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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

WAYNE PERANK, *et al.*, Plaintiffs, v. UNITED STATES, Defendant.	**UNITED STATES' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Case No. 2:20-cv-00712-JNP-CMR District Judge Jill N. Parrish Magistrate Judge Cecilia M. Romero

The United States has moved for summary judgment on three grounds: (1) Plaintiffs' allegation that the Bureau of Indian Affairs (BIA) failed to deliver water to their farms fails to state a claim under the Federal Tort Claims Act (FTCA) because a private party would not be liable for such a claim under Utah law; (2) the Court lacks subject-matter jurisdiction over Plaintiffs' claim, under the FTCA's discretionary-function exception; (3) to the extent that Plaintiffs base their claim on allegedly negligent construction of the water pipeline, their claim fails because an independent contractor constructed the pipeline.

In their opposition, Plaintiffs argue that they have adequately alleged a common-law negligence claim against the United States; that neither the facts nor the law support the United States' reliance on the discretionary-function or independent-contractor exceptions to the FTCA's

waiver of sovereign immunity; and that disputed issues of material fact regarding the United States' alleged negligence bar summary judgment. As discussed below, Plaintiffs' arguments are unsupported by either the facts or the law.

UNDISPUTED MATERIAL FACTS

Plaintiffs focus on the background fact section of the United States' motion and incorrectly contend that the United States has "admitted that there are disputed material facts and that it cannot carry its summary judgment burden." *See* Pls.' Opp'n Mem. ("Opp'n") (ECF No. 87) at 2–3. Plaintiffs misunderstand the purpose of the fact section in the United States' motion, which contains the following express limitation:

> The United States' defenses listed above [the discretionary-function exception and private-party analog] are primarily issues of law that require few supporting facts. Nonetheless, the following facts are presented to provide *background and context* for the discussion of *legal issues*. The only undisputed *material facts* are the facts regarding *the status of the independent construction contractor,* Excavation Services.

Mot. Summ. J. at 2 (emphasis added) (ECF No. 83). The majority of facts (Paragraphs 1–24 and 30–59) were provided as background. Whether those facts are disputed is immaterial to the discretionary-function exception and the private-party analog, defenses that are based on Plaintiffs' allegations in their Amended Complaint. The only material facts, which concern the independent-contractor exception, are listed in Paragraphs 25 through 29 of the Motion.

Plaintiffs have not created a genuine dispute of material fact concerning Excavation Services' status as an independent contractor. In their opposition, they pose questions with no reference to the record. Opp'n at 8, 21. Plaintiffs also cite to allegations in their Amended Complaint and contend that "genuine issues of material fact relative to each prong of the negligence inquiry . . . preclude . . . summary judgment in favor of Defendant." *Id.* at 18. But the

United States' alleged negligence is not relevant to Excavation Services' status as an independent contractor. "The government can't be liable under the FTCA for the negligence of its independent contractors." *Ohlsen v. United States*, 998 F.3d 1143, 1154 (10th Cir. 2021). Finally, as explained below, the evidence Plaintiffs do cite is consistent with the United States' evidence that Excavation Services is an independent contractor under the FTCA.

ARGUMENT

I. Plaintiffs have not sustained their burden of demonstrating that a private party would be liable under Utah law for the BIA's alleged acts and omissions.

The crux of Plaintiffs' claim is that the BIA breached a duty to deliver irrigation water to them by negligently designing and constructing an irrigation pipeline that replaced the previous open-air canal irrigation system. Am. Compl. (ECF No. 31) ¶¶ 78–81. Plaintiffs argue that "the BIA, through its negligent design and construction of the Pahcease Pipeline and replacement of the Pahcease Canal, departed from its most basic duty of ensuring that all irrigators on the pipeline were able to access water during and after the modifications." Opp'n at 15. In so arguing, however, Plaintiffs run up against a hurdle they cannot clear: the FTCA's limitation of the United States' liability to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Any duty Plaintiffs claim the BIA breached under those statutes would be uniquely federal, not a duty imposed on private persons.

Plaintiffs argue that they "are not predicating their negligence claim on the United States' breach of federal statutory obligations." Opp'n at 12. But that contradicts Plaintiffs' own allegations and arguments. In their Amended Complaint, Plaintiffs allege that "*[t]he United States has a duty* to deliver the Tribe's water to UIIP project lands through the UIIP *pursuant to*

federal laws including the Act of March 1, 1899, 30 Stat. 941 . . . ; the 1906 Act, 34 Stat. 325 . . . ; and 25 C.F.R. Part 171." Am. Compl. ¶ 119 (emphasis added); *see also* Opp'n at 4 ("The UIIP was authorized in the Indian Appropriations Act of June 21, 1906, Pub. L. 59-258, 34 Stat. 325 ('1906 Act'), as a Congressional response to the Indian Commissioner's 1905 Report that the 'future of these [Ute] Indians depends upon a successful irrigation scheme . . . .'" (citation omitted)). No private party could be found liable under Utah law for failing to comply with federal statutes.

Plaintiffs respond that they have asserted a simple negligence claim, based on the United States' breach of its "common law duty of care when designing, constructing, and installing modifications to the UIIP." Opp'n at 12. As illustrated above, however, Plaintiffs' claim that the United States negligently discharged a duty to supply irrigation water alleges a duty that they say derives solely from federal statutes. Because no private party has a duty under those statutes, the United States has no actionable duty under the FTCA.

Plaintiffs also argue that a private party could be liable in the analogous circumstance where they had an obligation to provide irrigation water as part of a private irrigation district established by municipal ordinance or contract. *Id.* at 13. But an irrigation district established by municipal ordinance would not impose duties on private parties. And even if a party operating an irrigation district through contract could be held to a tort duty of care, Plaintiffs have not alleged such a contract here. The management of the UIIP is governed by federal statutes, and "[i]t is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs." *United States v. Agronics Inc.*, 164 F.3d 1343, 1345 (10th Cir. 1999) (quotations and

citations omitted). Plaintiffs' Amended Complaint alleges just such a claim. Their complaint thus fails to state a claim authorized by the FTCA.

II. Plaintiffs have not sustained their burden of demonstrating that the FTCA's discretionary-function exception does not apply to the BIA's alleged acts and omissions.

Plaintiffs do not dispute that the BIA's actions in modifying the UIIP irrigation system were discretionary and thus met the first prong of the *Berkovitz* framework for determining whether federal agency actions are shielded from liability by the FTCA's discretionary-function exception. Opp'n at 14; *see* *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). Plaintiffs focus instead on the second prong, arguing that the BIA's decisions about how to design and construct the pipeline were not susceptible to policy analysis. Opp'n at 17. As discussed more fully in the United States' motion, however, the BIA's decisions are presumed to be susceptible to permissible policy considerations because the governing statutes and regulations entrust those decisions to the BIA's discretion. Mot. Summ. J. at 19. Moreover, the regulations identify policy factors governing the management of the irrigation system, including the safety and reliability of facilities providing irrigation water. 25 C.F.R. § 171.110. Additional policy considerations include efficiency, cost, and the supply of and demand for water. *See, e.g.,* *Rice v. United States*, No. CV06-10-GF-SEH, 2008 WL 11415915, at *2 (D. Mont. Jan. 8, 2008) (unpublished).

Plaintiffs rely primarily on the Ninth Circuit's decision in *O'Toole v. United States*, 295 F.3d 1029, 1036–37 (9th Cir. 2002). Opp'n at 14–15. There, the Court held that the BIA's failure to clean sediment from irrigation canals—resulting in the flooding of the plaintiffs' property—was not susceptible to permissible policy considerations and thus not protected by the discretionary-function exception. 295 F.3d at 1031–32, 1036. The Ninth Circuit found support in

its decision in *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987), where it had similarly rejected application of the discretionary-function exception to a claim of negligent maintenance—in that case, the National Park Service's alleged failure to maintain a road in Denali National Park. Notably, however, the plaintiffs in *ARA Leisure Services* also alleged that the NPS was negligent in the design and construction of the road. *Id.* at 194. And the Ninth Circuit held that "the decision to design and construct Denali Park Road without guardrails is protected by the discretionary function exception." *Id.* Plaintiffs' claim in the present case rests entirely on their allegation that the BIA negligently designed and constructed the UIIP pipeline. Am. Compl. ¶¶ 1, 132; Opp'n at 6, 10, 12, 15. Even the case law Plaintiffs rely on supports the application of the discretionary-function exception to that claim.

Finally, Plaintiffs argue that the discretionary-function exception cannot apply here because they are alleging that the BIA carried out its duties negligently. "Regardless of whether the U.S. has discretion to modify the UIIP, it does *not* have discretion to modify it in a way that constitutes a negligent omission." Opp'n at 17. But in fact, the FTCA expressly allows application of the exception even if the government was negligent. "Because the exception applies 'whether or not the discretion involved [was] abused,' 28 U.S.C. § 2680(a), it is irrelevant whether the government employees were negligent." *Elder v. United States*, 312 F.3d 1172, 1176 (10th Cir. 2002). Plaintiffs' allegations of the BIA's alleged negligent acts and omissions—even if they were supported by admissible evidence—do not alter the conclusion

that the FTCA does not waive the United States' sovereign immunity from Plaintiffs' negligence claim.[1]

III. Plaintiffs have failed to establish any dispute of material fact regarding the United States' defense based on the FTCA's independent-contractor exception.

The United States' reliance on the independent-contractor exception is narrow. The exception is relevant only to the extent Plaintiffs seek damages for physical harm to their property caused by acts or omissions of Excavation Services that were not part of the pipeline design or construction carrying out the design.[2] The United States raises the defense in part because the scope of Plaintiffs' damages claim is not altogether clear. They appear to allege that Excavation Services caused physical damage unrelated to its implementation of pipeline design specifications. For instance, they allege failure to remove debris piles, Am. Compl. ¶ 75(2), and unspecified damage and destruction of their on-farm ditches and irrigation boxes, Am. Compl. ¶¶ 108–09, 133. To the extent Plaintiffs allege damage *incidental* to Excavation Services' removal of ditches and replacement of structures with pipeline materials (in other words, its implementation of the pipeline design specifications), the alleged harm falls under the independent-contractor exception.

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[1] Even if Plaintiffs' negligence claim were not barred, they have presented no admissible evidence establishing a disputed issue of material fact on their negligence claim. Specifically, pursuant to Rule 56(c)(2), the United States objects to Plaintiffs' Exhibits A and C on the ground that they are not properly authenticated as required by FED. R. EVID. 901. The United States also objects to Exhibit D on the ground that it is not authenticated and, even if authenticated, would be inadmissible hearsay under FED. R. EVID. 801(c).

[2] As discussed above, Plaintiffs' negligent design and construction claim must be dismissed based on the discretionary-function exception and the private-party analog.

To determine whether the FTCA's independent-contractor exception in 28 U.S.C. § 2671 applies, the Court, balancing the seven *Lilly* factors,[3] must consider whether the United States controlled "the detailed physical performance" of Excavation Services and supervised its day-to-day operations. *Logue v. United States*, 412 U.S. 521, 528 (1973); *Curry v. United States*, 97 F.3d 412, 414 (10th Cir. 1996). The undisputed facts show that Excavation Services was an independent contractor under the FTCA.

The deposition testimony that Plaintiffs cite is consistent with the United States' evidence that it did not control the day-to-day operations or detailed physical performance of Excavation Services. According to Excavation Services' owner, the BIA monitored the work to ensure that the pipeline was being constructed as designed. *See* Opp'n at 20 (quoting Dep. of Kevin Rowley). Exercising control "necessary to ensure that the desired results were achieved" is not day-to-day supervision. *Ohlsen v. United States*, 998 F.3d 1143, 1159 (10th Cir. 2021) (quoting *Curry*, 97 F.3d at 415). Plaintiffs cite *Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008), as an example of analogous control, but that case is factually distinguishable. The Navy's contract governing the work of a civilian physician expressly stated that the physician's activities were "subject to day-to-day direction" the Navy exercised over its own employees. *Id.* at 1160. No such provision exists here. In another case they cite—*Robb v. United States*, 80 F.3d 884 (4th Cir. 1996)—the court held that the physicians were independent contractors. Also, Plaintiffs

[3] Those factors include "(1) the intent of the parties; (2) whether the United States controls only the end result or may also control the manner and method of reaching the result; (3) whether the [entity and its employees use the entity's] own equipment or that of the United States; (4) who provides liability insurance; (5) who pays social security tax; (6) whether federal regulations prohibit federal employees from performing such contracts; and (7) whether the [entity] has authority to subcontract to others." *Lilly v. Fieldstone*, 876 F.2d 857, 859 (10th Cir. 1989).

apparently rely on *United States v. Becker*, 378 F.2d 319 (9th Cir. 1967), but the level and detail of control in that case was substantial. Nothing here shows similar control.

The BIA's modification of the design and its request that Excavation Services implement that modification (essentially a change in the scope of work) does not amount to control over the detailed physical performance of the construction. *See* Opp'n at 20–21 (quoting Rowley Dep.). Similarly, O&M's change to the terms of the contract and scope of work throughout the project has no relationship to Excavation Services' detailed daily activities. *Id.*

As for O&M's request that Excavation Services repair a ditch where water had overflowed (*see* Opp'n at 21 (quoting Rowley Dep. at 45:20–22)), that request was unrelated to the construction contract. Rowley Dep. at 45:18–19 (O&M asked Excavation Services to repair the ditch independent of the original contract). Moreover, there is no evidence that O&M controlled Excavation Services' physical performance of that repair (or, for that matter, that the repair caused any harm). *See also, e.g.*, *Gonzagowski v. United States*, 495 F. Supp. 3d 1048, 1114–17 (D.N.M. 2020) (authority to inspect work and cure problems does not amount to control of day-to-day activities). In short, the United States controlled the end result, not the detailed manner and method of reaching that result.

Plaintiffs do not address the other relevant *Lilly* factors, which include the stated intent of the parties when they entered into the construction contract, the bidding process, the nature of the contract, Excavation Services' billing and O&M's payment of invoices, Excavation Services' liability insurance, and Excavation Services' hiring of subcontractors. *See* Mot. Summ. J. at 8–9 ¶¶ 25–29. With no evidence to dispute those facts and no evidence that the United States controlled the detailed physical performance of Excavation Services, the overall circumstances

show that the independent-contractor exception bars liability for damage caused by Excavation Services that was incidental to implementation of the pipeline design.

CONCLUSION

For the reasons discussed above and in the United States' Motion for Summary Judgment, the United States requests that the Court enter summary judgment dismissing Plaintiffs' Amended Complaint with prejudice.

Dated this 21st day of June, 2024.

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