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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Gregory Russell,  
Plaintiff,

v.

United States of America,  
Defendant.

CIV-08-8111-PCT-MHM

**DEFENDANT'S MOTION TO  
DISMISS COMPLAINT PURSUANT  
TO RULES 12(b)(1) AND 12(b)(6) OF  
THE FED. R. CIV. P.**

The defendant United States, by and through undersigned counsel, respectfully requests that the court dismiss the complaint in this matter pursuant to Rule 12(b)(1) Fed. R. Civ. P. and Rule 12(b)(6) Fed. R. Civ. P. as the Court lacks subject matter jurisdiction over this matter, and the Complaint fails to state claims upon which relief can be granted. Defendant's motion is based upon the attached memorandum of points and authorities.

Respectfully submitted this 5<sup>th</sup> day of March, 2009.

DIANE J. HUMETEWA  
United States Attorney  
District of Arizona

*s/ Patrick J. Schneider*  
PATRICK J. SCHNEIDER  
Assistant U.S. Attorney

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**MEMORANDUM OF POINTS AND AUTHORITIES**

3

**Facts:**

4 Plaintiff, Gregory Russell, an enrolled member of the Hualapai Indian Tribe, alleges  
5 in the Complaint that he was assaulted by Police Officers of the Hualapai Nation on May 21,  
6 2006, resulting in injuries to him. Plaintiff erroneously asserts that the Hualapai Nation is  
7 owned by the United States, and that the Hualapai Police Officers were officers of the  
8 Bureau of Indian Affairs and thus employees of the United States against whom intentional  
9 torts may be brought pursuant to 28 U.S.C. § 2680(h).

10 As the attached affidavit of Selanhongva McDonald, Special Agent in Charge of the  
11 Bureau of Indian Affairs Office of Law Enforcement clearly indicates, the officers named in  
12 the Complaint were officers of the Hualapai Nation Police Department, and they were not  
13 certified and commissioned by the Bureau of Indian Affairs to enforce federal laws within  
14 the Hualapai Nation in May of 2006. (Affidavit of Selanhongva McDonald, paragraph 3,  
15 attached as Exhibit 1). Instead, these officers were authorized only to enforce Hualapai tribal  
16 code violations on May 21, 2006. Indeed, the attached booking sheet which was prepared  
17 after Plaintiff was arrested confirms that Plaintiff was arrested based upon Hualapai Nation  
18 tribal code violations. (Coconino County Detention Facility Booking Report, see Charge  
19 Codes, attached as Exhibit 2.)

20

**Legal Analysis:**

21 “It is undisputed that Indian tribes have power to enforce their criminal laws against  
22 tribe members.” *United States v. Wheeler*, 435 U.S. 313, 322 (1978). The Supreme Court  
23 has squarely rejected the argument that this power derives from a delegation by the federal  
24 government, holding instead that the power is inherent in tribal sovereignty. *Id.* at 322-23.

25 The Federal Tort Claims Act (28 U.S.C. § 1346(b)(1)) allows injured persons to sue  
26 for torts committed by federal employees while acting within the scope of their office or  
27

1 employment. Under the intentional torts exception to the FTCA, the general waiver of  
2 sovereign immunity effected by the Act only extends to suits for intentional torts such as  
3 assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process  
4 only if the conduct of the investigative or law enforcement officers of the United States  
5 Government is involved. (*See* 28 U.S.C. 2680[h]). Title 28, United States Code, Section  
6 2680(h) defines investigative or law enforcement officer as “any officer of the United States,  
7 who is empowered by law to execute searches, to seize evidence, or to make arrests for  
8 violations of Federal law.”

9       25 C.F.R. § 12.21(b) states that “[t]ribal law enforcement officers operating under a  
10 BIA contract or compact are not automatically commissioned as Federal officers; however,  
11 they may be commissioned on a case-by-case basis.” Under a 638 contract, BIA is  
12 authorized to delegate the responsibility of enforcing federal law on Indian lands to tribal  
13 police. *See Hopland Band of Pomo Indians v. Norton*, 324 F.Supp. 2d 1067, 1068 (N.D. Cal.  
14 2004). However, to do so, the BIA must approve and issue federal commissions called  
15 “special law enforcement commissions” or “SLECs” to individual tribal officers determined  
16 to be qualified on a case-by-case basis. *Id.* Absent such commissions, tribal officers are not  
17 “investigative” or “law enforcement officers” as defined under 28 U.S.C. § 2680(h) which  
18 sets forth a narrow intentional torts exception to the FTCA. Thus, suits against the United  
19 States pursuant to the Federal Tort Claims Act seeking to hold the United States liable for  
20 intentional torts of tribal law enforcement officers committed in the course of their  
21 enforcement of tribal law have been dismissed for lack of subject matter jurisdiction. *See*  
22 *Dry v. United States*, 235 F.3d 1249 (5<sup>th</sup> Cir. 2000); *Hebert v. United States*, 438 F.3d 483  
23 (5<sup>th</sup> Cir. 2006); *Locke v. United States*, 215 F.Supp. 2d 1033 (D.S.Dak.2002); *Serrano v.*  
24 *United States*, –F.Supp. 2d.—, 2008 WL 343490 (S.D. Fla.); and *Boney v. Valline*,  
25 –F.Supp.2d.—, 2009 WL 302053 (D.Nev.). As the Court indicated in dismissing the  
26 Complaint in *Boney v. Valline*, –F.Supp.2d.—, 2009 WL 302053, “[i]f Defendant had arrived  
27 at the scene to enforce federal law, then there might be an argument that his conduct was in  
28

1 the exclusive prerogative of the federal government. . . .However, Defendant went to the  
2 scene to enforce tribal law against a member of the Tribe, which constitutes conduct within  
3 the Tribe's inherent sovereignty. In sum, Defendant was not performing a function that was  
4 traditionally the exclusive prerogative of the federal government."

5  
6 **Conclusion:**

7 In this matter there is not even a question of whether the Hualapai tribal police  
8 officers named in the Complaint were acting to enforce tribal or federal law. The attached  
9 Affidavit of BIA Special Agent in Charge clearly indicates that the Hualapai police officers  
10 did not have the certification or authority to enforce federal law at the time of the alleged  
11 events in 2006. (Affidavit of Selanhongva McDonald, paragraph 3, attached as Exhibit 1).  
12 Indeed, the attached booking sheet confirms that Plaintiff was arrested for violations of tribal  
13 law. (Coconino County Detention Facility Booking Report, see Charge Codes, attached as  
14 Exhibit 2.) As such, they are not "law enforcement officers" as defined in 28 U.S.C.  
15 §2680(h), and the FTCA intentional torts exception to sovereign immunity of the United  
16 States does not apply.

17 Wherefore, Defendant would respectfully request that the court dismiss the Complaint  
18 in this matter as it does not have subject matter jurisdiction over the alleged acts, and as the  
19 Complaint fails to state a claim for which relief may be granted.

20  
21 Respectfully submitted this 5<sup>th</sup> day of March, 2009.

22  
23 DIANE J. HUMETEWA  
United States Attorney  
District of Arizona

24  
25 s/ Patrick J. Schneider  
26 PATRICK J. SCHNEIDER  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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*s/Melanie McGeary*  
Office of the U.S. Attorney

# **EXHIBIT 1**

1 DIANE J. HUMETEWA  
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District of Arizona

2 PATRICK J. SCHNEIDER  
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6  
7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF ARIZONA  
9

10 Gregory Russell,

11  
12 Plaintiff,

13 v.

14 United States of America,

15 Defendant.  
16

CIV-08-8111PCT-MHM

**AFFIDAVIT OF  
SELANHONGVA MCDONALD**

17 STATE OF ARIZONA )  
18 ) ss.  
19 COUNTY OF MARICOPA )

20 I, Selanhongva McDonald, based upon personal knowledge and based upon my  
21 responsibility for authorizing and overseeing the federal 638 contracts with Tribal Police  
22 agencies within the District of Arizona, do hereby declare and state as follows:

23 1. I am currently the Special Agent in Charge of the Bureau of Indian Affairs  
24 Office of Justice Services located in Phoenix, Arizona. As the Special Agent in Charge, my  
25 duties include the authorization and oversight of Federal monies provided to Tribal Law  
26 Enforcement Agencies within Arizona pursuant to the Indian Self-Determination and  
27 Education Assistance Act of 1975, Public Law 93-638, as well as oversight of the  
28

1 certification process of tribal law enforcement officers within Arizona to enforce federal  
2 criminal laws. I held this position and was working in this same capacity in May of 2006.

3       2. In order for tribal law enforcement officers within Arizona to become certified  
4 by the Bureau of Indian Affairs to enforce federal criminal laws within their tribal  
5 jurisdiction, it is required that they participate in and successfully complete a course of  
6 training designed to familiarize them with the federal laws and regulations, policies and  
7 procedures. This training is normally provided at the Bureau of Indian Affairs, United States  
8 Indian Police Academy and the United States Attorney's Office. Upon successful  
9 completion of this course of training, a tribal law enforcement officer will then submit an  
10 application with all requested information and after review of application for accuracy, is  
11 then issued a Special Law Enforcement Commission ( SLEC) by the Bureau of Indian  
12 Affairs. Once issued, this commission authorizes that officer to enforce federal criminal law  
13 within their tribal jurisdiction. Absent receiving such training and having received BIA  
14 certification (evidenced by an SLEC card), tribal law enforcement officers are not authorized  
15 or privileged to enforce federal law within their communities.

16       3. Within Arizona, BIA Special Law Enforcement Commissions are issued to  
17 tribal law enforcement officers by me as the Special Agent in Charge of the Bureau of Indian  
18 Affairs, Office of Justice Services. In May of 2006, I know that no law enforcement  
19 officers working for the Hualapai Nation Police Department were in possession of BIA  
20 Special Law Enforcement Commissions, as none of the officers within that Agency had  
21 received and completed the necessary BIA training to receive such commissions. Therefore,  
22 neither Hualapai Nation Police Chief Francis Bradley, Sr.; Hualapai Nation Police Officer  
23 Francis Bradley, Jr.; nor Hualapai Nation Police Officer Brian Miller were authorized to  
24 enforce federal criminal laws within the Hualapai Nation on May 21, 2006, or at any time in  
25 May of 2006.

26 ...

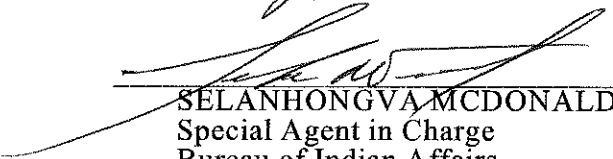
27 ...



1 Under penalty of perjury I hereby swear the preceding to be true and accurate.

2 Further, your affiant sayeth naught.

3 DATED this 27 day of FEBRUARY, 2009.

4  
5   
6 SELANHONGVA MCDONALD  
7 Special Agent in Charge  
8 Bureau of Indian Affairs  
9 Office of Justice Services

10 SUBSCRIBED AND SWORN to before me this 27th day of February,  
11 2009, by the affiant, Selanhongva McDonald.

12   
13 Notary Public

14 My Commission Expires:

15 July 31, 2010



## **EXHIBIT 2**

## Coconino County Detention Facility Booking Report

Last Name RUSSELL			First Name GREGORY			Middle Name NEIL			Booking Number			
Race AM	Sex M	Date Of Birth 1/4	BrAC Reading		Subject Address			City PEACH SPRING	State/Zip AZ 86434			
Phone		Height 5-08	Weight 185	Hair BLK	Eye BL	Ethnicity	Drivers Lic#	Lic State CA	SS#			
Employer Name			Address				Phone	Job Description				
Scars - Marks - Tattoos					AKA			Place Of Birth OAKLAND, CA.				
Relative Name			Address				Phone	Relationship				
Booking Date		Booking Time	Booking Officer		Finger Print Officer		Search Officer		Juvenile Y (N)			
Alerts		Court/Jurisdiction/Prat Type		Case Number 060521-1815			Place of Arrest RT. 166 M.P. 103					
Date/Time Of Arrest 05/21/06 2000		Arresting Agency HUALAPAI P.D.			Arresting Officer F. BRADLEY JR.			Officer Initial NCIC Complete				

## Arrest Comments

ON 05/21/06 SUBJECT WAS  
FOUND TO BE INTOXICATED WHILE  
IN CONTROL OF VEHICLE. SUBJECT WAS  
SUBSEQUENTLY FOUND TO BE IN POSSESSION  
OF DRUG PARATHERNALIN

CONSULAR NOTIFICATION	
MANDATORY? <input type="checkbox"/> YES <input type="checkbox"/> NO	
OFFERED? <input type="checkbox"/> YES <input type="checkbox"/> NO	
REQUESTED? <input type="checkbox"/> YES <input type="checkbox"/> NO	

(If there are multiple counts per charge, please enter separately.)

Charge Code 6.274	M F Possession of Description: DRUG PARATHERNALIN	Warrant#	Bond	Hold Agency Name HUALAPAI PD
Charge Code 6.279	M F OPEN Description: CONTAINER	Warrant#	Bond	Hold Agency Name HUALAPAI PD
Charge Code 6.278	M F PUBLIC Description: INTOXICATION	Warrant#	Bond	Hold Agency Name HUALAPAI PD
Charge Code 6.280	M F Description: D.U.I	Warrant#	Bond	Hold Agency Name HUALAPAI PD
Charge Code 6.75	M F VIOLENCE TO Description: POLICE OFFICER	Warrant#	Bond	Hold Agency Name HPD
Charge Code 6.236 A1	M F OBSTRUCTING Description: OFFICER	Warrant#	Bond	Hold Agency Name HPD
Charge Code	M F Description:	Warrant#	Bond	Hold Agency Name

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