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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Jesse Dupris, et al.,**

Plaintiffs,

vs.

**Perry Proctor, et al.,**

Defendants.

No. CV08-8132-PCT-PGR  
CV08-8133-PCT-PGR  
(Consolidated)

**PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
RE. FEDERAL EMPLOYEE  
STATUS OF TRIBAL OFFICER  
DEFENDANTS**

Defendants Perphelia Massey and Joshua Anderson were, at the time of the events at issue, agents of the Federal Government within the context of the Federal Tort Claims Act. At the time, Massey and Anderson were police officers with the White Mountain Apache Tribal Police Department. When the Federal Bureau of Indian Affairs formed an inter-agency task force to investigate a serial rapist on the White Mountain Apache Indian Reservation, the federal task force members, led by BIA Law Enforcement Agent Mike McCoy, selected Massey and Anderson to be on the task force. On the task force, these two officers followed the directives of their federal law enforcement counterparts. They exercised no independent discretion or judgment.

As set forth herein, the undisputed facts demonstrate that Massey and Anderson should be considered "federal employees," both for purposes of Plaintiffs' claims against the United States pursuant to the Federal Torts Claim Act, **28 U.S.C. §§ 2671, et seq.**, as well as for purposes of independent claims under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). As such, Plaintiffs seeks summary judgment

1 on these specific issues, as more fully set forth in the following Memorandum of Points  
2 and Authorities and the accompanying Statement of Facts.

3 RESPECTFULLY SUBMITTED: August 26, 2011

4 **ROBBINS & CURTIN, p.l.l.c.**

5 By: s/Joel B. Robbins

6 Joel B. Robbins

7 *Attorney for Plaintiffs*

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Background**

10 The White Mountain Apache Tribe (the “Tribe”) is a federally recognized tribe.  
11 **PSOF § 1.** It is located on the Fort Apache Indian Reservation in northeastern Arizona,  
12 with its tribal headquarters in Whiteriver, Arizona. *Id.*

13 On July 15, 2004, the Tribe entered into a Public Law 93-638 Contract (“638  
14 Contract”) with the United States Department of Interior, Bureau of Indian Affairs  
15 (“BIA”), for the operation of a tribal policy department, as authorized pursuant to Title I  
16 of the Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*  
17 *Id.* at ¶ 2. The Department was known as the White Mountain Apache Tribal Police  
18 Department (the “Tribal Police Department”). *Id.* As of August 1, 2006, Defendants  
19 Perphelia Massey and Joshua Anderson were sworn police officers with the Tribal Police  
20 Department. *Id.* at ¶ 3.

21 Beginning in January of 2005, a serial rapist began operating on the Fort Apache  
22 Indian Reservation. *Id.* at ¶ 4. The rapist was characterized by two distinct traits: *first*, he  
23 generally targeted post-pubescent teenage girls, ranging in age from 12 to 18 years old;  
24 and *second*, he impersonated a tribal police officer as part of his ruse to lure the girls to a  
25 place where he could commit his felonious acts. *Id.*

26 By early September of 2006, at least 15 rapes were attributed to this serial rapist.  
27 *Id.* at ¶ 5. Accordingly, officials with the BIA Law Enforcement Division detailed  
28 approximately eight agents to the Fort Apache Indian Reservation for 30 days as part of an

1 investigative task force known as Operation Mountain Line. *Id.* BIA Special Agent  
2 Michael McCoy was designated to be the lead agent on the task force, with BIA Special  
3 Agent Warren Youngman in charge of logistics. *Id.* at ¶¶ 6-7. McCoy was responsible  
4 for day-to-day and investigative decisions. *Id.* at ¶ 7.

5 Agents McCoy and Youngman concluded that the task force would benefit from  
6 the presence of tribal police officers. *Id.* at ¶¶ 8-9. Agent McCoy explained:

7 We had both officers, Massey and Anderson, attached to the task force  
8 because they were tribal officers, and that -- primarily because they knew --  
9 knew the locale. And, you know, you need somebody on the task force to act  
10 as a liaison as well, and **if we ever needed to file any tribal charges, then**  
11 **they would be the ones that would -- would take that role.**

12 *Id.* at ¶ 9. McCoy also testified that he thought their presence would be helpful in the  
13 event the task force needed to file charges in tribal court. He testified:

14 Q. Tell me as best you can what your understanding of the role played by  
15 Officers Massey and Anderson during the Mountain Line investigation.

16 A. We had both officers, Massey and Anderson, attached to the task force  
17 because they were tribal officers, and that -- primarily because they  
18 knew -- knew the locale. And, you know, you need somebody on the  
19 task force to act as a liaison as well, and if we ever needed to file any  
20 tribal charges, then they would be the ones that would -- would take  
21 that role.

22 Q. Okay. Because you as BIA officers can't file tribal charges; is that  
23 correct?

24 A. That's correct. Not -- not at that point in time. Right.

25 Q. Okay. And with respect to the day-to-day activities of the task force --  
26 and I'm dealing with specifically Officers Massey and Anderson --  
27 would it have been you or Mr. Youngman who would have given them  
28 their assignments or directed them, told them what to do, who to  
interview, who to go with, that sort of thing?

A. Would have been either Warren or I.

Q. They weren't out there just making decisions on themselves, deciding  
on where to go, who to talk to, what to do?

1           A.     No.

2     *Id.* at ¶¶ 9-10.

3           After an assistant United States attorney refused to prosecute Plaintiffs Jesse  
4     Dupris and Jeremy Reed, McCoy decided that Dupris and Reed should be prosecuted in  
5     tribal court. *Id.* at ¶ 13.     Because BIA agents lacked authority to institute charges in  
6     tribal court, he instructed the two tribal police officers to institute the charges. *Id.* at ¶¶  
7     10, 13-14.

8           As members of a federal task force under the direction of the Bureau of Indian  
9     Affairs Law Enforcement Division, Officers Anderson and Massey were federal “agents”  
10    for purposes of both the FTCA and *Bivens*. Accordingly, Plaintiffs seek partial summary  
11    judgment on this issue pursuant to Federal Rule of Civil Procedure 56(d).

12    **II.     Discussion**

13           **A.     Officers Massey and Anderson Were Federal Officers For**  
14           **Purposes of the Federal Tort Claims Act As A Matter Of Law.**

15                   **1.     Under 5 U.S.C. § 3372, Massey and Anderson Were**  
16                   **Deemed To Be Federal Employees By Operation of**  
17                   **Statute.**

18           Title 5, section 3372 of the United States Code provides that a local agency, which  
19     includes a tribal entity, *see* **5 U.S.C. § 3371(2)(C)**, may assign an employee to work with a  
20     federal agency, with the approval of the federal agency. **5 U.S.C. 3372.** Section 3374, in  
21     turn, provides that such assigned employees are deemed “federal employees” for purposes  
22     of the FTCA:

23           (a)     An employee of a State or local government who is assigned to a Federal  
24                   agency under an arrangement under this subchapter may—

25                                 \*   \*   \*

26                   (2)     be deemed on detail to the Federal agency.

27                                 \*   \*   \*

(c) During the period of assignment, a State or local government employee on detail to a Federal agency—

\* \* \*

(2) is deemed an employee of the agency for the purpose of . . . the Federal Tort Claims Act and any other Federal tort liability statute. . . .

**5 U.S.C. §§ 3374(a)(2), (c)(2).** Similarly, section 2671 of Title 28 – part of the FTCA -- provides that an “employee of the government” includes any “persons acting on behalf of a federal agency in an official capacity, **temporarily** or permanently in the service of the United States, **whether with or without compensation. . . .**” **28 U.S.C. § 2671** (emphasis added). Members of federal law enforcement task forces have routinely been declared “federal officers” for purposes of the FTCA. *See, e.g., Chin v. Wilhelm*, 291 F. Supp. 2d 400, 403 (D. Md. 2003) (and cases cited therein) (noting that “[d]eputized DEA agents have been considered federal employees within the meaning of the FTCA”).<sup>1</sup> Anderson and Massey are federal officers within the meaning of the foregoing statutes.

## **2. Massey and Anderson Were Federal Employees Under The “*De Facto Officer*” Doctrine.**

Even if Anderson’s and Massey’s appointment lacked the requisite formalities, they may still be considered federal officers under the “*de facto officer*” doctrine. In a case notably similar to the case at hand, the plaintiff, Turley, sued a county deputy sheriff who had been assigned to a federal DEA task force. *Turley v. United States*, 503 F.Supp.2d 912 (N.D. Ohio 2007). Following the dismissal of criminal charges against Turley, he brought state law claims against the deputy, asserting that the requisite formalities to deputize or commission the deputy as a federal agent had not been satisfied and, therefore, the deputy was not a federal agent notwithstanding his participation in the federal task force.

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<sup>1</sup> Ironically, the officer at issue is usually attempting to assert federal employment in an effort to evade liability and, as such, the Government is quick to validate the task force members as federal employees. Here, however, where federal employment may create

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The district court disagreed. “That effort fails,” the court held, “under the ‘*de facto* officer’ doctrine.” *Id.* at 915. This doctrine provides that “[w]here an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.” *Id.* (quoting *Norton v. Shelby County*, 118 U.S. 425, 444-45, 6 S.Ct. 1121 (1886)); *see also* *Ryder v. United States*, 515 U.S. 177, 180, 115 S.Ct. 2031 (1995) (reaffirming the *de facto* officer doctrine). Noting that the acts at issue were those normally performed by federal officers in a federal investigation – “[g]etting a search warrant and testifying at a bond hearing are acts routinely performed by federal law enforcement officers” – the court held that the deputy sheriff was a federal employee under the *de facto* officer doctrine. *Turley*, 503 F.Supp.2d at 916.

“The enforcement of federal criminal statutes (as opposed to state, tribal or local criminal statutes) on tribal lands has traditionally been the responsibility of the Department of the Interior's Bureau of Indian Affairs.” *Hopland Band of Pomo Indians v. Norton*, 324 F.Supp.2d 1067, 1072 (N.D.Cal. 2004). “Significantly, in carrying out this statutory responsibility, the BIA (in addition to maintaining its own police force) has been authorized to enter into deputation agreements with tribes to enforce federal law, maintain a qualified force and to deputize qualified tribal police officers to enforce federal law on Indian lands.” *Id.* (citing **25 U.S.C. § 2804**). Indeed, such deputation is required for tribal police to make “warrantless arrests,” such as the arrests of Plaintiffs in the case at hand. *See id.* (“Once a deputation agreement is in place, a tribal police officer, if found on a case-by-case basis to be qualified, may be commissioned by the BIA, which would allow him or her to carry a firearm and make warrantless arrests, among other things”). The acts at issue were conducted by federal agents, under federal law, and can be held accountable for their wrongful acts under the Federal Tort Claims Act. *See Casillas v. United States*, 2009 WL 735193, \*14 (D.Ariz. 2009) (finding tribal officer was a “federal agent,” noting

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liability, suddenly the two tribal officers, part of a task force clearly directed by federal law



1 that she was “a federal agent assigned to the violent crime investigations on the Tohono  
2 O’odham Reservation and that **the SWAT officers were in fact executing a search**  
3 **warrant authorized by a federal magistrate judge**”) (emphasis added).

4 The same is true here. This was a federal investigation, conducted by way of a  
5 federal task force, headed by a federal law enforcement officer. With the sole exceptions  
6 of two tribal officers, all of the task force members were federal law enforcement officers,  
7 and the investigative activities were conducted almost exclusively by the federal officers.  
8 In this vein, the ultimate objective of the task force – to arrest and charge the object of the  
9 investigation – was also an act that would routinely be performed by a federal officer and,  
10 as such, Defendants Anderson and Massey are federal officers under the *de facto* officer  
11 doctrine.

### 12 **3. Officers Anderson And Massey Were Federal** 13 **Employees Under The Indian Self-Determination And** 14 **Education Assistance Act, 25 U.S.C. § 450f.**

15 Public Law No. 101-512 provides in relevant part that

16 With respect to claims resulting from the performance of functions during  
17 fiscal year 1991 and thereafter, or claims asserted after September 30, 1990,  
18 but resulting from the performance of functions prior to fiscal year 1991,  
19 under a contract, grant agreement, or any other agreement or compact  
20 authorized by the Indian Self-Determination and Education Assistance Act of  
21 1975, as amended (88 Stat. 2203; 25 U.S.C. 450 et seq.) [Pub. L. 93–638, see  
22 Short Title note set out under section 450 of this title and Tables], . . . , an  
23 Indian tribe, tribal organization or Indian contractor is deemed hereafter to be  
24 part of the Bureau of Indian Affairs in the Department of the Interior or the  
25 Indian Health Service in the Department of Health and Human Services while  
26 carrying out any such contract or agreement and its employees are deemed  
27 employees of the Bureau or Service while acting within the scope of their  
28 employment in carrying out the contract or agreement: Provided, That after  
September 30, 1990, any civil action or proceeding involving such claims  
brought hereafter against any tribe, tribal organization, Indian contractor or  
tribal employee covered by this provision shall be deemed to be an action  
against the United States and will be defended by the Attorney General and be  
afforded the full protection and coverage of the Federal Tort Claims Act. . . .

enforcement officers, are treated as veritable pariahs within their own work group.

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*Public Law 101-512, Title II, § 314*, codified at 25 U.S.C. § 450f, Note, Historical and Statutory Notes. Here, the Tribal Police Department was organized under a section 638 contract and the officers were performing their law enforcement duties under the contract. As such, their conduct falls squarely within the provisions of section 314 above, and the officers are federal employees for purposes of the FTCA accordingly. *See, e.g., Red Elk v. United States* 62 F.3d 1102, 1103 (8<sup>th</sup> Cir. 1995) (tribe's "Public Safety employees are deemed to be part of the Bureau of Indian Affairs" so long as they are acting within the scope of their employment); *Big Crow v. Rattling Leaf*, 296 F.Supp.2d 1067, 1068-69 (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 is acting within the employee's scope of employment"); *Garcia v. United States*, No. CIV 08-0295, 2010 WL 2977611 (D.N.M. June 15, 2010); *Adams v. Tunmore*, No. CV-05-270, 2006 WL 2591272 (E.D.Wash. Sept. 8, 2006).<sup>2</sup> Accordingly, for this separate and independent reason, Plaintiffs respectfully request that this Court declare that Officers Anderson and Massey were federal employees as a matter of law.

**B. Officers Massey And Anderson Were Federal Agents For Purposes Of *Bivens* As A Matter Of Law.**

For the same reasons as outlined above with respect to Plaintiffs' claims under the Federal Tort Claims Act, Plaintiffs submit that Officers Anderson and Massey are federal agents for purposes of individual liability under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

Moreover, a person need not be a "formal" federal employee or agent, as long as she or he is engaged in federal action. In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183

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<sup>2</sup> The fact that Anderson and Massey were assisting a federal investigative task force does not take them out of the scope of their employment for purposes of the 638 contract. *See, e.g., Allender v. Scott*, 379 F.Supp.2d 1206, 1217-18 (D.N.M. 2005) (tribal officers assisting state law enforcement officials deemed to be within the scope of the tribal police's 638 contract).



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(1980), the United States Supreme Court held that an otherwise non-federal employee may be considered a federal agent if “he is a willful participant in joint action with the [government] or its agents.” *Id.* at 27, 101 S.Ct. at 186. The Ninth Circuit and other courts have applied this rule to *Bivens* claims against individuals. *See, e.g., Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9<sup>th</sup> Cir. 1987); *Ginn v. Mathews*, 533 F.2d 477 (9th Cir.1976). Most recently, in *Pollard v. Geo Group, Inc.*, 607 F.3d 583 (9th Cir. 2010), *cert. granted*, -- U.S. --, 131 S.Ct. 2449 (May 16, 2011), the Ninth Circuit held that private prison guards monitoring federal detainees were subject to claims under *Bivens*. *Id.* at 592.

Moreover, implying a *Bivens* remedy against Officers Anderson and Massey is consistent with the Ninth Circuit’s well-established rule of “integral participation.” *See Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004). In *Boyd* and its predecessors, the Ninth Circuit held that all members of a joint group of state actors can be responsible for the unconstitutional conduct of the group to the extent that each was an “integral participant” in the constitutional violation. *Id. see also Blankenhorn v. City of Orange*, 485 F.3d 463, 492 (9th Cir. 2007) (same); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978) (The “requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury”).

*Boyd* is instructive. In *Boyd*, one officer unconstitutionally deployed a flash-bang device to gain entry into a suspect’s home, while other others provided armed backup. In finding that every officer could be liable for the wrongful use of the flash-bang device, the Ninth Circuit held that “every officer participated in some meaningful way” in the arrest and “every officer was aware of the decision to use the flash-bang, did not object to it, and participated in the search operation knowing the flashbang was to be deployed.” *Boyd*, 374 F.3d at 780; see also *Blankenhorn*, 485 F.3d at 481 n.12 (integral participation simply requires “some fundamental involvement in the conduct that allegedly caused the

1 violation”); *Hillblom v. County of Fresno*, 539 F.Supp.2d 1192, 1206 (E.D. Cal. 2008)  
 2 (same). Federal courts do not excuse unconstitutional conduct simply because it was done  
 3 as a part of a group. Here, Officers Anderson and Massey were part of the Mountain Line  
 4 Task Force, and were an integral part of both the decision to and actual act of falsely  
 5 arresting and prosecuting Messrs. Dupris and Reed. Accordingly, for the reasons set forth  
 6 herein, Plaintiffs request that this Court hold that Officers Anderson and Massey be  
 7 deemed federal agents as a matter of law for purposes of *Bivens*.

### 8 **III. Conclusion**

9 For the reasons set forth herein, Plaintiffs Jesse Dupris and Jeremy Reed  
 10 respectfully request that this Court hold that tribal officers Joshua Anderson and Perphelia  
 11 Massey were federal officers as a matter of law for purposes of both the Federal Tort  
 12 Claims Act and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct.  
 13 1999 (1971).

14 RESPECTFULLY SUBMITTED: August 26, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2011, 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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