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6  
7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA

8 LOREN R. SHIRK,  
9 Plaintiff,

10 v.

11 MICHAEL LANCASTER, *et al.*,  
12 Defendant.

No. CV-2007-018088

**UNITED STATES' *AMICUS* BRIEF**

(Assigned to: Honorable Eileen S.  
Willett)

13  
14 The United States of America respectfully submits the following Memorandum  
15 concerning the waiver of Tribal sovereign immunity under Federal law applicable to claims  
16 against the United States and claims against Tribal Police officers under the Indian Self  
17 Determination and Education Assistance Act (ISDEA) and the Indian Law Enforcement Reform  
18 Act (ILERA) which involve enforcement of state traffic laws outside of Indian country. The  
19 issue is relevant to the pending Motion for Reconsideration of the previous dismissal of this case  
20 based on Tribal sovereign immunity.

21 **MEMORANDUM**

22 **SUMMARY**

23 This case involves Tribal police officers making a traffic stop under Arizona law outside  
24 Indian country. The United States District Court concluded that although the officers were  
25 acting within the scope of their employment with the Gila River Indian Community (GRIC), they  
26 were not "carrying out" the Community's Compact for law enforcement services in Indian  
27 country, and therefore the Federal Tort Claims Act did not apply. *Shirk v. United States*, 2010  
28 WL 3419757 (D. Ariz. August 27, 2010). That decision is currently on appeal in the Ninth

1 Circuit, but briefing is stayed pending resolution of this state court case. Congress provided  
2 liability insurance for Indian tribes under a contract or compact for claims which are not covered  
3 by the Federal Tort Claims Act, and waived Tribal sovereign immunity up to the policy limits,  
4 with other limits not applicable here such as punitive damages and prejudgment interest. The  
5 limited waiver of Tribal sovereign immunity expressly prohibits the insurance carrier from  
6 raising Tribal sovereign immunity as a defense, within these limits. This Court mistakenly  
7 dismissed this case because neither party brought the waiver of Tribal sovereign immunity to the  
8 Court's attention.

9 **1. The accident.**

10 On October 19, 2006, at approximately 5:00 p.m., Gila River Indian Community  
11 Detective Michael Lancaster and Sergeant Hilario Tanakeyoma were driving a GRIC Police  
12 SUV after completing an AZ POST training class in Tucson, Arizona. As Officers Lancaster  
13 and Tanakeyoma were proceeding northbound on Arizona Avenue, outside Indian country, to  
14 their homes in Chandler and Phoenix, they encountered a drunk driver. Deposition of Sergeant  
15 Tanakeyowma at p. 32, l. 16-22 and p. 36, l. 9 through p. 41, l. 8, and Detective Lancaster, at p.  
16 33, l. 7-12 and p. 38, l. 2 through p. 46, l. 21. They observed the driver driving dangerously, and  
17 pulled up behind him at a stoplight. They turned on their lights and attempted to make contact  
18 with the driver. The driver hit the gas and entered the intersection against the red light, seriously  
19 injuring Plaintiff Shirk. According to the Chandler Police Department Incident Report, three  
20 blood samples taken from the driver after his arrest showed blood alcohol readings of 0.150,  
21 0.136 and 0.119. The reading of 0.150 is "extreme DUI" under ARS § 28-1382.

22 **2. The officers were not "carrying out" the GRIC compact, the Federal Tort Claims Act**  
23 **does not apply, Federally funded liability insurance applies, and Tribal sovereign**  
24 **immunity is waived up to the policy limits.**

25 Pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §  
26 450-450n (ISDEAA) the United States Bureau of Indian Affairs (BIA) and the Community had  
27 entered into a contract for law enforcement services, commonly known as a 638 contract.

1 Subsequently, the BIA and the Community entered into a Compact of Self-Governance for law  
2 enforcement and other services.

3 The 1998 GRIC 638 contract for law enforcement, which preceded the compact,  
4 provided:

5 At page 14:

6 The program function is to provide law enforcement services for the Gila River  
7 Indian Community.

8 At page 1 of the Statement of Work attached to the Contract, Section 102:

9 The Contractor shall provide [personnel, etc.] to perform all tribal law  
10 enforcement and detention services on the Gila River Indian Reservation,  
including the investigation of applicable Federal violations (major crimes).

\*\*\*

11 102.3 The Contractor shall be responsible for the investigation of all offenses  
12 enumerated in the Tribal Law and Order Code, United States Codes or 25 CFR  
as applicable.

13 102.4 In addition to Section 102.3 of this Contract, The Contractor shall assist the  
BIA, other Federal and state law enforcement officials in the investigation of State  
or Federal offenses that occur on the reservation.

14 102.5 Uniform Police. The Uniform Police Program provides police protection  
15 and enforcement of Federal laws and laws of the Gila River Indian Community.  
This enforcement is to assure the health safety, and welfare of the community, its  
16 visitors, and all personal and real property.

17 The Contractor shall be responsible for the following patrol and protective  
services on the reservation:

18 A. Maintaining continual law enforcement services on the reservation . . .

19 B. Enforcement of all Tribal criminal and traffic laws, United States Codes or 25  
CFR as applicable, including all tribal ordinances.

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20 D. The protection of all private, public and government property on the  
reservation.

\*\*\*

21 G. Patrol services on and off roadways and in the communities within the  
boundaries of the Reservation.

22 102.8 Criminal Investigations. The Criminal Investigation Program has primary  
23 investigative responsibilities for crimes committed on, or involving, the Gila River  
Indian Community. This includes [listing crimes] within the community.

24 The 2003 GRIC Compact provides at Page 9:

25 **Section 3 - Federal Tort Claims Act coverage; Insurance.**  
26  
27  
28

1 (a) The Community is deemed by the Act to be covered under the Federal  
2 Tort Claims Act ("FTCA"), while performing programs, services, functions and  
activities under this Compact and any funding agreement incorporated herein.  
\*\*\*

3 (c) Funds provided under a funding agreement may be used to purchase  
4 such additional liability and other insurance as is prudent in the judgment of the  
Community for its protection and the protection of its employees.

5 The GRIC Funding Agreement effective October 1, 2006 provides at page 3, Part L, for  
6 funding the GRIC "Law Enforcement Program" including "Uniform Police" and "Criminal  
7 Investigation".

8 The BIA also entered into a Deputation Agreement with the Community and issued  
9 Special Law Enforcement Commissions (SLECs) to the GRIC officers. Sergeant Tanakeyowma  
10 had received a SLEC prior to the accident but Detective Lancaster received his after the  
11 accident.

12 The Interior Department Law Enforcement Handbook  
13 states at 4-04-01(K):

14 K. Federal Liability for Commission Holders. The SLEC grants the holder  
15 specific Federal authority and responsibility and as a result places a high level of  
16 liability risk upon the U.S. Government, To reduce liability risks for the  
Government, the SAC is responsible for ensuring that all requirements are  
17 satisfied prior to issuance of the commission. The liability or immunity of an  
officer with a SLEC will be determined according to the Deputation Agreement  
for issuance of the SLEC . . .

18  
19 (Emphasis added)

20 The Deputation Agreement between BIA and GRIC provides at page 8, Sections 8(A) and  
21 (B):

22 A. It is understood and agreed that each agency which is a party to this  
23 Agreement, its agents, employees and insurers do not, by virtue of this Agreement,  
assume any responsibility or liability for the actions of officers commissioned  
24 pursuant to this Agreement which are performed outside the scope of their duties.  
B. Notwithstanding subsection A, any Gila River Indian Community Law  
25 Enforcement Officer who is deputized by the Bureau of Indian Affairs Special  
Law Enforcement Commission will only be deemed an employee of the  
26 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  
27 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

1 respect to the enforcement of any other law except those applicable in Indian  
2 country as described in Section 3.A and Appendix A.

3 The GRIC Resolution (GR-98-06) approving the Deputation Agreement provides at page

4 1:

5 WHEREAS, the practical effects of the Community entering into the Deputation  
6 Agreement are, among other things, Community police officers holding Special  
Law Enforcement Commission (SLEC) are:

- 7 1. treated as BIA officers for enforcing federal laws
- 8 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; ...

9 Indian tribes have inherent sovereign power to enforce Tribal criminal laws against  
10 Indians in Indian country. *United States v. Lara*, 124 S.Ct. 1628, 1632 (2004); *Means v. Navajo*  
11 *Nation*, 432 F.3d 924, 931 (9<sup>th</sup> Cir. 2005).

12 Authority to enforce state laws belongs generally in the states, not the Federal  
13 government. *Allender v. Scott*, 379 F.Supp2d 1206, 1212 (D. New Mexico 2005) (citing *Brecht*  
14 *v. Abrahamson*, 507 U.S. 619, 635 (1993)).

15 The AZ POST certification authorized the officers to make the traffic stop as Arizona  
16 Peace Officers enforcing Arizona law outside Indian country, ARS § 13-3874(A):

17 While engaged in the conduct of his employment any Indian police officer who  
18 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  
19 standards adopted pursuant to § 41-1822 shall possess and exercise all law  
enforcement powers of peace officers in this state.

20 Under Arizona law, the officers, as citizens, were authorized and privileged to arrest the  
21 drunk driver. ARS §§ 13-3884; 13-3889; *State v. Chavez*, 208 Ariz. 606, 608 (Ariz. App. 2004)  
22 (DUI may constitute breach of the peace). Section 13-3884 provides:

23 A private person may make an arrest:

- 24 1. When the person to be arrested has in his presence committed a misdemeanor  
25 amounting to a breach of the peace, or a felony.
- 26 2. When a felony has been in fact committed and he has reasonable ground to  
27 believe that the person to be arrested has committed it.

1 The Department of Interior is generally authorized to fund Tribal police pursuant to 25  
2 U.S.C. § 13. The Interior Department can fund Tribal police through an Indian Self-  
3 Determination and Education Assistance Act contract because 25 U.S.C.A. § 450f(a)(1)(B)  
4 permits contracting for programs authorized by 25 U.S.C. § 13. Contracting tribes can convert  
5 to a Compact of Self-Governance in accordance with 25 U.S.C. § 458aa *et seq.* in which  
6 authority to provide Tribal police is contained in 25 U.S.C. § 458cc(b)(1)(B) pursuant to an  
7 Annual Funding Agreement (AFA).

8 Prior to 1990, the Interior Department funded liability insurance for tribes with 638  
9 contracts. In 1988 the statute was amended to provide FTCA coverage for claims of medical  
10 malpractice, and in 1990, Congress extended coverage of the FTCA to certain claims arising  
11 from carrying out law enforcement contracts, 25 U.S.C. § 450f Note; PL 101-512, SEC.314  
12 (quoted below).

13 Congress still required tribes to carry Federally funded liability insurance for claims not  
14 covered by the FTCA, and required contracting tribes to waive sovereign immunity up to the  
15 limits of the insurance policy. 25 U.S.C. § 450f(c):

16 (c) Liability insurance; waiver of defense

17 (1) Beginning in 1990, the Secretary shall be responsible for obtaining or  
18 providing liability insurance or equivalent coverage, on the most cost-effective  
19 basis, for Indian tribes, tribal organizations, and tribal contractors carrying out  
20 contracts, grant agreements and cooperative agreements pursuant to this  
subchapter. In obtaining or providing such coverage, the Secretary shall take into  
consideration the extent to which liability under such contracts or agreements are  
covered by the Federal Tort Claims Act.  
\*\*\*

21 (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to  
22 this subsection shall contain a provision that the insurance carrier shall waive any  
23 right it may have to raise as a defense the sovereign immunity of an Indian tribe  
24 from suit, but that such waiver shall extend only to claims the amount and nature  
of which are within the coverage and limits of the policy and shall not authorize  
or empower such insurance carrier to waive or otherwise limit the tribe's sovereign  
immunity outside or beyond the coverage or limits of the policy of insurance.

25 (B) No waiver of the sovereign immunity of an Indian tribe pursuant to this  
26 paragraph shall include a waiver to the extent of any potential liability for interest  
prior to judgment or for punitive damages or for any other limitation on liability  
imposed by the law of the State in which the alleged injury occurs.

1 These provisions apply to Compacts of Self-Governance as well pursuant to 25 U.S.C. § 458ff(c)  
2 (incorporating Section 450f(c) and other contracting provisions):

3 Statutory construction begins and ends with the language of the statute unless it is  
4 ambiguous. *Navajo Nation v. Department of Health and Human Services*, 325 F.3d 133, 1136  
5 (9<sup>th</sup> Cir. 2003); *Transcon Lines v. Sterling Press*, 58 F.3d 1432, 1437 (9<sup>th</sup> Cir. 1995). Section  
6 450f Note extended FTCA coverage as follows:

7 With respect to claims resulting from the performance of functions . . .under a  
8 contract, grant agreement, or cooperative agreement . . . authorized by the Indian  
9 Self-Determination and Education Assistance Act . . . an Indian tribe, tribal  
10 organization or Indian contractor is deemed hereafter to be part of the Bureau of  
11 Indian Affairs . . .while carrying out any such contract or agreement and its  
12 employees are deemed employees of the Bureau or Service while acting within the  
13 scope of their employment in carrying out the contract or agreement . . .[and] 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 . . .

14 (Emphasis added)

15 The statute therefore expressly provides that an Indian tribe is only deemed to be a  
16 Federal agency for claims resulting from performance of functions under the compact while  
17 carrying it out, and tribal employees are only deemed to be Federal employees for acts committed  
18 in carrying out the compact. The Tribal officers in this case were not carrying out the compact  
19 when they attempted the traffic stop outside Indian country.

20 Because the statutes govern liability under the FTCA and the limited waiver of Tribal  
21 immunity, the agreements with tribes need not include duplicate provisions. For example, one  
22 of the regulations describing FTCA coverage for a law enforcement compact, 25 C.F.R. §  
23 1000.275 states, in question and answer format:

24 Is it necessary for a self-governance AFA to include any clauses about Federal  
25 Tort Claims Act coverage?

26 No, clauses about FTCA coverage are optional. At the request of Tribes/Consortia,  
27 self-governance AFA's shall include the following clause to clarify the scope of  
28 FTCA coverage:

1 For purposes of Federal Tort Claims Act coverage, the Tribe/Consortium and its  
2 employees (including individuals performing personal services contracts with the  
3 tribe/consortium) are deemed to be employees of the Federal government while  
4 performing work under this AFA. This status is not changed by the source of the  
5 funds used by the Tribe/Consortium to pay the employee's salary and benefits  
6 unless the employee receives additional compensation for performing covered  
7 services from anyone other than the Tribe/Consortium.

8 The Compact/AFA provided for enforcement of Federal and Tribal laws within the  
9 boundaries of the Community, not for state law enforcement outside the Community.

10 Federal law controls the interpretation of the compact in this case. *Smith v. Central*  
11 *Arizona Water Conservation District*, 418 F.3d 1028, 1034, 1038 (9<sup>th</sup> cir. 2005). Section 15  
12 at page 11 of the GRIC Compact provides:

13 Interpretation of Federal Law. In the implementation of this Compact, the  
14 Secretary shall interpret all Federal laws, executive orders, regulations and this  
15 Compact in a manner that effectuates and facilitates the purposes of this Compact  
16 and achievement of the Community's goals and objectives.

17 The officers in this case were not carrying out the compact because they were not  
18 enforcing Tribal or Federal law within the exterior boundaries of the Community. Instead, they  
19 were making a traffic stop to enforce state law outside Indian country as Arizona Peace Officers  
20 under the authority of ARS 13-3874 or as citizens of Arizona under the authority of the Arizona  
21 citizen arrest statute, ARS §§ 13-3883. *See United States v. Smith*, 2006 WL 2990044 \*2  
22 (D.Ariz. Sept. 15, 2006) (Arizona law authorized Tribal officer to make lawful traffic stop off  
23 the reservation); *State v. Nelson*, 208 Ariz. 5, 8 (Ariz. App. 2004) (same). Similarly, while  
24 making this traffic stop under color of Arizona law, the officers would be state actors for  
25 purposes of 42 U.S.C. § 1983. *Evans v. McKay*, 869 F.2d 1341, 1348 (9<sup>th</sup> Cir. 1989). Similarly,  
26 they would not be Federal actors when making this traffic stop under a *Bivens* theory of liability.  
27 *Boney v. Valline*, 597 F.Supp.2d 1167, 1174 (D.Nev. 2009).

28 The facts of this case differ from those in which a Tribal officer has been found to be  
covered by the FTCA while making an arrest. For example, in *Allender*, 379 F.Supp.2d at 1215,  
the tribal officers were cross-commissioned as deputy sheriffs pursuant to agreements among



1 the Tribe and the County, the BIA had agreed with the state of New Mexico to assist in enforcing  
2 state law, the 638 contract included enforcing state law and the arrest was within Indian country.  
3 The Court therefore found that the FTCA covered the on-reservation arrest. Here, the compact  
4 did not cover enforcing state law off the reservation and the Deputation Agreement entered into  
5 pursuant to the Indian Law Enforcement Reform Act (ILERA) expressly provided there was no  
6 FTCA coverage. Under the ILERA the Secretary of the Interior “may” authorize Tribal officers  
7 to enforce Tribal or Federal laws in Indian country, and “may” authorize them to assist a state  
8 or local agency in enforcing state law, when requested, under Section 2803. 25 U.S.C. §  
9 2804(a) provides:

10 The Secretary may enter into an agreement for the use (with or without  
11 reimbursement) of the personnel or facilities of a Federal, tribal, State, or other  
12 government agency to aid in the enforcement or carrying out in Indian country of  
13 a law of either the United States or an Indian tribe that has authorized the  
Secretary to enforce tribal laws. The Secretary may authorize a law enforcement  
officer of such an agency to perform any activity the Secretary may authorize  
under section 2803 of this title.

14 Section 2803 provides:

16 The Secretary may charge employees of the Bureau with law enforcement  
17 responsibilities and may authorize those employees to-- (8) when requested, assist  
18 (with or without reimbursement) any Federal, tribal, State, or local law  
19 enforcement agency in the enforcement or carrying out of the laws or regulations  
the agency enforces or administers.

20 In this case, the Secretary did not authorize the officers to stop the drunk driver outside the  
21 Community. Therefore, FTCA coverage is not extended to them because they were not acting  
22 under authority granted by the Secretary as required by 25 U.S.C. § 2804(f):

23 (f) Status of person as Federal employee

24 While acting under authority granted by the Secretary under subsection (a) of this  
25 section, a person who is not otherwise a Federal employee shall be considered to  
be--

26 (1) an employee of the Department of the Interior only for purposes of--  
27  
28

1 (A) the provisions of law described in section 3374(c)(2) of Title 5, and [this  
2 includes the FTCA]

3 (B)sections 111 and 1114 of Title 18, and . . .

4 (Emphasis added)

5 **3. Arguments made in the Community’s *Amicus* brief.**

6 In their *Amicus* brief, p. 4, the Community argues that the 1975 version of the statute, 25  
7 U.S.C. § 450(f)(c), forbidding a Tribe’s insurance carrier from raising Tribal sovereign immunity  
8 up to the policy limits, did not expressly and unequivocally waive Tribal sovereign immunity.  
9 That may or may not be true, or even clear, but that version of the statute does not apply to this  
10 case. The Community acknowledges at page 5, footnote 2, that the statute was poorly written  
11 because personal injury suits are brought against parties, not insurance companies. At page 5,  
12 the Community quotes a portion of the amended statute, § 450(f)(c)(1) but misleadingly omits  
13 the title and two subsections, §§ 450(f)(c)(3) (A) and (B), quoted above, which expressly provide  
14 the limited waiver of Tribal sovereign immunity. The legislative history of the 1988 amendment  
15 is as explicit as the current statute - that Tribal sovereign immunity would be waived up to the  
16 policy limits:

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

21 1987 WL 61567, \*27; S. Rep. No. 274, 100TH Cong., 1ST Sess. 1987, 1988 U.S.C.C.A.N. 2620,  
22 S. REP. 100-274 (Leg.Hist.) \*1\*2620P.L. 100–472, INDIAN SELF–DETERMINATION AND  
23 EDUCATION ASSISTANCE ACT AMENDMENTS OF 1988

24 The Ninth Circuit has subsequently recognized that the statute, as amended, expressly  
25 waives Tribal sovereign immunity up to the policy limits. *Demontiney v. United States*, 255 F.3d  
26 801, 813 (9<sup>th</sup> Cir. 2001) (25 U.S.C. § 450f(c) “mandates that the government provide liability  
27 insurance for tribes in self-determination contracts and provides a limited waiver of tribal  
28 sovereign immunity”). *Accord Walton v. Pueblo*, 443 F.3d 1274, 1279-80 (10<sup>th</sup> Cir. 2006)  
29 (“Section 450f(c)(1) requires the government to obtain liability insurance for tribes carrying out

1 self-determination contracts entered into under the ISDEAA. In exchange for insurance  
2 coverage, the tribe agrees to waive its sovereign immunity with respect to suits arising out of the  
3 tribe's performance of its contractual duties. 25 U.S.C. § 450f(c)(3).”) (footnote omitted).

4 The Community correctly argues that Federal Tort Claims Act coverage was added to  
5 reduce insurance costs (Brief at 6). As explained below, the post-amendment insurance coverage  
6 was essentially gap insurance, to cover claims outside the coverage of the Federal Tort Claims  
7 Act, such as the Plaintiff’s claim in this case. The Community incorrectly argues (Brief at 6) that  
8 the GRIC officers were “carrying out” Federal law enforcement activities when they made the  
9 traffic stop outside Indian country - those activities were not activities traditionally carried out  
10 by the Federal government and traditionally covered by the Federal Tort Claims Act (FTCA).  
11 The Congressional purpose of extending FTCA coverage to Tribal employees carrying out  
12 traditional Federal activities therefore does not apply to this case. For example, Congress  
13 recognized that the FTCA would have covered medical care provided to Indians by the United  
14 States Indian Health Service before the Tribe contracted to provide the medical care, and  
15 Congress therefore extended FTCA coverage to the Tribes only to the extent the FTCA would  
16 have applied if the United States was still providing the medical care:

17 “The United States has assumed a trust responsibility to provide health care to  
18 Native Americans. The intent of the Committee is to prevent the Federal  
19 government from divesting itself, through the self-determination process, of the  
20 obligation it has to properly carry out that responsibility. Under current law, a  
21 self-determination contract with a tribal organization operates to actually relieve  
22 the United States of the liability which it had under the Federal Tort Claims Act  
23 before the contract was executed. In its place, the tribe is required to waive its  
24 immunity from suit up to the policy limits of its insurance, and then to be  
25 subjected to litigation without any of the protective and very restrictive provisions  
26 which apply to litigation under the Federal Tort Claims Act. The Indian  
27 Self-Determination Act was never intended to operate as a means for the United  
28 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\*2620 P.L. 100-472, INDIAN  
SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT  
AMENDMENTS OF 1988.

1 In this case, Tribal police making state law traffic stops outside Indian country was not  
2 an activity covered by the FTCA before contracting, and is not covered by the FTCA now.

3 In order to continue to protect contracting Tribes, Congress required the Secretary to fund  
4 gap insurance to cover claims which fell within a Tribal officer's scope of employment but  
5 outside the contract or compact, as in the Shirk case. For a detailed discussion of how the  
6 insurance and waiver of Tribal sovereign immunity are applied under the statute, as amended,  
7 See the following series of opinions: *United States v. CNA Financial Corporation*, 168  
8 F.Supp.2d 1109 (D. Alaska 2001), reversed on other grounds, *United States v. CNA Financial*  
9 *Corporation*, 113 Fed Appx. 205 (9<sup>th</sup> Cir. 2004) (unpublished), *United States v. CNA Financial*  
10 *Corporation*, 381 F.Supp.2d 1088 (D. Alaska) (on remand). The Court in these cases properly  
11 explained that under the amended statute the Secretary was to provide gap insurance for claims  
12 not covered by the FTCA and insurance companies were to reduce their coverage to gap  
13 insurance, with resulting savings in insurance costs. The Insurance company, contrary to legal  
14 advice, failed to exclude claims covered by the FTCA and failed to reduce premiums. The  
15 United States was found to be an additional implied insured under state law, and successfully  
16 sued the insurer for bad faith punitive damages for breach of the duty to defend. The  
17 Community and/or its insurance carrier should not be asserting Tribal sovereign immunity in this  
18 case, up to the policy limits.

19 At page 7 of its Brief, the Community misrepresents current law, citing an opinion based  
20 on the un-amended statute, arguing that Shirk made the same argument to the District Court, but  
21 not noting that the argument was rejected by the District Court. The opinion is *Evans v. McKay*,  
22 869 F.2d 1341, 1346 (9<sup>th</sup> Cir 1989). That case involved civil rights claims for acts under color  
23 of state law, 42 U.S.C. § 1983, not common law tort claims. The opinion remains valid to the  
24 extent there is no applicable waiver of Tribal sovereign immunity for Section 1983 claims. The  
25 *Evans* Court asserted in dicta that the only way to get to the insurance proceeds would be if a  
26 judgment was entered against the United States, the United States obtained a judgment against  
27 the Tribe for contractual indemnity and the Tribe obtained indemnity from the insurance carrier.

1 Regardless of whether that dicta was correct under the prior statute, it is no longer applicable  
2 because the statute was amended to add FTCA coverage for the Tribe's acts or omissions in  
3 carrying out the contract, the Secretary was required to provide the insurance taking into account  
4 the FTCA coverage, and the Tribes' sovereign immunity was expressly waived up to the  
5 insurance policy limits.<sup>1</sup>

6 At page 8 of its Brief, the Community incorrectly argues that under the current statute,  
7 insurance is optional. As shown above, it is mandatory by statute. BIA Law Enforcement  
8 advised the undersigned counsel in the Federal Shirk case that the Community had maintained  
9 a \$2 Million policy, but counsel for the Community declined to provide me with a copy. The  
10 Community's argument that insurance coverage is optional and therefore there is no limited  
11 waiver of Tribal sovereign immunity is simply contrary to the current statute.

12 At page 8 the Community further misrepresents the holding in the *Demontiney* case as  
13 if it applied here. That was a breach of contract case, not a tort case, the Court held that the  
14 ISDEA did not apply, and the opinion does not in any way support GRIC's argument that the  
15 statute does not provide a limited waiver of Tribal sovereign immunity. As quoted above, the  
16 Court expressly stated that the ISDEA mandated insurance and provided a limited waiver of  
17 Tribal Sovereign immunity. Piggy backing on that argument, GRIC argues at page 10 that its  
18 Compact with the BIA expressly states that the compact does not waive sovereign immunity.  
19 Of course that is what the Compact says, because the statute did so, in a narrow, limited way.  
20 The Compact should not and cannot be construed as, itself, a waiver of Tribal sovereign  
21 immunity, because the waiver is in the statute, not the Compact or any other agreement.

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22  
23  
24 <sup>1</sup> The *Evans* Court's hypothetical dicta at fn. 6 about how contractual indemnity "might"  
25 occur, is inapplicable as well because this case does not deal with a possible hypothetical  
26 judgment against a Federal employee under *Bivens* or the FTCA. A Tribal employee would not  
27 be subject to *Bivens* liability, and any such individual liability could not be the basis for 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.

1 The Community's conclusion (Brief at 10) argues that there is no case holding that a  
2 Tribe can be sued in tort in state court. There is no case holding that it cannot be, under these  
3 circumstances. Furthermore, in *Hunter v. United States*, CIV-09-02458-PHX-MEA (District of  
4 Arizona June 9, 2010) (copy attached) the Court held, as in the Federal Shirk case, that the off-  
5 reservation traffic stop was not covered by the FTCA because the Tribal officer was not carrying  
6 out the contract. The case is legally indistinguishable from the Federal Shirk case. The plaintiff  
7 in Hunter therefore sued the Tribal officer and the Quechan Tribe in state court for the accident.  
8 Undersigned counsel was informed by Hunter's counsel that the Tribe's insurance carrier has  
9 conceded coverage and has not asserted Tribal sovereign immunity, consistent with the above  
10 statutes. *Hunter v. Adrain Chaz Hemmer and Quechan Indian Tribe*, S-1400-CV-201000199  
11 (Yuma County Superior Court).

## 12 CONCLUSION

13 To the extent relevant to other issues in this case, the Court should conclude that Federal  
14 law provided a limited waiver of Tribal sovereign immunity for the acts of the Tribal officers  
15 in this case, up to the insurance policy limits.

16 Respectfully submitted this 1<sup>st</sup> day of June, 2011.

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18 United States Attorney  
District of Arizona

19 *S/Michael A. Johns*

20 MICHAEL A. JOHNS  
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1 ORIGINAL of the foregoing filed  
this 1<sup>st</sup> day of June, 2011, with:

2 Clerk of the Superior Court  
3 201 West Jefferson Street  
Phoenix, Arizona 85003-2208

4 COPY of the foregoing hand-delivered  
5 this 1<sup>st</sup> day of June, 2011, to:

6 THE HONORABLE EILEEN SWILLET  
7 Maricopa County Superior Court

8 COPY of the foregoing e-mailed  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

STEPHEN MICHAEL HUNTER,	)	
	)	
Plaintiff,	)	CIV 09-02458 PHX MEA
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

All of the parties to this matter have agreed to magistrate judge jurisdiction over the proceedings, including the entry of final judgment. Before the Court is Defendant's motion to dismiss Plaintiff's complaint for want of subject matter jurisdiction. See Docket No. 25.

**Background**

Plaintiff filed his complaint in the District Court on November 24, 2009. The United States is named as the sole Defendant. The complaint states a cause of action pursuant to the Federal Tort Claims Act ("FTCA"). The complaint alleges that on September 12, 2008, a Quechan tribal officer acting within scope and course of his employment was negligent and caused an accident resulting in permanent physical injury to Plaintiff. The complaint seeks compensatory and special damages in amount of approximately \$355,770. The accident was caused



1 when the tribal police officer, Officer Hemmer, turned left in  
2 front of Plaintiff's motorcycle while pursuing a vehicle for a  
3 traffic stop for violation of an Arizona traffic law, off the  
4 Quechan Fort Yuma Indian Reservation, within the City of Yuma,  
5 Arizona. The tribal police officer began following the car he  
6 intended to stop for failure to display a license plate in the  
7 parking lot of a tribal casino located within the boundaries of  
8 the Quechan reservation. Plaintiff asserts that, at the time of  
9 the accident, Officer Hemmer was acting as a tribal officer,  
10 attempting to apprehend a suspect who he believed had committed  
11 on offense on the reservation.

12           The parties agree that, at the time of the accident,  
13 pursuant to the Indian Self-Determination and Education  
14 Assistance Act, 25 U.S.C.A. § 450-450n ("ISDEAA"), the federal  
15 Bureau of Indian Affairs ("BIA") and the Quechan Tribe had  
16 entered into a contract for law enforcement services, commonly  
17 known as a "638" contract. At the time of the accident in  
18 September of 2008, the Quechan Tribe had not entered into any  
19 Deputation Agreement with the BIA, nor had Officer Hemmer been  
20 granted a Special Law Enforcement Commission ("SLEC") by the  
21 BIA. See Docket No. 25, Exh. A. Defendant argues that, because  
22 "Officer Hemmer was simply not carrying out the contract in this  
23 case because he was not enforcing Tribal law within the exterior  
24 boundaries of the Quechan Indian reservation," he was not a  
25 federal actor whose liability may be imputed to the United  
26 States pursuant to the FTCA.

**Standard for granting or denying the motion to dismiss**

The federal District Courts may adjudicate only those cases that the Constitution and Congress empower them to adjudicate. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994). Once the Court's jurisdiction over a claim is challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988).

Federal Rule of Civil Procedure Rule 12(b)(1) allows the Court's jurisdiction to be challenged either facially, based on the legal sufficiency of the claim, or factually, based on the sufficiency of jurisdictional fact. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000); Thornhill Publ'g Co. v. General Tel. & Elecs., 594 F.2d 730, 733 (9th Cir. 1979). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). See also Wright v. Incline Vill. Gen. Improvement Dist., 597 F. Supp. 2d 1191, 1198-99 (D. Nev. 2009).

When considering a factual attack on its jurisdiction, the Court is not confined to allegations in the complaint, but can consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction. White, 227 F.3d at

1 1242. The existence of disputed material facts does not  
2 preclude the trial court from evaluating the merits of  
3 jurisdictional claims. Id. The Court may look beyond the  
4 complaint to matters of the public record without converting the  
5 motion into a motion for summary judgment. Id.

6 The United States, as a sovereign, is immune from suit  
7 except as it consents to be sued. See, e.g., O'Toole v. United  
8 States, 295 F.3d 1029, 1033 (9th Cir. 2002). The FTCA  
9 delineates the United States' waiver of immunity for torts  
10 committed by federal government employees acting in the scope of  
11 their employment. See, e.g., Adams v. United States, 420 F.3d  
12 1049, 1051 (9th Cir. 2005) ("The FTCA provides a waiver of the  
13 United States government's sovereign immunity for tort claims  
14 arising out of the conduct of government employees acting within  
15 the scope of their employment."). See also 28 U.S.C. § 2674.  
16 "The FTCA defines 'employee of the government' in a way that  
17 creates five categories of employees," including employees of a  
18 "federal agency." Adams v. United States, 420 F.3d 1049, 1051  
19 (9th Cir. 2005). The terms of the United States' consent to be  
20 sued as delineated in the FTCA define the parameters of a  
21 federal court's jurisdiction to entertain such suits. See  
22 United States v. Orleans, 425 U.S. 807, 814, 96 S. Ct. 1971,  
23 1976 (1976) ("the United States can be sued only to the extent  
24 that it has waived its immunity").

25 The Indian Self-Determination and Education  
26 Assistance Act of 1975 ("ISDEAA"), Public Law  
27 93-638, authorizes federal agencies to  
28 contract with Indian tribes to provide  
services on the reservation. 25 U.S.C. §§

1 450-450n. The purpose of the ISDEAA is to  
2 increase tribal participation in the  
3 management of programs and activities on the  
4 reservation. Congress wanted to limit the  
5 liability of tribes that agreed to these  
6 arrangements. Congress therefore provided  
7 that the United States would subject itself  
8 to suit under the Federal Tort Claims Act  
9 ("FTCA") for torts of tribal employees hired  
10 and acting pursuant to such  
11 self-determination contracts under the  
12 ISDEAA. Pub.L. No. 101-512, Title III, § 314,  
13 104 Stat.1959 (codified at 25 U.S.C. § 450f  
14 note)

15 Snyder v. Navajo Nation, 382 F.3d 892, 896-97 (9th Cir. 2004).

16 Accordingly, tribal law enforcement officers such as  
17 Officer Hemmer are considered employees of the BIA for FTCA  
18 purposes when tribal law enforcement functions are performed  
19 pursuant to an ISDEAA contract. Additionally, a tribal police  
20 officer who has received a Special Law Enforcement Officer  
21 ("SLEO") commission may be considered an employee of the BIA.  
22 See Boney v. Valline, 597 F. Supp. 2d 1167, 1179-80 (D. Nev.  
23 2009).

24 A tribal officer is only considered to be a federal  
25 employee for FTCA purposes when the officer is acting under  
26 authority granted by the Secretary of the Interior. See 25  
27 U.S.C. § 2804(f). A tribal officer does not act in such a  
28 capacity when he is enforcing tribal, rather than federal law,  
and is doing so without having received a SLEC from the BIA.  
See Boney, 597 F. Supp. 2d at 1180-81. See also Cabazon Band of  
Mission Indians v. Smith, 388 F.3d 691, 695-96 (9th Cir. 2004)  
(observing that tribal police officers who have received SLECs  
from the BIA pursuant to a Deputation Agreement with the BIA

1 "are treated as federal employees under the Federal Tort Claims  
2 Act."). Compare Allender v. Scott, 379 F. Supp. 2d 1206, 1218  
3 (D.N.M. 2005) (finding FTCA applied where tribal police officer  
4 was enforcing state law on the reservation).


5 **Conclusion**

6 Because Plaintiff does not dispute that, at the time of  
7 the accident, Officer Hemmer was in the process of enforcing a  
8 state or tribal traffic law violation off the reservation, and  
9 that Officer Hemmer has no SLEC, the Court concludes that  
10 Officer Hemmer was not a federal employee as that term is  
11 defined by the FTCA. Therefore, the Court does not have  
12 jurisdiction over the claims arising from the accident.

13 Accordingly,

14 **IT IS ORDERED that** Defendant's motion to dismiss  
15 [Docket No. 25] is **granted**. Plaintiff's complaint against the  
16 United States is hereby dismissed for want of subject matter  
17 jurisdiction.

18 DATED this 9<sup>th</sup> day of June, 2010.

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21 \_\_\_\_\_  
22 Mark E. Asper  
23 United States Magistrate Judge  
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