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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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Paula Boyd,

No. CV-10-1252-PHX-GMS

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Plaintiff,

ORDER

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vs.

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United States of America, et al.,

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Defendant.

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Pending before this Court is the Motion to Dismiss (Doc. 8) for lack of subject matter jurisdiction filed by Defendants United States of America, and its agency, the United States Customs and Border Protection Service (“CBP”) (collectively “USA”). For the reasons stated below, the Court grants the Motion to Dismiss.

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BACKGROUND

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On October 6, 2007, Plaintiff Paula Boyd (“Boyd”) and her husband were crossing into the United States from Mexico at a CBP Inspection Station at San Luis, Arizona. The couple was towing a forty-foot long fifth-wheel trailer with a Ford F250 truck. Plaintiff contends that a CBP officer (“officer”) directed her husband to “make a hard right turn” into a secondary inspection bay. While trying to make the turn the husband hit a concrete pole and/or embankment. Thereafter, Plaintiff alleges, she was instructed by the officer to exit the truck and assist in directing her husband into the inspection bay by standing at the back of the trailer and signaling to the officer, who in turn, would signal to the driver. During the

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1 course of this process Plaintiff avers that the officer became distracted and missed her signal
2 to “stop” the vehicle, thereby causing the husband to continue driving the vehicle in reverse
3 and causing Plaintiff’s hand to become crushed between a concrete pole/embankment and
4 the trailer. Plaintiff asserts that under the Federal Tort Claims Act (“FTCA”) the U.S. is
5 liable for the injuries she sustained while attempting to direct the vehicle into the inspection
6 bay.

7 DISCUSSION

8 I. Legal Standard

9 The defense of lack of subject matter jurisdiction may be raised at any time by the
10 parties or the Court. *See* FED. R. CIV. P. 12(h)(3); *Augustine v. United States*, 704 F.2d 1074,
11 1077 (9th Cir. 1983). In resolving a motion to dismiss for lack of subject matter jurisdiction,
12 the Court is not limited to the allegations in the pleadings if the “jurisdictional issue
13 is separable from the merits of [the] case.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177
14 (9th Cir. 1987). The Court is “free to hear evidence regarding jurisdiction and to rule on that
15 issue prior to trial, resolving factual disputes where necessary.” *Augustine*, 704 F.2d at 1077;
16 *see Roberts*, 812 F.2d at 1177. “A Rule 12(b)(1) jurisdictional attack may be facial or
17 factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see Thornhill*
18 *Publ’g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). In a facial attack, the
19 challenger asserts that the allegations contained in the complaint are insufficient on their face
20 to invoke federal jurisdiction. *Safe Air for Everyone*, 373 F.3d at 1039. In resolving a facial
21 attack, the Court must accept the allegations within the Complaint as true and construe them
22 in a light most favorable to the claimant. *Love v. United States*, 915 F.2d 1242,1245 (9th Cir.
23 1989). Dismissal is improper unless it appears beyond doubt that Plaintiff can prove no set
24 of facts supporting her claim that would entitle her to relief. *Id.*

25 II. Analysis

26 Defendants move to dismiss Plaintiff’s negligence claim because it falls within the
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1 FTCA’s “detention of goods” exception to the United States’ waiver of sovereign immunity.¹
2 The FTCA authorizes claims against the United States, to the same extent as a private party,
3 “for injury or loss of property, or personal injury or death caused by the negligent or
4 wrongful act or omission of any employee of the Government while acting within the scope
5 of his office or employment.” 28 U.S.C. § 1346(b); *see also* 28 U.S.C. § 2674. The waiver
6 is subject to certain specific exceptions, such as for the “detention of goods.” 28 U.S.C.
7 § 2860(c). Section 2860(c) provides that the provisions of § 1346(b) do not apply to “[a]ny
8 claim arising in respect of the assessment or collection of any tax or customs duty, or the
9 detention of any goods, merchandise, or other property by any officer of customs or excise
10 or any other law enforcement officer.” The Supreme Court has broadly construed the
11 language “arising in respect of” to mean any claim “arising out of” the detention of goods
12 or property, including a claim resulting from negligent handling or storage of the detained
13 property. *Kosak v. United States*, 465 U.S. 848, 854 (1984). The detention of goods
14 exception is not limited to claims for damage caused by the detention itself. *See id.* This
15 holding furthers Congress’ intent that customs activities, as a class, not be disrupted by threat
16 of suit. *Id.* at 858.

17 Plaintiff’s negligence claim is based on personal injuries sustained while maneuvering
18 her vehicle into a secondary inspection bay at a CBP port of entry. Because Plaintiff’s injury
19 “arises out of” the detention of the vehicle in which she was riding, her negligence claim falls
20 squarely within the exception in § 2680(c). *See Goodman v. United States*, 987 F.2d 550,
21 551–52 (8th Cir. 1993) (finding routine customs inspection constitutes detention under §
22 2680(c)). The Ninth Circuit has held that the detention of goods exception bars personal
23 injury claims arising from the detention of goods, regardless of whether they were intentional
24 torts or grounded in negligence. *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994); *see*

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26 ¹ Because Plaintiff dismisses her claim alleging a failure to train, supervise or instruct
27 the officer, it is unnecessary to discuss Defendants’ arguments based on Federal Rule of Civil
28 Procedure 12(b)(6) and the discretionary function exception to the FTCA with respect to this
claim. (Doc. 9).

1 also *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 808 (9th Cir. 2003) (dismissing
2 negligence claim where “alleged negligence resulting in damage occurred while [plaintiff’s]
3 personal property was detained”); *Rayes v. United States*, 967 F. Supp. 1162, 1164–65 (D.
4 Ariz 1997) (dismissing negligent infliction of emotional distress claim under § 2680(c) where
5 claim arose out of assessment or collection of tax).

6 In response, Plaintiff argues that this is not a typical detention of goods case because
7 her injuries were independent from any detention and rather the result of her being “required
8 to perform traffic control measures on behalf of the CBP.” (Doc. 9). Plaintiff’s argument is
9 inconsistent with the Supreme Court’s holding in *Kosak*, which requires the Court to consider
10 whether her claim “arises out of” the detention of goods. 465 U.S. at 854. Plaintiff’s
11 negligence claim is based entirely on events that transpired when her vehicle was directed
12 into a secondary inspection bay at the port of entry. Thus, Plaintiff’s FTCA claim falls within
13 the “detention of goods” exception to the FTCA’s waiver of immunity.

14 In her response Plaintiff also argues that the vehicle was not being detained for
15 inspection but was being moved to another bay to alleviate the back-up traffic. To the extent
16 that Plaintiff now attempts to allege that her vehicle was not being detained at all, but was
17 merely being redirected to open another traffic lane, she may not now amend her complaint
18 through her response to the motion to dismiss.² In the Complaint, which is the operative
19 pleading, Plaintiff alleges that “an incident occurred while a United States Border Patrol
20 Officer guided a vehicle driven by Robert Boyd, into an inspection bay.” (Doc. 1, ¶ 12). We
21 interpret the Complaint according to its plain meaning and determine that it alleges that the
22 vehicle was being directed into an inspection bay at the border patrol station.

23 Therefore, the United States retains its sovereign immunity against the claim stated
24 in the Complaint and the Court dismisses this action for lack of subject matter jurisdiction.

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26 ² To the extent that Plaintiff now suggests that her vehicle was being detained in an
27 inspection bay merely to improve traffic flow, it is not apparent based on the text of the
28 statute that the detention had to arise for purposes of an inspection for the statute to be
applicable.

