

Affirmed in Part, Vacated in Part, Reversed in Part by [Mitchell v. Bailey](#), 5th Cir.(Tex.), December 14, 2020

2019 WL 11340109  
United States District Court, W.D. Texas, San Antonio Division.

Matthew MITCHELL, Plaintiff,

v.

Orico BAILEY and Hoopa Valley Tribe, d/b/a Americorps Hoopa Tribal Civilian Community Corps, Defendants.

No. 5:17-CV-411-DAE

|  
Signed 02/04/2019

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING AS MOOT DEFENDANTS' MOTION  
TO SUBSTITUTE PARTY

[David Alan Ezra](#), Senior United States District Judge

\*1 Before the Court are: (1) a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the alternative, a Motion for Summary Judgment filed by Defendants Orico Bailey (“Bailey”)<sup>1</sup> and Hoopa Valley Tribe (“Hoopa Valley Tribe”), d/b/a Americorps Hoopa Tribal Civilian Community Corp. (“Americorps Hoopa TCCC” or the “Hoopa TCCC”) (collectively, “Defendants”), on May 2, 2018 (Dkt. # 32); and (2) a Motion to Substitute United States in Place of Defendants Pursuant to the Westfall Act and/or Petition for Certification of Federal Employment Pursuant to the Westfall Act by Defendants (Dkt. # 35).<sup>2</sup> Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration of the memoranda filed in support of and in opposition to the motion, the Court—for the reasons that follow—**GRANTS** Defendants Motion to Dismiss with regard to the Hoopa Valley Tribe and Orico Bailey in his official capacity.<sup>3</sup> (Dkt. # 32.) Based on the dismissal of the Hoopa Valley Tribe from this suit, Defendants’ motion to substitute party is **DENIED AS MOOT**. (Dkt. # 35.)

BACKGROUND

Plaintiff Matthew Mitchell filed this personal injury and breach of contract action against Hoopa Valley Tribe and Orico Bailey to recover damages for injuries he sustained on June 20, 2015, while assisting with disaster relief operations in Wimberley, Texas. (Dkt. # 1.) Plaintiff Mitchell is a Texas citizen and San Antonio Fireman. (Id.) Defendant Hoopa Valley Tribe is a federally recognized Indian Tribe located in Hoopa, California. (Id.) The Americorps Hoopa TCCC is a national service program that Hoopa Valley Tribe created with federal grant money from the Corporation for National and Community Service<sup>4</sup> (the “CNCS”). (Id. at 4.) Defendant Bailey is a member of the Americorps Hoopa TCCC. (Id.) At all relevant times, Bailey was acting in his capacity as a member of the Americorps Hoopa TCCC. (Id.)

\*2 In June 2015, a massive storm struck Wimberley, Texas. (Id.) Shortly after the storm, Bailey and Mitchell went to Wimberley to assist with disaster relief operations. (Id.) On June 20, 2015, while removing debris that had accumulated at the riverbank of the Blanco River in Wimberley, Bailey and Mitchell came across an uprooted Live Oak tree (the “Tree”). The Tree had fallen in a horizontal position and was resting above the ground, atop trees that were still rooted in the ground. (Id. at 5.) According to the Complaint, Mitchell and Bailey agreed to remove any loose debris around the Tree before removing the Tree or any of the smaller trees that were propping up the Tree. (Id. at 5–6.) While Mitchell was removing the debris on the ground near the Tree, Bailey purportedly removed one of the supporting trees with a chainsaw, which allegedly caused the tree to fall to the ground. (Id. at 6–7.) On its way to the ground, the Tree struck Mitchell and pinned him to the ground. (Id. at 7.) Mitchell survived the accident but suffered serious injuries as a result. (Id.)

On May 9, 2017, Plaintiff filed the instant action against Bailey and Hoopa Valley Tribe to recover damages for the injuries he sustained on June 20, 2015. (Dkt. # 1.) Plaintiff’s Complaint alleges three causes of action: (1) a breach of contract claim against Hoopa Valley Tribe; (2) a negligence claim against Hoopa Valley Tribe; and (3) a negligence claim against Bailey. (Id. at 7–12.)

On May 2, 2018, Defendants filed the instant motion to dismiss pursuant to [Rule 12\(b\)\(1\) of the Federal Rules of Civil Procedure](#), arguing that Plaintiff’s claims are barred by the doctrine of tribal sovereign immunity. (Dkt. # 32.) On June 1, 2018, Plaintiff timely filed a response in opposition to the instant motion (Dkt. # 34), and Defendant filed a motion to substitute party and/or petition for certification of federal employment pursuant to the Westfall Act. Plaintiff filed a response to the motion to substitute on June 14, 2018. (Dkt. # 40.) Defendants timely filed a reply to Plaintiff’s response to their motion to dismiss on June 15, 2018. (Dkt. # 41). The United States filed a response to the motion to substitute on October 22, 2018, arguing that the petition for certification was premature, as no request for certification had been made (Dkt. # 46), and Defendants filed a reply to both responses to their motion to substitute on November 26, 2018.<sup>5</sup> (Dkt. # 47.)

## LEGAL STANDARD

### I. Dismissal Based on Lack of Subject Matter Jurisdiction

Pursuant to [Rule 12\(b\)\(1\) of the Federal Rules of Civil Procedure](#), a case will be dismissed if a court lacks subject-matter jurisdiction over the suit. [Fed. R. Civ. P. 12\(b\)\(1\)](#). When evaluating a [Rule 12\(b\)\(1\)](#) motion, the Court may dismiss a suit “for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” [Freeman v. United States](#), 556 F.3d 326, 334 (5th Cir. 2009) (quoting [Williamson v. Tucker](#), 645 F.2d 404, 413 (5th Cir. 1981)). “The burden of proof for a [Rule 12\(b\)\(1\)](#) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” [Ramming v. United States](#), 281 F.3d 158, 161 (5th Cir. 2001) (citations omitted).

### II. Tribal Sovereign Immunity

Indian tribes are immune from suit under the doctrine of tribal sovereign immunity unless Congress has authorized the suit or the tribe has expressly waived its sovereign immunity. See [Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.](#), 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); [Barnes v. Barnes](#), No. CIV.A. 1:03-CV-231-C, 2004 WL 1205123, at

\*7 (N.D. Tex. June 1, 2004). Tribal sovereign immunity shields: (1) the Indian tribe; (2) entities of the tribe that function as an “arm of the tribe”; and (3) “all tribal employees acting within their representative capacity and within the scope of their official authority.” [Barnes v. Barnes](#), No. CIV.A. 1:03-CV-231-C, 2004 WL 1205123, at \*7 (N.D. Tex. June 1, 2004) (citing [Bassett v. Mashantucket Pequot Museum & Research Ctr.](#), 221 F. Supp. 2d 271, 278 (D. Conn. 2002)); see also [In re Intramta Switched Access Charges Litig.](#), 158 F. Supp. 3d 571, 575 (N.D. Tex. 2015) (noting that when a “tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe” (quoting [Allen v. Gold Country Casino](#), 464 F.3d 1044, 1046 (9th Cir. 2006) (internal quotation marks omitted))).

\*3 The issue of tribal sovereign immunity is jurisdictional in nature. [F.D.I.C. v. Meyer](#), 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); (“Sovereign immunity is jurisdictional in nature.”); [Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma](#), 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (noting that “[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation”); see also [Meyer v. Accredited Collection Agency Inc.](#), No. 1:13-CV-444-LG-JCG, 2016 WL 379742, at \*2 (S.D. Miss. Jan. 29, 2016) (noting that “numerous courts have held that issues of tribal immunity are properly addressed via a [Rule 12\(b\)\(1\)](#) motion to dismiss based on lack of subject-matter jurisdiction”). Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. [Howery v. Allstate Ins. Co.](#), 243 F.3d 912, 916 (5th Cir. 2001); [In re Rapid-Torc, Inc.](#), No. CV-H-15-377, 2016 WL 8710443, at \*5 (S.D. Tex. Sept. 30, 2016). The court presumes it lacks jurisdiction until the plaintiff proves otherwise. [Kokkonen v. Guardian Life Ins. Co. of Am.](#), 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); [Howery v. Allstate Ins. Co.](#), 243 F.3d 912, 916 (5th Cir. 2001).

## DISCUSSION

In this case, it is undisputed that AmeriCorps Hoopa TCCC is an arm of the Hoopa Valley Tribe. (See Dkt. # 1 at 1.) It is also undisputed that, at all relevant times, Bailey acted in his representative capacity and within the scope of his authority as a member of the AmeriCorps Hoopa TCCC. (*Id.*) The only issues before the Court are: (1) whether Plaintiff’s breach of contract claim is barred by the doctrine of tribal sovereign immunity; (2) whether Defendants waived sovereign immunity; (3) whether tribal sovereign immunity extends to tort claims arising from off-reservation activities; and (4) whether Bailey, in his individual capacity, is entitled to sovereign immunity. The Court considers each issue in turn.

### III. Breach of Contract Claim Against Hoopa Valley Tribe

The Court first considers whether Plaintiff’s breach of contract claim against Hoopa Valley Tribe is barred by tribal sovereign immunity. (Dkt. # 1.) Briefly, Plaintiff’s breach of contract claim alleges that, in 2014, AmeriCorps Hoopa TCCC entered into a contract, the Disaster Response Cooperative Agreement (“the Agreement”), with CNCS to provide disaster relief to federally declared disaster areas. (Dkts. ## 1; 32-3; 34-4.) The relevant provisions of the Agreement state: “These initiatives provide opportunities for Americans of all ages and backgrounds to engage in service that addresses the nation’s educational, public safety, environmental, homeland security, and other human needs[.]” (Dkt. ## 32-3 at 3; 34-4 at 3.) To receive reimbursement expenses, the Agreement provides, “Program staff and members must be covered by workers’ compensation or occupational accident insurance and liability insurance.” (*Id.* at 9.) A CNCS Information and Guidance pamphlet (the “CNCS Pamphlet”), which allegedly accompanied the Agreement, states that AmeriCorps Hoopa TCCC must carry liability insurance coverage “for both injuries that may afflict [it’s] members/participants and damages that members/participants may

inflict upon the community in the provision of their service.” (Dkt. # 34-3 at 7.) Plaintiff claims Hoopa Valley Tribe breached this contract when it failed to obtain the liability insurance it contractually agreed to purchase. (Dkt. # 1 at 12.)

In [Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.](#), the Supreme Court held that “[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.” 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This immunity extends not only to Indian tribes but also to entities of the tribe that function as an “arm of the tribe.” [Barnes v. Barnes](#), No. CIV.A. 1:03-CV-231-C, 2004 WL 1205123, at \*7 (N.D. Tex. June 1, 2004) (citing [Bassett v. Mashantucket Pequot Museum & Research Ctr.](#), 221 F. Supp. 2d 271, 278 (D. Conn. 2002)). Thus, as a matter of federal law, an Indian tribe is not subject to suit unless Congress has authorized the suit or the tribe expressly waived its sovereign immunity. See [Kiowa Tribe of Oklahoma](#), 523 U.S. at 751, 118 S.Ct. 1700; [Barnes](#), 2004 WL 1205123, at \*7.

\*4 Americorps Hoopa TCCC is an arm of the Hoopa Valley Tribe and absent waiver by the tribe, Plaintiff cannot allege a breach of contract claim. Plaintiff concedes that contractual claims require such a waiver, and though he argues that the Tribe waived its sovereign immunity with regard to his tort claims, he does not make that argument for his breach of contract claim. (Dkt. # 34 at 9.) Therefore, the Court finds that Plaintiff’s breach of contract claim is barred by sovereign immunity.<sup>6</sup> [Kiowa](#), 523 U.S. at 760, 118 S.Ct. 1700 (1998). In light of the fact that: (1) Congress has not abrogated sovereign immunity in this area; (2) the Supreme Court has specifically held it applies; and (3) Plaintiff’s concession that his waiver argument only applies to his tort claims, the Court will grant Defendants’ motion to dismiss as it relates to the breach of contract claim.

#### IV. Negligence Claims

Having determined that Plaintiff’s breach of contract claim is barred by the doctrine of tribal sovereign immunity, the Court now turns to Plaintiff’s negligence claims against the Hoopa Valley Tribe and Bailey. Plaintiff argues that tribal sovereign immunity does not extend to tortious conduct committed outside the reservation. (Dkt. # 34 at 6–8.) In the alternative, assuming tribal sovereign immunity encompasses off-reservation torts, Plaintiff contends that the Hoopa Valley Tribe contractually waived its sovereign immunity. (*Id.* at 9–12.) Each argument is addressed in turn.

##### A. Tort Claims Arising From Off-Reservation Activities

The Court first addresses whether tribal sovereign immunity encompasses tort claims arising from off-reservation activities. Plaintiff argues that tribal sovereign immunity does not encompass tort claims arising from off-reservation activities. (*Id.* at 3–7.) In support, Plaintiff cites the Supreme Court decisions in [Kiowa](#) and [Bay Mills](#). (*Id.*)

\*5 In [Kiowa](#), the Supreme Court held that a tribe was immune from suit when it defaulted on a promissory note, which was signed and executed off the reservation. [Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.](#), 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). The Court rested its decision on the fact that Congress had not abrogated immunity for off-reservation commercial activities, nor had the tribe waived immunity. See *id.* at 760, 118 S.Ct. 1700 (“[W]e decline to revisit our case law and choose to defer to Congress.”).

In [Bay Mills](#), the second case cited by Plaintiff, the Supreme Court held sovereign immunity applied to a tribal casino located off-reservation, against Michigan state law. [Michigan v. Bay Mills Indian Community](#), 572 U.S. 782, 803–04, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). The Court declined to overturn [Kiowa](#) and held to its longstanding rule that, absent

abrogation from Congress, tribal immunity would be upheld. See [id.](#) at 800, 134 S.Ct. 2024 (“We ruled that way for a single, simple reason: because it is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity.”). The Court did note that Michigan would be free to sue for an injunction against the tribal officials individually or resort to criminal action against those who maintained or frequented the illegal casino. See [id.](#) at 796, 134 S.Ct. 2024 (“[T]ribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct.”) (emphasis in original).

Plaintiff’s reliance on [Kiowa](#) and [Bay Mills](#) is misplaced. First, “[n]othing in [Kiowa](#) could be construed to limit sovereign immunity to contractual claims[;] in fact, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities.” [Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council](#), 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999). “The court made no distinction between tort and contract claims in applying sovereign immunity.” [Id.](#) Further, “[t]o be sure, other courts have applied sovereign immunity to tort claims.” [Id.](#); see e.g., [Arizona v. Tohono O’odham Nation](#), 818 F.3d 549, 563 n.8 (9th Cir. 2016) (“We have held that tribal sovereign immunity bars tort claims against an Indian tribe, and that remains good law.”); [Elliott v. Capital Int’l Bank & Trust, Ltd.](#), 870 F. Supp. 733, 735 n.2 (E.D. Tex. 1994) (holding sovereign immunity barred suit where plaintiff was “bilked out of \$200,000”) (citing with approval [Morgan v. Colo. River Indian Tribe](#), 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) (finding that the court lacks “jurisdiction over an Indian tribe which has committed a tort while engaged in a business enterprise within this state and outside of the exterior boundaries of its reservation”)).

Plaintiff further relies on a footnote in [Bay Mills](#) which declined to decide whether sovereign immunity extended to off-reservation torts. See [Bay Mills](#), 572 U.S. at 799 n.8, 134 S.Ct. 2024 (noting the court has not decided, and declined to in the instant case, whether immunity would apply to a tort victim if there was no alternative form of relief). Plaintiff cites an Alabama State Supreme Court case, [Wilkes v. PCI Gaming Authority](#), in support of this argument. 287 So.3d 330 (Ala. 2017). However, in light of the federal cases interpreting tribal sovereign immunity as being applicable tort claims, see *supra*, this argument is unpersuasive. Further, a similar argument has been rejected by the Ninth Circuit. See [Tohono O’odham Nation](#), 818 F.3d at 563 n.8 (noting the Supreme Court had “expressly reserved” its decision on whether a tort victim would pose a special justification for abrogating immunity and declining to exclude torts from tribal sovereign immunity).

\*6 Indeed, the same logic the Supreme Court used to extend sovereign immunity in [Bay Mills](#) and [Kiowa](#) apply here: “The special brand of sovereignty the tribes retain—both its nature and its extend—rests in the hands of Congress.” [Id.](#) at 800, 134 S.Ct. 2024; see also [Kiowa](#), 523 U.S. at 758, 118 S.Ct. 1700 (declining to confine sovereign immunity to on reservation or noncommercial activities and “defer[ing] to the role Congress may wish to exercise in this important judgment”).

For the reasons stated above, the Court finds that tribal sovereign immunity encompasses tort claims arising from off-reservation activities. Plaintiff’s suit is therefore “barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.” [Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma](#), 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

#### B. Waiver of Sovereign Immunity

Having found that tribal sovereign immunity encompasses tort claims arising from off-reservation activities, the Court turns to whether Defendants have waived their sovereign immunity.

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Plaintiff argues that AmeriCorps Hoopa TCCC contractually waived its sovereign immunity when it entered into a “Disaster Response Cooperative Agreement” (the “Agreement”) with CNCS. (Dkt. # 34 at 10.) The Agreement contains certain liability insurance provisions, which generally require that Plaintiff cover the staff and members through “workers’ compensation or occupational accident insurance and liability insurance.” (Dkt. # 34-4 at 10.) According to Plaintiff, the liability insurance provisions constitute “a waiver of sovereign immunity concerning torts committed by the Hoopa Tribal CCC in its disaster response deployments.” (Dkt. # 34 at 12.)

Defendants argue that a waiver of sovereign immunity can only be accomplished expressly and argues that the Hoopa Valley Tribe did not enter into any agreement which could be construed as a waiver of sovereign immunity that was “unequivocally expressed.” (Dkt. # 47 at 3) (citing [Santa Clara Pueblo v. Martinez](#), 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).)

In response, Plaintiff contends that an “Indian tribe can contractually waive sovereign immunity from suit with respect to its off-reservation activities and can do so without expressly referencing ‘waiver’ or ‘sovereign immunity.’” (Dkt. # 34 at 9.) In support, Plaintiff cites the case of [C&L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.](#), 532 U.S. 411, 423, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (“[Citizen Band](#)”). ([Id.](#))

The Court finds Plaintiff’s reliance on [Citizen Band](#) misplaced. In [Citizen Band](#), the Citizen Potawatomi Nation tribe (“Citizen Tribe”) entered into a contract with C&L for the installation of a roof on an off-reservation building. [Id.](#) at 414, 121 S.Ct. 1589. Before the contract was performed, the Citizen Tribe decided to change the roofing material and solicited another company to install the roof. [Id.](#) at 416, 121 S.Ct. 1589. The contract contained an arbitration clause which C&L subsequently enforced and received an award in their favor. [Id.](#) After obtaining the award, C&L attempted to enforce the award in the District Court of Oklahoma County. [Id.](#) The District Court refused the Citizen Tribe’s defense of sovereign immunity and affirmed the award; the Oklahoma Court of Civil Appeals affirmed this decision. [Id.](#) The Oklahoma Supreme Court subsequently denied review and the Citizen Tribe petitioned for certiorari in the Supreme Court. [Id.](#)

The Supreme Court granted the Citizen Tribe’s petition, vacated the judgement of the Oklahoma Court of Civil Appeals, and remanded the case. [Id.](#) at 417, 121 S.Ct. 1589. After remand, the Court of Civil Appeals held in light of [Kiowa](#) that the Citizen Tribe “was immune from suit on its contract with C&L.” [Id.](#) “The Oklahoma Supreme Court denied C&L’s petition for review.” [Id.](#) The Supreme Court granted certiorari and held that the tribe waived its sovereign immunity because “the [t]ribe agreed, by express contract, to adhere to certain dispute resolution procedures[,]” in particular to arbitrate all claims or disputes between the tribe and plaintiff. [Id.](#) at 420, 121 S.Ct. 1589.

\*7 The instant case is clearly distinguishable from [Citizen Band](#). First, the Agreement is between AmeriCorps Hoopa Tribe TCCC and the CNCS, not between the Hoopa Valley Tribe and Mitchell. See [Pere v. Nuovo Pignone, Inc.](#), 150 F.3d 477, 482 (5th Cir. 1998) (“[I]n cases in which implied waiver [of sovereign immunity] based upon a contract has been found, the contract was between the parties suing and being sued.”). Second, courts which have addressed whether obtaining liability insurance waives sovereign immunity have determined it does not. The courts have rested their decisions on the fact that the tribes were simply protecting its resources should a court find the immunity did not exist or it was abrogated by Congress. See [Atkinson](#), 569 P.2d at 169 (“We do not believe that a waiver of sovereign immunity should be implied from an act which was intended to protect the tribal resources.”); [Seminole Tribe of Fla. v. McCor](#), 903 So.2d 353, 359 (Fla. Dist. Ct. App. 2005) (“Rather than indicating an intention to waive immunity, the purchase of insurance may simply be a measure to provide protection for the Tribe’s assets against the possibility that the Tribe’s immunity will be abrogated or ignored.”). The Alaskan Supreme Court noted the importance of protecting tribal assets in the context of tort judgments: “This problem is of

particular importance in Indian affairs, since once the tribal property is dissipated by tort judgments, it is very difficult to replace.” [Atkinson](#), 569 P.2d at 169.

While AmeriCorps Hoopa agreed to obtain liability insurance, the liability insurance provision does not amount to an express, unequivocal waiver of sovereign immunity—rather it was meant to protect its resources should its immunity be ignored or abrogated. See [United States v. Testan](#), 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (“[A] waiver of the traditional sovereign immunity ‘cannot be implied but must be unequivocally expressed.’ ” (quoting [United States v. King](#), 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969))); see also [Wilson v. Umpqua Indian Dev. Corp.](#), No. 6:17-cv-00123-AA, 2017 WL 2838463, at \*5 (D. Or. June 29, 2017) (holding a provision requiring the tribe to obtain liability insurance “falls short of the high bar to show waiver of sovereign immunity”); [Atkinson](#), 569 P.2d at 170 (concluding liability insurance does not amount to waiver of immunity); [Dixon v. Picopa Constr. Co.](#), 160 Ariz. 251, 772 P.2d 1104, 1109–10 (1989) (noting the court has previously held that liability insurance was “irrelevant to determining whether a tribe has waived its immunity”); [Seminole Tribe](#), 903 So.2d at 359 (“The purchase of insurance by an Indian tribe is not sufficient to demonstrate a clear waiver by the tribe of its sovereign immunity.”).

Still, Plaintiff argues that if the liability insurance was not a waiver of sovereign immunity it “would be meaningless because a *liability* insurance policy provides coverage for an injured party only if the policyholder (Hoopa Valley Tribe) could be found *liable* for the injured party's damages.” (Dkt. # 34 at 12 (emphases in original).) However, this is the exact reason the Hoopa Valley Tribe obtained insurance, to protect its assets in the event its sovereign immunity was ignored or abrogated and Hoopa Valley Tribe was held liable. [Atkinson](#), 569 P.2d at 170 (“Similarly, we conclude that a holding that the Metlakalta Indian Community's sovereign immunity was waived to the extent of its insurance coverage would operate to defeat the purpose of the immunity.”).

The Court finds Plaintiff's arguments to be without merit. As noted *supra*, a tribe cannot waive immunity except through express actions. [Testan](#), 424 U.S. at 399, 96 S.Ct. 948. Here, the Agreement to obtain insurance was only to protect the Hoopa Valley Tribe's assets should their immunity be ignored or abrogated. [Atkinson](#), 569 P.2d at 169. Thus, this cannot be construed as an express waiver of their sovereign immunity and Plaintiff's contentions to the contrary fail.

### C. Real Party in Interest

Last, the Court addresses the negligence claim against Bailey. Because the complaint does not specify whether Plaintiff is suing Bailey in his individual or official capacity, the Court must determine who the real party in interest is.

To determine who the real party in interest is, the Court must look to whether the claims will affect the sovereign. See [Lewis v. Clarke](#), — U.S. —, 137 S. Ct. 1285, 1291, 197 L.Ed.2d 631 (2017) (concluding the tribe was not the real party in interest because the suit “will not require action by the sovereign or disturb the sovereigns property” (quoting [Larson v. Domestic and Foreign Commerce Corp.](#), 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949))). “In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.” *Id.* Those in an official capacity can assert sovereign immunity while those sued individually cannot. *Id.*

\*8 In [Lewis](#), the Supreme Court determined the tribe was not the real party in interest because the suit was brought solely against the tribal member “and the judgment [would] not operate against the Tribe.” 137 S. Ct. at 1291. Thus, the tribe's

assets and resources would not be involved in paying a judgment against the tribal member—prohibiting the tribal member from asserting sovereign immunity. Id.

In this case, it is not immediately obvious who the real party in interest is. The complaint separates the claims against Bailey and those against the Hoopa Valley Tribe. (Id. at 7–8, 8–10.) However, the Plaintiff does make clear in his complaint that he is suing Hoopa Valley Tribe because Bailey “lacks the financial resources” to account for Mitchell’s damages. (Dkt. # 1 at 12). Plaintiff also asserts he has no alternative except to “pursue his tort claims against the Hoopa Valley Tribe.” (Id. at 19.) Further, Plaintiff states that Bailey was of an age group which Hoopa Valley Tribe “knew would be unable to respond in damages for the harm they might cause in connection with their disaster relief work.” (Id. at 11.) Finally, Plaintiff refers to the “Defendants” as a group throughout his pleading. (See generally, id.) Based on the evidence from the complaint, it appears that likely that real party in interest here is the Hoopa Valley Tribe, and thus Bailey can assert sovereign immunity. However, to the extent Plaintiff raises a claim against Bailey in his individual capacity, he may do so, and the Court will not dismiss the negligence claim against Bailey in his individual capacity.

For the reasons stated, Hoopa Valley Tribe and Orico Bailey, in his official capacity, are entitled to sovereign immunity for the aforementioned claims. Because all of Plaintiff’s claims against both the Hoopa Valley Tribe and Orico Bailey in his official capacity are barred by tribal sovereign immunity, this Court therefore lacks jurisdiction over this action. Thus, the Court finds that Plaintiff’s those claims should be dismissed. The Court finds that Plaintiff’s claims against Orico Bailey in his personal capacity are not barred by tribal sovereign immunity, and thus those claims should not be dismissed.

#### CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendants’ motion to dismiss. (Dkt. # 32.) Plaintiff’s claims against Bailey in his official capacity and Hoopa Valley Tribe are **DISMISSED WITH PREJUDICE**. In light of the dismissal, Defendant’s motion to substitute party is **DENIED AS MOOT**. (Dkt. # 35.) The only remaining claims in this case are negligence claims against Bailey in his individual capacity.

**IT IS SO ORDERED.**

#### **All Citations**

Not Reported in Fed. Supp., 2019 WL 11340109

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#### **Footnotes**

- <sup>1</sup> As discussed *infra*, Plaintiff does not specify whether he is suing Orico Bailey in his individual or official capacity.
- <sup>2</sup> The motion argues that the United States should be properly substituted as a party in place of the Hoopa Valley Tribe pursuant to the Westfall Act, 28 U.S.C. § 2679 (d)(3). (Dkt. # 35 at 1–2.) They argue that Bailey should be deemed an employee of the United States acting within the scope his employment, and thus that the United States should be the proper defendant and the suit should be construed as one under the Federal Tort Claims Act (“FTCA”). (Id. at 2.)

Because the Court finds that tribal sovereign immunity bars the suit against Bailey in his official capacity and the Hoopa Valley Tribe, it does not need to consider the Westfall Act claims.

<sup>3</sup> As noted *infra*, any individual claims against Bailey in his individual capacity survive.

<sup>4</sup> CNCS is a federal agency established in 1994 through the National and Community Service Trust Act of 1993. The corporation makes financial grants which help create AmeriCorps chapters around the United States.

<sup>5</sup> As Defendants point out in their reply, they did file a request for certification (see Dkt. # 47-1) on November 21, 2018. However, the Court need not decide whether the United States should properly be substituted as a party pursuant to the Westfall Act in light of the application of tribal sovereign immunity pursuant to the motion to dismiss. (Dkt. # 32.)

<sup>6</sup> Plaintiff also lacks standing to challenge the contract. Plaintiff claims he is a third-party beneficiary to the contract between Hoopa Valley Tribe and CNCS. (Dkt. #1 at 12). “[A] third party beneficiary will not be recognized unless the intent to make him or her so is clearly written or evidenced in the contract.” [Maddox v. Vantage Energy, LLC](#), 361 S.W.3d 752, 757 (Tex. App.—Fort Worth 2012, pet. denied). Third parties can recover on a contract “only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly and primarily for the third party’s benefit.” [Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.](#), 880 S.W.2d 417, 421 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Texas courts presume that “a party contracts only for its own benefit and have therefore maintained a presumption against third-party beneficiary agreements.” [Maddox](#), 361 S.W.3d at 757.

The contract between Hoopa Valley Tribe and CNCS does not clearly evidence an intent to recognize Mitchell as a third-party beneficiary. [Maddox](#), 361 S.W.3d at 757. The intent of the contract was to protect the tribe, not incidental third parties. Mitchell may be an incidental beneficiary of the contract, but “a mere incidental beneficiary may not enforce a provision of a contract.” [Dorsett](#), 880 S.W.2d at 421; see also [City of Houston v. Williams](#), 353 S.W.3d 128, 145 (Tex. 2011) (“Finally, a third party cannot enforce a contract if the third party benefits only incidentally from it.”). As explained *infra* the tribe obtained liability insurance to protect its assets, not Plaintiff. See [Atkinson v. Haldane](#), 569 P.2d 151, 169 (Alaska 1977) (concluding the purchase of liability insurance was to protect the tribe’s assets). Plaintiff benefits from the Contract incidentally and therefore does not have standing to bring a breach of contract claim. See [MCI Telecomm. Corp. v. Texas Utils. Elec. Co.](#), 995 S.W.2d 647, 651 (Tex. 1999) (“The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract.”).