

Trinette S. Sachrison (Arizona State Bar # 025232)
KAYE, ROSE & PARTNERS, LLP
402 West Broadway, Suite 1300
San Diego, CA 92101-3542
Tel: (619) 232-6555
Fax: (619) 232-6577

Bradley M. Rose (CA State Bar #126281 Admitted *Pro Hac Vice*)
KAYE, ROSE & PARTNERS, LLP
1801 Century Park East, Suite 1500
Los Angeles, CA 90067
Tel: (310) 277-1200
Fax: (310) 277-1220

Attorneys for Plaintiffs
LOREN R. SHIRK and JENNIFER ROSE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Loren R. Shirk and Jennifer Rose, individually
and as husband and wife,

Plaintiffs,

v.

United States of America, on behalf of its
Agency, Department of Interior, Bureau of
Indian Affairs,

Defendants.

Case No.: 09 CV 1786 PHX NVW

**PLAINTIFFS' RESPONSE TO
DEFENDANT UNITED STATES OF
AMERICA'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

[FRCP 12(B)(1)]

[ORAL ARGUMENT REQUESTED]

///

///

///

///

///

///

///

///

///

///

1 Plaintiff Loren R. Shirk and Jennifer Rose (hereinafter referred to as "Plaintiffs") hereby
 2 respond to Defendant United States of America's ("United States") motion to dismiss for lack
 3 of subject matter jurisdiction pursuant to Federal Rule 12(b)(1).

4 **I. INTRODUCTION**

5 The United States seeks a dismissal of the present matter on the premise the conduct of
 6 two Bureau of Indian Affairs (BIA) federal officers falls outside of the scope of the Federal
 7 Tort Claims Act (FTCA) because the federal officers were purportedly not acting in accordance
 8 with the terms and conditions of their enabling law enforcement contract between the BIA and
 9 the Gila River Indian Community (GRIC), "when they arrested a drunk driver outside the
 10 boundaries of the GRIC." United States' Motion to Dismiss ("MTD"), Page 1. The United
 11 States does not allege, nor can they allege, the two federal officers were acting outside the
 12 course and scope of their employment, but merely allege they were not empowered under their
 13 contract to perform police functions outside of the boundaries of the Gila River reservation.
 14 United States' MTD, Pages 10-11. Plaintiff's respectfully request this court deny the United
 15 States' motion on the basis: 1) the BIA's own published internal policies permit federal officers
 16 to perform police functions outside the boundaries of Indian country, 2) the BIA requires tribal
 17 officers to be AZ POST certified, which by state law allows federal officers to enforce Arizona
 18 law; for which the State of Arizona disclaims any liability arising from their actions, and 3) the
 19 federal officers never exercised jurisdiction under Arizona law but only attempted to stop an
 20 erratic driver and advise him to slow down, before he ran a red light and was arrested by the
 21 Chandler Police Department. Further, said actions were consistent with the scope of work
 22 delegated by the BIA to the GRIC. For these reasons and the arguments raised below, Plaintiffs
 23 respectfully request this Honorable Court deny the present motion to dismiss.

24 **II. FACTUAL BACKGROUND**

25 On October 19, 2006, at approximately 5:00 p.m., Officers Lancaster and Tanakeyoma
 26 were on the GRIC, traveling northbound on State Route 587 which becomes State Route 87
 27 (also known as Arizona Avenue.) State Route 87 is part of the National Highway System,
 28 which are roads designated by the Federal Government to be important to the nation's economy,

1 defense and mobility. *See* Exhibit A, Declaration of Bradley Rose ("Rose Decl."), attached
 2 hereto. The two Officers were returning from a mandatory police terrorism training class in
 3 Tucson, Arizona. *See* Exhibit B, Rose Decl., Affidavits of Hilario Tanakeyoma and Michael
 4 Lancaster submitted in support of Officers' Motion To Dismiss, Maricopa County Superior
 5 Court, Case No. CV2007-018088.

6 Officers Hilario Tanakeyowma and Michael Lancaster are, and at all relevant times were,
 7 police officers with the GRIC.¹ The GRIC operates its law enforcement program pursuant to
 8 Public Law 93-638, an Indian Self-Determination Agreement between the GRIC and the BIA
 9 executed in August of 1998, and funded in accord with the Self-Governance Compact executed
 10 in August 2003 between GRIC and the BIA. The Supervising Officer, Sergeant Hilario
 11 Tanakeyoma, was first employed with the GRIC Police Department in 1996, when it was a BIA
 12 administered department. *See* Exhibit C, Rose Decl., Deposition of Hilario Tanakeyoma, Page
 13 12, Lines 12-25. At this time, he was given a Special Law Enforcement Commission (SLEC)
 14 card as a permanent federal police officer. Exhibit C, Rose Decl., Tanakeyoma Deposition,
 15 15:6-13.

16 Detective Lancaster was first employed with the GRIC in 2001 and attended the Special
 17 Law Enforcement Training course four times throughout his tenure. *See* Exhibit D, Rose Decl.,
 18 Deposition of Michael Lancaster, Page 8, Lines 11-12, 24-25. Notably, in November 2005
 19 through February 2006, he attended the Federal Law Enforcement Training Center in Glynco,
 20 Georgia, as was required by the GRIC and BIA 638 Contract. Exhibit D, Rose Decl., Lancaster
 21 Deposition, 8:25-9:3. Upon completion of his course work, Detective Lancaster was
 22 commissioned by the BIA Office of Justice Services as a Special Agent Criminal Investigator
 23 (Series 1811). Exhibit D, Rose Decl., Lancaster Deposition, 27:1-8, 28:2-12. Based on his
 24 authority under his "1811" Commission, Detective Lancaster performed police work off of the
 25 reservation "numerous times" and is "unsure" what additional authority the SLEC card could
 26 bestow upon him. Exhibit D, Rose Decl., Lancaster Deposition, 24:21-25:2

27
 28 ¹ The Gila River Indian Community is a federally-recognized Indian Tribe. *See* Federal
 Register/ Vol. 67, No. 134/ Friday, July 12, 2002.

On October 19, 2006, during evening rush hour traffic, the Officers were driving a GRIC Police Department vehicle, which was assigned to Officer Tanakeyowma as a “take home vehicle,” and returning to Officer Tanakeyowma’s residence in Chandler from where they had car-pooled to their training course. The 638 contract mandates that each law enforcement officer “receive a minimum of forty (40) hours of local in-service training annually to meet training needs determined by the tribe and to keep abreast with the developments in field law enforcement.” *See* Exhibit E, Rose Decl., 638 Contract, Section 104.13. Further, the 638 Contract requires GRIC officers to be AZ POST certified which also requires law enforcement officers to receive continuing education. Exhibit E, Rose Decl., Section 102.2.

As the Officers were approaching the intersection of Chandler Heights and State Route 87, the Officers observed a white compact car driving erratically “weaving in and out of traffic.” The white car passed the Officers’ vehicle and came to a stop at the red light at Ocotillo and State Route 87/Arizona Avenue. The Officers later learned the car was being driven by a Leshedrick Sanford, a paroled felon.

At the intersection, Officers Lancaster and Tanakeyoma pulled up behind Sanford’s vehicle. Sanford was first in line at the red light. Officer Tanakeyoma reportedly instructed Officer Lancaster to exit the vehicle and “make contact.”² According to Officer Lancaster’s deposition testimony, his “intention was to approach [Sanford’s] vehicle on the passenger side and tell him to settle down or try and figure out what was going on with him.” Exhibit D, Rose Decl., Lancaster Depo., 51:2-6. As Officer Lancaster exited the vehicle and started to clear the door, Sanford punched the gas pedal, disregarding the red light, and drove into the intersection. Sanford’s vehicle struck Plaintiff Loren Shirk, who had rightfully entered the intersection on his motorcycle with the green light.

///

///

///

² Officer Tanakeyowma is Officer Lancaster’s superior. Exhibit C, Rose Decl., Tanakeyowma Depo., 31:3-4.

Officer Lancaster got back in the vehicle and Officer Tanakeyowa activated the SUV's grill lights and siren. They proceeded slowly into the intersection as cars were "sliding all around." Immediately thereafter, Sanford exited his vehicle and started to run, heading northbound on Arizona Avenue. Officer Tanakeyowma exited his vehicle and began chasing Sanford on foot, yelling "Stop, Police." Exhibit F, Rose Decl., Chandler Police Department Written Statements of Officers Lancaster and Tanakeyowma, dated 10/19/06. Officer Lancaster exited the vehicle to stop Sanford's car, which was heading toward oncoming traffic.

Officer Lancaster, successful in stopping Sanford's vehicle, returned to the police car and proceeded to tail the suspect; he drove past Officer Tanakeyowma and cut Sanford off. The two Officers ultimately apprehended Sanford with the assistance of a Hamilton High School security guard and detained him in handcuffs. Exhibit G, Rose Decl., Chandler Police Department Supplemental Incident Report, dated 10/19/06. Chandler Police arrived simultaneously to effectuate the arrest.³ As noted in the United States' MTD, Sanford pled guilty to one count of Aggravated Assault with prior felony convictions and one count of leaving the scene of a Serious Injury Accident in the Maricopa County Superior Court and was sentenced to 18 years in prison.

III. ARGUMENT

A. **The District Court Is Free To Weigh The Evidence And Satisfy Itself Of Its Power To Hear The Case**

In a Rule 12(b)(1) motion, the court is not confined by the facts contained in the four corners of the complaint. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). As the United States correctly notes, the Court may consider evidence presented with respect to the pending jurisdictional issues without converting the present motion to one for summary judgment. *Id.* However, if the motion is to be resolved on declarations alone, without an evidentiary hearing, the Ninth Circuit has held the complaint's factual allegations must be accepted as true.

///

³ When placed in the police car, Sanford assaulted Officer Lancaster by spitting on him. Exhibit G, Rose Decl.

1 *McLachlan v. Bell*, 261 F3d 908, 909 (9th Cir. 2001)(“Because no evidentiary hearing was held,
2 we accept as true the factual allegations in the complaint”).

3 **B. The FTCA Provides For A Cause Of Action For Personal Injury Resulting From**
4 **The Negligence, Wrongful Act Or Omission Of Any Federal Employee**

5 While the United States typically enjoys immunity from suit, the FTCA provides limited
6 waiver of sovereign immunity for suits brought alleging that a federal government employee’s
7 negligence, wrongful act or omission caused a person’s personal injury. Specifically, the FTCA
8 provides for:

9 civil actions on claims against the United States, for money damages, ... for injury or
10 loss of property, or personal injury or death caused by the negligent or wrongful act
11 or omission of any employee of the Government while acting within the scope of his
12 office or employment, under circumstances where the United States, if a private
person, would be liable to the claimant in accordance with the law of the place where
the act or omission occurred.

13 28 U.S.C. § 1346(b)(1). It is the exclusive remedy for torts committed by federal employees
14 during the course and scope of their employment. 28 U.S.C. § 2679(b)(1). For purposes of the
15 FTCA, an “employee of the Government” includes “persons acting on behalf of a federal
16 agency in an official capacity.” 28 U.S.C. § 2671. “Congress, in adopting the FTCA, sought to
17 prevent the unfairness of allowing the public as a whole to benefit from the services performed
18 by Government employees, while allocating the entire burden of government employee
19 negligence to the individual, ‘leav[ing] him destitute or grievously harmed’.” *Rayonier Inc. v.*
20 *United States*, 352 U.S. 315 319-320, 77 S.Ct. 374 (1957). Yet, contrary to the ideal espoused
21 by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. §137 (1803), that “the very
22 essence of civil liberty certainly consists in the right of every individual to claim the protection
23 of the laws, whenever he receives an injury,” this matter presents the situation where the
24 individual tortfeasors and the GRIC, State of Arizona and, now, the United States, all claim the
25 defense of sovereign immunity. So it is, Plaintiff Loren Shirk, age 54, his wife Plaintiff
26 Jennifer Rose, age 51, and their two daughters (ages 11 and 13), who face the possibility of
27 financial ruin and a life interrupted by emotional devastation and grievous bodily injury.

28 ///

C. Under the GRIC Governing Documents, Officers Lancaster and Tanakeyowma Are Deemed Federal Employees For Purposes Of The FTCA

Under a self-governance agreement - commonly known as a "638" contract given the enactment of the Indian Self Determination and Education Assistance Act ("ISDEAA"), Pub.L. No. 93-638, 88 Stat. 2203 (1975)- the BIA supplies funding to a tribe or tribal organization, allowing that tribal entity to conduct and administer a program or service that the federal government would otherwise provide the tribes directly. 25 U.S.C. § 450(f), b(j); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234-35(8th Cir. 1996). However, as is discussed herein, tribal programs, especially law enforcement programs, are performed under the strict and comprehensive guidelines promulgated by the BIA, Office of Law Enforcement Services, federal statutes codified in the United States Code, and regulations promulgated in the Federal Register. Given this paternalistic approach to law enforcement between the federal government and the tribes, the ISDEAA expands the United States' liability under the FTCA to employees working pursuant to "638 contracts." *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 805 (9th Cir.2001). Section 314 of the 1990 amendments to the ISDEAA provides that tribal employees who engage in activities in furtherance of the 638 contract are deemed federal employees, and therefore, covered by the FTCA. See Pub.L. No. 101-512, Title III, § 314, 104 Stat.1915, 1959-60 (1990) (codified at 25 U.S.C. § 450f notes):

With respect to claims resulting from the performance of functions...under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA]... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior...while carrying out any such contract or agreement and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract or agreement.

The GRIC first contracted with the BIA to provide law enforcement services in 1998. Specifically, the GRIC signed an ISDEAA Public Law 93-638 Contract (hereafter "ISDEAA 638 Contract" or "638 Contract") with the Department of Interior BIA in July of 1998, authorizing the creation and administration of a law enforcement program.⁴ In 2001, the GRIC

⁴ The ISDEAA 638 Contract between the GRIC and the BIA calls upon the GRIC to perform "all tribal law enforcement and detention services on the Gila River Indian Reservation,

reached mature status and, as a result, was eligible to provide law enforcement services under the 638 contract for an indefinite period pursuant to annual funding agreements. In 2003, the GRIC entered into a Self-Governance Compact with the United States authorizing the GRIC to operate any program identified in its Funding Agreement. Exhibit H, Rose Decl., Self-Governance Compact. Article V of the GRIC Self-Governance Compact expressly provides that an employee performing acts in furtherance of the “programs, services, functions and activities” under the Compact, including those outlined in the Funding Agreement, are “deemed by the [ISDEAA] to be covered by the Federal Tort Claims Act (“FTCA”).”⁵

Under basic statutory and contract interpretation principles, specific provisions govern over vague. *Natural Resources Defense Council v. Kempthorne*, 621 F. Supp.2d 954, 983 (2009) (“It is a generally accepted principle of contract interpretation that ‘specific terms and exact terms are given greater weight than general language’”). The specific provisions of both the ISDEAA 638 Contract and the Self-Governance Compact provide that any tort claim resulting from the carrying out of the 638 contract is covered by the FTCA provided the employee was acting within the scope of employment. *See Walker v. Chugachmiut*, 46 Fed. Appx. 421, 423 (9th Cir.2002); *Big Crow v. Rattling Leaf*, 296 F. Supp.2d 1067, 1069 (D.S.D.2004)(“Where a self-determination (638) contract exists, the United States may be liable for the negligent acts of tribal employees when the employee in question is acting within the employee’s scope of employment”). Neither the ISDEAA 638 Contract nor the Compact provide that the Contractor/Indian Tribe will lose its protection under the FTCA based on what sovereign’s law is being enforced or whether the enforcement of such law is on or off the reservation. *See, e.g. Big Crow, supra*, 296 F. Supp.2d at 1070 (“Common sense tells us that

including the investigation of applicable Federal violations; to assist the BIA, other Federal and State Law enforcement officials in the investigation of State or Federal offenses that occur on the Reservation; and enforcement of United States Codes or 25 CFR...including all tribal ordinances.” Exhibit E, Rose Decl.

⁵ The Compact further provides “Use of Federal Employees. Section 104 of the [ISDEAA] shall apply to this Compact and to any individuals assigned or detailed to the Community performing functions under this Compact.” Exhibit H, Rose Decl.

RRL was acting appropriately and within the scope of his employment in assisting the other officer on the night in question”).

The Secretary of the Interior is imbued with authority under the Indian Law Enforcement Reform Act (“ILERA”), 25 U.S.C. § 2801, *et seq.*, to define the scope of the law enforcement functions delegated to the Tribe. The Secretary of Interior may contract with a tribe to assist the BIA in enforcing tribal laws and, in connection with such a contract, may authorize a tribal law enforcement officer “to perform any activity the Secretary may authorize under section 2803.” 25 U.S.C. § 2804(a).

Section § 2803 expressly provides:

The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to--

(1) carry firearms;

(6) wear a prescribed uniform and badge or carry prescribed credentials;

(7) perform any other law enforcement related duty; and

(8) when requested, assist (with or without reimbursement) any Federal, tribal, State, or local law enforcement agency in the enforcement or carrying out of the laws or regulations the agency enforces or administers.

Significantly, subpart (7) grants the Secretary of the Interior wide latitude in allowing tribal officers to “perform any other law enforcement related duty,” including, but certainly not limited to, traffic stops off the reservation. In fact, the Secretary of the Interior has published a notice in the Federal Register: February 10, 2004 (Volume 69, Number 27), addressing the checkerboard jurisdictional issues in and around Indian lands as follows:

Under the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801-2809, and the corresponding regulations at 25 CFR part 12, the Secretary of the Interior, acting through the BIA, is charged with providing, or assisting in the provision of, law enforcement in Indian Country. This is true nationwide—throughout Indian Country and **in the areas near and adjacent to Indian Country**. To increase the effectiveness of law enforcement in Indian Country, the authority and status of law enforcement officers, relationship among and between law enforcement officers, relationships among and between law enforcement departments, as well as potential liability and liability coverage, must be clear. Law enforcement officers are expected to appear a certain way, use certain equipment, and drive certain vehicles both for the safety of the officers and for the safety fo the public. The BIA’s internal policies prescribe all of these standards and recognize that officers maintain their status when they are outside Indian country. **The BIA’s policy makes clear that although officers will not as a rule conduct investigations or make arrest outside Indian country, they maintain their law enforcement officers’ responsibility and certain authorities irrespective of whether they are located in Indian country.** 69 Fed. Reg. 6321-22, effective February 10, 2004. (Emphasis added.)

Both Officers, Tanakeyowma and Lancaster, testified consistently with the above cited BIA internal policy during deposition: both testified they routinely perform police work off the reservation [Exhibit C, Rose Decl., Tanakeyowma Depo., 23:12-24:1, 24:10-25:23; Exhibit D, Rose Decl., Lancaster Depo., 24:24-25:1, 35:11-36:3, 44:20-45:13], both testified they were AZ POST certified [Exhibit C, Tanakeyowma Depo., 16:12-17; Exhibit D, Lancaster Depo., 11:6], and both have consistently maintained they were within the course and scope of their employment at the time of the accident. *See* Exhibit B, Rose Decl. Significantly, the Officers have previously been determined by the Maricopa County Superior Court to be “acting within their official capacity and scope of authority” at the time of the incident. *See* Maricopa County Superior Court Minute Entry, dated 9/24/08, attached to the United States’ MTD as Exhibit C (“Defendants were at all pertinent times on duty and being paid in their capacities as GRIC police officers. Moreover, they were returning to the tribal community, in their official GRIC vehicle, after conducting mandatory AZ POST training class for the benefit of the GRIC”).

D. Enforcement of State Law Does Not Strip The Officers Of Their Status As Tribal/Federal Police Officers

The State of Arizona has given BIA commissioned federal officers and tribal police officers the statutory authority to perform police functions outside the boundaries of Indian country. Critically, the State of Arizona has also disclaimed liability for any actions taken by BIA/Tribal officers.

A.R.S. § 13-3874 provides:

A. While engaged in the conduct of his employment any Indian police officer who is appointed by the Bureau of Indian Affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards adopted pursuant to section 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state.

B. Each agency appointing any Indian police officer pursuant to this section shall be liable for any and all acts of such officer acting within the scope of his employment or authority. Neither the state nor any political subdivision shall be liable for any acts or failure to act by any such Indian police officer.

///

///

1 The legislature, by enacting Section 13-3874, clearly intended to allow AZ POST
2 certified tribal officers to “possess and exercise all law enforcement powers of [state] peace
3 officers,” thereby fostering cooperation between police officers in adjoining jurisdictions. *See*
4 *e.g. Allender v Scott*, 379 F. Supp 1206, 1214 (D.N.M. 2005)(“Due to the checkerboard nature
5 in ownership of land between Indian, non-Indian, federal and state in locales with Indian
6 Reservations, law enforcement agencies, including the BIA, have openly embraced cross
7 deputation agreements and concurrent jurisdiction amongst law enforcement agencies”).
8 Similarly, the GRIC Police Department Operating Orders specifically provide: “Personnel who
9 are authorized a take home vehicle may take enforcement action outside the community...when
10 the officer has reason to believe the violator has committed an offense that is a danger to public
11 safety and is classified under the Arizona Revised Statutes as a misdemeanor or felony.” *See*
12 Exhibit I, Rose Decl., Paragraph G, Page 9.6. The interaction between the State and the GRIC
13 is the exact type of cooperation that was discussed by the Secretary of Interior in the Federal
14 Register Notice (69 Fed. Reg. 6321), cited above. The position taken by the United States is not
15 only contrary to the public policies espoused by the BIA, State of Arizona and GRIC, but would
16 effectively chill cooperation among federal, state, local and tribal agencies and strip rather than
17 augment the authority needed by the Officers to serve and protect the public.

18 The attempted traffic stop by Officers Tanakeyoma and Lancaster here is strikingly
19 similar to the facts of *State v. Nelson*, 208 Ariz. 5, 90 P.3d 206 (Ariz App. 2004). In that case, a
20 police dispatcher alerted officers of a possible drunk driver traveling northbound on Horne
21 Road in Mesa, Arizona. While outside the reservation, a Salt River Indian Community police
22 officer observed a vehicle fitting the description, and initiated a stop. The plaintiff challenged
23 the lawfulness of the traffic stop, specifically questioning the authority of the tribal police
24 officer. The court held “In light of §13-3874(A), a law enforcement official employed by the
25 governing body of an Indian tribe and certified by the AZ POST may conduct a brief stop and
26 detention of a vehicle, in accordance with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968),
27 outside the reservation, while engaged in the scope of employment.” *Nelson*, 208 Ariz. at 10.
28 The Court went on to reason:

1 Cross-deputization agreements and hot pursuit are the most common methods of
2 granting authority to tribal officers. *Id.*; see also *United States v. Patch*, 114 F.3d
3 131, 134 (9th Cir.1997) (“Under the doctrine of hot pursuit, a police officer who
4 observes a traffic violation within his jurisdiction to arrest may pursue the offender
into [or off] Indian country to make the arrest”). But they are not the only means.
Other methods, like AZ POST certification, provide an equal and distinct manner for
the grant of such authority.

5 *Id.* at 11; see also *U.S. v. Smith*, 2006 WL 2990044 (D.Ariz. 2006)(“A law enforcement official
6 employed by the governing body of an Indian tribe and certified by the AZ POST may conduct a
7 brief stop and detention of a vehicle, in accordance with *Terry v. Ohio* ... outside the
8 reservation, while engaged in the scope of employment. The defendant seeks to distinguish the
9 present case by arguing that [Officer] Shonk never observed Smith driving on the reservation on
10 November 23rd. However, given the breadth of the wording in the Arizona court's holding in
11 *Nelson*, this court finds the defendant's argument unavailing”). Among tribes' inherent powers
12 is the power to arrest and detain non-Indians and deliver them to state authorities for
13 prosecution under state laws. *Duro v. Reina*, 495 U.S. 676, 697 (1990); see also *Ortiz-Barraza*
14 *v. United States*, 512 F.2d 1176 (9th Cir. 1975)(“Where jurisdiction to try and punish an
15 offender rests outside the tribe, tribal officers may exercise their power to detain the offender
16 and transport him to the proper authorities”).

17 The existence of the GRIC Police Department exists by virtue of the Tribe being a party
18 to the 638 Contract with the BIA. The 638 contract outlines the applicable statutes, regulations,
19 policies, procedures, training, record keeping, auditing, communications and criminal
20 investigations that the Tribe shall follow and carry-out in order to maintain its funding under the
21 contract. As noted in the deposition testimony of Officer Tanakeyoma, the BIA supervises the
22 work results of the Tribe and appears at tribal council to take action on matters not in accord
23 with its requirements. Exhibit C, Rose Decl., 27:2-29:12. Should the BIA not be satisfied with
24 the work results of the tribal officers, it may cease to fund the Police Department. Exhibit C,
25 Rose Decl., 29:9-12. The 638 contract requires tribal officers to be AZ POST certified, the BIA
26 and the Tribe require the GRIC officers to be AZ POST certified and, as such, these Officers
27 were authorized under the contract to perform police work outside the boundaries of the GRIC
28 through the enforcement, if necessary, of State law.

E. These Tribal/BIA Officers Were Carrying Out The Purpose Of The ISDEAA 638 Contract And Self-Governance Compact At The Time Of The Incident

It is universally followed that while exercising any BIA law enforcement responsibility, commissioned tribal police officers are treated as federal employees under the FTCA. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 696 (2004). This is so regardless of whether the officer is enforcing a tribal, state, or federal law, so long as he is engaged in the performance of his official duties.” *U.S. v. Schrader*, 10 F.3d 1345, 1351 (1993). As set forth herein, there are two relevant agreements under which the United States has delegated the function of law enforcement to the GRIC. The first is the ISDEAA 638 Contract which delineates the terms and conditions under which the GRIC Police Department will operate. Exhibit E, Rose Decl. The “Purpose” of the 638 Contract is found at Page 2 (a) (2) wherein it states:

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities and programs...from the Federal Government to the Contractor for the Law Enforcement Program. The program function is to provide Law Enforcement Services for the Gila River Community. The program provides for costs necessary to carry out uniform police activities, detention services, radio communications and criminal investigations.

Attached to the 638 Contract is Attachment 1, entitled “Statement of Work”, which reads: “The Contractor shall provide all necessary qualified and licensed personnel, equipment, materials and services to perform all tribal law enforcement and detention services on the Gila River Indian Reservation, including the investigation of applicable Federal violations (major crimes).” Exhibit E, Rose Decl., Section 102. To that end, Section 102.1 specifies:

Services shall be provided in accordance with defined authority, procedures and guidelines contained in the Gila River Tribal Law and Order Code, the Gila River Tribal Constitution, 25 CFR, 40 IAM, court decisions and other applicable rules, regulations, ordinance and statutes.

Section 102.2 further states:

The Contractor shall obtain all necessary licenses, permits and approvals required by local, State and Federal statutes to perform under this contract.

///

///

1 The other relevant agreement is the Self-Governance Compact which provides the annual
 2 funding for the law enforcement program. The authority of the Compact is identified as
 3 follows: “**Section 1 - Authority** - This agreement, denoted a Self-Governance Compact
 4 (referred to herein as the “Compact”), is entered into by the Assistant Secretary of the Interior,
 5 BIA, on behalf of the Secretary of the U.S. Department of Interior, and the Governor of the Gila
 6 River Indian Community, as authorized by the Gila River Indian Community Counsel and the
 7 Act.” See Exhibit H, Rose Decl. The Compact mandates its provisions be “liberally construed”
 8 to achieve its purpose, delineated as:

9 This Compact is the underlying agreement between the United States and the Gila
 10 River Indian Community under which the BIA and Community will carry out the
 11 Self-Governance program authorized by Title IV of the Act, and is intended to
 12 transfer to tribal governments, at tribal request, the power to decide how federal
 13 programs, services, functions and activities in the local community will be funded
 14 and operated. Title IV is intended to strengthen the government-to-government
 relationship and to uphold the United States’ trust responsibility to Indian tribes,
 including the Gila River Indian Community. This Compact encourages innovation
 in order to determine how to improve the government-to-government relationship
 and promote the anatomy of the Community.

15 Exhibit H, Rose Decl., Section 2(A).

16 Both contractual agreements call for liberal interpretation of their respective terms in
 17 favor of the Contractor. Nowhere in either contract does the United States claim that all police
 18 work shall be performed within Indian country boundaries or that any police officer performing
 19 a traffic safety stop will be stripped of his federal authority and law enforcement powers. If the
 20 purpose of the Self-Governance Compact is to encourage government to government relations
 21 and the BIA and Tribe both require the Officers to be POST certified, under the required liberal
 22 interpretation of these two provisions, the inescapable conclusion is that the Officers were
 23 empowered to act, and, in this case, make a traffic safety stop outside the Gila River reservation.

24 Interestingly, the United States cites to a Deputation Agreement entered into between the
 25 GRIC and the BIA Office of Law Enforcement Services on July 26, 2006, to confine the
 26 Officers’ authority to acts within the boundaries of the reservation. Critically, neither Officer

27 ///

28 ///

1 was deputized under this Agreement at the time of the incident [Exhibit C, Rose Decl.,
 2 Tanakeyowma Decl., 15:19-21; Exhibit D, Rose Decl., Lancaster Decl., 12:18-21], and
 3 therefore, the deputation agreement is of no legal consequence on the issues raised in the United
 4 States' present motion.

5 Notwithstanding the inapplicability of the Deputation Agreement, the United States cites
 6 Section 8(B) of the Agreement for the proposition that a Special Law Enforcement
 7 Commissioned police officer will only be deemed an employee of the Department of Interior for
 8 purposes of the FTCA while carrying out laws in Indian Country. First, the provision speaks to
 9 laws "applicable in Indian country," not that the law enforcement of those laws must occur "in
 10 Indian country." Second, driving under the influence of alcohol is illegal and applicable on
 11 Indian land. 18 U.S.C. § 13(b)(1) (conviction for operating a motor vehicle under the influence
 12 of a drug or alcohol).⁶ Third, the Assimilative Crimes Act, 18 U.S.C. § 13, makes state law
 13 applicable to conduct occurring on lands reserved or acquired by the Federal government as
 14 provided in 18 U.S.C. § 7, when the act or omission is not made punishable by an enactment of
 15 Congress. Driving under the influence in Indian country is illegal and, on information and
 16 belief, Leshedrick Sanford became intoxicated at a casino located on the GRIC reservation.
 17 Notably, the Officers need not have observed Sanford drunk driving on the reservation to assert
 18 their authority and initiate a stop. *Smith, supra* ("The defendant seeks to distinguish the present
 19 case by arguing that [Officer] Shonk never observed Smith driving on the reservation...
 20 However, given the breadth of the wording in the Arizona court's holding in *Nelson*, this court
 21 finds the defendant's argument unavailing"). Of further interest, the roadway upon which
 22 Sanford was stopped is part of the National Highway System, lands reserved by the Federal
 23 Government for the national defense and economy of the United States. *See* Exhibit A, Rose
 24 Decl.

25 Given the facts of the instant case and the layers of applicable jurisdiction, it is
 26 indisputable Officers Tanakeyowma and Lancaster were acting within the course and scope of

27
 28 ⁶ Similarly, Sanford could have been charged for the assault on Officer Lancaster under
 federal law. 18 U.S.C. § 11 (Assault on a Federal Officer).

1 their employment of the ISDEAA 638 Agreement and Self Governance Compact, thereby
 2 maintaining their status as “federal employees” and falling within the purview of the FTCA.

3 **F. Plaintiffs Cannot Proceed Directly Against the GRIC Under Section 25 U.S.C. §**
 4 **450f**

5 As a final matter, the United States raises the issue of insurance under 25 U.S.C. § 450f,
 6 maintaining “Congress still require[s] tribes to carry federally funded liability insurance for
 7 claims not covered by the FTCA.” *See* United States’ MTD, Page 8, lines 1-2. Plaintiffs,
 8 however, cannot proceed directly against the GRIC under 25 U.S.C. § 450f.

9 As established herein, the ISDEAA permits various Indian tribes to contract with the
 10 Secretary of the Interior to furnish services previously administered by the federal government.
 11 25 U.S.C. § 450f. The Act further vests the Secretary with discretion to require any tribe
 12 requesting such a contract to obtain adequate liability insurance. To that end, the Act provides:

13 The Secretary is authorized to require any tribe requesting that he enter into a
 14 contract pursuant to the provisions of this subchapter to obtain adequate liability
 15 insurance: Provided, however, That each such policy of insurance shall contain a
 16 provision that the insurance carrier shall waive any right it may have to raise as a
 17 defense the tribe's sovereign immunity from suit, but that such waiver shall extend
 18 only to claims the amount and nature of which are within the coverage and limits of
 19 the policy and shall not authorize or empower such insurance carrier to waive or
 20 otherwise limit the tribe's coverage and limits of the policy of insurance.

21 While requiring a tribe to obtain liability insurance as a condition precedent to
 22 contractual performance authorized by the Secretary, section 450f(c) clearly addresses, as is
 23 evident in the caveat of that subsection, the rights and limitations of the insurance carrier, not
 24 the Tribe. *Evans v. McKay*, 869 F.2d 1341, 1346 (1989). This provision expressly precludes the
 25 insurer from defeating a claim covered by the policy by an invocation of the tribe's sovereign
 26 immunity. *Id.* As explained by the Court in *Evans*, “[t]hese statutory and contractual provisions
 27 might come into play in the following situation:

28 A third party who is injured by a BIA agent could bring an action against the
 government under *Bivens* or the Federal Tort Claims Act. The government would
 then bring a third-party claim against the Tribe, pursuant to the Tribe-BIA contract,
 seeking indemnification. The Tribe, in turn, would call upon its insurer to indemnify
 the Tribe for its liability to the government. At that juncture, the insurance company
 would be precluded from asserting that it has no duty to indemnify the government
 because of tribal immunity.

Id. at 1347, FN 6.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the United States' motion to dismiss for lack of subject matter jurisdiction be denied.

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

KAYE, ROSE & PARTNERS, LLP

By: /s/ Trinette S. Sachrison
Trinette S. Sachrison, Esq.
Bradley M. Rose, Esq.
402 West Broadway, Suite 1300
San Diego, California 92101
Attorney for Plaintiffs

Copy of the forgoing sent via First Class Mail this
11th day of June, 2010, to:

Mike Johns, Assistant United States Attorney
District of Arizona
Two Renaissance Square
40 North Center Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone No.: 602-514-7500
Facsimile No.: 602-514-7760
Email: Mike.Johns@usdoj.gov
Attorney for Defendant