IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOHN DAVID GARCIA,

Plaintiff,

vs. CIV. No. 08-00295 JB/WDS

THE UNITED STATES OF AMERICA and
BEN GARCIA,

Defendants.

DEFENDANT UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) OR 12(b)(6)

Defendant United States of America, by and through its undersigned counsel, respectfully submits this Memorandum of Law in support of its Motion to Dismiss Plaintiff's Complaint for Damages (hereinafter "Complaint") as to the United States, pursuant to FED. R. CIV. P. 12(b)(1) or 12(b)(6). Specifically, the Complaint asserts that this Court has jurisdiction over Defendant United States of America pursuant to 28 U.S.C. §§ 1346(b), 2671-2680, the Federal Tort Claims Act ("FTCA"), and alleges that Plaintiff's "personal injuries . . . were proximately caused by the negligence, wrongful acts and omissions of a person deemed an employee of the United States [Defendant Ben Garcia], on December 9, 2006, as that employee was acting within the scope of his employment as a law enforcement officer of the Pueblo of Isleta." Complaint, ¶¶ 4, 7.

It is Defendant United States' contention that Defendant Ben Garcia was not within the scope of his employment as an Isleta Tribal Police Officer at the time of the incident which is the subject of this lawsuit and thus the FTCA does not apply. This

Court lacks jurisdiction over the United States. Moreover, even if Defendant Ben Garcia were acting within the scope of his employment at the time of the incident, his actions constituted an assault and battery. Defendant Ben Garcia, an Isleta Tribal Police Officer, is not a "federal law enforcement officer" for purposes of 28 U.S.C. § 2680(h), and thus the provisions of the FTCA do not apply. When a claim is barred by a § 2680 exception to the FTCA, the Court lacks subject matter jurisdiction to hear the case.

I. STATEMENT OF THE CASE

Plaintiff filed his Complaint on March 20, 2008, alleging that he suffered injuries as a result of an encounter with Defendant Ben Garcia on December 9, 2006. On that date, Plaintiff was at the St. Augustine Church in the Pueblo of Isleta for the wedding of his daughter. Complaint, ¶ 9. Before the wedding, Plaintiff entered another part of the church complex. *Id*., ¶ 10. Another group of people was using that area for a different wedding reception. *Id*. After entering the room, Plaintiff claims he was confronted by Defendant Ben Garcia, who told Plaintiff to leave that room. *Id*., ¶ 11. Plaintiff alleges that he then "felt a blow to his head which knocked him to the floor." *Id*., ¶ 13. He also alleges that after he fell to the floor from the blow, he was "kicked by someone among the assemblage of men who had accosted him." *Id*. Plaintiff further alleges that the blow was "delivered by Defendant Ben Garcia." *Id.* After this alleged incident, Plaintiff stood up from the floor and attended his daughter's wedding before going to the hospital emergency room. Complaint at ¶¶ 14-15. He was diagnosed with a broken jaw and required medical and dental care for his injury. *Id.* at ¶¶ 15-18.

II. UNDISPUTED MATERIAL FACTS

The United States submits that there is no genuine issue as to any of the material facts set forth below. The evidence supporting these facts is contained in the Complaint and the Exhibits attached hereto.

1. On December 9, 2006, Defendant Ben Garcia was at the St. Augustine Church within the Pueblo of Isleta attending a wedding reception. BIA Office of Law Enforcement Services, Professional Standards Division, Internal Affairs Report, Case Number: KOL 120-06-088, Exhibit A attached hereto, 9, 11.

2. Defendant Ben Garcia was not on duty with the Isleta Tribal Police Department at the time of the alleged incident. Exhibit A, 9, 11; FBI Civil Rights Investigation, Case Number 282A-AQ-60575 Exhibit B attached hereto, at 3, 13 - 15.

3. Defendant Ben Garcia was attending the wedding with his family. Exhibit B, at 15

4. Defendant Ben Garcia was not wearing his Isleta Police uniform, badge, nameplate, or other insignia, but instead was wearing wedding attire. Complaint, ¶ 12.

5. Plaintiff, who was attending his daughter's wedding at the St. Augustine Church, walked into the area of the church where a different wedding party was underway. *Id*., ¶ 10.

6. Defendant Ben Garcia told Plaintiff to leave the area. *Id.,* ¶ 11.

7. Plaintiff was injured in an altercation with several individuals. *Id*., ¶ 12.

III. RELEVANT LAW

A. Standards For Dismissal Under Fed. R. Civ. P. 12(b)(1) And 12(b)(6)

Rule 12(b)(1) of the Federal Rules of Civil Procedure empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." When making a Rule 12(b)(1) motion, a party may go beyond the allegations in the complaint to challenge the facts upon which jurisdiction depends by relying on affidavits or any other evidence properly before the court. New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995); Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995). A court has broad discretion to consider affidavits or other documents to resolve disputed jurisdictional facts under Rule 12(b)(1). Holt, 46 F.3d at 1003. In those instances, a court's reference to evidence outside the pleadings does not necessarily convert the motion to a Rule 56 motion. Id. (citing to Wheeler v. Hurdman, 825 F.2d 257, 259 n.5 (10th Cir.), cert. denied, 484 U.S. 986 (1987)). Where, however, the court determines that jurisdictional issues raised in a Rule 12(b)(1) motion are intertwined with the merits of the case, the motion should be resolved under either FED. R. CIV. P. 12(b)(6) or Rule 56. Franklin Sav. Corp. v. United States, 180 F.3d 1124, 1129 (10th Cir.), cert. denied, 528 U.S. 964 (1999); Tippet v. United States, 108 F.3d 1194, 1196 (10th Cir. 1997).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." When addressing a Rule 12(b)(6) motion, a court must accept as true all well-pleaded factual allegations in the complaint and view those allegations in the light most favorable to the non-moving party. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999); Yoder v. Honeywell Inc. 104 F.3d 1215, 1224 (10th Cir.), cert. denied, 522 U.S. 812 (1997). Although reasonable inferences raised in the pleadings must be

resolved in favor of the plaintiff, Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998), "unwarranted inferences drawn from facts or footless conclusions of law predicated upon them" are not accorded deference. Ryan v. Scoggin, 245 F.2d 54, 57 (10th Cir. 1957); see also Hall v. Belmon, 935 F.2d 1106, 1111 (10th Cir. 1991) (a "court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations"). A Rule 12(b)(6) motion will be granted only "if the plaintiff can prove no set of facts in support of a claim for relief." David v. City and County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996), cert. denied, 522 U.S. 858 (1997).

IV. ARGUMENT

Plaintiff bears the burden of demonstrating this Court's jurisdiction to hear his claims. "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182 189 (1936); see also Byrd v. EPA, 174 F.3d 239, 243 (D.C. Cir. 1999); Miller v. United States, 710 F.2d 656, 662 (10th Cir. 1983). It is also "axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983) (citations omitted); see also F.D..IC. v. Meyer, 510 U.S. 471, 475 (1994); United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941); Smith v. United States, 507 U.S. 197, 200 (1993). The terms of the United States' consent define the parameters of federal court jurisdiction to entertain suits brought against it. United States v. Orleans, 425 U.S. 807, 814 (1976); Ewell v. United States, 776 F.2d 246, 248 (10th Cir. 1985). When the United States waives its immunity from suit, a court should neither narrow the waiver, nor "take it upon [itself] to extend the waiver beyond that

which Congress intended." Smith, 507 U.S. at 203 (quoting United States v. Kubrick, 444 U.S. 111, 117-18 (1979)).

In 1946, Congress enacted the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees. Meyer, 510 U.S. at 475. Of significance, sovereign immunity is waived only for certain torts caused by an employee of the Government *while acting within the scope of his office or employment.* 28 U.S.C. § 1346(b). In 1990, Congress extended the FTCA waiver of sovereign immunity to allow the United States to be sued in tort for the negligent conduct of tribal employees that occurred in the performance of an Indian Self-Determination Act contract. Pub. L. 101-512, Section 314. However, this extension of the FTCA does not operate as a waiver of sovereign immunity in all respects.

Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims. United States v. Varig Airlines, 467 U.S. 797, 808 (1984). The waiver of immunity set forth in 28 U.S.C. § 1346(b) is subject to thirteen statutory exceptions enumerated in 28 U.S.C. § 2680. Kosak v. United States, 465 U.S. 848, 852 (1984).[1] Specifically, under section 2680(h), the United States retains its sovereign immunity with respect to "[a]ny claim arising out of assault, battery," and other enumerated intentional torts. The exception is, however, subject to the following:

> *Provided,* that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section

[1] Although liability under the FTCA generally depends on the law of the state where the allegedly negligent or wrongful act or omission occurred (28 U.S.C. § 1346(b)(1)), whether a claim is excepted by 28 U.S.C. § 2680(h) is a question of federal law. United States v. Neustadt, 366 U.S. 696, 705-06 (1961); Franklin v. United States, 992 F.2d 1492, 1495 (10th Cir. 1993); see also Molzof v. United States, 502 U.S. 301, 305 (1992) (meaning of term used in FTCA is, by definition, a federal question).

> 1346(b) . . . shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution . . . . For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. 2680(h). By this proviso, Section 2680(h) waives the defense of sovereign immunity for suits against the United States for certain intentional torts committed by its law enforcement officers acting within the scope of their employment. See Dry v. United States, 235 F.3d 1249, 1257 (10th Cir. 2000). The critical threshold issue is whether or not the alleged tortfeasor is a federal "investigative or law enforcement officer" as that term is specifically defined by 28 U.S.C. § 2680(h). An "investigative or law enforcement officer" is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." Dry, 235 F.3d at 1257.

A. Officer Ben Garcia Was Not Acting Within the Scope Of His Employment When the Alleged Tortious Conduct Occurred.

As with any jurisdictional issue, the party bringing suit against the United States bears the burden of proving that sovereign immunity has been waived. James v. United States, 970 F.2d 750, 753 (10th Cir. 1992). Plaintiff asserts that Defendant United States is liable for the actions of Defendant Ben Garcia, which resulted in Plaintiff's injuries. However, Defendant Ben Garcia was not on duty as an Isleta Police Officer at the time of the incident, and does not claim that he was on duty. Therefore, his actions alleged in the Complaint were not within the scope of his employment. This Court lacks jurisdiction to hear Plaintiff's claims as to the United States and those claims should be

dismissed pursuant to FED. R. CIV. P. 12(b)(1).

Under the FTCA, the United States has waived sovereign immunity only if an "employee of the Government" is "acting within the scope of his office or employment" when a negligent or wrongful act or omission occurred. 28 U.S.C. § 1346(b). Scope of employment under the FTCA is determined by the law of the place where the alleged negligent conduct took place. 28 U.S.C. § 1346(b); see also Williams v. United States, 350 U.S. 857 (1955); Henderson v. United States, 429 F.2d 588, 590. (10th Cir. 1970). Since the acts alleged by Plaintiff occurred in New Mexico, New Mexico law as to scope of employment governs whether Defendant Ben Garcia was acting within the scope of his employment when he allegedly struck the Plaintiff.

In New Mexico, an employee's acts are within the scope of his employment if the act "was something fairly and naturally incidental to the employer's business assigned to the employee," and the act "was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee." Cain v. Champion Window Co. of Albuquerque, 164 P.3d 90, 94 (N.M. App. 2007) (citing UJI 13-407 NMRA). Scope of employment is an issue of fact that a court must resolve in each case in light of its particular facts. Nabors v. Harwood Homes, Inc., 423 P.2d 602, 603 (N.M. 1967); Medina v. Fuller, 971 P.2d 851, 856 (N.M. App. 1998).

Isleta law enforcement officers perform law enforcement duties pursuant to an Indian Self-Determination and Education Assistance Act ("ISDEAA") contract with the Bureau of Indian Affairs to provide law enforcement services to Pueblo of Isleta

residents. 638 Contract CTM20T70521 between BIA-Southern Pueblos Agency and Pueblo of Isleta, C-2 Statement of Work, at 20, Exhibit C attached hereto. Individuals performing law enforcement duties pursuant to the contract "shall be readily and constantly identifiable to the public *while on duty* through visible badges, nameplate, and Isleta Police patches that shall be worn with [the] approved Isleta Police uniform." *Id*., Monitoring Plan, 2, Military Identification, at 21, emphasis added. Isleta Police Officers are *not* "on duty" twenty-four hours a day.

At the time of the incident alleged by Plaintiff, Defendant Ben Garcia was attending a private wedding as a guest and was not on duty as an Isleta Tribal Police Officer. Declaration of George Jojolla, Chief of Police for the Isleta Police Department, Exhibit D attached hereto. He was not acting within the scope of his employment as a tribal law enforcement officer. *Id*. People at the wedding reception he was attending were upset because other people not part of the reception were using the bathroom facilities in the room in which the wedding reception was taking place. His actions to extricate Plaintiff from the room arose entirely from a personal motive on his part. Cain,164 P.3d at 90. He was not readily identifiable to the public through a badge, nameplate or uniform as required by the 638 Contract, nor did he produce his badge at any time during the alleged altercation. *Id.*

While Plaintiff alleges that Defendant Ben Garcia told him "[d]on't you realize I am a police officer," Complaint, ¶ 12, that statement does not impute official capacity status as a tribal law enforcement officer, nor does such a statement indicate that Defendant Ben Garcia's actions were in any way taken on behalf of or related to his employer. Likewise, Plaintiff's attempt to "deem" Defendant Ben Garcia a federal

employee, Complaint ¶ 7, does not establish that Defendant Ben Garcia's actions on December 9, 2006 at the wedding reception were incident to his employment. Defendant Ben Garcia was not enforcing Pueblo or federal law, nor was he making any arrest, nor was a felony occurring in his presence. Defendant Ben Garcia was not performing work that was assigned to him by his employer, or work that was fairly and naturally incidental to his employer's business -- he was not on duty. Exhibit B, at 13. His actions at the wedding reception were taken solely for his personal reasons and were not in any way related to his employment as a tribal police officer "dealing with non-criminal behavior by members of the public." Complaint, at ¶ 36. Whatever training which might have been provided by the federal government or any other entity for purposes of his work as an Isleta Tribal Officer is irrelevant to the facts before this Court.

Defendant Ben Garcia was not engaged in any act on behalf of his employer when he allegedly attempted to remove Plaintiff from an area within the Isleta Church complex. He had no view towards furthering the Pueblo's interests when interacting with Plaintiff on December 9, 2006 and any action taken by Defendant Ben Garcia while off-duty arose from an external, independent, and personal motive. The fact that he identified himself as an Isleta Police Officer does not change the fact that he was not on duty and was not acting within the scope of his employment with the Isleta Police Department. There is no waiver of sovereign immunity, the provisions of 28 U.S.C. § 1346(b) do not apply, and this Court lacks jurisdiction to hear Plaintiff's claims against the United States and those claims should be dismissed.

B. Plaintiff's claims against Defendant United States are barred by 28 U.S.C. § 2680(h)

While the FTCA serves as a general waiver of the Untied States' immunity, 28 U.S.C. § 2680(h) is an exception to that general waiver. 28 U.S.C. § 2680(h) provides that "any claim arising out of . . . battery" is not subject to the waiver of sovereign immunity provided for in 28 U.S.C. § 2671-2679 (FTCA). However, this exception also provides that if the conduct was attributable to a federal law enforcement officer, the FTCA does apply and the exception is inapplicable. 28 U.S.C. 2680(h) defines "law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

In extending the FTCA to ISDEAA contracted programs, Congress did not modify the limitations contained in the FTCA, including exceptions to the waiver of sovereign immunity provided at 28 U.S.C. § 2680(h). When interpreting the law enforcement provision of section 2680(h)'s exception to the general waiver of immunity, courts have held that tribal officers are not federal investigative or federal law enforcement officers, absent the specific authority and actual enforcement of federal law. See Dry, 235 F.3d at 1256 (tribal police officers "were not acting as federal officers or otherwise under color of federal law. At all times material to this action, the tribal [officers] acted pursuant to their inherent criminal jurisdiction . . . neither the United States nor any other federal agency or officer is liable for the acts of the tribal [officers]"); Locke v. United States, 215 F. Supp. 2d 1033, 1038 (D.S.D. 2002) ("the federal government is not liable as a matter of law for certain intentional torts by [the tribal police officer], including assault."). See also Morsette v. United States, 26 Ind.L.Rep. 3052 (Sept 17, 1998)

(holding that tribal officers, while covered by a self-determination contract and considered federal employees for purposes of the FTCA by virtue of 25 U.S.C. § 450(f), were not federal law enforcement officers under section 2680(h)).

The existence of a Public Law 93-638 contract between a tribe and the BIA, such as the 638 Contract between the Isleta Pueblo and BIA, providing for law enforcement services does *not* automatically confer federal law enforcement authority upon tribal police departments. Trujillo v. United States, 313 F. Supp.2d 1146, 1150 (D.N.M. 2003). A tribal police officer is a federal law enforcement officer within the meaning of § 2680(h) *only if* the tribal officer is empowered to enforce federal law at the time of the alleged tortious conduct. When a court is determining the applicability of the battery exception to FTCA, it must look to the substance of the plaintiff's claims rather than the plaintiff's elected theory. Lorrits v. United States, 489 F. Supp. 1030 (D. Mass. 1980).

Because the Isleta Pueblo law enforcement program is funded under an ISDEAA contract, Defendant Ben Garcia would be considered a federal employee for purposes of the FTCA, *only* if he had been acting within the scope of his employment at the time of the alleged tortious conduct *and* if his actions could subject the United States to liability. *See* 25 U.S.C. § 450f, note. However, at the time of the incident in question, Defendant Ben Garcia was not acting within the scope of his employment and, even if he were within scope for FTCA purposes, he was not a federal law enforcement officer as defined by section 2680(h). The actions he took with respect to Plaintiff were not in any way related to the enforcement of federal law. Police officers of the Isleta Pueblo Police Department assist the Bureau of Indian Affairs and other federal law enforcement officers in investigating federal offenses occurring on the Isleta Indian Reservation.

Exhibit C, at 21. They.are not authorized by law to execute searches, to seize evidence or to make arrests for violations of federal law absent specific authorization to do so. Exhibit D. As Judge William P. Johnson noted in Trujillo, "[n]othing in the ISDEAA, or in relevant case law, suggests that the mere existence of a Public Law 93-638 contract between BIA and a tribe for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments." Trujillo, 313 F. Supp. 2d at 1150. See also, Platero v. United States, Civ. No. 05-398 LH/RHS (D.N.M. Nov. 21, 2006 "Memorandum, Opinion and Order," Doc. No. 43.)

C. Exhaustion Of Tribal Court Remedies

Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978); Montana v. United States, 450 U.S. 544, 566 (1981); Enlow v. Moore, 134 F.3d 993, 996 (10th Cir. 1998) (stating that "civil jurisdiction over non-Indians on reservation lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute'") (citation omitted).

The Supreme court, citing the promotion of tribal self-government and principles of comity (as opposed to a jurisdictional prerequisite), has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction.[2] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16 (1987). See

[2] It should be noted that tribal courts cannot entertain § 1983 suits. Nevada v. Hicks, 533 U.S. 353, 369 (2001). A § 1983 action is unavailable "for persons alleging deprivation of constitutional rights under color of tribal law." Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006) citing to R. J. Williams Co. v. Ft. Belknap Hous. Auth., 719 F.2d 979, 982 (9th Cir. 1983).

Burrell v. Armijo, 456 F.3d 1159, 1174 (10th Cir. 2006); Texaco Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993) (noting that "[w]hen the activity at issue arises on the reservation, [exhaustion] policies almost always dictate that the parties exhaust their tribal remedies before resorting to a federal forum"); Smith v. Moffett, 947 F.2d 442, 444 (10th Cir. 1991) (stating that application of the exhaustion requirement does not depend on the existence of a pending action in a tribal court).

This exhaustion policy provides a tribal court the first opportunity to examine its own jurisdiction, but is subject to the following exceptions: (1) "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,'" Nat'l Farmers Union Ins, Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n. 21 (1985) (internal citations omitted); (2) "where the [tribal court] action is patently violative of express jurisdictional prohibitions," *id*; (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction," *id*.; (4) "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by [the main rule established in Montana v. United States]," Strate v. A-1 Contrs., 520 U.S. 438, 459 n. 14 (1997); or (5) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement '"would serve no purpose other than delay,'" Hicks, 533 U.S. at 369 (internal citations omitted). Allegations of local bias and tribal court incompetence, however, are not exceptions to the exhaustion requirement. Iowa Mut., 480 U.S. at 19. After exhaustion is completed, litigants may seek federal court review of a tribal court's ruling that it has jurisdiction. Iowa Mut., 480 U. S. at 19; Nat'l Farmers, 471 U.S. at 853. But "[u]nless the district court finds the tribal court lacked jurisdiction or withholds comity for some

other valid reason, it must enforce the tribal court judgment without reconsidering issues decided by the tribal court." AT&T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 905 (9th Cir. 2002) (citing Iowa Mut., 480 U.S. at 19.

In the case before this Court, the alleged incident occurred in the St. Augustine Church on Isleta Pueblo between a non-Indian (Plaintiff) and a Tribal Member (Defendant Ben Garcia). Exhibit B at 9-11. Based on the relevant law, it appears likely that the Isleta Tribal Court has jurisdiction over this matter. Plaintiff has not filed an action in Isleta Pueblo Tribal court and thus has failed to exhaust his tribal court remedy prior to filing this action in Federal court. Plaintiff's Complaint should be dismissed for a failure to exhaust tribal court remedies.

CONCLUSION

Defendant Ben Garcia was not acting within the scope of his employment at the time of the alleged incident and, even if the Court determines that he was acting within the scope of his employment, he was not acting as a federal "investigative or law enforcement officer." The United States is not liable for the acts of Defendant Ben Garcia. Therefore, this Court lacks subject matter jurisdiction over Plaintiff's claims against Defendant United States of America. Plaintiff's cause of action and Complaint as to the United States should be dismissed.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

Filed Electronically 1/9/2009
JAN ELIZABETH MITCHELL
Assistant United States Attorney
DORI E. RICHARDS
Special Assistant U. S. Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274
jan.mitchell@usdoj.gov

I HEREBY CERTIFY that on January 9, 2009, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Brad D. Hall, Attorney for Plaintiff John David Garcia
E-mail: Brad@bhallfirm.com
Robert B. Martinez, Attorney for Plaintiff John David Garcia
E-mail: rbmesqnm@aol.com
Tim Vollman, Attorney for Plaintiff John David Garcia
E-mail: Tim_Vollmann@hotmail.com
By first class mail, postage prepaid:

Ben Garcia
1505B State Road 314
Albuquerque, NM 87105

/s
JAN ELIZABETH MITCHELL
Assistant U.S. Attorney

N:\CLarson\Mitchell Court\Garcia\Memorandum of law.wpd