcement, corrections,
3 forestry, and social work – in other words, programs that are typical government
4 functions. *Id.* (638 Contract for Uniformed Police, Detention Services,
5 Communications, and Criminal Investigations), *see also Colbert*, 785 F.3d at 2386
6 (638 Contract for Navajo Nation to administer social services to Navajo children
7 formally administered by BIA under Indian Child Welfare Act). Under the ISDEAA,
8 BIA handed over management of these government programs to the Tribes so the
9 tribes could manage the programs themselves, and BIA compensates based on the
10 money BIA would have spent managing the programs themselves. *Shirk*, 773 P.3d at
11 1002.

12 BIA *never* managed for profit corporations for the tribe like operating lumber
13 mills or tribal casinos. Those functions have always been exclusively run by the tribal
14 corporation. The government has not entered 638 contracts for the management of
15 those corporations, nor could they under the ISDEAA. Because the allegations at issue
16 in this case stem from fee land owned and operated by the CTFC, any claims related to
17 failure to mitigate or address a condition on the land cannot be subject to a 638
18 Contract.

19 **2. The Fire Protection 638 Contract does not cover the Omak Mill property.**

20 Plaintiffs’ theory of jurisdiction under the Fire Protection 638 Contract is that
21 the Colville Tribe and/or CTFC failed to provide “essential firefighting and fire

1 protection services” at the Omak Mill property, which Plaintiffs describe as “tribal
2 lands” covered by the contract. ECF No. 15 at ¶¶ 4.7–4.8, 4.14–4.15. The thrust of
3 Plaintiffs’ allegations is that the Colville Tribe and/or CTFC knew of the fire risk
4 posed by the “slash pile,” but failed to mitigate the risk. *Id.* at ¶¶ 4.7–4.8.

5 This theory fails for two reasons. First, the Fire Protection 638 Contract only
6 covers fire protection services for the Town of Nespelem. As noted above, the contract
7 states that the Colville Tribe will provide “essential firefighting and fire protection
8 services” under a MOA with the Town of Nespelem. The MOA, in turn, calls for the
9 Colville Tribes’ Emergency Services Department to maintain a presence in a “Fire Hall
10 Facility” owned by the town and to respond to “all fire[s] within the Town of
11 Nespelem, Agency Campus area, and surrounding Nespelem area.” *Id.* at 36-37. The
12 Fire Protection 638 Contract is wholly inapplicable to the Omak Mill property, which
13 is in Omak, some 35 miles northwest of Nespelem.

14 Second, and more fundamentally, Plaintiffs’ characterization of the Omak Mill
15 property as “tribal lands” is not correct. Although the property lies within the external
16 boundaries of the Colville Reservation, it is owned in fee simple by CTFC. *Taylor*
17 *Decl.*, Exs. E, F, G, H. CTFC’s predecessor entity, Colville Tribal Enterprises, Corp.
18 (“CTEC”), purchased the property from the bankruptcy estate of a private business for
19 \$3.4 million in 2001. *Id.* CTEC transferred the property to the Colville Tribe in 2012,
20 which then transferred the property to CTFC in 2013 and 2014. *Id.* CTFC pays
21 property taxes—including a fire protection levy to Okanogan County Fire Protection

1 District No. 3—every year. *Taylor Decl.*, Exs. G, H. Publicly available records reflect
2 that CTFC paid \$579.74 in property taxes on the two parcels on which the “slash pile”
3 sits (Parcel Nos. 3326021001 and 3326021002) in 2020, the year the slash pile
4 allegedly sparked the wildfire that burned Plaintiffs’ property. *Id.* \$22.10 of that
5 amount was for “2020 FIRE DISTRICT #3 GENERAL PROPERTY TAX.” *Id.*

6 By virtue of being owned in fee by a private landowner, the Omak Mill is
7 outside BIA’s firefighting jurisdiction. The responsibility for remediating any fire risk
8 allegedly posed by the slash pile rested with Okanogan County Fire Protection District
9 No. 3, which assessed and collected property taxes from the landowner to cover such
10 services. *See also Taylor Decl.*, Ex. J.

11 The fact that the property is outside BIA’s jurisdiction is further confirmed by a
12 Cooperative Fire Protection Agreement between BIA and Okanogan County Fire
13 Protection District No. 3, executed in July 2018. *Taylor Decl.*, Ex. K. The
14 Cooperative Fire Protection Agreement is an interlocal agreement that commits BIA
15 and Fire Protection District No. 3 to “mutual assistance and cooperation” in the
16 “control and suppression of wildland fire” occurring within their respective
17 jurisdictions. *Taylor Decl.*, Ex. K at 1.

18 Importantly for purposes of this motion, the Cooperative Fire Protection
19 Agreement draws a clear jurisdictional distinction between lands that are owned in fee
20 and subject to a Fire District 3 fire protection levy, and lands that are held in trust by
21 BIA for the benefit of the Colville Tribe. As outlined in Section 3, lands in the former

1 category fall under the exclusive jurisdiction of Okanogan County Fire Protection

2 District 3:

3 **SECTION 3 – JURISDICTIONAL RESPONSIBILITY**

4 Jurisdictional responsibility of the parties varies. It may be:

5 3.01 **Sole BIA Fire Management Jurisdiction**, i.e., Colville
6 Reservation Trust land not within the boundaries of the Fire
7 District.

8 3.02 **Sole Fire District 3 Jurisdiction**, i.e., those lands within the
9 boundaries of the Fire District subject to Fire District 3 protection
10 district levy and not subject to Forest Fire Protection Assessment.

11 3.03 **Joint Jurisdiction**, i.e., Lands subject to Forest Fire Protection
12 Assessment within the boundaries of the District, non-trust lands
13 not subject to Forest Fire Protection Assessment or fire protection
14 district levy or trust lands within the fire district boundary.

15 *Taylor Decl.*, Ex. K at 1-2 (underlined emphasis added).

16 The Omak Mill property is within the boundaries of Fire Protection District No.
17 3 (as evidenced by the fact that it is subject to a Fire District 3 fire protection levy). *See*
18 *also Taylor Decl.*, Ex. J. The property is taxed by Fire Protection District No. 3, and it
19 is not subject to a Forest Fire Protection Assessment.⁴ The jurisdictional classification

20 ⁴ A Forest Fire Protection Assessment is “a fee that is paid by private forest
21 landowners . . . to help pay for the cost of preparing to fight wildfires.” *See*
Washington State Department of Natural Resources, “Wildfire Assessments,” available
[here](#) (last visited February 13, 2024); Washington State Department of Natural

1 of the property is therefore “Sole Fire District 3 Jurisdiction.”

2 Plainly stated, the Omak Mill property is the responsibility of Fire Protection
3 District No. 3, not BIA. BIA may choose to respond to a wildfire at the property under
4 the Cooperative Fire Protection Agreement, but it is not required to do so. If BIA does
5 choose to respond, its role is limited to “indirectly protect[ing]” lands that are within
6 BIA’s jurisdiction that the fire might reach if not promptly contained. *See Taylor*
7 *Decl.*, Ex. K at 2 (“Sole District Jurisdiction: In the event of a fire emergency in a sole
8 Fire District 3 jurisdiction area, *Fire District 3 will respond*. BIA Fire Management
9 *may respond* to provide immediate control action, minimize fire loss, and *thereby*
10 *indirectly protect its own jurisdictional area.*”) (emphasis added).

11 The foregoing refutes Plaintiffs’ allegations that the Omak Mill property is
12 “tribal lands” covered by the Fire Protection 638 Contract. The property is not “tribal
13
14 Resources, “DNR Wildfire Assessments in Washington State,” available [here](#) (last
15 visited February 13, 2023); *see also* RCW 76.04.610 (authorizing Forest Fire
16 Protection Assessment). An example of a parcel that is subject to both a Fire District 3
17 fire protection levy **and** a Forest Fire Protection Assessment is attached to the
18 *Declaration of Derek Taylor* as Exhibit L. The Forest Fire Protection Assessment is
19 listed as a “DNR Fire Control Tax” on the property tax statement. The parcels in
20 question at the Omak Mill are not subject to a Forest Fire Protection Assessment, as
21 reflected by the absence of a “DNR Fire Control Tax” on the property tax statements.

1 lands,” and is therefore not covered by the Fire Protection 638 Contract. And, given
2 that the property is solely within the jurisdiction of Fire Protection District No. 3, the
3 property could not conceivably be covered by any other 638 contract for fire protection
4 that Plaintiffs might invoke. Because Plaintiffs have failed to carry their burden of
5 establishing a Section 314 waiver of the United States’ sovereign immunity, the case
6 should be dismissed for lack of jurisdiction.

7 **B. No employee was acting within scope of employment while carrying out**
8 **638 Contract.**

9 No 638 Contract encompasses the alleged negligent activity in this case,
10 therefore an analysis of whether an employee was carrying out such a contract is not
11 necessary. To the extent the Court finds otherwise, however, no Tribal Employee was
12 carrying out a 638 Contract during the events surrounding the allegations in this case.

13 Plaintiffs have not pointed to any specific employees’ actions that caused or
14 created the alleged negligent activity other than vague allegations about “CTFC and its
15 agents/employees breached their duty to maintain the land (including the slash pile).”
16 ECF No. 15 at 4.13. As described in detail above, the woodchip pile at issue was on
17 private fee land owned by a private for-profit corporation. Any responsibility for
18 creating⁵ or maintaining that condition was on an employee of CTFC, which would not

19
20 ⁵ Defendants dispute that the creation of the woodchip pile was inherently
21 negligent, or that it caused the fire alleged in this case. The facts show the woodchip

1 be carrying out the Tribes Forestry 638 Contract nor a Fire Protection contract. Simply
2 alleging that the CTFC is affiliated with the Tribe is not enough. Tribal casinos are
3 affiliated with the Tribe as well, yet they are not operated under a 638 Contract
4 managed by BIA. The same is true for the Omak Mill, it was a for-profit venture,
5 purchased in 2001 as fee simple land, and currently maintained as private land. The
6 interlocal firefighting agreement solidifies this theory, as it undisputedly shows that the
7 Omak Mill is within the sole firefighting jurisdiction of Okanogan County.

8 No employees of the Tribe were carrying out the cited agreements within the
9 scope of their employment when they allegedly failed to maintain private land owned
10 by a private party. *See* ECF No. 4.13.

11 VI. CONCLUSION

12 For the reasons set forth above, Defendant respectfully requests that Plaintiffs'
13 second amended complaint be dismissed for lack of subject matter jurisdiction.

14 ///

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16
17 pile was ignited by a fire started by an individual located off the Mill Property on July
18 18, 2020, and the woodchip pile then proceeded to have hotspots. In other words, the
19 fire did not start because of the woodchip pile, it started because some currently
20 unknown individual started a fire, and that fire was allegedly not extinguished
21 completely before a high wind event on September 7, 2020.

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RESPECTFULLY SUBMITTED: March 6, 2024.

Vanessa R. Waldref
United States Attorney

/s/ Derek T. Taylor
Derek T. Taylor
John T. Drake
Assistant United States Attorneys
Attorneys for Defendant United States

Certificate of Service

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I hereby certify that on March 6, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Richard C. Eymann: Eymann@eahjlaw.com

And to the following non CM/ECF participants: N/A

/s/Derek T. Taylor
Derek T. Taylor