IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

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| ISABEL G. ANDRADE, *et al*. | § | CIVIL ACTION NO. W-96-CA-139 |
| | § | JUDGE WALTER S. SMITH |
| Plaintiffs, | § | |
| | § | and consolidated actions: |
| V. | § | *Holub v. Reno* W-96-CA-140 |
| | § | *Ferguson v. Reno* W-96-CA-141 |
| PHILLIP J. CHOJNACKI, *et al.* | § | *Brown v. U.S.* W-96-CA-142 |
| | § | *Riddle v. Reno* W-96-CA-143 |
| Defendants. | § | *Gyarfas v. U.S.* W-96-CA-144 |
| | § | *Martin v. U.S.* W-96-CA-145 |
| | § | *Holub v. U.S.* W-96-CA-146 |
| | § | *Brown v. U.S.* W-96-CA-147 |
| | § | *Sylvia v. U.S.* W-96-CA-373 |

**_ANDRADE_ PLAINTIFFS'[1] RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL AND MOTION FOR PARTIAL SUMMARY JUDGMENT**

In a rehash of prior motions—which were rejected—and bereft of any substantial new evidence, the Government asks for dismissal or summary judgment on four issues:

(1) decisions concerning the use of experts and/or specialized equipment pertaining to firefighting;

(2) decisions regarding the means of inserting tear gas, including the use of particular vehicles and equipment;

(3) the reasonableness of holding fire trucks at a checkpoint until the gunfire from the compound ceased; and

(4) the Branch Davidians started the fire on April 19, 1993.

For reasons detailed below, the Government's motion must be denied.

[1] This Response is also submitted on behalf of the *Holub* plaintiffs as well.

## I. PARTIAL DISMISSAL BASED ON DISCRETIONARY FUNCTION

### A. Discretionary Function Limits

Plaintiffs do not differ with the DOJ's discussion of the general parameters of the discretionary function exception.[2] It is in the application of these principles to the facts of this case that the DOJ's legal analysis breaks down.

As the Court noted in its July 1, 1999 Memorandum Opinion and Order[3]:

> Furthermore, even "*assuming* the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment *is of the kind* that the discretionary function exception was designed to shield." . . . [W]hen properly construed, the exception "protects *only* governmental actions and decisions based on considerations of *public policy*."[4]
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> * * * * *
>
> The discretionary function exception, then, does not apply if "a federal statute, regulation *or policy* specifically prescribes a course of action for an employee to follow.[5]

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[2] Memorandum of Law in Support of [Government's] Motion for Partial Dismissal and Motion for Partial Summary Judgment (hereafter "Government's Memorandum"), at 4-5.

[3] Hereafter "Court's Opinion."

[4] Court's Opinion at 64, quoting from *United States v. Gaubert*, 499 U.S. 315, 322-323 (1991). Emphasis added throughout Plaintiffs' Response unless otherwise noted.

[5] Court's Opinion at 65, quoting from *Buchanan v. United States*, 915 F.2d 969, 971 (5th Cir. 1990), citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

It is axiomatic that virtually every "act" by a federal official—if the analysis is taken to the extreme—involves some element of "judgment" or "discretion." The critical issues for this Court's determination are (1) whether prior policy mandates precluded the exercise of such discretion and/or (2) whether the decisions in question were "based on considerations of public policy." Under either test, the Government's Motion for Partial Dismissal must fail.

**B. FBI's Failure to Have Adequate Firefighting Equipment on Scene**

The lawyers for the FBI assume in their arguments that FBI decisions concerning firefighting equipment at Mt. Carmel were made in a vacuum, without any policy directive from Attorney General Reno. Further, the DOJ glosses over this issue with conclusory statements that the FBI's failure to have adequate firefighting equipment at Mt. Carmel on April 19, 1993, was "grounded in social, economic, and political policies underlying law enforcement," and based on the "finite nature of [the FBI's] resources"[6] Not only is there no factual support offered for these assertions, but—in fact—they are in direct contradiction to the record.

**Attorney General's Policy Directive**

In the aftermath of Mt. Carmel, Attorney General Reno told Congress that she had *ordered* "additional resources" be provided to ensure that there was an "adequate emergency response":

[6] Government's Memorandum at 6.

I was concerned about intentional or accidental explosions and *ordered* that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.[7]

[7] Congressional Hearing transcript, Serial No. 95, April 28, 1993, at 16. Attached at Tab 1.

While the Attorney General did not specifically discuss fire vehicles, she testified that "I just *directed* there be sufficient emergency vehicles to respond both from a medical *and any other point of view* . . . .[8]

Moreover, implementation of the Attorney General's directives were to be without regard to economics or "finite resources," as DOJ has suggested. As the Attorney General told Congress, " . . . I just very early on put [expense] in the background and said I can't consider that when I have the lives of the children at stake."[9]

The fact that the Attorney General's policy directive did not explicitly require armored firefighting equipment or aerial water-delivery capabilities is irrelevant. Two of the most common policy directives encountered in law enforcement are similarly non-specific and must be interpreted in the context of specific circumstances: deadly force and probable cause. While the application of each in an actual situation involves the exercise

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[8] *Id*., at 29. The FBI knew that "any other point of view" included the possibility of fire. On April 9, 1993, just a few days before the Attorney General's orders concerning "sufficient emergency vehicles," the FBI's daily briefing for law enforcement personnel at Mt. Carmel noted a discussion concerning the availability of fire trucks " **in case the Davidians attempted to torch the compound**." Briefing for April 9, 1993, attached at Tab 2.

[9] *Id*., at 37. It is obvious expense, economics, and "finite resources" were not an issue in decisionmaking at Mt. Carmel, when the FBI's resources swelled to include nine (9) Bradley Armored Fighting Vehicles, four (4) Modified M-60 Patton tanks (CEV's), two (2) M-1A Abrams tanks, an M-88 tank retriever, and an assortment of airplanes, helicopters, and other vehicles.

of discretion and judgment for the law enforcement officials involved, the *reasonableness* of their actions—and resultant liability of the Government—is still measured against the broad policy directive in question.

Similarly, once the Attorney General *mandated* (1) "sufficient emergency vehicles" be present at Mt. Carmel—"from a medical *and any other point of view*"—and (2) cost was not an issue, the negligence of the FBI in failing to have *any* firefighting capability at Mt. Carmel suitable for April 19 is clearly actionable under the FTCA.

**FBI's Response Inadequate**

The FBI leadership clearly understood the Attorney General's directives. Former Deputy Assistant Director Coulson has acknowledged that:

- the Attorney General's *orders* concerning an adequate emergency response *included* having sufficient vehicles to respond to the possibility of fire,
- the FBI made efforts to determine the availability of *armored firefighting equipment* but—for reasons unknown to Coulson—failed to have any present on April 19, and
- cost or expense played *no role whatsoever* in any decision with regard to Mt. Carmel, including the decision not to have armored firefighting equipment present during the assault.[10]

The potential for gunfire from at least some of the Davidians when the tanks began inserting tear gas was well-known. The FBI's Special Agent-in-Charge, Jeff Jamar, "believed it was **99 percent when we approached with the tank they would fire**."[11]

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[10] Deposition of Danny O. Coulson, February 22, 2000, at p. 74-82. Attached at Tab 3. [Filed under seal].

[11] Congressional Hearing transcript, Serial No. 72, July 25-27, 1995, at 484, attached at Tab 4.

Given that expectation, the FBI's reliance upon a local volunteer fire company as the "primary responder" for fire suppression was particularly egregious.[12]

The FBI's fire "plan" was essentially **no plan**, as FBI Deputy Director Clarke acknowledged afterwards in his Form 302:

[12] Excerpt from Medical Annex to Proposed Operations Plan, attached at Tab 5.

> During these deliberations, the subject of fire was discussed. The FBI representatives in Waco said that they had thought about the possibility but concluded that *little could be done about it if it happened* and that the protection of the firefighters would be a high priority.[13]

Similarly, former FBI Director Sessions testified before Congress, less than ten days after the fire, that "we believed from the onset that **no fire equipment or firefighters** could safely be allowed near the compound, even if a fire broke out."[14]

In light of the Attorney General's policy directives, the virtual certainty some Davidians would open fire, the obvious inadequacy of the local fire-fighting companies in that circumstance, and the fact that cost was not an issue, why were there not "sufficient emergency vehicles"—armored or aerial—to handle the April 19 fire?

**Let Them Burn**

Jamar and Rogers ordered that there would be "**no plan to fight a fire**" at Mt. Carmel! On April 9, 1993, only three days before presentation of the proposed plan of operation to Attorney General Reno, as the plan itself was being finalized, a telephone call to the FBI SIOC from the HRT Command Post in Waco at 7:30 p.m. relayed the following:

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[13] Excerpt from FD-302 for Floyd I. Clarke, Deputy Director FBI, July 14, 1993, at 6. Attached at Tab 6.

[14] Congressional Hearing transcript, Serial No. 95, April 28, 1993, at 80. Attached at Tab 7.

> SA _____ advised that the HRT CP would fax the medical annex update to SIOC. **He further advised that per SAC Jamar and HRT-ASAC Rogers there would be no plan to fight a fire should one develop in the Davidian compound**.[15]

The duty officer in SIOC who took the message noted that he "advised SC Kahoe" of this information.

The truth is ugly. Rather than making choices from among various options based on "social, economic, and political reasons" and "finite resources," Jamar and Rogers simply decreed there would be **no plan to fight a fire should one develop in the Davidian compound**. This is not defensible, on discretionary function or any other basis.

**Reasonable Alternatives Existed Which Would Have Complied With The Attorney General's Directives**

When the fire began on April 19, the Department of Defense liaison log records the following:

| | |
|---|---|
| 12:05 | Compound begins to burn |
| 12:34 | Rec'd call from _____ regarding use of *fire buckets* at Waco in case needed. |
| 12:41 | Alerted LTC [Lieutenant Colonel] _____ to have *fire buckets* standby in case needed. |
| 12:45 | Compound completely collapsed. |
| 12:50 | _____ called for LTC _____ |
| 12:52 | Returned _____'s call. He wants to know how long it will take *helicopters with buckets* to get to Waco. Told him about one |

[15] SIOC Telephonic Action Record, dated April 9, 1993. Attached at Tab 7A. [Filed under seal.]

hour. _____ said just to stand by, he is going to check with DPS personnel on site.

13:03 _____ *cancelled fire bucket* stand by.[16]

The significance of these log entries is obvious: if the FBI's fire plan was adequate, if aerial water drops had been considered and rejected, why was there a scramble to try and round up "helicopters with buckets" *after* the fire had begun? It was too late to try to implement the Attorney General's orders at that point.

[16] Department of Defense document USA D-20750, attached at Tab 8.

There were numerous alternatives available to the FBI in April 1993 which would have satisfied the Attorney General's orders, including armored fire-fighting vehicles, anti-riot armored water cannons, and fixed-wing and helicopter water-deluge aircraft.[17]

> According to Larry Potts, FBI Assistant Director, at least some inquiry was made: You know, sir, we talked extensively about what was available. We even had our liaison officer with the Department of Defense *check with them to see if there was some kind of armored vehicle that could be used as a firefighting—we talked about planes that could drop water*, and we were afraid if we tried—if there was a fire and there was water that was dropped it would crash the roof, and so I mean the best we could do was the fire departments that were available.[18]

Inexplicably, no one ever conveyed to Congress the results of these inquiries—particularly those concerning armored firefighting equipment.

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[17] Report and Declaration of Patrick M. Kennedy, February 28, 200, at 7-8, 25-26. Attached at Tab 9.

[18] Congressional Hearing transcript, Serial No. 72, July 28, 31, and August 1, 1995, at 67. Attached at Tab 10.

In fact, reports indicate that the FBI *refused* an offer from Flamechek International, a California company, to use Czech armored, *remote-controlled* tanks that would allow firefighters to extinguish flames while being protected from gunfire.[19] These firefighting tanks hold nearly 3,000 gallons of water—the equivalent of six fire engines—and can be remotely controlled from almost a mile away.[20]

Other armored firefighting vehicles in use in 1993 included several in Johannesburg, South Africa,[21] and—much closer to home—two armored firefighting vehicles utilized just blocks away from FBI Headquarters by the Washington, D.C. fire department![22]

There is clearly no explanation for the FBI's failure to comply with the Attorney General's policy directives concerning "sufficient emergency vehicles" but negligence. The most honest judgment on the total lack of suitable firefighting equipment at Mt. Carmel

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[19] *Los Angeles Times*, "WACO: Flaws in Official Account of Events Fuel Doubts About Blaze," July 16, 1995. Attached at Tab 11.

[20] Excerpts from *Fire Engineering*, August 1994, and *Firehouse*, November 1994. Attached at Tab 12.

[21] *Fire Chief*, "FIRE/EMS Operations During Civil Unrest," August 1994. Attached at Tab 13.

[22] Photographs of one of the Washington, D.C. armored firefighting vehicles taken in 1994, attached at Tab 14.

on April 19 was by Stuart Gerson, who served as Acting Attorney General until the confirmation of Janet Reno. The notes of Gerson's FBI interview after April 19 contain the following succinct comment: "**Think about fire next time**."[23]

Gerson was not aware that his successor had ordered the FBI to do just that.

### C. Use of Particular Vehicles and Equipment to Insert Tear Gas

### Limits on Jamar/Rogers' Discretion

The FBI's lawyers are on similarly shaky ground with respect to the use of tanks to penetrate and demolish Mt. Carmel on April 19.

First, it is important to delineate what this claim is not. Plaintiffs read the Court's Opinion as foreclosing claims concerning the use of tear gas, and the means chosen to insert the gas—modified Patton tanks with booms and M-79 grenade launchers firing non-pyrotechnic Ferret rounds. Any use of these vehicles and equipment *in accordance with the approved plan* is not actionable, based on the Court's prior rulings.

However, the operations plan presented to and ultimately approved by the Attorney General *limited* the manner in which these vehicles and equipment would be utilized on April 19:

[23] Excerpt from FD-340 of Stuart M. Gerson, July 14, 1993, attached at Tab 15.

> The CEVS using the boom and the Mark 5 liquid injection system will introduce CS *into the windows*. The booms will push aside obstructions and *if necessary* sweep left and right *into the windows* to clear the opening for the CS injection. *If it is impossible to use the windows*, *the booms will push through the wall*, making an *alternative opening to facilitate the injection of CS*.[24]

Once this plan was approved, the "discretionary function" of Jamar and Rogers was severely limited.

In fact, in handwritten notes that appear to have been authored by FBI Deputy Director Clarke or FBI Assistant Director Potts, the proposed plan is analyzed and the following assessments made:

- the approach will be gradual, giving advance notice to the occupants of Mt. Carmel,

- the result will not be immediate: "Will it cause people to run out and give up[?] No—but it will make their life a little more difficult in there,"

[24] Plan presented to Attorney General Reno by FBI Director Sessions, Deputy Director Clarke, and Assistant Director Potts on April 12, 1993, attached at Tab 16.

- "Murder/Suicide—we don't know whether this is a possibility or not, but *seems unlikely* compared to full insertion which would most likely provide a "violent" response. Most of those who think suicide is a possibility believe that this would be in the form of 'suicide by cop.'"[25]

The clear impact of the analysis is that the proposed assault must be gradual, giving advance notice, and carefully implemented in order to avoid a disaster.

The memo concludes:

> **Only thing left to the discretion of on-scene commander is the emergency response.**[26]

To state the obvious: there was no emergency on April 19—until the FBI's unauthorized deviations from the plan approved by the attorney General either sparked the fatal fire or provoked some of the Davidians to set fires to repel the Government's assault. Then, when "on-scene commander" discretion was appropriate, Jeff Jamar used his discretion—not to order an emergency response—but to hold back fire trucks that were inadequate because he failed to follow the Attorney General's directives concerning "sufficient emergency vehicles."

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[25] Handwritten notes, Exhibit 103 to Deposition of Danny O. Coulson, February 22, 2000, attached at Tab 17.

[26] *Ibid*.

**No Provision for Penetration of Building By Tanks in Approved Plan**

Try as they might, the DOJ lawyers can point to no plan ever approved by the Attorney General which expressly permitted penetration into Mt. Carmel by more than a tank *boom* to insert tear gas. Moreover, use of tanks to create "escape/exit" holes or "entrance" holes to insert gas was not implicit in the final, approved plan.

Initial versions of the final operations plan were circulated as early as March 8, 1993. These earlier versions *did* provide—explicitly—for the use of tanks to create holes in Mt. Carmel:

- March 8: "If occupants fail to comply with the surrender demand, the *CEVs will create entrances/escape routes in the structure* . . ." and the Bradleys would "deliver CS gas *as well as projectable flashbangs."*[27]

- March 10: Same as March 8 plan: "entrances/escape routes," "projectable flashbangs," "escape/exit openings".[28]

- March 14: "two (2) CEVs will create entrances/escape routes in the structure," "the CEVs will proceed to establish escape/exit openings in the structure".[29]

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[27] March 8, 1993 "Proposed Operations Plan," at § II. This plan reiterated the use of CEVs to penetrate Mt. Carmel in § III.A: "the CEVs will proceed to establish escape/exit openings in the structure . . . ." Attached at Tab 18.

[28] March 10, 1993 "Proposed Operations Plan," at §§ II and III.A. Attached at Tab 19.

[29] March 14, 1993 "Proposed Operations Plan," Revision #2, at §§ II and III.A. This plan eliminated the concept of using "projectable flashbangs." Attached at Tab 20.

- March 27: "On order two CEVs will enter the compound and immediately penetrate the structure utilizing their booms . . . . *Additionally, the CEVs will establish escape/exit openings* . . . ."[30]

The plan approved by the Attorney General, however, *never mentions* the use of tanks to create "entrances/escape routes" or "escape/exit openings." The *only* penetration of "the structure" was to be "utilizing the boom."[31] It is clear that penetration of Mt. Carmel by more than the tear-gas insertion boom was not part of the plan approved by Attorney General Reno.

Additional evidence that Jamar and Rogers clearly deviated from the approved plan in contained in the previously-filed *Andrade* Plaintiffs' Application to Reconsider Dismissal of Jeffrey Jamar and Richard Rogers, together with the first and second supplements thereto, all of which are hereby incorporated herein by reference. The evidence set forth in those pleadings conclusively proves that the true purpose of the tank penetrations into Mt. Carmel on April 19 was to commence the "dismantling," the "systematic destruction" of Mt. Carmel.[32]

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[30] March 27, 1993 "Proposed Operations Plan," Revision #3, at § III.A. Attached at Tab 21.

[31] April 9, 1993 "Proposed Operations Plan," Revision #6, at § III.A. Attached at Tab 22.

[32] Particular reference is made to the HRT commendation recommendations attached as exhibits to the *Andrade* Plaintiffs' Supplemental and Second Supplemental Applications, which reveal that CEV-2's "mission" on April 19 was the "dismantling of the gymnasium," and the "systematic destruction of the black side of the compound."

Finally, if any doubt remains concerning whether there was a deviation from the *approved* plan for April 19, consider the testimony of former FBI Deputy Assistant Director Danny Coulson, who helped formulate the plan finally approved by Attorney General Reno, participated in meetings with the Attorney General where the plan was discussed and approved, and was present in the FBI's SIOC on April 19, 1993:[33]

17. "We wanted the procedures to be **incremental, deliberate, giving advance notice**, giving ample opportunity **without any unnecessary provocation**, which would bring about a peaceful resolution."

Q. (By Mr. Caddell) Would you agree with that statement by Mr. Clarke?

A. **I agree with that**.

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Q. Would you agree with Ms. Reno that at the time she left, the FBI considered that the events at Mount Carmel would be a **slow, gradual process**?

A. **Yes**.

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Q. And we've had testimony that there was some surprise, when that happened, within SIOC, and people made comments and that sort of thing. **Who were you with or seated next to, for example, when that CEV went into the building, fully penetrated the building**?

A. Mike Kahoe.

Q. Did you say anything, or did Mr. Kahoe say anything at that time?

A. Yes. He said something, and I said something.

Q. What did he say?

[33] The following quotes are excerpts from the Deposition of Danny O. Coulson, February 22, 2000, at 17, 30-31, 60, 141-143, 145-150, 154-157, 160. Attached at Tab 23. [Filed under seal.]

A. **“Holy s _ _ _.”**

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Q. All right sir. What did you say?

A. **I said, “I hope that’s a bad camera angle.”**

***

Q. Look at Exhibit 127, if you would. You see the condition of the gym. Half of it is gone. The other half has collapsed. Would you say that’s a fair characterization?

A. Yes.

Q. When you began the day at the SIOC, on April 19, 1993, as Assistant Deputy Director of the FBI, having had input into the Plan of Operations for that day, having met with Attorney General Janet Reno concerning the plan, having gotten through various iterations of the plan, **did you ever contemplate, on the morning of April 19, 1993, that by noon on that day the gym would be in that condition**?

A. **No**.

Q. (By Mr. Caddell) Now, Mr. Kahoe said “Holy s _ _ _” when he saw a tank penetrate the front of the building; correct?

A. Yes.

Q. He never saw this on the back, did he?

A. No.

Q. You didn’t either, did you?

A. No.

***

Q. But you would agree with me, wouldn’t you, that in terms of a **deviation from the plan**, **this, what we see on the back of Mount Carmel, is far worse than the penetrations that were made on the**

**front of the building**, that you could see from the SIOC on April 19; correct?

A. **I don't think it's worse than what happened on the front.**

***

Q. At any time did anybody come to you and say Jamar and Rogers want to begin demolishing the building on the back side?

A. No.

Q. Did anyone come to you and say Jamar and Rogers want to begin penetrating the building on the front with more than just a boom to inject tear gas, they want to drive the tank all the way into the building? Did anyone ever come to you and tell you that they wanted permission to do that?

A. No.

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Q. Now, my question is just . . . if somebody is making an announcement, saying **this is not an assault**, wouldn't you agree, that if that's being made **at the same time that the tanks are destroying this building**, as we can see in Exhibit 127, that those two things are not consistent?

A. It would appear to be **inconsistent**.

***

Q. But with respect to your understanding of the plan, would you agree that what happened on the **back side of Mount Carmel**, as reflected in Exhibit 127, is a **deviation from the plan**, as you understood it to be on April 19, 1993?

A. **I don't recall that the plan contemplated this activity.**

Q. (By Mr. Caddell) All right sir. Now **do you recall the plan contemplating the penetration of the tanks**, the body of the tanks, fully into the building **on the front of Mount Carmel** on April 19, 1993?

A. **No.**

***

A. I was **surprised to see the activity**.

Q. (By Mr. Caddell) And it was **not something that you had contemplated**, based on your understanding of the plan, would occur on April 19, 1993, correct?

A. **No, I did not contemplate that**.

***

Q. Do you recall anyone having, as part of the plan of operation for April 19, 1993, the mission of dismantling the gym on the black side, the back side of Mount Carmel?

A. No.

Q. Have you ever heard, until this moment, that internally at HRT, they characterized the actions of the CEV on the black side of Mount Carmel as a “mission” to dismantle the gym?

A. No.

***

Q. Again, the first two sentences, systematic destruction of the black side of the compound, skillful maneuvering, was able to remove the entire black side of the compound—was that in any way in contemplation of the plan of operations for April 19, 1993, as you understood the plan to be?

A. No.

***

Q. No. You would agree with the characterization of **these activities** as being a **deviation from the plan**, correct?

A. You could use the term “**deviation**.” You could use the term “**inconsistent**” with what I understood the plan to be.

## II. DOJ'S MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING FIRE-RELATED ISSUES

### A. Holding the Fire Trucks on April 19

Evidence that the delay in letting the fire trucks pass on April 19 was unreasonable and negligent comes not from Plaintiffs, but from the FBI itself.[34] The audio recording on the FLIR tapes for the 10:30 a.m. to 2:00 p.m. time frame is not present until 12:26 p.m.—well after the fire had begun.[35]

Nevertheless, the Rear HRT-TOC radio log for April 19, 1993, reports "Fire in Black A-15" at 12:12 p.m.[36] Assuming the fire trucks were called immediately, the response time

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[34] The apparent concession by the Government that Jamar's decision to hold the fire trucks after they arrived at Mt. Carmel on April 19, 1993, is not subject to the discretionary function exception to the FTCA is additional support for the Plaintiffs' position that the FBI's failure to have armored fire fighting equipment present at Mt. Carmel on the final day ( or other suitable substitutes, such as aerial water-delivery capabilities) is similarly subject to FTCA liability if negligent.

[35] Plaintiffs use the phrase "is not present" advisedly, since all occupants of the FLIR aircraft during the 10:30 a.m. to 2:00 p.m. time frame deposed thus far have testified they believed they were recording radio transmissions throughout their flight and were surprised to learn—either during or shortly before their depositions in this case—that no audio track is present until 12:26 p.m.

[36] Excerpt from "Radio-log - Rear HRT-TOC, CH-AW-8," for April 19, 1993, attached at Tab 24.

for the Bellmeade Fire Department—the "primary responder"—was "8 minutes."[37] The *only* entry on the radio log after the fire begins concerning possible gunfire from the Davidians occurs at 12:15: "Shots fired or rounds cooking off."[38] Therefore, it appears that any Davidian gunfire was over before the fire trucks ever arrived.

At 12:26 the FLIR audio track is present and provides a damning record of the FBI's failure to let the fire trucks reach Mt. Carmel:

| | |
|---|---|
| **12:31:04** | HR1 to Rear TOC: **If you have any fire engines get them up here now** |
| 12:31:50 | SA1 to HR1: We'll have the fire trucks go to the "T"—to the "T" for instruction. |
| **12:31:55** | **I want the fire trucks up here—on the scene.** |
| **12:32:19** | HR1 to SA1: If we can . . . we want to let the fire trucks go on to the area where the _____ might be—**there's a chance we might still be able to save them**. |
| 12:35:23 | What's the ETA on the fire engines SA1? |
| 12:35:29 | They should be there momentarily. |
| **12:37:10** | **If you've got fire engines down there, get them up here immediately.** |
| 12:37:15 | There are no fire engines yet at the "T". |
| 12:37:26 | Repeat: no fire engines at the "T". |

[37] Tab 5.

[38] Tab 24.

| | |
|---|---|
| 12:39:29 | [Occupants in Nightstalker] Looks like two fire engines approaching over here. |
| 12:39:55 | "Y" to "T" |
| 12:40:02 | This is the "T"—go ahead. |
| 12:40:04 | "T"—are you clearing the fire trucks into your area now? |
| **12:40:07** | **10-4—we'll send it up as soon as it gets here.** |
| 12:40:10 | Okay, here comes the fire trucks.[39] |

Of course, by the time the fire trucks were allowed to pass, it was too late.

The FBI has failed to meet its heavy burden for summary judgment on this issue. It has presented no competent evidence that Davidians were continuing to fire at government tanks after the fire began. Jeff Jamar had no personal knowledge of the conditions at Mt. Carmel, and the FBI personnel on the scene were demanding that the fire trucks be brought to the scene "now" and "immediately."

The Plaintiffs are sympathetic to the risk posed to the volunteer firefighters thrust into the "primary responder" role by the FBI's failure to follow the Attorney General's policy directive concerning "sufficient emergency vehicles." Nevertheless, based on the FBI's own evidence, summary judgment is not appropriate on this issue.

**B. Who Started the Fire?**

[39] For the Court's convenience, a diagram illustrating the relative locations of the "Y" and "T" intersections, which was made part of the Medical Annex to the April 19 Operations Plan, is attached at Tab 25.

The FBI is back for a second or third bite at the apple on this issue—but offers nothing new to justify altering the Court's prior ruling denying summary judgment on fire causation.

The DOJ lawyers commit the unpardonable sin in their motion of relying on misleading quotes taken out of context from deposition testimony. Graham Craddock's testimony, the only "new" evidence submitted by the Government in support of its motion on this issue, does *not* "confirm that the fire was [set] intentionally by the Branch Davidians from within the compound."[40]

[40] Government's Memorandum at 15.

The Government submits two excerpts from Craddock's October 1999 deposition, both of which end with Mark Wendel saying "Light the fire."[41] What the DOJ lawyers *fail* to provide the Court are the pages immediately following this testimony, where Craddock relates that the statement by Wendel was followed by a protest from Pablo Cohen: "Wait. Wait. Find out."[42]

Craddock also testified that:

- Pablo Cohen screamed out when a Davidian poured fuel inside the chapel: "Wait. Wait. Not inside. **Outside**." "Don't pour it inside. **Pour it outside**."[43] [This would be consistent with using the fuel to create a wall of flame *outside* Mt. Carmel to try to stop or slow the tank's unauthorized "systematic destruction" of the building.]

- The building was *already* on fire when Mark Wendel said "Light the fire"[44]—hardly evidence the Davidians started it.

- Craddock left the chapel after he heard the exchange between Cohen and Wendel.[45]

- He never saw anyone actually light a fire.[46]

- He never lit a fire.[47]

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[41] *Id*., at Exhibit B.

[42] Deposition of Graham Craddock, October 28 - 29, 1999, at 203, 264. In fact, in Craddock's grand jury testimony in 1993 he testified that Cohen's response to Wendel's statement was "**Don't** light the fire." *Id*., at 261, 264, 292, 294. Craddock agreed that his recollection was better at the time of his grand jury appearance than today. *Id*., at 264, 292-293. For the Court's convenience, *all* pages from Craddock's deposition containing any reference to the fire are attached at Tab 26.

[43] *Id*. at 201.

[44] *Id*., at 202, 260, 263, and 293.

[45] *Id*., at 203, 261, 265.

[46] *Id*., at 283.

[47] *Id*.

- He was not aware of any plan to start a fire on April 19.[48]

It is clear that Craddock's testimony is not an adequate basis for summary judgment.

[48] *Id*., 283-284.

The other evidence referenced in the Government's Memorandum are the Title III surveillance tapes made on April 19, 1993. However, these tapes are not reliable. Plaintiffs' expert audio and video forensic analyst has concluded that the supposed "original" April 19 overhear tapes are probably copies and, as such, unreliable evidence.[49]

Even if the Title III tapes were originals, and unaltered, the evidence they present does not support summary judgment on this issue. The references to pouring fuel—even if true—occurred hours before the start of the fire, and appear to be unrelated to the points of origin of the fire.

Finally, Plaintiffs offer three new pieces of evidence on this issue: (1) the expert analysis of Patrick Kennedy, one of the country's foremost experts on the origin of fires, (2) 302s from HRT members Joseph Servel and Michael Sackett, who were on the "black" side of Mt. Carmel on April 19, and (3) notes compiled during interviews of HRT members in preparation for the *Branch* criminal trial.

[49] Laboratory Report, February 24, 2000, Steve Cain, Applied Forensic Technologies Intl., Inc., at 3-4. Attached at Tab 27.

Patrick Kennedy, engaged in the evaluation and analysis of fire and explosion incidents for more than thirty-nine (39) years, and president of the oldest fire investigation firm in the world, after an exhaustive review of the evidence in this case, has concluded that the origin of the Mt. Carmel fire—pursuant to accepted industry standards of fire investigation (many of which he helped author)—must be listed as "undetermined," the cause of the fire must be listed as "undetermined," and the responsibility for the fire must be listed as "undetermined."[50]

The 302s of Sackett and Servel indicate at least a temporal connection between their firing tear gas rounds into the kitchen area on April 19 and the fire which was subsequently observed in that area. Sackett's 302 provides that "later in the morning (estimated to be approximately 11:45 a.m.)," he saw a CEV make a tear gas insertion[51], heard "three loud reports" from a large weapon, and, "as a result, his BV shot more ferret gas rounds through the plywood windows covering the kitchen area."[52] "At approximately noon, he saw a puff of smoke from the Alpha Level [first floor] of the kitchen area and then, almost immediately thereafter (less than 30 seconds), saw flames."[53]

Servel's 302 concurs:

> Sierra Two Sniper post requested that Servel **insert more gas into Black Alpha Sixteen**, which their tank does. *At this time*, Servel was advised by Sackett that he **saw smoke from Black Alpha Fourteen/Sixteen**, the

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[50] Tab 9, at 1.

[51] Impossible, since Sackett was on the black side and the only CEV on the black side had no tear gas delivery system.

[52] FD-302 of Michael J. Sackett, dated April 20, 1993, at 2. Attached at Tab 28.

[53] *Ibid*.

> kitchen area of the BDC building. Shortly after that, Servel said Sackett advised that he saw flames. Servel confirmed this sighting and then they went to the BR [Black-Red] corner.[54]

Given this evidence, and coupled with the known presence of Coleman lanterns in the kitchen, there is a significant possibility that the tear gas rounds fired by Servel and Sackett's Bradley accidentally triggered a fire in the kitchen.

The HRT interview notes in advance of the *Branch* criminal trial present similar evidence. The "WACMUR F.B.I. H.R.T. Interview Schedule" contains the following "significant observations" for Dave Corderman, HRT member who operated on the White-Green side of Mt. Carmel on April 19:

- Ferret shooter on 19th S-2 Bradley
- Smoke on film came from attempt to penetrate bunker w/1 *military* and 2 ferret rounds
- *Military* was grey bubblehead with green base

[54] FD-302 of Joseph Servel, Jr., dated April 20, 1993, at 2-3. Attached at Tab 29.

- **Dave fires 3 rounds into kitchen and less than 30 sec later sees smoke**[55]

The actual handwritten notes are even more troubling:

Dave fires 3 rounds into
kitchen & at same time
less than 30 secs later
he said he saw white smoke

chronology
shots 3 rounds
looks like smoke
& then Scott saw
fire
—when fire starts they
backed up to positions[56]

[55] "WACMUR F.B.I. H.R.T. Interview Schedule," November 9, 1993, at 6. Attached at Tab 30.

[56] "Charlie Team" notes, USAWDTX 388-00124 through 00127, at 00126-127. Attached at Tab 31. [Filed under seal.]

The fact that Corderman—the same HRT member who fired at least one pyrotechnic military tear gas round earlier in the day (contrary to Attorney General Reno's instructions)—later fired three "rounds"[57] into the kitchen and within "30 seconds" saw smoke, clearly creates a fact issue as to the origin of the fire.

## III. CONCLUSION

The discretionary function exception clearly does not apply to the FBI's failure to have "sufficient emergency vehicles" at Mt. Carmel to fight the fire on April 19, nor does it shield the FBI from liability for Jamar and Rogers' unauthorized deviations from the plan approved by the Attorney General, which limited the penetration of Mt. Carmel on April 19 to only the CEV booms for the purpose of inserting tear gas. There is clearly a "genuine dispute as to material fact" concerning Jamar's decision to hold the fire trucks until it was too late, and whether some of the Davidians started the fire. Therefore, the Government's Motion for Partial Dismissal and Motion for Partial Summary Judgment must be denied.

Respectfully submitted,

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[57] It is curious that the notes fail to identify the "3 rounds" fired into the kitchen as either military or ferret rounds, particularly since it is clear Corderman possessed both.

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## CERTIFICATE OF SERVICE

I certify that on March 1, 2000, I have served a true copy of the foregoing to the following by fax and first class mail.

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_____
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**He further advised that per SAC Jamar and HRT-ASAC Rogers there would be no plan to fight a fire should one develop in the Davidian compound.**

SIOC Telephone Record, April 9, 1993

**12:31:04** HR1 to Rear TOC: **If you have any fire engines get them up here now**

**12:37:10** **If you've got fire engines down there, get them up here immediately.**

Radio-log—Rear HRT-TOC, April 9, 1993

Q. When you began the day at the SIOC, on April 19, 1993, as Assistant Deputy Director of the FBI, having had input into the Plan of Operations for that day, having met with Attorney General Janet Reno concerning the plan, having gotten through various iterations of the plan, **did you ever contemplate, on the morning of April 19, 1993, that by noon on that day the gym would be in that condition**?

A. **No**.

Former Deputy Assistant Director, FBI