CASE	A*	S*	FACTS & HOLDINGS
Autery v. United States, 424 F.3d 944 (9th Cir. 2005)	**X**		DOE contracted with various contractors for the express purpose of controlling wildfires. A wildfire occurred and the exception applied. Moreover, the Contracts expressly mentioned wildfire control.
Laurence v. Dep't. of the Navy, 59 F.3d 112 (9th Cir. Cal. 1995)	**X**		Plaintiffs alleged that the Government used contaminated soil when building a housing project for the Navy. But the Federal Public Housing Authority ("FPHA") had contracted with a private firm to do a feasibility study and build the project, and that firm had made the decision to use the backfill at issue. **No duty of a federal employee identified that had been breached.**
Letnes v. United States, 820 F.2d 1517 (9th. Cir. 1987)	**X**		Two planes collided. Pilot died. Pilot's company had a firefighting contract with the USA. Pilot's wife (Letnes) brought an action against the USA alleging that a contractor (WAIG) was an employee of the USA. The court reiterated that a pilot who contracts with the forest service for firefighting is an independent contractor. USA's regulations and oversight did not rise to the level to invalidate the independent contractor exception (and the USA's control was to maximize safety, not supervision). **No duty of a federal employee identified that had been breached.**
Arora v. United States, 144 F. App'x 627, 628 (9th Cir. 2005)	**X**		An inmate, who was apparently housed in a city jail and treated at a county hospital, brought an FTCA claim alleging inadequate medical care. But he failed to provide any evidence that the government had authority over the daily operations of either the New River Valley Regional Jail or the Roanoke Memorial. Accordingly, his claim was barred under the exception. **No duty of a federal employee identified that had been breached.**

CASE	A*	S*	FACTS & HOLDINGS
Monroe v. United States Marshals, 1996 U.S. App. LEXIS 30007 (9th Cir. Wash. Nov. 15, 1996)	X		**[UNPUBLISHED DECISION]** Federal prisoner temporarily housed at the City of Kent correctional center ("jail") pursuant to a contract between the United States Marshal's Service ("Marshals") and the City of Kent alleged she acquired Lupos as a result of that incarceration in a city jail. **No duty of a federal employee identified that had been breached.**
ABF Freight Systems, Inc., v. U.S., (not reported), 2013 WL 3244804 (N.D. CA 2013)	X		**[UNPUBLISHED DECISION]** Plaintiff – a driver for a freight company, slipped while leaving an elevator of a building owned by the Department of Homeland Security. The USA had contracted with Security Consultants Group, Inc. ("SCG") to provide security for the facility, including the loading dock area, and had contracted with another contractor to repair drywall. Several lawsuits ensued, and the USA agreed to settle all claims for $50,000, and the Court then considered whether the settlement should be upheld. In evaluating the settlement, the Court considered the likelihood that the USA's claims would be dismissed under the independent contractor exception. In evaluating that argument, the Court reiterated that "Plaintiffs must prove that the USA was independently negligent." The court held that that the USA did not contribute to the injury and that the failure to warn was delegated to the contractors (who had been retained to perform the functions that lead to the dangerous condition). **No duty of a federal employee identified that had been breached.**
Edison v. USA, et al. and *Nuwintore v.*		X	The Court "ascertaine[d] the boundaries of the United States' liability when it has delegated some, but not all, of its legal duties to an independent contractor." *Id.* at *13.

CASE	A*	S*	FACTS & HOLDINGS
USA, et al. (presently published at 2016 U.S. App. LEXIS 9250) ("*Edison*") (9th Cir., May 20, 2016).			Plaintiffs, inmates at Taft federal prison, alleged that they contracted a severe form of valley fever as a result of their incarceration. The USA owned Taft, but had contracted with MTC to operate it, but retained control over changes to the buildings. In addition to claims against MTC (the contractor), the plaintiffs asserted claims against the USA based on failure to warn, failure to modify structures, and failure to develop and implement an adequate protection policy. The 9th Circuit Court allowed Plaintiffs to proceed on all asserted grounds stating "the independent contractor exception is not a complete bar to liability any time the United States employs a contractor. Some duties of care are non-delegable; others are retained by the government, if not delegated" and "…our precedents do not hold that the United States is absolved of all liability, no matter what the injury complained of its cause, any time it hires an independent contractor." 2016 U.S. App. LEXIS 9250 at *5, 13. The Court clarified that the plaintiffs were not seeking to hold the USA vicariously liable for the contractor's actions, but were seeking to hold the USA directly liable. *d.* at *17-18. Accordingly, jurisdiction was present. The 9th Circuit enumerated a three-step inquiry to determine whether the USA may be liable for its own acts or omissions – First, whether state law would impose a duty of care on a private individual in a similar situation; Second, looking to the contract and the parties' actions, whether the United States retained some portion of that duty for which it could be directly liable. Third, even if the government delegated all its duties to the independent contractor, whether, under the applicable state law, non-delegable duties were imposed on the government. **Plaintiffs identified a specific duty of a federal employee that had been breached.**

CASE	A*	S*	FACTS & HOLDINGS
Noel v. United States, 893 F. Supp. 1410 (N.D. Cal. 1995)		**X**	Ice Cream cart turned over on volunteers at naval air show. Ice Cream cart hit a pad-eye, turned over, injured plaintiffs. Military prepared the safety plan. Navy contracted with a concession company to provide booths for food, ice cream, beverages and novelties. The Moral, Welfare and Recreation Department of the Navy ("MWR") contracted with National Concession Company ("National Concession") to operate concession booths for food, ice cream, beverages and novelties at the 1992 Air Show. The concessionaire was responsible for supervising the volunteers Plaintiff was assigned to an ice cream cart. The Volunteer moved an ice-cream cart through crowds. It hit a pad-eye, turned over, and injured her leg. Court determined that the injury was potentially due to breaches by the concessionaire and the USA. **Plaintiffs identified a specific duty of a federal employee that had been breached.**
McGarry v. United States, 370 F.Supp. 525, 545 (D. Nev. 1973)		**X**	United States Atomic Energy Commission owned a test site, operated by a private contractor. While drilling on the site, the plaintiff/decedent came in contact with a power line and was electrocuted. The Court held that "Although the present case presents an obvious basis for the imposition of absolute liability or the imputation of the negligence of an independent contractor if the defendant were a private person, the plaintiffs are not asserting that type of liability against the United States. The plaintiffs' claims against the United States are predicated solely upon the negligence of employees of the United States. The fact that someone else might be charged with absolute liability, or the fact that an independent contractor might have been negligent, does not absolve the United States from liability under the FTCA if its employees were also negligent. " *McGarry v. United States*, 370 F. Supp. 525 (D. Nev. 1973).

CASE	A*	S*	FACTS & HOLDINGS
			Plaintiffs identified a specific duty of a federal employee that had been breached.
Suro v. United States, 107 F. Supp. 2d 206 (2000)		**X**	USA, through forfeiture, owned a building. An agent of the USA was aware that a child lived there. The USA hired a company to manage the property. The child ingested lead paint, the parents sued, and the USA moved to dismiss based on the independent contractor exception. The Court applied NY law, in which a property owner had a duty to remove lead paint in any building where a child under six resided. The Court acknowledged that "The cases upon which the government relies for this position do not go that far. To the contrary, these cases merely emphasize that, in order to hold the United States liable under the FTCA, a plaintiff must be able to point to a direct act of negligence by a government employee; claims based solely on theories of non-delegable duties or strict liability must be dismissed." The Court ultimately held that "Here, plaintiffs' allegations can be read to claim liability that is based, not on a non-delegable duty to maintain the premises or on the theory that the government should be vicariously liable for the acts or omissions of its contractor, but rather on direct acts of negligence on the part of the government, namely its failure to notify CAISI of the presence of an infant child at the premises." (at 209) **Plaintiffs identified a specific duty of a federal employee that had been breached.**
Logue v. United States, 412 U.S. 521 (1973)		**X**	**Supreme Court's ultimate authority on "independent contractor exception."** Following a federal inmate's suicide attempt and the discovery of his psychiatric break, a District Court ordered a Federal Marshall to house the Federal Inmate a medical facility. Instead, The Federal Marshall arranged for his temporary housing at a city jail. The

CASE	A*	S*	FACTS & HOLDINGS
			Marshall (Bowers) made arrangements for the cell to be cleared of dangerous items but made no arrangements for constant surveillance. The inmate fashioned a noose from a bandage and hung himself. **District Court** found that (1) jail employees were negligent in supervision; (2) federal marshal was negligent in failing to arrange for appropriate supervision; and (3) the USA was responsible for both. **Circuit Court reversed**, determining that County Sheriffs were not federal employees and further found that the Federal Employee – Marshal Bowers – did not have a duty of safekeeping to the deceased. **The Supreme Court Reversed and Remanded**. The majority of the Supreme Court's opinion was ascertaining what is an "employee of the United States" (and we concede that MTC is not an employee of the United States). The Court agreed that the USA could not be liable for the conduct of the jail employees. But the Supreme Court found that the Circuit Court had not examined the independent basis of liability – the breach of the Marshall's own independent negligence, and remanded the matter to the Circuit Court for that examination (and the Circuit Court, in turn, remanded to the District Court for that examination) The Supreme Court stated: The Court of Appeals in that portion of its opinion quoted supra, at 525, stated that "the deputy marshal, accordingly, [violated no duty of safekeeping with respect to the deceased." But that conclusion appears to us to follow from the court's discussion of the nature of the intergovernmental relationship and the status of the sheriff's employees

CASE	A*	S*	FACTS & HOLDINGS
			rather than being a separate rejection of the finding of the District Court that Bowers himself was negligent. Since the Court of Appeals thus did not consider the distinct question regarding the negligence of Bowers, we believe that the parties' arguments on that question should be addressed in the first instance to the Court of Appeals. *Logue v. United States*, 412 U.S. 521 (U.S. 1973) (The Court of Appeals, in turn, remanded the matter to the trial court. *Logue v. United States*, 488 F.2d 1090 (5th Cir. Tex. 1974)). **Plaintiffs identified a specific duty of a federal employee that had been breached.**

CASE	A*	S*	FACTS & HOLDINGS
W.C. & A.N. Miller Cos. v. United States, 963 F. Supp. 1231, 1232 (D.D.C. 1997)		**X**	In 1993, a landowner was performing excavations to build a home, and discovered that property -- leased by the USA during WWI -- contained underground munitions. The court examined the application of every exception to the FTCA, including the independent contractor exception. The court held that the USA had an independent duty to warn subsequent landowners (such as plaintiff) of the buried munitions. *W.C. & A.N. Miller Cos. v. United States*, 963 F. Supp. 1231, 1243 (D.D.C. 1997). This duty had not been delegated. Therefore the failure to warn claim was not barred by the independent contractor exception. In fact, the header for the Court's discussion was "The Plaintiff's Claims Arising From The Allegedly [18] Negligent Investigation In 1993 Are Not Barred By The Independent Contractor Provision Of The FTCA Because The Plaintiff's Challenge Is To The Defendant's Conduct, Not To The Contractor's Conduct" *W.C. & A.N. Miller Cos. v. United States*, 963 F. Supp. 1231, 1237 (D.D.C. 1997). The Court stated "the defendant's invocation of the independent contractor provision is inappropriate in this case because the plaintiff's complaint does not challenge the actions of the independent contractor. Rather, the plaintiff claims that the Army was negligent in failing to take appropriate action after learning from its independent contractor that there were "possible burial sites, shell and bomb pits, trenches and possible test areas." This claim is not barred by the independent contractor provision. *W.C. & A.N. Miller Cos. v. United States* , 963 F. Supp. 1231, 1237 (D.D.C. 1997). **Directly analogous:** Appellants have identified three specific duties that were not delegated to third parties – failure to warn (same as in W.C. and A.N. Miller); failure to implement structural changes, and negligent policy implementation. Moreover, Court was furious that USA could be so negligent and then try to transmute claim and assert independent contractor exception (same as here).

CASE	A*	S*	FACTS & HOLDINGS

CASE	A*	S*	FACTS & HOLDINGS
Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989)		**X**	*Only case I found to address potential delegation of non-delegable duties (not at issue here).* Plaintiff engaged in road-paving activities. The Department of Defense had an agency in charge of disposing of PCBs (highly toxic chemicals). The DOD agency contracted with a company to dispose of the PCBs, and kept a manifest of what went where, but failed to ensure that the PCBs were properly disposed of. The PCB-infused waste-oil was sold by one contractor to another, who sold it to plaintiff for use on paving roads. [Presumably, an injury followed]. As far as the discretionary function, there was a cradle-to-grave policy in effect mandating government oversight, that had not been followed (1st prong of test not satisfied). The Court reiterated its holding from *Emelwon, Inc. v. United States*, 391 F.2d 9, 10-11, 12-13 (5th Cir.), cert. denied, 393 U.S. 841, 89 S. Ct. 119, 21 L. Ed. 2d 111 (1968), that although the United States is not liable under the FTCA for the negligence of an independent contractor, it may be liable, just as any private citizen would be, under an applicable state tort theory for its own negligence in failing to prevent harm to third parties when the activity contracted for was inherently dangerous or when the Government was aware that the contractor had created a dangerous situation. The Court stated that the governmental agency may, however, be liable to third parties for its own negligence in discharging a nondelegable duty imposed under state tort law. Id. at 11-12. The court applied Florida tort law that "if the work contracted for is an inherently dangerous activity, the employer has a nondelegable duty of reasonable care to take precautions ensuring that the independent contractor carries out the task in a non-negligent manner." *Dickerson*, 875 F.2d at 1583. The court determined that the USA breached it's separate duty to ensure that the contractor did its work in a non-negligent manner. *Dickerson*, 875 F.2d at 1583). Accordingly, the Independent Contractor exception did not bar a claim based on a breach of this duty. **Directly Analogous -** In *Dickerson*, Court identified a duty that had not been delegated to a contractor. In this case, the Appellants have as well.