

Jun 05, 2024

SEAN F. MCAVOY, CLERK

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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; MALCOM 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,

v.

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

Defendant.

NO. 2:23-CV-0170-TOR

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

1 BEFORE THE COURT is Defendant's Motion to Dismiss Pursuant to Rules
2 12(b)(1) and 12(h)(3) (ECF No. 26). The matter was submitted for consideration
3 without oral argument. The Court has reviewed the record and files herein and is
4 fully informed. For the reasons discussed below, Defendant's Motion to Dismiss
5 (ECF No. 26) is **GRANTED**.

6 BACKGROUND

7 This motion to dismiss arises out of a fire that destroyed Plaintiffs' real
8 property in Okanogan County, Washington. ECF No. 6 at 7-8, ¶¶ 4.2-4.4.

9 Plaintiffs' property is located near the Omak Mill. ECF No. 35-1 at 4. The
10 Colville Tribal Federal Corporation (CTFC) has owned the Mill in fee simple since
11 2013. ECF Nos. 6 at 5, ¶ 2.17; 27-6 at 2. The CTFC is the business arm of the
12 Confederated Tribes and Bands of the Colville Reservation (Confederated Tribes).
13 ECF Nos. 6 at 5, ¶ 2.16; 26 at 2. The CTFC pays property taxes on the Mill, a
14 portion of which goes to Okanogan County Fire District No. 3 (District 3). ECF
15 Nos. 27-7; 27-10 at 2. In July 2018, District 3 and the Bureau of Indian Affairs
16 (BIA) executed a Cooperative Fire Protection Agreement. ECF No. 27-11. The
17 purpose of the Agreement was "to provide for mutual assistance and cooperation in
18 the . . . suppression of wildland fire to lands within the jurisdiction" of BIA or
19 District 3. *Id.* at 2. However, the Agreement also allocates sole jurisdiction over
20 certain lands to the parties. *Id.* at 2, ¶ 3. Importantly, District 3 has sole

1 jurisdiction over “lands within the boundaries of the Fire District [which are]
2 subject to [the] Fire District 3 protection district levy and not subject to Forest Fire
3 Protection Assessment.” *Id.* at 2, ¶ 3.01. When a fire emergency occurs on
4 property under the exclusive jurisdiction of District 3, BIA Fire Management may
5 “provide immediate control action” and “minimize fire loss,” or “provide
6 supplemental resources . . . or support.” *Id.* at 3, ¶ 4.01.

7 Plaintiffs claim that on September 7, 2020, a fire from the Mill spread
8 southward and destroyed their property. ECF No. 6 at 9-10, ¶¶ 4.9-4.11; 31 at 5.
9 According to Plaintiffs, the Mill site “contained one or more burn piles of forest
10 and timber scrap (a.k.a ‘slash’)” which had been left smoldering by tribal
11 employees and eventually “flared up, resulting in the wildfire” due to high winds.
12 ECF No. 6 at 2, ¶ 1.1; *see id.* at 9, ¶ 4.9. Plaintiffs allege that city officials warned
13 CTFC and BIA on multiple occasions that the smoldering slash pile presented a
14 risk of wildfire but “no measure of any type was made to prevent the wildfire that
15 occurred.” *Id.* at 12, ¶¶ 4.20-4.21.

16 Defendant alleges that the fire that burned Plaintiffs’ property was not due to
17 high winds rekindling the smoldering pile at the mill, but instead due to a different
18 fire, known as the “Cold Springs Fire” or “Pearl Hill Fire”, which was started by
19 an arsonist a day earlier, on September 6, 2020, and eventually spread to the Mill,
20 where it combined with the smoldering slash pile to create a bigger fire that

1 destroyed Plaintiffs’ property. ECF No. 26 at 6. Plaintiffs dispute this. ECF No.
2 31 at 3.

3 The parties appear to agree that slash pile was smoldering in the first
4 instance due to a fire that began several months earlier, on July 18, 2020, known as
5 the “Rodeo Trail Fire.” ECF Nos. 26 at 4; 32 at 4, ¶ 10. The Rodeo Trail Fire was
6 started by a group of squatters and necessitated a multi-jurisdictional response by
7 District 3, the Washington State Department of Natural Resources, and the Colville
8 Agency Mount Tolman Fire Center (Mount Tolman), which is managed by the
9 BIA. ECF Nos. 26 at 5-6; 31 at 12. Pursuant to the Cooperative Fire Protection
10 Agreement, District 3 responded to the Rodeo Trail Fire and later requested mutual
11 aid. ECF No. 32 at 2, ¶ 4. Mount Tolman assisted with mopping up the fire at
12 District 3’s request. ECF Nos. 27-1 at 2; 32 at 3, ¶¶ 5-6.

13 Plaintiffs filed their second amended complaint (SAC) with this Court on
14 August 11, 2023, bringing claims against the BIA for negligence, trespass,
15 nuisance, and inverse condemnation. ECF No. 6 at 13-15. Plaintiffs seek
16 recompense in the amount of \$47 million dollars. *Id.* at 19.

17 The SAC asserts that this Court has subject matter jurisdiction over this
18 action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1),
19 and the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub.
20 L. No. 93-638. Under the ISDEAA, tribes “receiving a particular service from the

1 BIA may submit a contract proposal to the BIA to take over the program and
2 operate it as a contractor and receive the money that the BIA would have otherwise
3 spent on the program.” *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*,
4 729 F.3d 1025, 1033 (9th Cir. 2013). “These contracts are known as 638 contracts,
5 after the Public Law that created them.” *Id.*

6 Plaintiffs allege that Defendant was acting pursuant to two different 638
7 contracts at the time of their property loss: contract A20AV00089, or the
8 “Cooperative Forest Management Program” contract; and contract A20AV00075,
9 or the “Fire Protection Services Program” contract. ECF Nos. 27-8; 27-9.

10 Plaintiffs argue that these agreements make Defendant liable for the alleged
11 negligence of tribal employees in failing to suppress the smoldering fire at the Mill
12 before it grew into a wildfire. ECF No. 6 at 6, ¶ 2.19 (citing 25 U.S.C. § 5321).

13 Defendant moves to dismiss Plaintiff’s claims, alleging the actions in issue were
14 not performed under either of the 638 contracts. ECF No. 26 at 2.

15 DISCUSSION

16 I. Motion to Dismiss Standard

17 A jurisdictional challenge brought under Rule 12(b)(1) may present as
18 either a facial or factual attack. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
19 2000). “In a facial attack, the challenger asserts that the allegations contained in a
20 complaint are insufficient on their face to invoke federal jurisdiction. By contrast,

1 in a factual attack, the challenger disputes the truth of the allegations that, by
2 themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone*
3 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

4 Defendant raises a factual challenge to the Court’s jurisdiction, arguing that
5 the 638 contracts do not cover the conduct in issue. ECF No. 26 at 11. Defendant
6 brings copies of the 638 contracts as well as the tax and sales history of the Mill
7 parcel as evidence. In resolving a factual attack, a court “need not presume the
8 truthfulness of the plaintiffs’ allegations” and “may look beyond the complaint to
9 matters of public record without having to convert the motion into one for
10 summary judgment.” *White*, 227 F.3d at 1242. Thus, “the court can actually
11 weigh evidence to confirm the existence of the factual predicates for subject-matter
12 jurisdiction.” *Anderson v. United States*, 606 F. Supp. 3d 1040, 1050 (E.D. Wash.
13 2022) (quoting *Global Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*
14 *Ltd.*, 807 F.3d 806, 810 (6th Cir. 2015)). However, “a jurisdictional finding of
15 genuinely disputed facts is inappropriate when ‘the jurisdictional issue and
16 substantive issues are so intertwined that the question of jurisdiction is dependent
17 on the resolution of factual issues going to the merits’ of an action.” *Safe Air*, 373
18 F.3d at 1039 (quoting *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 139
19 (9th Cir. 1983)) (brackets omitted). “The question of jurisdiction and the merits of
20 an action are intertwined ‘where a statute provides the basis for both the subject

1 matter jurisdiction of the federal court and the plaintiff’s substantive claim for
2 relief.” *Id.* (quoting *Sun Valley*, 738 F.2d at 139)).

3 ““Once the moving party has converted the motion to dismiss into a factual
4 motion by presenting affidavits or other evidence properly brought before the
5 court, the party opposing the motion must furnish affidavits or other evidence
6 necessary to satisfy its burden of establishing subject matter jurisdiction.” *Id.*
7 (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir.
8 2003)); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377
9 (1994) (“It is . . . presumed that a cause lies outside this limited jurisdiction, and
10 the burden of establishing the contrary rests upon the party asserting
11 jurisdiction[.]”) (internal citations omitted). The action must be dismissed if a
12 court finds it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

13 **II. FTCA & ISDEAA Standard**

14 The United States and its agencies are generally immune from suits seeking
15 money damages; however, Congress may choose to waive that immunity. *Dep’t of*
16 *Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 48 (2024). Under the
17 Federal Tort Claims Act (FTCA), Congress has waived the federal government’s
18 sovereign immunity from suit for tort claims “caused by the negligent or wrongful
19 act or omission of any employee of the Government while acting within the scope
20 of his office or employment, under circumstances where the United States, if a

1 private person, would be liable to the claimant in accordance with the law of the
2 place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). In 1990,
3 Congress extended the FTCA’s waiver of sovereign immunity to claims ““resulting
4 from the performance of functions . . . under a contract . . . authorized by the
5 ISDEEA.”” *Shirk v. U.S. ex rel. Dep’t of Interior*, 773 F.3d 999, 1003 (9th Cir.
6 2014) (quoting 25 U.S.C. § 450 (note)). However, that waiver is necessarily
7 circumscribed. To establish governmental liability for the acts of a tribal
8 employee, the plaintiff must establish that (1) “the language of the federal contract
9 ‘encompass[es] the activity that the plaintiff ascribes to the employee’” and (2)
10 “the employee’s activity [fell] ‘within the scope of employment.’” *Wilson v.*
11 *Horton’s Towing*, 906 F.3d 773, 781 (9th Cir. 2018) (quoting *Shirk*, 773 F.3d at
12 1006-7). “The Supreme Court has characterized [tribal] immunity as a necessary
13 corollary to Indian sovereignty and self-governance, and [the courts] employ a
14 strong presumption against its waiver.” *Bodi v. Shingle Springs Band of Miwok*
15 *Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016).

16 **III. Defendant’s Motion to Dismiss**

17 **A. Intertwinement**

18 Plaintiffs submit that the question of subject matter jurisdiction is so
19 intertwined with the merits of the case that dismissal would be inappropriate at this
20 stage. Specifically, Plaintiffs contend that “it would be inappropriate for this Court

1 to determine whether the source of the damage to Plaintiffs’ property was the fire
2 that originated at the old Omak Mill site, as alleged in the [SAC]” or if the source
3 was instead “the Rodeo Trail Fire and/or the Cold Springs Fire described in . . .
4 Defendant’s motion to dismiss.” ECF No. 31 at 3. In support of this contention,
5 Plaintiffs point to *Munger v. United States Soc. Sec. Admin.*, C19-5571TSZ, 2020
6 WL 6874792 (W.D. Wash. Nov. 23, 2020).

7 Although the decisions of another federal district court may carry some
8 persuasive value, this Court is not bound by such authority. Even if it were,
9 however, *Munger* is distinguishable. In *Munger*, the plaintiff was paralyzed after
10 tripping over a door mat in the vestibule outside the Social Security
11 Administration’s (SSA’s) office. 2020 WL 6874792 at *1. The SSA maintained
12 that it was not responsible for the mat, which had been placed there by the property
13 owner and which, under the lease agreement, the property company was allegedly
14 responsible for maintaining. *Id.* Plaintiff disputed this, contending that “the
15 United States owned, or . . . its employee placed or otherwise factually controlled
16 the allegedly defective mat.” *Id.* at *4. The court agreed that it could not resolve
17 this factual issue in the context of a Rule 12(b)(1) jurisdictional challenge because
18 the dispute went “to the substantive merits of [Plaintiff’s] FTCA claim.” *Id.*

19 Here, by contrast, the Court can resolve the jurisdictional issue—whether the
20 638 contracts imposed a duty on tribal employees to “safely inspect, maintain, and

1 monitor the smoldering slash pile” at the Mill, as alleged in the SAC, *see* ECF No.
2 6 at 8, ¶ 4.7—without reaching the substantive question on the merits of whether
3 the smoldering slash pile spontaneously combusted due to high winds or the
4 embers of the pile were kindled by the Cold Springs Fire on September 6, *see* ECF
5 No. 26 at 2-3. Therefore, the Court declines to reserve ruling on Defendant’s
6 jurisdictional challenge.

7 **B. 638 Contracts**

8 As a threshold matter, Plaintiffs’ claims are deficient because they have not
9 shown that CTFC, which owns the Mill in fee simple, ever contracted with BIA to
10 administer any sort of program through a 638 contract on BIA’s behalf. However,
11 even if the Court were to proceed to step one of the *Shirk* analysis, Plaintiffs’
12 claims would likewise fail because the contracts do not require tribal employees to
13 protect property at the Mill against wildfires.

14 Defendant has submitted copies of the Forest Management Program contract
15 and Fire Protection Services contract. *See* ECF Nos. 27-8; 27-9. The only parties
16 to those agreements are the BIA and Confederated Tribes. CTFC was not
17 mentioned in either document. A tribally chartered entity like CTFC may enter
18 into a 638 contract, and the parties appear to agree that CTFC, as the business arm
19 of the Confederated Tribes, is entitled to sovereign immunity. *See Demontiney v.*
20 *United States ex rel. Dep’t of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 807-8

1 (9th Cir. 2001); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir.
2 2006) (“[Sovereign] immunity extends to business activities of the tribe, not
3 merely to governmental activities.”). Given CTFC’s status as owner of the Mill
4 property, the Court would expect to see CTFC mentioned in either the 638
5 contracts or some related subcontract between the Confederated Tribes and CTFC.

6 Second, and more fundamentally, Plaintiffs have not shown that the Mill
7 land was ever held in trust by BIA for the Confederated Tribes. As it stands,
8 CTFC owns the land in fee simple. *See* ECF Nos. 27-6; 27-7. CTFC’s
9 predecessor entity, the Colville Tribal Enterprises Corporation, purchased the
10 property from the bankruptcy estate of a private business in 2001, then transferred
11 the property to the Confederated Tribes in 2012, which in turn transferred the
12 property back to CTFC in 2013. ECF No. 27-6 at 2. Likewise, tax records
13 confirm that the property is under the jurisdiction of Okanogan County Fire
14 District 3. ECF No. 27-12 at 2-3. In other words, BIA has never held the land in
15 trust to administer a program on behalf of the Confederated Tribes. As such,
16 Plaintiffs cannot show that the Tribes or CTFC assumed any responsibility from
17 the BIA in managing the land or operations at the Mill. *See Los Coyotes*, 729 F.3d
18 at 1033 (confirming the ISDEAA “created a system by which tribes could take
19 over the administration of programs operated by the BIA”).

1 Even if the Court could theoretically overlook these barriers to jurisdiction,
2 Plaintiffs have not met their burden under step one of the *Shirk* analysis to show
3 that language in either 638 contract is tethered to the maintenance and protection of
4 the Mill.

5 Both 638 contracts include an appendix titled “Scope of Work,” which lays
6 out the responsibilities of the tribal contractor. ECF No. 27-8 at 9 (“The
7 Contractor agrees to administer the program . . . in conformity with the following
8 standards[] [i]dentified in the Scope of Work.”). The Court begins by examining
9 the Forest Management contract’s Scope of Work section. In broad terms, the
10 program envisions that the contractor will serve as a policymaker and advisor to
11 the Colville Reservation regarding the appraisal/sale of timber, forest resource
12 management, and forest health and protection. *See id.* at 31-33.

13 Plaintiffs urge the Court to find that the objectives of the Forest
14 Management program are broader than mere “oversight of forested land,” ECF No.
15 31 at 9, and in particular that the contractor’s responsibility to “provide corrective
16 action to forest stands impacted by wildfire”, ECF No. 27-8 at 32, implicated a
17 duty on behalf of the Confederated Tribes to suppress the smoldering of the slash
18 pile at the Mill. Plaintiffs concede that the Mill was not being used to process
19 timber or manufacture wood products at the time of the fire. ECF Nos. 31 at 5-7.

1 Plaintiffs' arguments are unavailing. The fact that the Forest Management
2 contract includes a general mandate to the Confederated Tribes to maintain and
3 protect forestland does not necessarily implicate a specific duty to protect the
4 privately held and developed Mill property. Further, the Cooperative Fire
5 Protection Agreement between District 3 and the BIA confirms that District 3 was
6 responsible for suppressing the remaining smoldering fire at the Mill's slash piles.
7 *See* ECF No. 27-11 at 2 (providing that District 3 has sole jurisdiction over lands
8 within the boundaries of the fire district, whereas BIA has sole jurisdiction over
9 trust land). As mentioned, the Mill is subject to a District 3 fire protection tax and
10 has not historically been held in trust for the Confederated Tribes.

11 Plaintiff Edward Townsend declared that Mount Tolman, a BIA-managed
12 fire center, assumed responsibility for responding to the Rodeo Trail Fire "and
13 subsequent rekindles of the fire" after an initial response by District 3 and
14 conference between District 3 and Mount Tolman. ECF No. 32 at 3-4. This does
15 not prove that the Mill was under the exclusive jurisdiction of the BIA. Indeed,
16 Mr. Townsend's declaration admits that "subsequent rekindles of fire" were
17 initially tackled by fire districts and only then handed over to Mount Tolman "for
18 mop up and extended monitoring." *Id.* at 4, ¶ 9. The fact that the Mill was under
19 District 3's sole jurisdiction did not prevent Mount Tolman from assisting with
20 mop ups. The Cooperative Fire Protection Agreement specifically contemplates

1 that District 3 will respond to a fire emergency in a sole District 3 jurisdiction, but
2 that BIA fire management may respond as well to “provide immediate control
3 action, minimize fire loss, and thereby indirectly protect its own jurisdiction area.”
4 *Id.* at 3, ¶ 4.02; *see also id.* at ¶ 5.02 (noting District 3 may request the support and
5 assistance of BIA). Therefore, the fact the Mount Tolman offered its fire
6 protection services to District 3 in responding to the Rodeo Springs Fire did not
7 bring CTFC’s maintenance of the Mill within the scope of the 638 contract for
8 forest management services.

9 Respecting the Fire Protection contract, Plaintiffs’ claims likewise fail. The
10 Fire Protection agreement specifies that the Confederated Tribes will “provid[e]
11 essential firefighting and fire protection services within the respective
12 jurisdictional boundaries of each party – the Tribal Emergency Management
13 Services and the city of Nespelem.” ECF No. 27-9 at 30. The Court takes judicial
14 notice that the city of Omak, where the Mill is located, is outside the town of
15 Nespelem. Fed. R. Evid. 201(b). Accordingly, neither 638 contract supports the
16 Court’s exercise of subject matter jurisdiction over this action.

17 **C. Extra-Judicial Discovery**

18 Plaintiffs ask the Court for permission to engage in further jurisdictional
19 discovery before dismissing the action. ECF No. 31 at 4. Specifically, Plaintiffs
20 aver that “recent news reports suggest that at least part of the Old Omak Mill site is

1 dedicated to a new health care facility to be operated as a joint venture between the
2 Confederated Tribes and Defendant” and that “[t]his sounds very much like a 638
3 contract . . . which was contemplated even at the time of the fire, begging the
4 question whether the site was trust land owned by the Confederated Tribes.” *Id.* at
5 7-8.

6 The Court will not allow Plaintiffs to engage in further jurisdictional
7 discovery. If there was such a 638 contract between the tribes and BIA providing
8 for health services on Mill land existing at the time of the fire, the Court anticipates
9 the parties would have produced it by now. And unlike the Fire Protection
10 contract, which could conceivably implicate some nexus between the alleged tribal
11 employees’ activity—i.e., monitoring of the slash pile for potential rekindling—
12 and the scope of the contract—i.e., protecting against wildfires—it is unclear how
13 a contract for operating a health services facility would superimpose a duty on
14 tribal employees to monitor piles of timber byproducts.

15 Additionally, the evidence which Plaintiffs produce does not establish
16 beyond mere conjecture that a 638 contract for health services even might have
17 existed at the time of the fire. The newspaper articles which Plaintiffs submit as
18 evidence that BIA was contracting with the Confederated Tribes to build a
19 healthcare facility were published on October 19, 2023—over three years after the
20 fire of September 7, 2020, that destroyed their property. *See* ECF Nos. 33-5; 33-6

1 at 3 (noting “[t]he project is nine years in the making”). These documents only
2 confirm that a 638 contract was not in place for the Mill at the relevant times.
3 Accordingly, the Court declines to permit further jurisdictional discovery.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 Defendant’s Motion to Dismiss (ECF No. 26) is **GRANTED**. Plaintiff’s
6 Second Amended Complaint (ECF No. 6) is **DISMISSED WITH PREJUDICE**.
7 The District Court Executive is directed to enter this Order, and Judgment
8 accordingly, furnish copies to counsel, and **CLOSE** the file.

9 DATED June 5, 2024.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge