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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Loren R. Shirk and Jennifer Rose, individually and as husband and wife, Plaintiff, v. United States of America, on behalf of its agency, Department of Interior, Bureau of Indian Affairs, Defendants.	**CIV-09-1786-PHX- NVW** **REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendant United States of America submits the following reply Memorandum in support of its Motion to Dismiss (Document No. 19).

MEMORANDUM

1. Clarifications.

The Motion to Dismiss (Document No. 19, pages 4-5) incorrectly cited the Interior Department Manual for Section 4-04-01(K). The correct cite for that section is the BIA Law Enforcement Handbook., rather than the Interior Department Manual.

The Motion to Dismiss alleged that both Tribal Officers had been issued a SLEC prior to the accident. Further discovery including depositions have established that Sergeant Tanakeyowma had received a SLEC prior to the accident but Detective Lancaster received his after the accident. See Supplemental Declaration of SAC McDonald attached as **Exhibit A** and the deposition excerpts of the officers.

The Motion to Dismiss incorporated Plaintiffs' allegation that the officers were returning to the GRIC from training in Tucson at the time they encountered the drunk driver. However, they had already passed through the GRIC and were driving north on Arizona Avenue in Chandler to their homes in Chandler and Phoenix when they first encountered the drunk driver. Deposition excerpts of Sergeant Tanakeyowma attached as **Exhibit B**, at p. 32, l. 16-22 and p. 36, l. 9 through p. 41, l. 8, and Detective Lancaster attached as **Exhibit C**, at p. 33, l. 7-12 and p. 38, l. 2 through p. 46, l. 21.

2. Additional argument in reply.

Plaintiffs' Introduction.

The first two sentences of Plaintiffs' Introduction misstate the position of the United States. The only substantive issue is whether the officers were carrying out the Compact when they made the traffic stop off the Gila River Indian Community (GRIC). Carrying out the Compact is a condition precedent to FTCA coverage. It is an express requirement of the statutory waiver of Federal sovereign immunity in the Indian Self-Determination and Education Assistance Act (ISDEA). The United States does not contend that the officers' conduct "falls outside the scope of the FTCA" - the United States does not know what Plaintiffs intend by that statement. Nor does the United States contend that the officers were acting contrary to any terms and conditions of the Compact. The United States agrees that the officers were acting within the scope of their employment as Tribal officers, which is determined by Arizona law of *respondeat superior*, but the issue here is one of statutory application, not common law scope of employment. The United States agrees that the officers were authorized to make the stop by Arizona law, but they were not carrying out the Compact, and therefore they were not employees of the government for purposes of FTCA coverage when the stop was made. The Introduction posits three reasons why the Court should deny the Motion to Dismiss. Number 1 argues that BIA policies permit Federal officers to enforce laws outside Indian country, which is true but irrelevant. Number 2 argues that BIA requires Tribal officers to be AZ-Post certified, which is true (at least without a temporary waiver) but also irrelevant, and that the State of Arizona disclaims any liability for AZ-Post certified officers, which is true but irrelevant (the statute

places liability on the employing agency, in this case the Tribe, ARS § 13-3874(B)). Number 3 argues that "the federal officers [Tribal officers] never exercised jurisdiction under Arizona law . ." merely made a *Terry* stop to discuss the driver's erratic driving, and argues that this was "consistent with" the scope of work statement. The United States agrees that the officers were making a *Terry* stop when the accident occurred. It was not until after the accident that they took the escaping driver to the ground, cuffed him and placed him in the police car, effectuating an arrest. The off-reservation stop and arrest were made solely under their authority as Arizona Peace Officers. That does not affect the validity of the stop and has no bearing on whether the United States is subject to liability in this case. Whether they were carrying out the Compact is determinative of whether the action lies against the United States, or against the Tribe, which is covered by Federally funded insurance.[1]

Plaintiffs' Factual Background Statement.

Plaintiffs' statement that the officers "were on the GRIC" could be misleading. They had passed through the GRIC into Chandler Arizona where they stopped at a prior accident briefly to assist, continued north away from the GRIC and then encountered the drunk driver. Exhibit B p. 32, l. 16 through p. 41, l. 25 and Exhibit C p. 38, l. 2 through p.49, l. 22.

To make the facts clear at page 3, second and third paragraphs of the Response, Sergeant Tanakeyowma had been a Hopi officer (1993-1994 not under a contract or compact) where he obtained his AZ-Post certification before becoming a GRIC officer, the GRIC Police Department transitioned to a 638 Contract during 1996-1998, and he first obtained a SLEC in 2001. Exhibit B p. 8, l. 2 through p.16, l. 14. Detective Lancaster started with the Pascua Yaqui Police

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[1] Describing the Tribal officers as Federal officers could be confusing. Although the issue is not relevant in this case, a Tribal officer is a Federal law enforcement officer for purposes of § 2680(h) of the FTCA only if the officer was acting under authority granted by the BIA pursuant to a SLEC, **and** acting to enforce Federal law at the time of the alleged tort. *See Hebert v. United States*, 438 F.3d 483, 486 (5th Cir. 2006) (Tribal officer who had SLEC was not acting in accordance with commission and was not enforcing Federal law and, therefore, was not a Federal law enforcement officer for purposes of the FTCA); *Dry v. United States*, 235 F.3d 1249, 1254 (10th Cir. 2000) (Tribal officers were not Federal law enforcement officers under FTCA because they were acting under authority inherent in Tribe's sovereignty and not under authority granted by BIA); *Washakie v. United States*, 2006 WL 2938854 (D. Idaho 2006) (Tribal officer must be certified as a Federal law enforcement officer and enforcing Federal law at the time of alleged tort to be a Federal law enforcement officer under FTCA).

Department in1999 where he was AZ-Post certified. He became employed with the GRIC Police Department in 2001, and was not issued a SLEC until 2007, after the accident. Exhibit C p. 8, l. 1 through p. 12, l. 17.

Plaintiffs misstate that BIA issued Detective Lancaster an 1811 "commission" granting him some sort of "authority" to perform police work "off of the reservation". 1811 is merely a civil service job series classification for a "Criminal Investigator" established by the Office of Personnel Management (OPM) under 5 U.S.C. § 5107. *See* Exhibit A.[2] *See also Perdoux v. United States*, 338 F.3d 137 (2nd Cir. 2003) (litigation over proper job series and grade). Detective Lancaster described 1811 as a Criminal Investigations Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC) in which he obtained a certificate for attending the course, and did not think it granted him any additional authority beyond that which he already had. Detective Lancaster understood that the SLEC covered him in Federal investigations. Plaintiffs generally misstate irrelevant questions and responses about jurisdiction and authority which are not at issue in this case. Exhibit B p. 1, l. 1 through p. 20, l. 2 and Exhibit C p. 24, l.21 through p. 28, l. 20. Neither officer knew much if anything about the Compact and Deputation Agreement, and it was not necessary that they do, since they are covered by either the FTCA or the insurance as long as they act within the scope of employment on or off the reservation. Exhibit B p. 20, l. 3 through p. 22, l. 19; Exhibit C p.11, l. 9 through p. 12, l.5 and p.20, l. 11 through l. 18 and p. 23, l. 20 through p. 24, l. 5.

Argument F.

The United States will address Plaintiffs' argument about insurance and the waiver of Tribal sovereign immunity first, as it is relevant to the other arguments.

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[2] A link to an OPM website decision on this classification follows, and the summary of the decision explains what an "1811" is:

Office of Personnel Management (OPM), accepted an appeal for the position of Marine Enforcement Officer, GS-1801-11 . . .. The appellant is requesting that his position be changed to Criminal Investigator, GS-1811-12 or 13.
http://www.opm.gov/classapp/decision/1997/18111203.pdf

Plaintiffs argue that they cannot proceed against the Tribe because there is no waiver of Tribal sovereign immunity. However, Plaintiffs quote the statute before it was amended to include the FTCA coverage and the express waiver of Tribal sovereign immunity, citing a pre-amendment opinion which is no longer applicable to the current statute.

At page 16, Plaintiffs quote the old statute, apparently lifting the text from the old opinion. The actual statute in this case is quoted in the Motion to Dismiss and it contains an express waiver of Tribal sovereign immunity. The legislative history of the amendment is as explicit as the current statute:

> Under current law, a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance . . .[3]

The opinion cited by Plaintiffs is *Evans v. McKay*, 869 F.2d 1341, 1346 (9th Cir 1989). The case involved claims for acts under color of state law, 42 U.S.C. § 1983, not common law tort claims. The opinion remains valid to the extent there is no applicable waiver of Tribal sovereign immunity for Section 1983 claims. The *Evans* Court asserted in dicta that the only way to get to the insurance proceeds would be if a judgment was entered against the United States, the United States obtained a judgment against the Tribe for contractual indemnity and the Tribe obtained indemnity from the insurance carrier. Regardless of whether that dicta was correct under the prior statute, it is no longer applicable because the statute was amended to add FTCA coverage for the Tribe's acts or omissions in carrying out the contract, the Secretary was required to provide the insurance taking into account the FTCA coverage, and the Tribes' sovereign immunity was expressly waived up to the insurance policy limits.[4]

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[3] 1987 WL 61567, *27; S. Rep. No. 274, 100TH Cong., 1ST Sess. 1987, 1988 U.S.C.C.A.N. 2620, S. REP. 100-274 (Leg.Hist.) *1*2620P.L. 100–472, INDIAN SELF–DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1988

[4] The Court's hypothetical dicta at fn. 6 about how contractual indemnity "might" occur, quoted by Plaintiffs, is inapplicable as well because this case does not deal with a possible hypothetical judgment against a Federal employee under *Bivens* or the FTCA. A Tribal employee would not be subject to *Bivens* liability, and any such individual liability could not be (continued...)

The Ninth Circuit subsequently recognized that the statute, as amended, expressly waives Tribal sovereign immunity up to the policy limits. *Demontiney v. United States,* 255 F.3d 801, 813 (9th Cir. 2001) (25 U.S.C. § 450f(c) mandates that the government provide liability insurance for tribes in self-determination contracts and provides a limited waiver of tribal sovereign immunity). *Accord Walton v. Pueblo,* 443 F.3d 1274, 1279-80 (10th Cir. 2006) ("Section 450f(c)(1) requires the government to obtain liability insurance for tribes carrying out self-determination contracts entered into under the ISDEAA. In exchange for insurance coverage, the tribe agrees to waive its sovereign immunity with respect to suits arising out of the tribe's performance of its contractual duties. 25 U.S.C. § 450f(c)(3)."") (footnote omitted).

For a detailed discussion of how the insurance and waiver of Tribal sovereign immunity are applied under the statute, as amended, *See* the following series of opinions: *United States v. CNA Financial Corporation,* 168 F.Supp.2d. 1109 (D. Alaska 2001), reversed on other grounds, *United States v. CNA Financial Corporation,* 113 Fed Appx. 205 (9th Cir. 2004) (unpublished), *United States v. CNA Financial Corporation,* 381 F.Supp.2d 1088 (D. Alaska) (on remand). The Court in these cases properly explained that under the amended statute the Secretary was to provide gap insurance for claims not covered by the FTCA, insurance companies were to reduce their coverage to gap insurance, with resulting savings in insurance costs. The United States was allowed to pursue a bad faith claim for punitive damages above the general coverage for breach of the duty to defend. A tort claim is properly brought against the tortfeasor, in this case the Tribe, not its insurance carrier.[5] Arizona law conferring Arizona Peace Officer status on AZ Post certified Tribal officers places liability for their acts on the Tribe which appointed them.

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[4] (...continued)
the basis for a an indemnity claim by the individual against the Tribe. Similarly, an FTCA judgment based on negligence of a Federal employee could not be the basis of a contractual indemnity claim against the Tribe, as no tribal employee would be involved. The hypothetical is inapplicable under the current statute in any event.

[5] *Maricopa County v. Barfield,* 206 Ariz. 109, 112 (Ariz. App. 2003); *Nationwide Mutual Insurance Company v. Arizona Heath Care Cost Containment System,* 166 Ariz. 514, 517 (Ariz. App. 1990); *Dumas v. American International Specialty Lines Insurance Company*, 2009 WL 4269951, *1 (D. Ariz. 2009).

ARS § 13-3874(B). Unless their acts are covered by the FTCA, they are covered by the insurance, and Plaintiffs can maintain a direct action against the Tribe in state court. The insurance carrier has a duty to defend the Tribe and is expressly forbidden by the ISDEA from asserting Tribal sovereign immunity, up to the policy limits.[6]

Argument A.

Regarding Plaintiffs' Argument A , the United States agrees that the Court is free to make factual determinations concerning subject matter jurisdiction. Plaintiffs' argument that the Court must accept all allegations of the complaint as true unless an evidentiary hearing has been held, applies to a situation where there is a genuine issue of material fact concerning jurisdiction. Neither party in this case argues that there is such an issue. A detailed explanation of ways resolution of jurisdictional issues can be made is contained in *Fordjour v. United States,* 2002 WL 31720161 *2 (D. Ariz. 2002).

Argument B.

Plaintiffs' Argument B states that the FTCA provides a cause of action for personal injury resulting from negligence of a Federal employee. Whether someone is a Federal employee is determined by Federal law and the Tribal officers were not Federal employees. *Brandes v. United States*, 783 F.2d 895, 896 (9th Cir. 1986). The issue is whether they are deemed to be, solely for purposes of the FTCA. Plaintiffs argue that the assertion of sovereign immunity is unfair, citing *Marbury v. Madison,* 5 U.S. 137 (1903), incorrectly arguing that they will be left without a remedy for their injuries. They allege that the State of Arizona has asserted sovereign immunity but cite no facts or law supporting that proposition, nor any basis in tort law for an action against the State of Arizona for acts of Tribal officers. Plaintiffs complain that the officers and GRIC asserted sovereign immunity in the earlier state court case, but neither Plaintiffs nor the officers brought the statute waiving the Tribe's sovereign immunity to the

[6] There is ultimately no liability here as the sole cause of the accident was the intentional criminal act of the drunk driver entering the intersection against the light even though he had stopped for the light and had a police car stopped behind him with emergency lights on.

attention of the Court, resulting in a decision based on a fundamental error of fact and law.[7] [8] The ISDEA contains a limited waiver of the United States' sovereign immunity, but to the extent the claim is not covered by the FTCA it is covered by insurance. Argument B provides no grounds for denying the Motion to Dismiss.

Argument C.

In Argument C Plaintiffs erroneously argue that under GRIC governing documents, the officers are deemed Federal employees. At page 7, Plaintiffs argue that the ISDEA expanded the United States' liability under the FTCA because of a "paternalistic approach to law enforcement", citing *Demontiney*. *Demontiney* was a contract case. The opinion does not support Plaintiffs' argument, and actually refutes it. From 1975 to 1988 the ISDEA merely required that contracting Tribes provide insurance, including medical malpractice insurance, and seek reimbursement. The FTCA was not involved with the ISDEA until 1988, expanded in 1990 to include law enforcement and other activities by PL 101-512, SEC. 314. Quoting the legislative history, the *Demontiney* opinion describes in detail the purposes of the ISDEA which was ". . . to encourage Indian self-determination and tribal control over administration of federal programs for the benefit of Indians . . .". *Id.* at 806. FTCA coverage was added in 1988 to reduce insurance costs, especially medical malpractice insurance, for activities that the United States would have still been undertaking if it had not contracted to have the Tribes do it.[9]

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[7] Plaintiffs did not name the GRIC in the state court case (Document 19-3).

[8] Rule 60(c)(6) of the Arizona Rules of Civil Procedure may be available to relieve Plaintiffs from the erroneous dismissal of the state case. *Gorman v. City of Phoenix*, 152 Ariz. 74 (Ariz. 1987) (if factors are present, relief should usually be granted).

[9] As explained in the legislative history: "The United States has assumed a trust responsibility to provide health care to Native Americans. The intent of the Committee is to prevent the Federal government from divesting itself, through the self-determination process, of the obligation it has to properly carry out that responsibility. Under current law, a self-determination contract with a tribal organization operates to actually relieve the United States of the liability which it had under the Federal Tort Claims Act before the contract was executed. In its place, the tribe is required to waive its immunity from suit up to the policy limits of its insurance, and then to be subjected to litigation without any of the protective and very restrictive provisions which apply to litigation under the Federal Tort Claims Act. The Indian

(continued...)

At page 8, Plaintiffs misstate:

> 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 [ISDEA] to be covered by the Federal Tort Claims Act ("FTCA").

Article V merely states, in its entirety on the FTCA subject (Document 28-9, page 9):

> Section 3 - Federal Tort Claims Act coverage, Insurance.
> (a) The Community is deemed by the Act to be covered under the Federal Tort Claims Act ("FTCA"), while performing programs, services, functions and activities under this Compact and any funding agreement incorporated herein."

The provision does not expressly say anything about acts of employees, an express requirement in 25 U.S.C. § 450f Note. Footnote 5 at the end of Plaintiffs' misstatement refers to Federal employees assigned or detailed to GRIC. The officers in this case were not Federal employees so the footnote is irrelevant.

Plaintiffs' argue from the above misstatement that specific statutory provisions govern over vague, but then describe contract provisions, not statutory provisions. Because the argument ends up stating the Government's argument, it is not worth arguing further about, as the United States agrees with the Plaintiffs' conclusion 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." If the acts at issue were both within the scope of employment and committed in carrying out the contract, the FTCA applies. The point of the Motion to Dismiss is that the officers were not carrying out the Compact when they made the traffic stop, as required by the ISDEA. Plaintiffs argue that a Tribe should not "lose" FTCA coverage

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[9] (...continued)
Self–Determination Act was never intended to operate as a means for the United States to avoid the liability it would otherwise have under the Federal Tort Claims Act. The amendment to the Act will not increase the Federal government's exposure under the Federal Tort Claims Act. On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the Indian Self–Determination Act." 1987 WL 61567, *27-28, S. Rep. No. 274, 100TH Cong., 1ST Sess. 1987, 1988 U.S.C.C.A.N. 2620, S. REP. 100-274 (Leg.Hist.) *1*2620P.L. 100–472, INDIAN SELF–DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1988.

depending on what sovereign's law is being enforced, on or off reservation. Absent the two elements expressly set forth in the ISDEA, the United States would be subjected to liability for virtually everything a Tribal officer did anywhere in the country, regardless whether the officer was carrying out the contract. The insurance may cover such activities, but not the ISDEA.

Plaintiffs cite an unpublished opinion, *Walker v. Chugachmiut*, 46 Fed. Appx. 421 (9th Cir. 2002) but that opinion fully supports the requirements of **both** elements, scope of employment and carrying out the contract. *Id*. at 423-424:

> Removal of this action was mandatory. Any civil action against a tribal organization, or one of its employees acting within the scope of employment, for tort claims resulting from the carrying out of an Indian Self-Determination and Educational Assistance Act ("ISDEA") contract "shall be deemed to be an action against the United States" under the FTCA. Department of the Interior and Related Agencies Appropriations Act of 1991, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (Nov. 5, 1990) (codified as amended at 25 U.S.C. § 450f note) [hereinafter Section 314]. Any such action that is originally filed in state court therefore is removable to federal court. 28 U.S.C. §§ 1346(b)(1), 1441(a), 2679(d)(2) (2001).
>
> ***
>
> In the instant case, the United States Attorney for the District of Alaska certified on behalf of the Attorney General that Walker's tort claims against Chugachmiut and Henrichs arose from the carrying out of an ISDEA contract and that Henrichs was acting within the scope of his employment during the relevant time period. This certification satisfied the requirements of the FTCA and Section 314.

(footnotes omitted).

Plaintiffs also cite *Big Crow v. Rattling Leaf*, 296 F.Supp2d 1067 (D.S.D. 2004) in which the government raised a question of first impression whether the Director of the Tribe's Natural Resources Department, involved in an accident while assisting a Tribal Police Officer, would be covered by the FTCA. Since the Director was also an authorized law enforcement officer, the Court held that it did not matter which contract paid his salary (the ISDEA has an exclusion for FTCA coverage if the employee is paid by someone other than the contractor).

Plaintiffs argue at page 9 that the Indian Law Enforcement Reform Act (ILERA) provides discretion to the Secretary of the Interior to grant Federal law enforcement authority to Tribal police, which is generally true, not exactly as phrased by Plaintiffs: " . . . to define the scope of law enforcement functions delegated to the Tribe". As explained in the Motion to Dismiss, the contract which matured into the compact in this case was for law enforcement within the GRIC

under the ISDEA. The grant of Federal law enforcement authority under the ILERA in this case was defined by the Deputation Agreement with the Tribe, and contingent upon issuance of a SLEC to a Tribal officer, who could then exercise that Federal authority. The Deputation Agreement in this case states that it is **not** entered into under the ISDEA (Exhibit A, Agreement at p. 3 last paragraph). The Deputation Agreement, at page 2, limits FTCA coverage to ". . . enforcing or carrying out laws of the United States covered by this Deputation Agreement. . ." The Deputation Agreement expressly excludes from FTCA coverage the off-reservation traffic stop made under State Peace Officer authority (see opening Motion). The Deputation Agreement also states at page 4, paragraph H, "A commission issued by the BIA under this Agreement shall not be used to invoke any State of Arizona authority." Exhibit A. Thus, the fact that the Secretary has discretion to convey Federal law enforcement authority is not material in this case, because the Secretary exercised discretion to **not** convey to Sergeant Tanakeyowma any ILERA authority to enforce Arizona law off the reservation. The officers' authority derived solely from Arizona law, not Federal law.

At page 9 Plaintiffs cite BIA policy published in the Federal Register applicable to Deputation Agreements and SLECs. The United States acknowledges that BIA, like most if not all law enforcement agencies, does not prohibit officers from exercising their authority to protect public safety, regardless of their location or duty status. The officers in this case had authority as Arizona Peace Officers when they made the stop, not as SLEC officers. The stop is not covered by the FTCA. It is covered by the insurance.

The position of the United States is consistent with the published policy. A copy of the entire text is attached as **Exhibit D**. Throughout, the policy refers to providing and improving law enforcement "in Indian country". Throughout, the policy discusses conveying Federal authority to Tribal officers, not state authority. Nothing in the policy can be read to state that Tribal officers receiving a SLEC obtain authority to enforce state laws. They obtain that authority as Arizona Peace Officers, or through similar cross-deputation or mutual aid agreements, depending on state law. The policy states on page 2, last paragraph:

> Due to the nature of law enforcement in Indian Country, SLEC officers will often have to respond to calls where it is unclear initially whether they are responding in their Federal or tribal capacity.

The policy statement does not mention state capacity because the SLEC in this case does not convey state authority. In terms of FTCA coverage for officers with SLECs, the policy does not attempt to define all circumstances in which that could occur, but defers to the Justice Department on a case-by-case basis, *Id.* at page 3, third paragraph:

> The BIA expects that, first, liability coverage under the Federal Tort Claims Settlement Act (FTCA) may be available to officers carrying Federal SLECs, but the Department of Justice makes all determinations on FTCA coverage on a case-by-case, factual basis, and their decisions are final.

Plaintiffs argue (page 10) that the officers in this case testified "consistently with the above policy" that they routinely perform police work off the reservation. But this is due to their authority as Arizona Peace Officers or SLEC officers, so "consistency" with the above policy is irrelevant to the issue in this case involving an off-reservation traffic stop to enforce state law.

Plaintiffs argue further at page 10 that the State court found that the officers were acting within the scope of their employment as Tribal officers. The United States agrees but notes that the State court also found that the officers made the traffic stop based on authority of their Arizona Peace Officer status, not based on a SLEC.[10] In addition, the officers testified that they made the traffic stop under their Arizona Peace Officer authority. Exhibit B p. 31, l. 12 through l. 17 and p. 40, l. 1 through l. 19; Exhibit C p. 11, l. 9 through p. 12, l. 5 and p. 30, l. 18 through p. 31, l. 23 and p. 36, l. 24 through p. 37, l. 13 and p. 49, l. 23 through p. 50, l. 23.

Argument D.

Plaintiffs' argue at page 10 that enforcement of state law does not strip the officers of their status as Tribal or Federal officers. Plaintiffs cite the correct Arizona statute authorizing Tribal officers to obtain Arizona Peace Officer status. The statute also states that the State of Arizona disclaims any liability and places that liability with the Tribe which appointed the

[10] At page 10 Plaintiffs continue to allege that the officers were returning to the GRIC at the time of the traffic stop, but it is now clear from their depositions that they had passed through the GRIC into Chandler going to their homes off the reservation.

officers (the BIA did not appoint or employ the officers in this case). BIA and other Federal law enforcement officers are commissioned as Arizona Peace Officers under a different statute, ARS 13-3875. Plaintiffs' argument therefore confusingly lumps Tribal officers and Federal officers under the same statute. In this case, regardless of some hypothetical involving a Federal officer, the Tribe is expressly liable under state law, subject to the limited waiver of sovereign immunity up to the policy limits. The United States' position is therefore consistent with the Arizona statutory scheme involving Arizona Peace Officers.

Plaintiffs argue at pages 11-12 that the United States' position would strip the officers of their authority to enforce state laws, and chill cooperation among law enforcement agencies, citing cases for the proposition that the traffic stop was authorized by Arizona law. First, the United States cited the same case law in its opening Motion and expressly stated that the traffic stop was authorized by Arizona law, so the argument is a straw one. Second, there is no chilling of cooperation, because the only issue is whether the accident is covered by the FTCA or the insurance, which has no impact on the officers' cooperative law enforcement efforts.

Plaintiffs discuss a Tribe's inherent authority, but this relates to the power to exclude non-Indians from a reservation, not to conduct traffic stops entirely outside Indian country. The accurate but irrelevant statement of the Court in *Duro v. Reina*, 495 U.S. 676, 697 (1975) is simply:

> The tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands.
> ***
> Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. 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.

(Citations omitted) (overruled on other grounds by the Indian Civil Rights Act)

Plaintiffs quote *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th cir. 1975) without citing a page, and the quote does not appear in the opinion, but the general proposition is true - a Tribe has inherent authority to detain and eject a non-Indian offender from a reservation. That authority is irrelevant to this off-reservation traffic stop.

Plaintiffs argue that the GRIC police department exists by virtue of the 638 contract, but the police department existed before the contract (Exhibit B p. 12, l. 9 through p.14, l. 8). Plaintiffs argue that BIA can cease to fund the police department, which is a very complex issue under the ISDEA. At any rate, BIA law enforcement did not oversee development of the GRIC police department, is not present on the GRIC and does not supervise the day to day operations of the police or the police department (Exhibit B p. 13, l. 14 through p. 14, l. 8 and p. 20, l. 17 through p. 22, l. 19 and Exhibit C p. 20, l. 19 through p. 21, l. 5). Plaintiffs state that both the BIA contract and the Tribe require that GRIC officers be AZ Post certified, and therefore they are authorized "to perform police work outside the boundaries of the GRIC", but the United States does not contend that the officers in this case were not authorized to make the traffic stop. Argument D therefore is a straw argument, irrelevant to whether the officers were carrying out the contract when they made the traffic stop.

Argument E.

In Argument E Plaintiffs argue that the officers were carrying out the purpose of the ISDEA contract/compact. They mix a few concepts together which confuses the statements. First, they cite dicta in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 696 (9th Cir. 2004) in which it was held that in California (a public Law 280 state) a Sheriff was preempted from forbidding Tribal police from having light bars on their police cars outside a reservation. Plaintiffs' statement that all exercises of BIA law enforcement responsibility by a Tribal officer with a SLEC is covered by the FTCA (1) overstates the holding, (2) fails to note the dicta applies to enforcement of Federal laws (3) fails to include in the statement "responsibility in Indian country" and (4) is irrelevant here because the officers were not exercising any BIA responsibility to enforce Federal laws when they made the traffic stop in Chandler.

Plaintiffs also misstate the holding in *United States v. Schrader*, 10 F.3d 1345, 1351 (8th Cir. 1993) which did not involve FTCA liability, it involved assault on a Federal officer. The Court noted that the assault statute applies under the ILERA whenever the officer is acting within the scope of employment. "Carrying out" a contract under the ISDEA is not an issue under the assault statutes.

Plaintiffs quote from the contract to assert its "purpose" but the quoted text expressly states that the law enforcement services are for the Gila River Community, not the City of Chandler or the State of Arizona. The terms are to be liberally construed, but expressly for the "transfer of funds" and services "for the Gila River Community", which does not support a conclusion that traffic law enforcement in Chandler or throughout Arizona is a purpose of the contract.

Plaintiffs quote the Statement of Work, but it expressly covers enforcement of Tribal and Federal laws on the reservation, not state traffic laws off the reservation. Plaintiffs quote the Statement of Work, Section 102.1, but the listed law enforcement authority is not applicable to this off reservation traffic stop (Tribal criminal law and 25 C.F.R. which are inapplicable to non-Indian traffic offenders off the reservation). Requiring the contractor to obtain all necessary licenses, permits and approvals sheds little or no light on the "purpose" of the contract, and is not relevant to the issue whether the officers were carrying out the contract when they made the traffic stop.

Plaintiffs quote from the Compact, but the quote is consistent with the United States' position on FTCA coverage. The relevant text merely states that the Compact is intended to transfer to the Tribe, "the power to decide how federal programs, services, functions and activities in the local community will be funded and operated." The actions here were outside the Community, permissible under Arizona law, and did not involve any funding issue. Plaintiffs again raise the straw argument that the contract and compact are not intended to strip Tribal officers of their law enforcement authority. The United States never contended that the officers lacked authority for the traffic stop.

At the bottom of page 14 Plaintiffs again raise a straw argument, misrepresenting that the United States cites the Deputation Agreement as confining the officers' authority to acts within the reservation. The Deputation Agreement does no such thing, but it does expressly limit, FTCA coverage:

> . . . any Gila River Indian Community Law Enforcement Officer who is deputized by the Bureau of Indian Affairs Special Law Enforcement Commission will only be deemed an employee of the Department of the Interior for purposes of the

> Federal Tort Claims Act while carrying out those laws applicable in Indian country as described in Section 3.A and Appendix A. Therefore, such officer will not be deemed a federal officer under 25 U.S.C. § 2804(f)(1), or for purposes of the Federal Tort Claims Act with respect to the enforcement of any other law except those applicable in Indian country as described in Section 3.A and Appendix A. [does not include state laws]

Deputation Agreement between BIA and GRIC, page 8, Section 8(B) quoted in original Motion.

Furthermore, the GRIC expressly agreed to this limited FTCA coverage in the Resolution authorizing the Deputation Agreement:

> WHEREAS, the practical effects of the Community entering into the Deputation Agreement are, among other things, Community police officers holding Special Law Enforcement Commission (SLEC) are:
>
> 1. treated as BIA officers for enforcing federal laws
> 2. deemed to be employees of the Department of Interior for purposes of the Federal Tort Claims Act (FTCA) while carrying out those laws applicable in Indian country; ...

Exhibit A, GRIC Resolution (GR-98-06) approving the Deputation Agreement, at page 1.

These provisions are consistent with the "purpose" being law enforcement on the GRIC, but in any event limit FTCA coverage regardless of the overall "purpose" of the Compact.

Plaintiffs argue that the Deputation Agreement is inapplicable because "neither officer was deputized under it". The superior officer in this case, Sergeant Tanakeyowma, held a SLEC issued in 2001 without an expiration date, and was issued a new one after the accident with a 3 year expiration date. Exhibit B p. 15, l. 4 through p. 16, l. 6. He was driving, initiated his emergency lights to effectuate the traffic stop and told his subordinate to talk to the driver. Exhibit B p. 40, l. 13 through p. 42, l.2. The Deputation Agreement was in effect at the time of the accident. Plaintiffs cite no law, because there is none, preventing parties to an agreement from revising an agreement by mutual agreement, so whatever might have been the terms of a prior agreement, the Deputation Agreement in this case is applicable. It is also relevant insofar as it states that no State law authority is exercised under the SLEC. The ILERA provides no basis for FTCA coverage in this case.

At page 15 Plaintiffs argue that the Deputation Agreement's limit on FTCA coverage means something other than what it says. But the Agreement expressly limits FTCA coverage to enforcement of laws applicable in Indian country, enforceable because the victim or

perpetrator is an Indian. *Id.* Plaintiffs' suggestion that the Deputation Agreement's FTCA coverage includes enforcement of traffic violations committed by non-Indians off the reservation is factually and legally incorrect.

Plaintiffs' argument concerning the Assimilative Crimes Act is also incorrect. Unlike military enclaves, application of that Act in Indian country is limited to prosecution of an Indian drunk driver because of the jurisdictional limits in 18 U.S.C. §§ 1152 and 1153. *United States v. Cruz*, 554 F.3d 840, 842 (9th Cir. 2009); *United States v. Burland*, 441 F.2d 1199, 1200 (9th Cir. 1971). Plaintiffs' statement that the officers need not have seen the driver in this case driving on the reservation, citing *United States v. Smith*, 2006 WL 2990044 *2 (D.Ariz. 2006) is misleading because that statement by that court dealt with whether the officer had probable cause for the traffic stop, not whether the Assimilative Crimes Act would be applicable. More importantly, the only contact with the driver in this case involved off-reservation conduct, and the issue is not authority to make the stop, the issue is FTCA coverage under the ISDEA's limited waiver of sovereign immunity. Plaintiffs go on to argue that the Assimilative Crimes Act applies to the state highway (Arizona Avenue in Chandler which is part of State Highways 87 and 587). That highway is not within the definition of 18 U.S.C. § 7:

> Special maritime and territorial jurisdiction of the United States defined.
> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
> ***
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Even if the events in this case occurred on a state highway within the reservation, the Assimilative Crimes Act would not apply, and the Act does not apply off the reservation in Chandler. *See Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1414-1416 (1997) (state highway not a federal enclave for enforcement of Tribal or Federal law); *Bressi v. Ford*, 575 F.3d 891, 895-99 (9th Cir. 2009) (Tribal police limited to stop to determine Indian status on state highway through reservation); *United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982) (state would have

jurisdiction on reservation for non-Indian drunk drivers); *United States v. Imngren,* 98 F.3d 811, 816 (4th Cir. 1996) (Assimilative Crimes Act conviction on fort did not extend the suspension of driving privileges to state highways outside fort). Plaintiffs also argue in footnote 6 at page 15 that the drunk driver in this case could have been prosecuted for assault on a Federal officer, Detective Lancaster, but he had not yet been issued a SLEC and, in any event, the assault occurred after the accident, and is irrelevant to FTCA coverage under the ISDEA as explained above.[11]

Plaintiffs conclude this argument by stating that the officers were acting within the scope of their employment, thereby making them Federal employees within the FTCA. The Tribal officers were not Federal employees. *Brandes*, 783 F.2d at 896. Scope of employment for the Tribal officers is only one of the two critical criteria in the ISDEA's waiver of sovereign immunity. Because they were not also carrying out the Compact, the FTCA does not apply. The Court in *Hunter v. United States,* CIV-09-02458-PHX-MEA (D. Ariz. June 9, 2010) (copy attached as **Exhibit E**) recently held that a Tribal officer making a traffic stop off the reservation, for a state traffic violation, was not carrying out the contract, and therefore not covered by the FTCA. The same result is required in this case.

CONCLUSION

The Complaint and action should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 30th day of June, 2010.

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S/ Michael A. Johns

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[11] The correct assault statute is 18 U.S.C. § 111. A person can qualify as a Federal officer or employee merely if the person was "assisting" a Federal officer or employee at the time. 18 U.S.C. § 1114.

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, 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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