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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOWNSEND RANCH LLC, a Washington limited liability corporation; ESTATE OF DAVID TOWNSEND; EDWARD TOWNSEND; DANIEL TOWNSEND; WILLIAM TOWNSEND; NATHAN TOWNSEND; MALCOLM and KELLY TOWNSEND, husband and wife; TOWNSEND BROTHERS LLC, a Washington limited liability corporation; T3 RANCH LLC, a Washington limited liability corporation; and SWEDE W. ALBERT, an individual,

Plaintiffs,

vs.

UNTED STATES OF AMERICA, acting by and through the DEPARTMENT OF INTERIOR and BUREAU OF INDIAN AFFAIRS,

Defendant.

No. 2:23-cv-00170-TOR

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs suggest that Defendant "misread" the allegations in the Second Amended Complaint (SAC). But Plaintiffs have not offered an alternative reading that plausibly implicates either of the 638 contracts on which they rely, much less establishes a waiver of sovereign immunity under Section 314 of the ISDEAA. At bottom, Plaintiffs are asking the Court to exercise jurisdiction based on an incorrect assumption that the Omak Mill property is "tribal land," and bare speculation that the land must somehow be connected to a 638 contract. Because Plaintiffs have not carried their burden to establish jurisdiction, the case should be dismissed.

II. REPLY ARGUMENT

A. Plaintiffs' procedural arguments improperly shift the burden of establishing subject matter jurisdiction.

The law is clear: a plaintiff asserting an FTCA claim stemming from the performance of a 638 contract must identify "which contractual provisions the alleged tortfeasor was carrying out at the time of the tort." *Shirk v. US. Ex rel. Dep't of Interior*, 773 F.3d 999, 1006 (9th Cir. 2014). The plaintiff, as the party invoking the court's jurisdiction, bears the burden of establishing that the alleged conduct falls within the scope of the particular provision(s) identified. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see also* ECF No. 31 at 2 (Plaintiffs acknowledging that they bear the burden of establishing subject matter jurisdiction).

Plaintiffs urge the Court to deny the motion, arguing that Defendant has not asserted a "proper factual challenge" to jurisdiction. ECF No. 31 at 2. The thrust of this argument is that Defendant was required to submit an affidavit from an individual "with personal knowledge of the 638 contracts," and cannot rely solely on documents submitted by counsel. *Id.* at 4. This argument fails. The Forest Management 638 Contract and the Fire Protection 638 Contract speak for themselves. The Court does not need testimony from a witness with "knowledge" of the contracts to decide the issue presented, which is whether the acts attributed to the Colville Tribe in the SAC were undertaken pursuant to either contract. This is an improper attempt to foist the burden of establishing jurisdiction onto Defendant.

Plaintiffs also argue that Defendant "misread" their allegations. ECF No. 31 at 5. The upshot of this argument is that the word "slash" in the SAC refers to "forest and timber scrap," not wood chips and other byproducts of a manufacturing process. *Id.* at 5–6. Plaintiffs go on to argue that Defendant "submitted no evidence" that the Omak Mill was operational during the relevant timeframe and that the Colville Tribe or CTFC contributed to the slash pile. *Id.* at 5–9.

This argument is unavailing. As a threshold matter, Defendant's reading of the SAC is consistent with Plaintiffs' own evidence. Documents Plaintiffs provided in their initial disclosures confirm that the parties are talking about the very same large mound of organic material. *See* Taylor Reply Decl., Ex. M (document entitled "Map of Origin Area" identifying the origin of the subject fire as the same mound that

Defendants identified in their opening brief and supporting materials); *id.* at Ex. N (declaration by eyewitness Brian Mergen attesting that the subject fire "started at the old Omak Mill **chip pile**") (emphasis added); *id.* at Ex. O (SF-95 submission by Plaintiff Swede Albert explaining that "the mill's old **sawdust pile hill**" was on fire during the July 2020 Rodeo Trail Fire) (emphasis added); ECF No. 27-1 (Incident Report for July 2020 Rodeo Trail Fire explaining that fire "burned onto the mill property and into old **sawdust storage area**") (emphasis added). In short, the distinction Plaintiffs are attempting to draw between "scrap" and "wood chips" is pure semantics.

Second, and more importantly, the distinction Plaintiffs are attempting to draw undermines their efforts to establish subject matter jurisdiction. Defendant's reading of the SAC—that the Colville Tribe sold timber to CTFC, which then processed the timber into finished lumber products and negligently disposed of the manufacturing waste—is the only reading that remotely implicates the Forest Management 638 Contract, under which the Colville Tribe is responsible for (1) managing forest lands on the Colville Reservation; and (2) generating revenue from the sale of timber. ECF No. 26 at 9–10. By insisting that the slash pile is composed of something *other than* manufacturing waste from timber sold to CTFC by the Colville Tribe, Plaintiffs have eliminated the only plausible link between the slash pile and the Forest Management 638 contract. If the slash pile is actually composed of "[b]ranches and other residue left on a forest floor after the cutting of timber" as Plaintiffs suggest, ECF No. 31 at 6,

the only way to connect the slash pile to the Forest Management 683 Contract is to draw wholly implausible inferences from facts that Plaintiffs have not alleged—*e.g.*, that the Colville Tribe cut timber in the middle of the forest and then hauled the scrap to the Omak Mill property.

Because it is *Plaintiffs'* burden to establish jurisdiction, the argument that Defendant "misread" the SAC gets Plaintiffs nowhere. If Plaintiffs have a different way to connect the scrap pile to the Forest Management 638 Contract, it is incumbent upon them to allege that connection with particularity and provide evidence to support it. Because Plaintiffs have not done so, the case must be dismissed.

B. Plaintiffs have not connected the Omak Mill property to the Colville Tribe, much less a 638 Contract between the Colville Tribe and BIA.

Plaintiffs are ignoring a fundamental point: there is no contractual relationship between BIA and CTFC, the entity that owns the Omak Mill property.[1] The parties to the 638 contracts Plaintiffs have identified are BIA and the *Colville Tribe*. ECF No.

[1] There is no material dispute concerning the ownership of the Omak Mill property. Okanogan County Assessor records and documents filed in the Quality Veneer & Lumber bankruptcy make clear that the property is owned by CTFC in ***fee simple***. It is not trust land. Plaintiffs' rhetorical questions about the status of the property (ECF No. 31 at 8) do not give rise to a material dispute on which jurisdictional discovery should be permitted.

27-8. To establish jurisdiction, Plaintiffs must show that *the tribe* was carrying out an activity that *the tribe* was contractually obligated to perform on BIA's behalf.

Plaintiffs have not connected the property to the Colville Tribe, let alone the two 638 contracts. Plaintiffs are relying on an incorrect belief that the Omak Mill property is "tribal lands," ECF No. 1 at ¶¶ 4.14–4.15, and bald speculation that the land must somehow be connected to a 638 contract between the tribe and BIA. That is not a sufficient basis for exercising jurisdiction.

The point Plaintiffs are missing is CTFC can purchase property on the open market anywhere it chooses—within the boundaries of the Colville Reservation, adjacent to the reservation, in a different county, in a different state, or even in a different country. CTFC's status as a tribally-chartered entity does not convert the property from fee land into trust land. And, more importantly for present purposes, the fact that the land was purchased by a tribally-chartered entity does not mean that it will be used by the *Colville Tribe* for a purpose covered by a 638 contract between the tribe and BIA.

CTFC is the business arm of the Colville Tribe. It manages gaming and timber manufacturing. It is a registered Foreign Profit Corporation in Washington State. *See* Taylor Reply Decl., Ex. P. Under the ISDEAA, BIA can only transfer management authority to the tribe on programs the BIA historically managed. *Shirk*, 773 F.3d at 1002. BIA did not historically manage non-trust property purchased by a private

corporation engaged in the for-profit enterprise of lumber manufacturing at a bankruptcy sale.

In short, the Court cannot exercise subject matter jurisdiction based solely on the fact that the Omak Mill property is owned by a tribally-chartered entity. There must be a through line from the tribally-chartered entity to the tribe performing a contractual obligation on BIA's behalf. Because Plaintiffs have not established that connection, the case must be dismissed.

C. The Forest Management 638 Contract does not apply.

Now that Plaintiffs have expressly denied that the property was used by CTFC to mill timber sold by the Colville Tribe under the auspices of the Forest Management 638 Contract, Plaintiffs are left with *nothing* connecting the property to that contract. Plaintiffs argue that the tribe's obligations under this contract are "far broader than overseeing forested land." ECF No. 31 at 9–10. But Plaintiffs have not pinpointed how the broader reach of the contract encompasses their claims.[2] All Plaintiffs offer is a conclusory assertion that "[u]nder these circumstances, management of the site came within the scope of the Forest Management [638] Contract." ECF No. 31 at 10. Without having explained *how* the property is connected to the tribe and a specific

[2] Plaintiffs' reference to a Health Clinic that is planned to be built on a parcel of land not connected to the chip pile is irrelevant. The cited articles are years after the fires in question, and it is not even the same land at issue.

provision of the Forest Management 638 Contract, Plaintiffs have failed to carry their burden of establishing jurisdiction.

D. The Fire Protection 638 Contract does not apply.

Defendant established in its opening brief that the Fire Protection 638 Contract only covers the Town of Nespelem. ECF No. 26 at 10–11, 19–20. It does not apply to the Omak Mill property, which is in Omak, some 35 miles away. *Id.*

Plaintiffs do not dispute that the Fire Protection 638 Contract only applies to the Town of Nespelem. ECF No. 31 at 11–12. That is the end of the inquiry. Subject matter jurisdiction cannot be established through the Fire Protection 638 Contract.

E. Plaintiffs' reliance on the testimony of Plaintiff Edward Townsend is unavailing.

The declaration submitted by Plaintiff Edward Townsend, ECF No. 32, does not change the jurisdictional landscape. Mr. Townsend's declaration focuses on the Rodeo Trail Fire, which was started by squatters in July 2020 and burned into the "slash" pile on the Omak Mill property. ECF No. 32 at ¶ 10. Mr. Townsend avers that Mt. Tolman Fire Center responded to the Rodeo Trail Fire in response to a request for mutual aid from Okanogan County Fire District No. 3. *Id.* at ¶ 5.

This testimony confirms precisely what Defendant explained in its opening brief: that the parcels in question are under the firefighting jurisdiction of Okanogan County Fire Protection District No. 3—not BIA. ECF No. 26 at 21–24. When Mt. Tolman Fire Center responded to the property to fight the Rodeo Trail Fire in July

2020, it did so *pursuant to the interlocal agreement between Okanogan County Fire Protection District No. 3 and BIA*, which is filed at ECF No. 27-11. The fact that Mt. Tolman Fire Center responded to the Omak Mill property pursuant to an interlocal agreement does not suggest that the parcels in question are trust land under BIA's firefighting jurisdiction that would be covered by a 638 contract.[3] Indeed, it proves exactly the opposite.

To the extent Plaintiffs are relying on Mr. Townsend's declaration to suggest that the Omak Mill property might be covered by a *different* firefighting 638 contract on which jurisdiction could potentially be predicated, ECF No. 31 at 11–12, the suggestion is not persuasive. Because the parcels on which the "slash" pile sits are under the sole jurisdiction of Fire Protection District No. 3, BIA's sole connection to them is through the interlocal agreement referenced above. BIA's obligation under that agreement is limited to "provid[ing] immediate control action, minimiz[ing] fire loss, and thereby indirectly protect[ing] its own jurisdiction area." ECF No. 27-11 at 2. Once that obligation has been fulfilled, BIA has no further involvement.

Mr. Townsend's assertion that BIA and Mt. Tolman Fire Center agreed to perform "extended monitoring" of the Rodeo Trail Fire so that the slash pile would

[3] The fact that Kevin Bowling, Okanogan Fire District 3 Fire Chief (ECF No. 27-11, at 10), drafted the Rodeo Trail Fire report is more evidence that Okanogan County was ultimately responsible for fire protection on the parcels at issue. ECF No. 27-1

not "rekindle" is similarly unsupported. That is plainly beyond the scope of BIA's obligation under the interlocal agreement, which, again, is limited to "provid[ing] immediate control action, minimiz[ing] fire loss, and thereby indirectly protect[ing] its own jurisdiction area." ECF No. 27-11 at 2. BIA and its contractor, Mt. Tolman Fire Center,[4] would not have agreed to "extended monitoring" of a fire burning on land under Fire Protection District No. 3's sole jurisdiction.

In any event, Mr. Townsend's claim that Mt. Tolman Fire Center was responsible for the "extended monitoring" of the Rodeo Trail Fire—and his implicit suggestion that it negligently allowed the fire to "rekindle" into the fire that allegedly burned Plaintiffs' property two months later—bears no resemblance to the theory of liability outlined in the SAC. If Plaintiffs wish to pursue this new theory, they must amend their complaint to allege with particularity (1) how Mt. Tolman Fire Center's alleged "extended monitoring" of the Rodeo Trail Fire was covered by a 638 contract between the Colville Tribe and BIA; and (2) how the monitoring was performed in a negligent manner.[5]

[4] BIA contracts with Mt. Tolman Fire Center under a "cooperative agreement" to fulfill its mutual aid obligations under the interlocal agreement. *See* Taylor Reply Decl., Ex. Q.

[5] Defendant notes, however, that any such amendment would likely prove futile. Decisions about how to fight and manage fires are inherently discretionary and

Because this new theory is such a marked departure from the theory of liability outlined in the SAC, the Court should not allow Plaintiffs to embark on jurisdictional discovery. Plaintiffs would effectively be taking discovery on a claim they have not yet asserted, in hopes of saving the case from a jurisdictional dismissal. Because there is no dispute that jurisdiction cannot be predicated on the two 638 contracts cited in the SAC, the case should be dismissed.

RESPECTFULLY SUBMITTED: May 28, 2024.

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therefore fall within the "discretionary function exception" to liability under the FTCA. *See Esquivel v. United States*, 21 F.4th 565 (9th Cir. 2021) (controlled burnout performed as part of fire suppression effort was a discretionary function, and plaintiff's claims were therefore barred by the discretionary function exception); *Shurg v. United States*, 63 F.4th 826 (9th Cir. 2023) (Forest Service's communications and decision-making surrounding fire suppression activities were discretionary and therefore, discretionary function exception applied); *Evans v. United States*, 598 F.Supp.3d 907 (E.D. Cal. 2022) (firefighters' actions involved policy judgments associated with fire safety and suppression operations, and thus fell within discretionary function exception.).

Certificate of Service

I hereby certify that on May 28, 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
Assistant United States Attorney