Ohlsen v. United States, 998 F.3d 1143 (10th Cir. 2021)

- **Holding:** Pueblo whose employees carried out tree-thinning functions under a Cooperative Funds and Deposits Act agreement with USFS was an independent contractor for Federal Tort Claims Act purposes.
- **Summary:** In 2014, the United States Forest Service and the Isleta Pueblo entered into a contract pursuant to the CFDA, 16 U.S.C. § 565a-1, to "'improve forest health, restore the area to more natural conditions, and improve wildlife habitat' by 'cutting and masticating trees.'" The agreement provided in part that

  > the Pueblo had several responsibilities relating to on-the-ground thinning operations. For example, the Pueblo was required to "[c]ontribute personnel" and "manage the employees so that work [was] completed as mutually agreed upon. ... The Pueblo was also responsible for "establish[ing] and maintain[ing] a complete Quality Control Plan[]" ... and for "perform[ing] work to the Quality Assurance Requirements[.]" ... Further, the Pueblo was responsible for training Pueblo employees, volunteers, and other program participants in safety and the use of equipment. Of particular relevance here, the Agreement established that no Pueblo "employees, volunteers, [or] program participants" were to be deemed Federal employees "for any purposes," including the FTCA. ... Rather, the Pueblo "agree[d] to assume [those] responsibilities."

  USFS "agreed to 'reimburse the Pueblo for the U.S. Forest Service's share of actual expenses incurred'; '[d]esignate work areas and provide cutting guidelines for achieving desired condition[s]'; and '[i]nspect the work to provide feedback on how goals [were] being accomplished.'" As to safety, "the Pueblo was to 'prepare and submit a safety plan to provide for worker and public safety.' ...The Pueblo was responsible for supplying the crews with emergency equipment, including fire extinguishers and water-filled tanks. In the event of a fire, the Pueblo was to close areas of the forest and restrict thinning operations as required by the Agreement's Fire Precaution Schedule." The Pueblo recognized that it could be held liable for all costs incurred by the United States "'deemed necessary to control or suppress a fire set or caused by the [Pueblo] or the [Pueblo]'s agents or employees.'" The CFDA addresses potential federal liability for actions taken by a "cooperator," i.e., a contractor, in this manner: "'cooperators and their employees may perform cooperative work under supervision of the Forest Service in emergencies or otherwise as mutually agreed to, but shall not be deemed to be Federal employees other than for the purposes of [the FTCA] and [the Federal Employees Compensation Act].'"

  A forest fire—named the Dog Head Fire—did occur in 2016 during a Pueblo crew's mastication of slash derived from tree-thinning undertaken pursuant to the contract. It "raged for about three months, burning 17,912 acres and destroying twelve residences and forty-four other structures." It also generated a lawsuit by affected insurance companies and landowners against the United States under FTCA. Plaintiffs alleged two forms of negligence: (1) "[T]he government was liable based on the Forest Service employees' negligence in failing to properly supervise the Pueblo crewmembers and in making other decisions that worsened the fire"; and (2) "government liability [existed] based on the Pueblo crewmembers' negligence in failing to maintain the proper slash depth, failing to have fire equipment near the masticator, and failing to implement a fire-safety plan." The United States moved to dismiss or, alternatively, for summary

judgment on several grounds—including the independent-contractor exception under FTCA, 28 U.S.C. § 1346(b)(1), with respect to alleged liability for the Pueblo crew's conduct. The district court granted the motion.

The Tenth Circuit affirmed on appeal. The only arguable Indian law issue centered on the independent-contractor status of the Pueblo. On this point, the panel stated that

> we encounter an issue of first impression. The parties have cited no cases, and we have found none, analyzing what effect the CFDA has on the question whether cooperators are federal employees under the FTCA. We conclude that the CFDA simply permits the government and cooperators to agree that the cooperators' employees shall be deemed federal employees under the FTCA, but it doesn't mandate it. In other words, though the CFDA *excludes* cooperators from ever being deemed federal employees outside of the FTCA and the Federal Employees Compensation Act, it doesn't automatically include cooperators as federal employees in either instance.

That conclusion, however, left unresolved the question whether the Pueblo was in fact an independent contractor. To answer that question, the panel looked to the multi-factor test adopted in *Lilly v. Fieldstone*, 876 F.2d 857 (10th Cir. 1989), and, more specifically, to the first two of those factors: the parties' intent and "whether the United States controls only the end result or may also control the manner and method of reaching the result." It deemed the other factors irrelevant because Plaintiffs had not addressed them in their briefing.

As to the parties' intent, the panel relied heavily on the agreement's language that provided:

> "The Pueblo agree(s) that any of their employees, volunteers, and program participants shall not be deemed to be Federal employees for any purposes including Chapter 171 of Title 28, United States Code (Federal Torts Claim Act)." ... And we have ruled that "[w]here there is a contract between the government and the [plaintiff], clear language regarding government control or 'federal employee' status can often prevail over facts that might otherwise support a finding of 'day-to-day control.'" ... The provision here evinces a strong intent that the Pueblo crewmembers acted as independent contractors.

As for federal control, the panel acknowledged that

> [s]urely the government exercised control over the results of the Pueblo's thinning work by requiring the Pueblo to meet daily quotas, establishing starting and ending times for the Pueblo's work, specifying the size and types of trees to be cut, and marking specific trees for removal. But even taken together, this control doesn't result in an employer-employee relationship, particularly when balanced against the control retained by the Pueblo to "manage," "supervise," and "direct the work of its employees, volunteers, and [other program] participants," ... as well as its duty to "establish and maintain a complete Quality Control Plan ... to ensure the requirements of the agreement [were] provided as specified[.]"

In short, "the Forest Service controlled the Pueblo only to the 'extent necessary to ensure that the desired results were achieved.'"

The panel found Plaintiffs' claim directed to USFS employees' alleged negligence based on negligent supervision barred by the FTCA discretionary-function exception.

- **Relevant (2020) Deskbook Section:** 1:13 n.39