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RESPONSIBLE SOVEREIGNTY: HOW TRIBES CAN USE PROTECTIONS PROVIDED IN P.L. 93- 638 AND P.L. 101-152 TO THEIR ADVANTAGE WITHOUT *TAKING* ADVANTAGE

Jessie Huff Durham*

I. HISTORY OF PROVISIONS

Pursuant to the Acts of April 16, 1934¹, November 2, 1921,² and August 5, 1954,³ the Bureau of Indian Affairs in the Department of Interior (DOI) and the Public Health Service in the Department of Health and Human Services (DHHS) have the responsibility of providing a number of benefits and services to Indians because of their status as Indians. Under the Indian Self-Determination and Education Assistance Act of 1975⁴ (P.L. 93-638), many tribes have contracted or compacted with the DOI and the DHHS to plan, conduct and administer programs to provide these benefits and services to Indians residing in their jurisdictional area (638 agreements). With the enactment of P.L. 93-638, Congress did not intend to in any manner diminish any trust responsibility owed by the United States to Indian people.⁵ Congress has determined that the activities carried out by tribes under P.L. 93-638 are responsibilities owed by the federal government to Indian people.⁶ As such, the ultimate responsibility for civil claims arising under the performance of functions contracted by tribes pursuant to P.L. 93-638 also remains with the federal government.

Congress openly acknowledged this pre-existing responsibility in Senate Report No. 100-274 on the 1988 amendments to P.L. 93-638.⁷ The Senate Report explains:

“It is clear that tribal contractors are carrying out federal responsibilities. The nature of the legal liability associated with such responsibilities does not change because a tribal government is performing a Federal function. The unique nature of the legal trust relationship between the Federal Government and tribal governments requires that the Federal Government provide liability insurance coverage in the same manner as such coverage is provided when the Federal

*. Acting Attorney General, Muscogee (Creek) Nation.

1. 48 Stat. 596 (1934) (codified as amended at 25 U.S.C. §§452 et seq. (1994)).

2. 42 Stat. 208 (1921) (codified as amended at 25 U.S.C. §13 (1994)).

3. 68 Stat. 674 (1954) (codified as amended at 42 U.S.C. §2001 (1994)).

4. Pub. L. No. 93-638 (codified as 25 U.S.C. §450 et seq. (1994)).

5. See 25 U.S.C. §450n. (1994).

6. See *id.*

7. See S. Rep. No. 100-274, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2620.

Government performs the function. Consequently, section 201(c) [Section 102(c) of P.L. 93-638, as amended] of the Committee amendment provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out self-determination contracts are considered to be employees of the Federal Government.⁸

Unfortunately, the resulting amendments did not go as far as the Senate Report suggested they would. Section 102(c) of P.L. 93-638, as amended, (Section 102(c)) provides that the Secretary shall obtain liability insurance or equivalent coverage for tribes carrying out 638 contracts⁹ and, in obtaining such coverage, take into consideration "the extent to which liability under such contracts are covered by the [FTCA.]"¹⁰ And Section 102(d) of P.L. 93-638 as amended (Section 102(d)), now provides that, for purposes of claims for "personal injury, including death, resulting from the performance...of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation,"¹¹ and claims for "personal injury, including death resulting from the operation of an emergency motor vehicle,"¹² an Indian tribe, a tribal organization or Indian contractor carrying out a 638 contract is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Service while acting within the scope of their employment in carrying out such contract.¹³ No similar "deeming" language was provided for non-health care-related claims.

However, in later appropriations bills, Congress further expanded the statutory protection from liability for tribes. P.L. 101-512, §314¹⁴ (P.L. 101-512), provides that for purposes of "claims" resulting from the performance of functions under a 638 contract, grant agreement or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act¹⁵, an Indian tribe, tribal organization or tribal contractor is deemed to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract,¹⁶ and its employees are deemed employees of the Bureau of Indian Affairs or the Indian Health Service while acting within the scope of their employment in carrying out the contract.¹⁷ P.L. 101-512 specifically provides that any civil action or proceeding involving such claims shall be "deemed to be an action against the United States and will be defended by the

8. *Id.* at 2645.

9. *See* 25 U.S.C. §450f(c) (1994).

10. *Id.*

11. 25 U.S.C. §450f(d) (1994).

12. *Id.*

13. *See Id.*

14. 104 Stat. 195 (1990), as amended by Pub. Law No. 103-138, §308 (107 Stat. 1416).

15. 25 U.S.C. §450c (1994).

16. *See* Pub. Law No. 101-512, *supra* note 14.

17. *See Id.*

Attorney General and be afforded the full protection of the Federal Tort Claims Act.”¹⁸

II. FTCA COVERAGE FOR 638-RELATED CLAIMS

A. Overview of the Federal Tort Claims Act, Generally

With the Federal Tort Claims Act¹⁹ (FTCA), Congress expressly authorized lawsuits arising out of certain kinds of tortious conduct to be brought against the United States, provided that specific procedures for presenting the claim to the federal government are followed within a specific period of time.²⁰ Under the terms of the FTCA, the United States consents to be liable for qualified tort claims to the same extent as a private individual under like circumstances,²¹ although prejudgment interest and punitive damages are not allowed.²² “Qualified” tort claims are those that are not excluded by the Act.²³ With the exception of claims for violations of the United States Constitution and claims for violations of specific federal statutes otherwise authorizing a claim, the FTCA is the exclusive remedy against the United States and its employees for personal injuries, death or property damages resulting from negligent or wrongful acts or omissions of employees of the federal government acting within the scope of their employment.²⁴ Following is an outline of the basic steps taken in an action covered by the FTCA:

When a federal employee is named as a defendant to any action arising out of his employment, the federal employee delivers the process served upon him to his immediate superior, who then distributes copies of the same to the United States Attorney for the district where the action is pending, to the Attorney General of the United States and to the head of his employing federal agency.²⁵ The Attorney General then “scopes” the employee. That is, the Attorney General determines whether the employee was acting within the scope of his employment when the incident out of which the claim arose occurred.²⁶ If the employee is found to have been acting within the scope of his employment, the action is deemed to be one against the United States and pleadings are filed in the case to have the United States substituted as the party defendant.²⁷ If the case was brought in state court, it will

18. *Id.*

19. 28 U.S.C. §2670 et seq. (1994).

20. *See id.*; *see also* 28 C.F.R. Part 14, §§14.1 et seq.

21. 28 U.S.C. §2674.

22. *Id.*

23. *See* 28 U.S.C. §2680.

24. *See* 28 U.S.C. §2679(b).

25. *See id.*

26. 28 U.S.C. §2679(d). On a practical level, based on this author’s experience, it appears that the responsibility for making this determination has been delegated to the Department of Justice, Civil Division - Torts Branch

27. *See id.*

then be removed to federal court.²⁸ The Attorney General's determination that the employee was acting within the scope of his or her employment is final for purposes of removal but may otherwise be appealed if the plaintiff does not agree that the employee was acting within the scope of his or her employment (or doesn't want the claim to fall within the FTCA).²⁹

B. Application of the FTCA to 638-Related Claims and Suits

The Secretaries of the Department of Interior and the Department of Health and Human Services have jointly promulgated regulations with step-by-step instructions on how tribes should handle tort claims or suits arising out of the performance of 638 agreements.³⁰ These regulations require that tribes select someone within their operation to serve as "tort claims liaison" with the federal government.³¹ The tort claims liaison should read, understand and apply all the authorities cited herein and others in order to perform this function effectively.³² If the liaison is not a lawyer, it is recommended that he or she contact tribal legal counsel (if available) whenever a claim is presented.

Under the Secretaries' joint regulations, the tort claims liaison is responsible for notifying the appropriate federal official when the tribe or a tribal employee is made the subject of a tort claim or suit relating to the performance of a 638 agreement.³³ The tort claims liaison must then work closely with the federal government to provide the information necessary to investigate the claim, to "scope" the tribe and/or the employee and to expeditiously address the claim.³⁴ The regulations specify which federal officials should be notified for medical related and non-medical related tort claims for claims relating to the performance of 638 agreements with the DHHS and which federal officials should be notified for any claim relating to the performance of 638 agreements with the DOI.³⁵

The tort claims liaison is also charged with assisting the appropriate federal agency in preparing a comprehensive and unbiased report of the incident to evaluate the claim.³⁶ This report will be used by the Attorney General to "scope" the tribal employee and to dispose of the claim either by defense or settlement. The tort claim liaison should make every effort to cooperate with the federal government in the gathering of information necessary for the preparation of the report and be as actively

28. *See Id.*

29. *See* 28 U.S.C. §2679 (c) and (d); *see also* *Guittierrez de Martinez v. Lamagno*, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995).

30. *See* 25 C.F.R. §§900.180, et seq.

31. *See id.* at §900.188.

32. *See id.*

33. *See generally id.*

34. *See generally id.*

35. *See id.* at §§ 900.188, 900.202 and 900.209.

36. *See* 25 C.F.R. at §900.188(c).

involved with the actual preparation of the report as the federal government will allow.

For tribal employees, scoping involves two steps. First, they are scoped to determine whether they were acting within the scope of their employment as tribal employees when the incident out of which the claim arose occurred. Second, they are scoped to determine whether they were acting within the scope of the 638 agreement when the incident occurred. If the answer to either of these questions is no, the tribe and/or its employee are not deemed to be an agency or employee of the federal government and the provisions of Section 102(d), and P.L. 101-512 do not apply.³⁷ If the tribal employee was 1) acting within the scope of his or her employment and 2) acting within the scope of a 638 contract, the tribe and its employee should be deemed an agency and employee of the federal government and represented by the Attorney General and afforded the protection and coverage of the FTCA.³⁸

III. HANDLING 638-RELATED CLAIMS AND SUITS

The application of the FTCA to 638-related tort claims can benefit both injured claimants and tribes. Injured claimants, whose claims or suits may have formerly been barred by tribal sovereign immunity, can bring their claims directly against the federal government pursuant to the FTCA.³⁹ And tribes are given the opportunity to retain sovereign immunity without the negative stigma that seems to go along with doing so in the present political and judicial climate.⁴⁰

Tribes should consider giving the appropriate notices to the United States for *any* type of civil claim or suit filed against it for actions arising out of the tribe's performance of a 638 agreement – even if the claim does not appear to fall within the FTCA. The protections afforded tribes and tribal employees under Section 102(c) and (d) and P.L. 101-512 are not limited to claims cognizable under the FTCA. Rather, a careful reading of all three sections supports the conclusion that regardless of the claimant's theory of recovery--whether he characterizes it as a tort or a violation of some other right--if the claim arises out of activities carried out under a 638 agreement, they must still be defended by the Attorney General and, as discussed below, financially covered by the federal government, if necessary. As long as the tribe and its employees are acting within the scope of a 638 agreement, for purposes of "claims" they are deemed a federal agency and federal employees.⁴¹

A. *Placing the Federal Government on Notice*

37. See Pu. Law No. 101-512, *supra* note 14.

38. See *id.*

39. See *supra* note 19.

40. See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, _ U.S. _, 118 S.Ct. 1700, 140 L.Ed. 2d 981 (1998).

41. See *Waters v. United States*, 812 F.Supp. 166 (N.D. Cal. 1993).

If a tribe receives notice that a personal injury, property damage, or death has allegedly resulted from a function that the tribe performs under a 638 agreement, the tribe's tort claims liaison should forward it to the appropriate federal official as directed by the Secretaries' regulations.⁴² Notice of such claims may not always come in the form prescribed by the federal regulations. Regardless of the form, the appropriate federal official should be notified of the claim (or possible claim) as early as possible.

B. Suits Brought Directly Against the United States

If a suit is brought directly against the United States under the provisions of Section 102(d) or P.L. 101-512, the Attorney General (actually a local U.S. Attorney) will enter an appearance and defend the case. If the tribe or tribal employee is favorably scoped, the tort claims liaison or tribal legal counsel, if available, should be prepared to assist the local U.S. Attorney when called upon. If the tribe or tribal employee is not favorably scoped, the tribe should immediately engage legal counsel (if it has not already done so) to consider whether an appeal of that decision is in the best interest of the tribe⁴³ and otherwise be prepared to defend the case should the tribe and/or its employee become parties defendant.

C. Suits Brought Against the Tribe or Tribal Employees

Most plaintiffs – and often their lawyers – are not familiar with 638 agreements and the implications of Section 102(d) and P.L. 101-512. As a result, claims and suits are often brought directly against tribes, tribal agencies and tribal employees without regard to the provisions of Section 102(d) or P.L. 101-512 or the FTCA. If such a suit is filed directly against a tribe and the tribe can make a good faith argument that the claim arises from the tribe's performance of functions under a 638 agreement, notice of the lawsuit should be given to the appropriate federal officials immediately.⁴⁴ However, the tribe's tort claims liaison or attorney should not wait for the Attorney General (or the U.S. Attorney's office) to enter an appearance and risk a default judgment. Rather, counsel should immediately take charge of the case until the United States assumes the defense, preserving any and all available defenses to the case, including the sovereign immunity of the tribe (in case the tribal defendant is not favorably scoped later). Once this is done, the following options should be discussed with the U.S. Attorney's office:

If the case is brought in tribal court, tribal counsel may wish to seek an immediate dismissal with prejudice on the basis of a failure to comply with the FTCA or may prefer to forego federal assistance entirely and seek a dismissal on the basis

42. See 25 C.F.R. §§900.188, 900.202, 900.209.

43. See 28 U.S.C. §2679(d)(3) (1994).

44. See 25 C.F.R. §§900.203 & 900.210.

of sovereign immunity or handle the case within the context of the tribe's own waiver of immunity or tort claims act, if any. However, another option would be to ask that the case be dismissed without prejudice and suggest that it be refiled in federal court pursuant to the provisions of Section 102(d) or P.L. 101-512.

If the case is filed in state court, counsel should consider removing the case to federal court under the provisions of 28 U.S.C. §2679(d)(2), and/or 28 U.S.C. §1442(a)(1), which allows the United States or agencies or employees thereof to remove cases against them from state court to federal court. The notice of removal must be filed within 30 days of receiving notice of the case.⁴⁵ The notice should recite the facts and the law supporting the removal.⁴⁶ Once the case is removed, the federal court will likely allow the Attorney General time to scope the tribe or its employee and to substitute the United States as party defendant, if appropriate.

IV. PAYMENT OF 638 CLAIMS AND JUDGMENTS

The federal government is financially responsible for claims arising from 638 agreement performance. Recall that Section 102(c), provides that the Secretary shall obtain liability insurance or "equivalent coverage"⁴⁷ for tribes carrying out 638 agreements, and "take into consideration the extent to which liability under such contracts or agreements is covered by the [FTCA]".⁴⁸ Although the federal government has not actually obtained liability insurance for tribes required by Section 102(c), it can provide tribes "equivalent coverage" by simply paying the bill—an option contemplated by Congress.⁴⁹ Senate Report No. 100-274 states:

As originally enacted, the Self-Determination Act authorized either Secretary to require that tribal contractors to obtain liability insurance. The Act also precluded insurance carriers from asserting the tribe's sovereign immunity from suit.

In practice, the costs of such liability insurance have been taken from the amount of funds provided to the tribal contractor for direct program costs or for indirect costs. The Committee is concerned that tribal contractors have been forced to pay for liability insurance out of program funds, which in turn, has resulted in decreased levels of services for Indian beneficiaries.

* * *

The Indian Self-Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal

45. See 28 U.S.C. §1446 (1994).

46. See *id.*

47. 25 U.S.C. §450(c) (1994).

48. *Id.*

49. See S. Rep. No. 100-274, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2620.

Tort Claims Act. The amendment to the Act will not increase the Federal government's exposure under the Federal Tort Claims Act. On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self-Determination Act.⁵⁰

Additionally, P.L. 101-512 provides that the appropriate Secretary shall request, through annual appropriations, funds sufficient to reimburse the Treasury for 638-related claims paid in the prior fiscal year.⁵¹

V. CONCLUSION

Being a tribal sovereign already carries great responsibility and, as understood by Congress, the cost of insurance for 638-related tort claims may simply be too high for some tribes. Section 102(c) and (d) and P.L. 101-512 allow these tribes to be responsibly sovereign by handling such claims without actually waiving sovereign immunity. These protections can and should be used by all tribes to their advantage. However, tribal officials and legal counsel are urged not to *take* advantage of these provisions. Tribal officials should not deliver 638-related claims and suits to the federal government and expect to wash their hands of them. At the very least, tribal officials and/or tribal legal counsel can assist the federal government in the proper disposition of these claims.

50. *Id.* at 2645-47.

51. *See* P.L. 101-512, *supra* note 14.