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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PATRICIA LUMAS,

Plaintiff,

v.

UNITED STATES OF AMERICA, and
BARBARA ANTONE,

Defendants.

Case No.: 19-CV-0294 W (WVG)

**ORDER GRANTING DEFENDANT
UNITED STATES’S 12(B)(1)
MOTION TO DISMISS [DOC. 7]**

Pending before the Court is Defendant United States of America’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). (*Mot.* [Doc. 7.]; *see also Reply* [16].) Plaintiff opposes. (*Opp’n* [Doc. 11].)

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons that follow, the Court **GRANTS** the motion [Doc. 7].

1 **I. BACKGROUND**

2 On May 25, 2017, Plaintiff Patricia Lumas (“Lumas”) was injured while riding in a
3 vehicle driven by Defendant Barbara Antone-Levy (“Antone”).¹ (*Compl.* [Doc. 1] ¶¶ 14–
4 20.) Lumas alleges that Antone was working within the scope of her responsibilities as
5 the Quechan Indian Tribe Language Preservation Coordinator when the accident
6 occurred. (*Id.* ¶¶ 8–10; *DHHS Claim* [Doc. 1-1, Ex. 1].)

7 Lumas submitted a claim against the Fort Yuma Quechan Indian Tribe, to which
8 Hudson Insurance Company replied:

9 [Lumas] should immediately submit this matter to the federal government,
10 on the grounds that it may be a claim against a tribal contractor and its
11 employees, arising out of tribal activities funded by a Self-Determination
12 Contract In the meantime, Hudson is taking no further action
13 concerning this matter while it awaits the decision from the federal
14 government.

(*Hudson Insurance Correspondence* [Doc. 11-1, Ex. 1].)

15 In February of 2019, Lumas brought this action. (*Compl.* [Doc. 1].) In line with
16 Hudson’s analysis, Lumas contends that the Federal Torts Claims Act (“FTCA”) makes
17 the federal government liable for Antone’s negligent driving. (*Id.* ¶¶ 1–2.)

18 On June 14, 2019, the United States filed the instant motion requesting dismissal of
19 Lumas’s complaint for lack of subject matter jurisdiction under Rule 12(b)(1). (*Mot.*
20 [Doc. 7.]; *see also Reply* [16].) Lumas opposes and each party has submitted
21 supplemental briefing at this Court’s request. (*Opp’n* [Doc. 11]; *Pl.’s Suppl. Br.*
22 [Doc.18]; *Def.’s Suppl. Br.* [Doc. 19].)

27
28 ¹ Antone’s last name occasionally switches to Levy in the record. The two are one and the same for the purposes of this Order.

1 **II. LEGAL STANDARD**

2 Rule 12(b)(1) provides a procedural mechanism for a defendant to challenge
3 subject-matter jurisdiction. “A jurisdictional challenge under Rule 12(b)(1) may be made
4 either on the face of the pleadings or by presenting extrinsic evidence. Where
5 jurisdiction is intertwined with the merits, we must assume the truth of the allegations in
6 a complaint unless controverted by undisputed facts in the record.” Warren v. Fox
7 Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotation marks,
8 brackets, ellipsis and citations omitted).

9 A facial attack challenges the complaint on its face. Safe Air for Everyone v.
10 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). But when the moving party raises a factual
11 challenge to jurisdiction, the court may look beyond the complaint and consider extrinsic
12 evidence, and “need not presume the truthfulness of the plaintiff’s allegations.” See id.
13 Once the defendant has presented a factual challenge under Rule 12(b)(1), the burden of
14 proof shifts to the plaintiff to “furnish affidavits or other evidence necessary to satisfy its
15 burden of establishing subject matter jurisdiction.” Id.

16
17 **III. DISCUSSION**

18 Here, the United States asserts a factual challenge. It argues there are no facts in
19 this case overriding its baseline immunity from suit. The burden of proof therefore lies
20 with Lumas to furnish sufficient evidence establishing subject matter jurisdiction. See
21 Safe Air for Everyone, 373 F.3d at 1039.

22 The doctrine of sovereign immunity establishes that “[t]he United States, as
23 sovereign, is immune from suit save as it consents to be sued.” United States v.
24 Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584,
25 586 (1941)). The United States may waive its sovereign immunity, but any such waiver
26 must be strictly interpreted. Id. The FTCA is a limited waiver of sovereign immunity. It
27 establishes that a plaintiff can sue the United States for:
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1 injury or loss of property, or personal injury or death caused by the negligent
2 or wrongful act or omission of any employee of the Government while
3 acting within the scope of his office or employment, under circumstances
4 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.

5 28 U.S.C. § 1346(b)(1).

6 In its motion to dismiss, the United States argues that the FTCA does not apply
7 here to grant subject matter jurisdiction because Lumas was not a government employee.
8 (*Mot.* [Doc. 7] p. 2.) However, Lumas contends that the Indian Self-Determination and
9 Education Assistance Act (“ISDEAA”) extends FTCA coverage to torts of tribal
10 employees acting pursuant to federal contracts granted under the ISDEAA. (*Opp’n* [Doc.
11 11] p. 6.)

12 An ISDEAA contract provides funding to a tribe to plan, conduct, and administer
13 programs that the federal government would have otherwise provided, thereby furthering
14 Indian self-determination. See 25 U.S.C. § 5321. A “self-determination contract” under
15 the ISDEAA is one between a tribal organization and either the Secretary of Health and
16 Human Services (“DHHS”) or the Secretary of the Interior. 25 U.S.C. § 5304(i), (j).
17 Congress amended the ISDEAA to allow FTCA recovery when death or injury results
18 from the performance of a self-determination contract. 25 U.S.C. § 5321(d). While tribal
19 members are not federal employees, they are deemed “covered employees” when
20 operating under ISDEAA self-determination contracts and treated as federal employees
21 for FTCA purposes. Id. Thus, the controlling question for purposes of the current
22 motion is whether Antone was working under a self-determination contract when the
23 alleged tortious conduct occurred.

24 At the time of the accident, the Quechan Indian Tribe employed Antone as a Tribal
25 Language Preservation Coordinator. (*DHHS Claim* [Doc. 1-1, Ex. 1]; *Quechan*
26 *Language Revitalization Project Grant* [Doc. 16-10, Ex. A] pp. 45–47.) According to the
27 official responsible for administering self-determination contracts between the DHHS
28 and the Quechan Indian Tribe, the position of Tribal language Preservation Coordinator

1 was not funded by either the Alcohol/Drug Abuse Prevention Program or the Community
2 Health Representatives Program—the only two programs funded by DHHS pursuant to
3 the ISDEAA at the time of the accident. (*Morales Decl.* [Doc. 16-1] ¶¶ 1–5;
4 *Alcohol/Drug Abuse Prevention Program* [Doc. 16-2, Ex. A.]; *Community Health*
5 *Representatives Program* [Doc. 16-3, Ex. B].) Likewise, the Department of Interior did
6 not identify Antone’s position in its respective ISDEAA contracts. (*Shields Decl.* [Doc.
7 16-6] ¶¶ 1–3; *Johnson O’Malley Program* [16-7, Ex. A]; *Higher Ed. Adult Vocational*
8 *Training* [16-8, Ex. B].) In fact, Antone’s position is funded by the Native Language
9 Preservation and Maintenance Program, which was authorized under the Native
10 American Programs Act. (*Strickland Decl.* [16-9] ¶¶ 2–3; *Quechan Language*
11 *Revitalization Project* [16-10, Ex. A].) The Native American Programs Act is an entirely
12 different statute from the ISDEAA. See 42 U.S.C. § 2991b-3.

13 Nevertheless, Lumas argues the Language Preservation Program agreement for
14 which Antone was the Program Coordinator falls under the ISDEAA because it is “for
15 the benefit of Indians.” (*Pl.’s Suppl. Br.* [Doc. 18] 4:22–5:19.) However, the ISDEAA
16 does not say that all grants for the benefit of Indians must necessarily be a self-
17 determination contract; it specifically provides that a “‘self-determination contract’
18 means a contract . . . entered into under subchapter I of this chapter between a tribal
19 organization and the appropriate Secretary.” 25 U.S.C. § 5304(j). The Native Language
20 Preservation and Maintenance grant funding Antone’s position was entered into under an
21 entirely different Title than subchapter I of Title 25. Compare 25 U.S.C. § 5321, with 42
22 U.S.C. § 2991b-3.

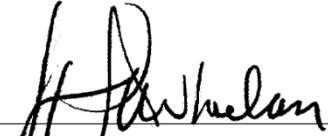
1 Lumas has failed to show that an ISDEAA contract underwrote Antone's position
2 with the Quechan Indian Tribe. Accordingly, sovereign immunity has not been waived
3 and Lumas's complaint is dismissed for lack of subject matter jurisdiction.²
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5 **IV. CONCLUSION & ORDER**

6 Defendant's motion to dismiss for lack of jurisdiction is **GRANTED**. [Doc. 7.]
7 This action is dismissed **WITHOUT LEAVE TO AMEND**.

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9 **IT IS SO ORDERED.**

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11 Dated: October 10, 2019

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14 Hon. Thomas J. Whelan
15 United States District Judge
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27 ² The Court finds Lumas's request for additional time to conduct a limited deposition of Antone prior to
28 ruling on this motion futile and counter to judicial efficiency. (*Pl.'s Suppl. Br.* [Doc.18] 1:18–2:3.) The
requisite information has already been supplied by the agencies involved.