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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHERRI BLACK, Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	Case No. C13-5415-RBL SUQUAMISH TRIBE RESPONSE TO UNITED STATES MOTION TO DISMISS Noted for Consideration: September 13, 2013

Introduction

The United States has moved to dismiss the BIA, DOI and the United States from this action, setting forth essentially one reason: that the only claims Plaintiff asserts in this action are intentional or constitutional torts, and that the United States has not waived its sovereign immunity under the Federal Tort Claims Act (FTCA) for claims based upon the intentional torts

asserted in this action. The Suquamish Tribe, however, contends the Plaintiff has alleged claims that appear to be based on simple negligence, and not upon intentional torts among a significant number of constitutional and intentional tort claims.

In addition, the Plaintiff has named over twenty "John Doe" defendants, who may or may not be federal employees as defined under 25 USC §450 *et seq*. (Indian Self Determination and Education Assistance Act as amended by Pub. L. 101–512, Title III, §314, Nov. 5, 1990, 104 Stat. 1959, as amended by Pub. L. 103–138, Title III, §308, Nov. 11, 1993, 107 Stat. 1416) (ISDEA) depending on whether the named John Does are Tribal or non-tribal actors. The United States is obliged to remain in this litigation until it is clear whether or not additional Tribal officers will be named.

Further, the United States is incorrect in its interpretation of the nature of the law enforcement activities contracted under the ("ISDEA"), 25 USC §450 *et seq*. Contrary to the United States' position, alleged intentional torts do in fact subject the United States to an obligation to defend under the FTCA.

Arguments

I. Plaintiff Is Advancing Simple Negligence Claims besides Intentional Tort Claims

It is not clear from the allegations in the Complaint that all claims brought by the Plaintiff are in the nature of intentional torts. Indeed, some of the allegations appear to be based in negligence rather than intent. For example, the Plaintiff's Complaint at Paragraph 9.3 alleges, "Defendant's [sic] committed a negligent or wrongful act or omission." According to the Plaintiff's allegations, the failure of officers at the scene to call for and provide emergency medical services could, if all elements were proven, provide a factual basis for a negligence claim. The United States admits that it is responsible for defending tribal officers haled into

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court on simple negligence claims. *See* United States Motion to Dismiss at 3-4. It is simply too early in this proceeding to dismiss the United States while potential negligence claims have been asserted in the complaint. For this reason, the Court should deny the United States Motion.

II. Any Tribal John Doe Defendants Are Entitled to the Same FTCA Defense as the Named Tribal Defendants

The United States is obligated to defend not only the one Tribal actor identified in the pleadings by name, but also any Tribal "John Does" set out in the Complaint who are yet to be named and who are alleged to have committed acts of simple negligence. Because the United States has an obligation to certify when a tribal officer is acting as a federal employee within the scope of his or her duties under the FTCA, as it did with Officer Graves of the Port Gamble S'Klallam Tribe, it is unclear how the remaining unnamed Tribal law enforcement officers (if any) who were at the scene will be certified, protected or defended by the United States if the United States Motion to Dismiss is granted. For this reason, the Court should deny the United States Motion.

III. Contracting or Compacting Law Enforcement Services with the Federal Government Pursuant to the Indian Self-Determination and Education Assistance Act Provides Tribes with Independent Authority to Enforce Federal Law

The ISDEA (commonly referred to in Indian Country as "638" after its Public Law Number, P.L. 93-638) provides Tribes with the ability to contract programs, functions, services and activities from the federal government. At least in part, the goal of the Act was to end federal paternalism in the operation of on-reservation programs by giving Tribes the opportunity to operate and redesign (as needed, and subject to federal approval) these programs in ways best suited to address tribal needs. ISDEA includes several different types of agreements – contracts, grants-in-lieu-of-a-contract, and self-governance compacts. Regardless of the agreement type,

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the Tribe receives federal funding to take over a program, function, service, or activity of the federal government. *See,* Thomas W. Christie, *An Introduction to the Federal Tort Claims Act In Indian Self Determination Act Contracting*, 71 Mont. L. Rev. 115 (2010).

In the case of the Suquamish Tribe, it has a self-governance compact that includes law enforcement as one of the contracted programs, functions, services or activities. It has operated a contracted law enforcement program for over thirty years. In delivering these law enforcement services, first under an ISDEA contract and more recently under the compact, the Suquamish Tribe has received funding of an equivalent amount that the Department of the Interior would have spent (along with certain adjustments) on those services for the Tribe. *See* 25 USC §450 j-1.

It is important to note that the Department of the Interior, Bureau of Indian Affairs, is charged with "enforcement of Federal law and, with the consent of the Indian tribe, tribal law." 25 USC §2802(c). And logically, the only organic law enforcement activities in which the BIA can engage are *federal* law enforcement activities, because in order to enforce either state law or tribal law, it must have some type of permission to do so. *Id*. Consequently, when the Suquamish Tribe contracted the BIA program, the only law enforcement activity that could be contracted is *federal* law enforcement. [1]

The United States attempts to argue that a "special law enforcement commission" (SLEC) is required before a tribal police officer can be considered a "Federal law enforcement officer."

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1 25 USC §2804 mandates the Secretary of the Interior to develop minimum standards (in consultation with Tribes) for the "special law enforcement commissioning agreements." However, this is duplicative of the existing contracting or compacting process under ISDEA, as the Tribe and Secretary of the Interior negotiate the standards that apply to the performance of the program, service, function, or activity to be contracted or compacted by the particular Tribe. *See, e.g.* 25 USC §2802(e) which gives the Secretary of the Interior broad authority to set law enforcement training requirements.

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However, there is no requirement that ISDEA contracted officers have an SLEC. 25 USC §2804 merely notes that the SLEC is a reflection of the status of that particular individual as one who *can* carry out federal law enforcement. If one is already capable of performing federal law enforcement duties (for example, a United States Marshall, an Agent of the Federal Bureau of Investigation, or a Tribal law enforcement officer, trained and meeting the standards of the Tribal-Department of the Interior compact or ISDEA contract), no additional authorization through the SLEC is or should be required.

The United States has outlined a number of cases from several other jurisdictions that generally require that before a tribal law enforcement officer can be considered a federal law enforcement officer, that person *must* have an SLEC, citing *Dry v. United States*, 235 F.3d 1249 (10th Cir. 2000); *Locke v. United States*, 215 F.Supp.2d 1033 (D.S.D. 2002), *aff'd*, *Locke v. United States*, 63 Fed.Appx. 971 (8th Cir. 2003); Trujillo *v. United States*, 313 F.Supp.2d 1146 (D.N.M. 2003); *Vallo v. United States*, 298 F.Supp.2d 1231 (D.N.M. 2003). Admittedly, there are many courts that have determined that a SLEC is required before a law enforcement officer is considered a "federal" law enforcement officer. However, the courts' holdings in these cases are not on point. The question of what an ISDEA contracting or compacting tribe had contracted *if not federal law enforcement* was not before the courts. Absent separate authorization by Tribal government, the BIA law enforcement program cannot enforce tribal law. Similarly, absent some state authorization, the BIA law enforcement program cannot enforce state law. Simple logic then demonstrates that the only law enforcement activities that can be contracted by a Tribe under an ISDEA contract or compact *must* be *federal* law enforcement.

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While there is no case law which squarely addresses the question of exactly what is contracted when a tribe contracts law enforcement from the United States under ISDEA, a very recent Ninth Circuit case examined the application and contracting process under the ISDEA where there was no existing law enforcement program. *Los Coyotes Band Of Cahuilla & Cupeño Indians v. Jewell, et al*., No. 11-57222 D.C. No. 3:10-cv-01448-AJB-NLS, Slip Op. (September 4, 2013). In Los *Coyotes Band of Cahuilla & Cupeño Indians,* the Ninth Circuit held that because the BIA had had no law enforcement program, there was no program, function, service or activity for the Tribe to take over; therefore, there was no federal funding to transfer to the Tribe. As the Ninth Circuit noted:

> The ISDA allows the Tribe to take control of existing programs and obtain the funds that the Bureau of Indian Affairs ("BIA") would otherwise have spent on those programs. Where there is no existing BIA program, there is nothing that the BIA would have spent on the program, and therefore nothing to transfer to the Tribe.

Id. at 4.

If the BIA has contracted a law enforcement program to a Tribe, it must be an *existing* program. Since the BIA on its own does not have the jurisdiction to enforce either state or Tribal law, then it *must* be enforcing federal law, since it is the only law enforcement program it can contract to a Tribe.

IV. Tribal Law Enforcement Officers and Law Enforcement Programs Meet Identical or More Restrictive Standards than Those Required for a SLEC

Contrary to the intent of Congress, the United States' reliance on the SLEC is a particularly disingenuous means of shifting responsibility for *Bivens*-type tort claims away from the United States. One needs only look at the regulations for the BIA law enforcement program to realize that there are virtually no differences in the training, education, performance standards,

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and even pay rates between BIA law enforcement programs and tribally contracted law enforcement programs. Notwithstanding its chilling effect on tribal creativity and initiative in designing programs to meet specific tribal needs, the BIA admits that it will impose minimum standards on tribal programs, stating:

> [T]he Deputy Commissioner of Indian Affairs will ensure minimum standards are maintained in high risk activities where the Federal government retains liability and the responsibility for settling tort claims arising from contracted law enforcement programs. It is not fair to law abiding citizens of Indian country to have anything less than a professional law enforcement program in their community. Indian country law enforcement programs that receive Federal funding and/or commissioning will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies.

25 CFR §12.12. (*emphasis added*).

Despite the United States' position in its Motion to Dismiss, this policy statement published by the Bureau of Indian Affairs makes clear that the purpose of these standards are precisely designed to address the facts of this case – to provide the appropriate training and professionalism to safeguard the public and to acknowledge that the Federal government retains liability for tort claims arising from those contracted programs. It is also clear from this policy statement that the BIA anticipated that such liability could result from either the funding of programs in a contracting situation or from the act of commissioning with or without contracting under the ISDEA.

Because of the Bureau of Indian Affairs' regulations, for all practical purposes there is virtually no difference between a tribal police law enforcement program and the BIA law enforcement program or any program under the SLEC rubric. BIA regulations require that "Every Indian country law enforcement program covered by the regulations in this part must

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maintain an effective and efficient law enforcement program meeting minimal qualitative standards and procedures specified in chapter 68 Bureau of Indian Affairs Manual (BIAM) and the Law Enforcement Handbook." 25 CFR §12.14.

Of particular note to this case, the BIA regulations also require that:

> The Director will develop and maintain the use of force policy for all BIA law enforcement personnel, and for programs receiving BIA funding or authority. Training in the use of force, to include non-lethal measures, will be provided annually. All officers will successfully complete a course of instruction in firearms, to include judgment pistol shooting, approved by the Indian Police Academy before carrying a firearm on or off duty.

25 CFR §12.55.

Here, the United States shirks its responsibilities to the Tribe(s) as promised by Congress in the ISDEA and its subsequent amendments by hiding behind the SLEC argument to avoid liability for tort claims that the United States would otherwise defend were the officers equally trained but from any other federal law enforcement agency.

V. A Special Law Enforcement Commission Is Practically Unavailable in Indian Country In Western Washington

In its Motion to Dismiss, the United States places great reliance on the existence of the SLEC as evidence of the sole means for tribes to enforce *federal* law in Indian Country, and argues that the only way that a Tribal law enforcement officer can ever enforce federal law is with an SLEC. That is not the case here. Tribal law enforcement officers routinely work with the Federal Bureau of Investigation and other purely federal law enforcement agencies and routinely refer cases to the United States Attorney for prosecution. Under the United States' position, however, tribal law enforcement officers enforce federal law at great risk, as the SLEC is virtually unavailable in Western Washington. *See,* Affidavit of Mike Lasnier. Regardless,

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obstacles to gaining SLEC deputation exist and have only grown more so in recent years. *See e.g.*, BIA Interim Policy 4-04-01. Despite several attempts by the Suquamish Tribe to obtain SLEC deputation, even going so far as to pay for specific training on this matter and to bring trainers in from great distances, the Suquamish Tribe has been frustrated in its efforts to receive SLEC certification. *See* http://www.indianaffairs.gov/cs/groups/public/documents/text/idc012192.pdf (Statement of Mike Lasnier, pages 162-175, United States Department Of The Interior, Bureau Of Indian Affairs Tribal Law And Order Act Consultation, October 20, 2010, Albuquerque, New Mexico) (hereinafter "Statement"). There appear to be few, if any, tribal law enforcement officers in Washington State who also have a Special Law Enforcement Commission unless they are part of an intergovernmental task force of some kind, because of the changes in the law required by the recent Tribal Law and Order Act, the difficulties in obtaining the training required, and even reaching agreement on the certification process. *See* Statement at pages 164-170. Thus, the Affidavit of SAC Woolworth, attached to the United States Motion to Dismiss creates a false impression that there is a clear path to a SLEC in Washington when in fact the United States has issued a mere handful of SLECs despite repeated attempts by Washington Tribes to acquire SLECs for their Officers. *Id*.

VI. Federal Statutory Law Does Not Necessarily Require a Special Law Enforcement Commission to Enforce Federal Law

Although the United States points to 25 USC §2804(b) to suggest that a separate agreement is required before commissioning can occur, the statute shows it does not require it. The first subsection of §2804(b) requires that the Secretary establish the minimum requirements to be included in the SLEC agreements. However, the actual policy guidance developed by the

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BIA explains in detail that these agreements are only "to be issued or renewed at BIA-OJS discretion and only when legitimate law enforcement need requires issuance." BIA Interim Policy 4-04-01(C). The policy then goes into great detail about the training and qualification requirements imposed before a person can receive a SLEC – requirements that are all already imposed through the regulations in 25 CFR Part 12 on Tribes contracting and receiving funding under the ISDA to perform federal law enforcement activities.

One reason for these requirements that makes much more sense and fulfills a logical law enforcement purpose for the existence of 25 USC §2804 and this SLEC policy is to allow the BIA and/or contracted Tribes to get assistance from other tribes (which do not contract Federal law enforcement services) and state and local law enforcement agencies in order to address short-term task force and similar situations where additional law enforcement resources are needed in Indian Country or elsewhere. *See* BIA Interim Policy 4-04-01(E). Inter-Tribal task forces are quite common in Indian country. For example, the Suquamish Tribal Police have expertise in tracking, finding, and uncovering hidden drug labs and marijuana grows in remote locations and are often asked to work on other Indian reservations in drug interdiction activities because of it. *See* Aff. Lasnier. While performing such activity on the Suquamish Reservation clearly falls within the Suquamish Police Department's contracted authority, a SLEC would be a highly useful commission to have for Suquamish Officers performing these activities on another Reservation.

Therefore, contrary to the United States' urging, there is another equally valid purpose for SLECs issued under 25 USC §2804 that has nothing to do with requiring the officers of contracting tribes to obtain same in order to enforce federal law on their own Reservation, or to

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have same in order to be considered federal law enforcement officers for purposes of the intentional tort claim exception to the FTCA.

VII. The Underlying Goal of the ISDEA Is to Give Tribes the Same Benefits and Advantages of Federal Programs, including the Complete Benefit of the Federal Tort Claims Act

The whole history of the ISDEA shows that it was designed to give Tribes at the least, the same resources to perform the various programs, functions, services or activities that had been performed by the Department of the Interior or the Indian Health Services before the Tribe contracted the activity. *See* 25 USC §450f. Although tribes are generally encouraged to be creative in making these programs, functions, services or activities meet tribal needs, Congress clearly wanted tribes to have the same advantages and opportunities that the Federal government had when undertaking the contracted program, function, service or activity. Throughout the ISDEA, Congress made provisions for contracting or compacting tribes to receive a wide range of access – property transfers for those resources used by the federal program, access to GSA sources of supply, access to surplus property, inclusion of tribal property in a regular *federal* replacement schedule, as well as the opportunity for direct hires from the federal government to continue receiving *federal* unemployment, retirement, health and other benefits while working for the tribe that has assumed responsibility for the operation of any formerly federal program, function, service or activity. *See generally* 25 USC §450j and §450i. The United States' theory of how the SLEC works is self-serving and runs contrary to the intent of Congress as expressed in the ISDEA and the Tribal Law Enforcement Act.

Tribal law enforcement officers who meet the standards to be employed by the tribe when contracting or compacting federal law enforcement programs must be treated as federal

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employees for *all* federal tort claims purposes. Any remaining policy or regulatory provision to the contrary must fail of necessity, because tribal law enforcement personnel contract to perform and actually do perform federal law enforcement. Further, the United States fails to cite to any authority that Congress intended to provide disparate treatment to federal and tribal law enforcement officers given virtually identical training, standards, ethics, policies and procedures between those used by the BIA and those *imposed* by the BIA on Tribes.

Conclusion

The Plaintiff has expressed at least some allegations in her Complaint which sound in negligence, such as the allegation that the police failed to provide medical assistance to Mr. Black if all elements are proven at trial. Further, notwithstanding case law to the contrary, the Suquamish Tribe has contracted with and continues to contract with the federal government to provide law enforcement services on the Port Madison Indian Reservation and those officers who fulfill the standards set forth in the ISDEA contract or compact are contracted first to enforce *federal* law and second to enforce tribal law. For all the above reasons, the Suquamish Tribe respectfully requests this Court to deny the United States Motion to Dismiss.

The Suquamish Tribe

DATED this 9th day of September, 2013.

s/ James R. Bellis
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2013, I caused the foregoing document to be electronically filed with the Clerk of the District Court using the CM/ECF system, which will send notification of this filing to all parties registered for this matter with the CM/ECF system.

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