**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

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| Terrence Bressi,<br><br>Plaintiff,<br><br>vs.<br><br>Michael Ford, Eric O'Dell, George Traviolia, and Richard Saunders,<br><br>Defendants. | ) | No. CV-04-264 TUC JMR<br><br>**ORDER** |

This order addresses Defendants' motion to dismiss. On December 20, 2002, Defendants, officers of the Tohono O'odham Police Department, stopped Plaintiff at a roadblock/checkpoint on a highway running through the Tohono O'odham Nation. Defendants detained and questioned Plaintiff, and then arrested and cited him for violations of Arizona law. Plaintiff filed this case against Defendants pursuant to 42 U.S.C. § 1983 and state law.

In an order filed on January 7, 2005, the Court dismissed certain claims against Defendants, but refused to dismiss the § 1983 claims against Defendants in their individual capacities. The Court held that because Defendants acted under color of Arizona law they were not entitled to tribal sovereign immunity. However, in an order filed on February 1, 2005, the Court granted in part Defendants' motion to reconsider with respect to one issue, and ordered the parties to submit further briefing. That issue is whether the roadblock, stop, questioning, and detention of Plaintiff, as distinct from Defendants' citation and arrest of

Plaintiff pursuant to Arizona law, were carried out under color of Arizona law. If the answer to that question is yes, Defendants are not entitled to sovereign immunity for those actions. *See Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). After limited discovery on this jurisdictional issue, Plaintiff filed a response on May 9, 2005, Defendants filed a reply on May 27, 2005, and Plaintiff filed a reply on July 12, 2005.

In the meantime, Plaintiff filed a second amended complaint, adding claims against Defendants pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), thereby alleging that Defendants acted under color of federal law. On April 11, 2005, Defendants filed a motion to dismiss the *Bivens* claims. Plaintiff responded on May 11, 2005, and Defendants replied on May 31, 2005. Defendants requested a hearing on the pending motions on June 2, 2005. On August 4, 2005, Plaintiff also requested a hearing, claiming that Plaintiff had filed new evidence with the Court in regard to the pending motions.

The Court finds that the pending motions can be decided without further oral argument, based on the extensive filings of the parties and the oral argument held on Defendants' original motion to dismiss on December 9, 2004. While Plaintiff may have new evidence regarding these motions, oral argument on pending motions is not the proper procedural vehicle for introducing new evidence to the Court.

*Background*

The general background to these claims is described in the second amended complaint and in the Court's previous orders. More specific facts, however, are presented in the parties' response and replies. The complaint alleges that on December 20, 2002, Plaintiff was driving on Arizona State Route 86 through the Tohono O'odham Nation when Defendants Richard

Saunders, Michael Ford, George Traviola, and Eric O'Dell—all Tohono O'odham Police Department officers—stopped him and several other vehicles at a roadblock. Plaintiff argued the constitutionality of the roadblock with Defendants, who realized that Plaintiff was not a drunk driver. When Defendants requested Plaintiff's identification papers, he refused to produce them. Defendants arrested Plaintiff and cited him for violations of A.R.S. § 28-1595(B) (failure to provide driver license or evidence of identity) and A.R.S. § 28-622(A) (failure to comply with police officer).

Under tribal law, roadblocks to check for sobriety, driver's licenses, and registration are permitted, as are roadblocks to search for possession of alcohol, which is prohibited in much of the Tohono O'odham Nation. (*Nation v. Ahill, et al.*, No. CR12-1762-88 (Jud. Ct. Tohono O'odham Nation Oct. 23, 1989), Exh. 2, Defs.' SOF.) Defendants were authorized to enforce tribal law against Indians affiliated with any tribe, and to investigate for violations of state and federal law. (Ford. Aff. ¶ 16, Exh. 4, Defs.'s SOF.) Although tribal law does not authorize enforcement of state or federal law, it does authorize Defendants to eject such violators from tribal boundaries or turn them over to state or federal custody. (*Id*.) The State of Arizona certified Defendants to enforce Arizona law. (*Id*.) The State also issues driver's licenses and registrations to tribal members. (*Id*. ¶ 15.)

Defendant Tohono O'odham Chief of Police Richard Saunders ordered Defendants to conduct the December 20, 2002 roadblock in order to check for sobriety and other tribal violations. (Saunders Aff. ¶ 7, Exh. 1, Defs.'SOF (May 27, 2005).) Arizona officials were not involved in the planning or execution of the roadblock. (Saunders Decl. ¶ 8, Attached to Saunders Aff., Exh. 1, Defs.' SOF.) Defendants assert that U.S. Border Patrol and U.S.

Customs Agents did not plan or set up the roadblock, but were called to the scene two hours after it began due to the discovery of drug and immigration violations. (*Id*. ¶ 8; Ford Aff. ¶ 17, Exh. 4, Defs.' SOF; Ford. Decl. ¶ 6, Attached to Ford. Aff., Exh. 4, Defs.' SOF.) A similar practice is followed in cases of routine traffic stops that uncover federal violations. (Traviolia Aff. ¶ 5, Exh. 5, Defs.' SOF.)

During the roadblock, Defendants stopped vehicles, questioned drivers to determine whether they were drunk, and requested identification papers. (Traviolia Aff. ¶ 5, Exh. 5, Defs.' SOF.) Defendants would ask all stopped drivers the same questions. (Bressi Dep. at 118:19–22, Exh. 7, Defs.' SOF.) Defendants cited tribal members into tribal court, and non-Indians violating Arizona law into Pima County Justice Court at Ajo pursuant to Defendants' Arizona certification. (¶ 15, Defs.' SOF.) When federal violations were uncovered, Defendants referred them to federal officials. (Ford Aff. ¶ 17, Exh. 4, Defs.' SOF; Traviolia Aff. ¶ 5, Exh. 5, Defs.' SOF.)

Ten reports of detentions or arrests exist from the roadblock in question, seven of which describe the events in detail. (Exh. 4, Pla.'s SOF (May 9, 2005).) One of the reports describes Plaintiff's arrest, which began around 5:00 p.m. (*Id*., IR #:021220087), and three more apparently involved tribal violations. The other three reports involved violations of tribal and/or federal law. Around 4:40 p.m., a tribal member driving a car with a temporary plate was unable to produce a valid driver's license on request. (*Id*., IR #:021220083.) The officer discovered that the two passengers in the vehicle with her were undocumented aliens. The tribal member was cited under tribal traffic law for a suspended license, and the aliens were released into the custody of the U.S. Border Patrol. Around 6:00 p.m., a driver who

possessed a suspended license was detained. (*Id*., IR #:021220094.) As the vehicle approached, a U.S. Customs Agent was helping Defendants direct traffic. (Exh. 1 at 8, Pla.'s Reply, (July 12, 2005).) When the driver exited the vehicle, the officer saw a blue cloth covering the floorboard of the entire backseat. The officer asked if he could look under the cloth and in the trunk, at which point the driver admitted to possessing 175 pounds of marijuana. The two occupants of the vehicle were transported to the U.S. Customs office in Robles Junction. Finally, around 8:30 p.m., two Spanish-speaking males approached in a stolen pickup truck, the driver did not have a driver's license or registration, and both admitted to not being U.S. citizens. ( IR #:021220111, Exh. 4, Pla.'s SOF.) The two men were transferred into the custody of U.S. Border Patrol on the scene.

When Plaintiff was being questioned in his vehicle and was arguing with Lt. Ford, U.S. Customs Agent Bill Dreland approached on his own accord and told Plaintiff to comply with Lt. Ford's demands. (Bressi Dep. at 128:20–129:8, Exh. 7, Defs.' SOF). Plaintiff responded that Dreland had no authority in the situation, and Lt. Ford replied that the operation was a "multijurisdictional task force." (*Id*. at 132:9–11.) Lt. Ford denies having made this statement. (Ford Decl. ¶ 3, Exh. 12, Defs.' SOF.) Plaintiff's friend, whom he had called to the scene, witnessed U.S. Border Patrol Agents standing near the lines of vehicles at the checkpoint, looking into cars and then talking to the Tohono O'odham officers who were conducting the primary questioning. (Tubbiolo Aff. ¶ 11, Exh. 12, Pla.'s SOF.) After Plaintiff's arrest, Plaintiff saw Defendants search the trunks of several vehicles. (Bressi Aff. ¶ 4, Exh. 6, Pla.'s SOF.) In one officer's arrest report, he said that the purpose of the roadblock included finding illegal aliens and drugs, but all other officers described the

roadblock as simply a sobriety or license checkpoint. (¶ 25, Pla.'s SOF.)

*§ 1983 Claims*

Legal Standard

1. Tribal Sovereign Immunity

Immunity from suit "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002) (quoting *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981)). Tribal officers have inherent authority to stop and exclude trespassers on tribal land. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). "Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro v. Reina*, 495 U.S. 676, 697 (1990). Tribes do not have inherent jurisdiction to prosecute non-Indian offenders in victimless crimes. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211–12 (1978).

Nonetheless, for both official and individual capacity claims involving alleged actions pursuant to state authority, tribal defendants do not act within their "scope of authority," if they act "under the color of state law," as determined by "well established" § 1983 principles. *Evans v. McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989).

*Evans* involved allegations that police officers of the City of Browning, Montana, who were also under contract as BIA/tribal officers, had violated the constitutional rights of plaintiffs, and that "individual tribal defendants" had acted in concert with the City/tribal officers in the same conduct. *Id.* at 1348. *Evans* held that tribal defendants do not act within their "scope of authority," and therefore are not entitled to tribal sovereign immunity, if they

act "under color of state law" as determined by "well established" principles of 42 U.S.C. § 1983 litigation. *Id*. at 1347–48. Applying § 1983 principles, *Evans* concluded that dismissal of the City/tribal officers was not proper because: (1) the officers carried out their activities pursuant to both a tribal court order and a city ordinance; (2) the complaint "explicit[ly] alleg[ed] official state authority"; and (3) a "'peculiar' law enforcement situation" existed in which the officers were contracted as both City and tribal officers. *Id*. In addition, the Court reversed dismissal of the individual tribal defendants, because they were alleged to have acted "in concert" with the City/tribal officers—another basis for finding § 1983 liability. *Id*. at 1348 n.9.

2. Dismissal for Lack of Jurisdiction

Defendants move for dismissal of the § 1983 claims pursuant to Fed. R. Civ. P. 12(b)(1), arguing that tribal sovereign immunity removes these claims from the Court's jurisdiction. Defendants rely on facts outside the complaint. Factual attacks to jurisdiction usually permit the Court to weigh the extrinsic evidence and make factual determinations. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Yet the Court may not resolve factual disputes "when the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits." *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 846 (9th Cir. 1996). This is true in the instant case because the "color of Arizona law" issue "provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139–40 (9th Cir. 1983). Therefore, in considering Defendants' motion, disputed facts must be treated

in the posture of Rule 56 summary judgment, where the Court must view the evidence in the light most favorable to Plaintiff, and must leave genuine issues of material fact for determination at trial. *Metro Industries*, 82 F.3d at 846; *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1140 (9th Cir. 2003). Defendants must show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Discussion

No genuine issue of fact supports the allegation that the roadblock and its incidents were conducted under color of Arizona law. The roadblock was conducted by tribal officers on a road running through tribal land, with no Arizona officers present. Although Defendants cited and arrested Plaintiff under Arizona law, those actions did not occur until after Plaintiff started arguing with the officers and was taken aside for further questioning. The mere fact that Defendants could foresee that some persons who will be stopped, such as Plaintiff, are Arizona rather than tribal residents, does not transform such a roadblock into action under color of Arizona law.

Bivens *Claims*

Relation Back of Second Amended Complaint

Defendants argue that the *Bivens* claims are barred by the statute of limitations and do not "relate back" to the first amended complaint under Fed. R. Civ. P. 15(c).

In considering Rule 15(c), "the emphasis is not on the legal theory of the action, but whether the specified conduct of the defendant, upon which the plaintiff is relying to enforce his amended claim, is identifiable with the original claim." *F.D.I.C. v. Jackson*, 133 F.3d 694, 702 (9th Cir. 1998) (quoting *Gelling v. Dean (In re Dean)*, 11 B.R. 542, 545 (9th Cir.

BAP 1981), *aff'd*, 687 F.2d 307 (9th Cir. 1982)). The Court must determine whether the two complaints "share a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question." *Id*. (quoting *Martell v. Trilogy Limited*, 872 F.2d 322, 327 (9th Cir. 1989)).

Plaintiff's second amended complaint relates back to his first. Although he asserts a separate legal theory, the theory itself is parallel to the § 1983 theory asserted in his first amended complaint. The underlying event is also the same, as are the constitutional violations he claims to have suffered. The difference is between the facts at the scene that would support an allegation of action under color of Arizona law, upon which Plaintiff premised his first amended complaint, and the facts at the same scene that would support an allegation that the same action occurred under color of federal law. These facts "share a common core" sufficient to give notice to Defendants and relate his *Bivens* claim back to the filing of his first amended complaint.

Legal Standard for *Bivens* Claim

*Bivens* is the federal state-action equivalent of § 1983, to which claims the Court applies the same basic legal principles. *See, e.g., Ward v. Caulk*, 650 F.2d 1144, 1148 (9th Cir. 1981). Defendants argue that their actions were not carried out under color of federal law, just as in their motion to dismiss the § 1983 claims, Defendants argued that their actions were not carried out under color of Arizona law.

Action under color of federal law can occur where "joint action" exists between the federal government and a non-federal party. Joint action is present where the non-federal party's actions are "inextricably intertwined" with federal action, necessitating a showing of

"substantial cooperation" between the entities. *Brunette v. Humane Society of Ventura Cty*, 294 F.3d 1205, 1211 (9th Cir. 2002) (quoting *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 (9th Cir. 1996), and *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989)). The federal government must be "a significant participant, if not the chief actor," in order to find joint action. *See Cabrera v. Martin*, 973 F.2d 735, 743 (9th Cir. 1992). Joint action can also be shown where the federal government has "far insinuated itself into a position of interdependence with" the non-federal party. *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003).

The "symbiotic relationship" test is met when "a position of interdependence" exists between the federal and the non-federal actors, such that they are considered "joint participant[s] in the challenged activity." *Brunette*, 294 F.3d at 1213. The essence of a symbiotic relationship is "substantial coordination and integration." *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

In *Cabrera v. Martin*, 973 F.2d 735, 743-44 (9th Cir. 1992), the Ninth Circuit compared two cases from the Seventh Circuit that illustrate whether officials of one jurisdiction have acted under color of the law of another jurisdiction. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), involved federal law enforcement officers who were found to have "played a significant role" with the Chicago Police Department in a raid on the Black Panther Party. *Cabrera*, 973 F.2d at 744. *Hampton* permitted a § 1983 claim against the federal officers because "evidence in the instant case indicates that the federal and state defendants shared in instigating and preparing for the raid." *Hampton*, 600 F.2d at 623.

*Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976), on the other hand, involved St.

Louis Police Department officers, assigned full-time to a federal agency, who executed a narcotics raid. Other, purely state officers were also present as back-up and joined in the planning before the raid. *Askew* held that, based on the totality of the circumstances, the state/federal officers were not acting under color of state law because "the impetus for, and the execution of, the actions complained of derives from federal officials and not, . . . at least partly from state officials[;] the mere presence of state agents in a support status does not turn a federal law enforcement endeavor into state action sufficient to support a § 1983 claim against the federal agents whose official actions necessarily stand on an independent, federal law bottom." *Askew*, 548 F.2d at 678.

Notwithstanding these tests, no "'set of circumstances [is] absolutely sufficient, for there may be some countervailing reason'" not to find action under color of federal law. *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 295–96 (2001)).

Discussion

Defendants have shown that none of their actions were conducted under color of federal law. First, the evidence indicates that when Defendants arrested and cited Plaintiff they were acting under color of Arizona law, but not of federal law.

Regarding the roadblock, Plaintiff's strongest evidence is as follows:

- Customs Agent Dreland intervened in Plaintiff's argument with Lt. Ford.
- In response, Lt. Ford said the roadblock was a "multi-jurisdictional task force."
- Border Patrol Agents looked inside vehicles in line at the checkpoint.
- A Customs Agent at one point helped direct traffic.

These facts, even taken in Plaintiff's favor, do not create a genuine issue regarding whether the roadblock was in part a federal project. Action under color of federal law requires "substantial coordination," with the federal government undertaking "significant participation" in the event. The singular incident of a Customs Agent directing traffic, or spontaneously intervening in Plaintiff's arguments with police, do not give rise to the needed federal involvement in the roadblock. Plaintiff's friend, who saw Border Patrol Agents looking in vehicles, had no knowledge of the particular circumstances in which such searches were taking place, including whether certain drivers had already failed to produce identification. Lt. Ford's comment to Plaintiff during his argument with Dreland is insufficient to overcome the overwhelming evidence of tribal purposes behind the roadblock. When federal offenses were uncovered the federal officials did have jurisdiction, so in that sense there were "multi-jurisdictional" exercises of authority at the scene.

Plaintiff relies heavily upon the apparently continual presence of federal officers, but the record explains their presence by the frequent, regular discoveries of federal violations. No issue of fact exists to show that the officers were more than incidentally present, as in *Askew*, instead of "play[ing] a significant role" in "instigating and preparing for" the roadblock, as in *Hampton*. Federal officers played mildly active "support status" roles, but nothing indicates that they decided whether or when to execute the roadblock, or that they arrived before they were called. The roadblock itself was founded on the "independent, [tribal] law bottom" of the inherent tribal authority to police tribal land, and cannot fairly be said to have been an action of the federal government. *Askew*, 548 F.2d at 678.

The stopping, questioning, and vehicle searching by Defendants was authorized by

tribal law and needed no joint federal motive. All of the discoveries of federal violations occurred in the course of investigating and discovering violations of tribal or traffic law, which Defendants had the inherent authority to police. Although Plaintiff saw federal agents and vehicles at the scene when he arrived early in the evening, they had been needed when Defendants found undocumented aliens 20 minutes earlier. Calling federal officials to pick up violators is within the tribe's inherent authority. *See Duro*, 495 U.S. at 697. Case law does not require Defendants to drive suspects to another location before transferring custody to federal officials, nor are the federal officials forced to evacuate the scene if they know they will likely be called back minutes later. Mere transfer of custody of federal violators to federal officials, even on the scene, does not demonstrate that Defendants actions were "inextricably intertwined" with federal government actions.

Notably, such activity differs from the citation of Plaintiff under Arizona law, which the Court held is not protected by tribal sovereign immunity because it is authorized by Arizona law but not by tribal law. The vital interest of tribal police in preventing illegal activities in tribal boundaries, and the tribe's immunity from Constitutional oversight, are also "countervailing reason[s]" to find a lack of jurisdiction over Plaintiff's *Bivens* claims. *See Lee*, 276 F.3d at 554.

*Conclusion*

Plaintiff's § 1983 and *Bivens* claims relating to the roadblock, stop, questioning, and detention of Plaintiff are dismissed because no reasonable issue of material fact exists that such actions were committed under color of Arizona law or under the color of federal law.

The following claims from the second amended complaint remain:

(1) Plaintiff's § 1983 damages claims against Defendants in their individual capacities, and Plaintiff's § 1983 injunctive relief claims against Defendants in their official and individual capacities, relating to the citation and arrest of Plaintiff pursuant to Arizona law; and

(2) Plaintiff's claims pursuant to the Arizona Constitution.

Accordingly,

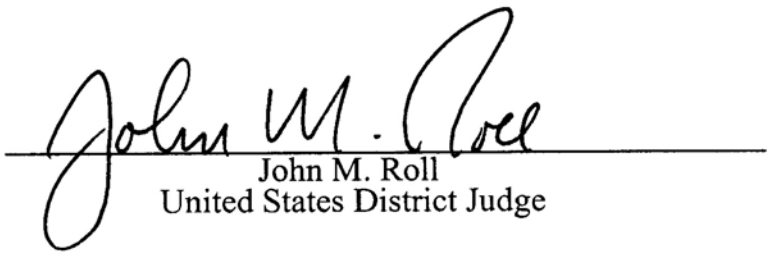
**IT IS ORDERED** that Defendants' motion to dismiss the § 1983 claims relating to the roadblock, stop, questioning, and detention of Plaintiff, is **GRANTED**. [Defendants' motion to dismiss, docket # 6, retains its status as granted in part and denied in part.]

**IT IS FURTHER ORDERED** that Defendants' motion to dismiss Plaintiff's *Bivens* claims [DOC # 44] is **GRANTED**.

**IT IS FURTHER ORDERED** that Defendants' motion for oral argument on pending motions [DOC # 53] is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff's motion for oral argument on pending motions [DOC # 62] is **DENIED.**

DATED this 26th day of September, 2005.



John M. Roll
United States District Judge