

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS BOTELL, JENNIFER BOTELL,	)	
individually, and B.B. and K.B.,	)	2:11-cv-01545-GEB-GGH
minors, by and through their	)	
Guardian ad Litem, JENNIFER	)	
BOTELL,	)	<u>ORDER</u>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
The UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	

Defendant the United States of America seeks dismissal of Plaintiffs' wrongful death, negligence, and negligent infliction of emotional distress claims under Federal Rule of Civil Procedure 12(b)(1), arguing "[t]he Court lacks jurisdiction over this lawsuit because the challenged actions are covered by the discretionary function exception to the Federal Tort Claims Act ('FTCA')." (Def.'s Mot. 1:9-11.) Plaintiffs oppose the motion.

This action concerns a fatal and nonfatal accident occurring on July 29, 2009, on Lassen Volcanic National Park's Lassen Peak Trail ("Trail"). (Compl. 3:24-4:10.) Plaintiffs allege Defendant's failure to maintain the Trail and failure to provide any warning regarding the danger on the Trail involved with these accidents causes Defendant to be liable for the fatality of Tommy Botell and the severe physical injury

1 to Plaintiff K.B. Id. 3:15-19, 4:2-5.

2 The FTCA waives sovereign immunity for tort claims arising out  
3 of "the negligent or wrongful act or omission of any employee of the  
4 Government while acting within the scope of his office or employment,  
5 under circumstances where the United States, if a private person, would  
6 be liable to the claimant in accordance with the law of the place where  
7 the act or omission occurred." 28 U.S.C. § 1346(b)(1) (2010). However,  
8 the FTCA's waiver of immunity is limited by many exceptions, including  
9 the discretionary function exception, which provides immunity from suit  
10 for "[a]ny claim . . . based upon the exercise or performance or the  
11 failure to exercise or perform a discretionary function or duty on the  
12 part of a federal agency or an employee of the Government, whether or  
13 not the discretion involved be abused." 28 U.S.C. § 2680(a). "The burden  
14 of proving the applicability of the discretionary function exception is  
15 on the [Defendant]." Marlys Bear Med. v. United States ex. rel. Sec'y of  
16 Dep't of Interior, 241 F.3d 1208, 1213 (9th Cir. 2001).

17 The Supreme Court implemented "a two-step analysis to determine  
18 applicability of the [discretionary function] exception." Terbush v.  
19 United States, 516 F.3d 1125, 1129 (9th Cir. 2008). The first step  
20 requires determining whether the challenged action "involve[s] an element  
21 of judgment or choice." United States v. Gaubert, 499 U.S. 315, 322  
22 (1991). "The second [step] requires the court to determine whether the  
23 discretion left to the government is the kind of discretion protected by  
24 public policy, which is understood to include decisions grounded in  
25 social, economic, or political policy." Myers v. U.S., --- F.3d ----,  
26 2011 WL 2816640, at \*5 (9th Cir. 2011) (internal quotation marks omitted).

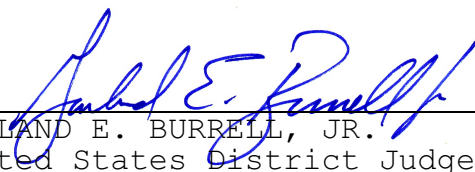
27 Defendant's factual showing in support of its motion is  
28 premised on its asserted judgments or choices in its decisions concerning

1 how the Trail was to be maintained and how the public was to be warned  
2 of any danger on the Trail. Defendant contends "there was no federal  
3 statute, regulation, or policy that specifically prescribed how or when  
4 the Trail's rock walls should be maintained" or "how to warn of any  
5 dangers that the Trail, including its rock retaining walls, may have  
6 posed." (Def.'s Mot. 10:17-20.) Even assuming, *arguendo*, that the issue  
7 is only whether Defendant's alleged failure to maintain the Trail or to  
8 warn about any danger thereon was based on a discretionary decision,  
9 Defendant has failed to meet its burden in showing that it made a  
10 decision which "is of the kind that the discretionary function exception  
11 was designed to shield." Gaubert, 499 U.S. at 322.

12 Defendant supports its position that its decision concerning  
13 maintenance of the Trail was grounded in policy by citing to information  
14 in an Environmental Assessment that postdates the accidents, and to  
15 averments in two declarations regarding funding considerations concerning  
16 maintenance of the Trail that fail to state when the considerations were  
17 pondered. Further, Defendant supports its position that its decision  
18 concerning warning visitors about any dangers on the Trail was grounded  
19 in policy by citing to an averment in a declaration concerning an issued  
20 warning. However, the referenced averment fails to state whether the  
21 warning was issued after or before the subject accidents.

22 Therefore, Defendant's motion to dismiss for lack of subject  
23 matter jurisdiction is DENIED.

24 Dated: October 17, 2011

25  
26   
27 GARLAND E. BURRELL, JR.  
United States District Judge