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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.

1 The Motion to Dismiss incorporated Plaintiffs' allegation that the officers were returning
2 to the GRIC from training in Tucson at the time they encountered the drunk driver. However,
3 they had already passed through the GRIC and were driving north on Arizona Avenue in
4 Chandler to their homes in Chandler and Phoenix when they first encountered the drunk driver.
5 Deposition excerpts of Sergeant Tanakeyowma attached as **Exhibit B**, at p. 32, l. 16-22 and p.
6 36, l. 9 through p. 41, l. 8, and Detective Lancaster attached as **Exhibit C**, at p. 33, l. 7-12 and
7 p. 38, l. 2 through p. 46, l. 21.

8 **2. Additional argument in reply.**

9 **Plaintiffs' Introduction.**

10 The first two sentences of Plaintiffs' Introduction misstate the position of the United
11 States. The only substantive issue is whether the officers were carrying out the Compact when
12 they made the traffic stop off the Gila River Indian Community (GRIC). Carrying out the
13 Compact is a condition precedent to FTCA coverage. It is an express requirement of the
14 statutory waiver of Federal sovereign immunity in the Indian Self-Determination and Education
15 Assistance Act (ISDEA). The United States does not contend that the officers' conduct "falls
16 outside the scope of the FTCA" - the United States does not know what Plaintiffs intend by that
17 statement. Nor does the United States contend that the officers were acting contrary to any terms
18 and conditions of the Compact. The United States agrees that the officers were acting within the
19 scope of their employment as Tribal officers, which is determined by Arizona law of *respondeat*
20 *superior*, but the issue here is one of statutory application, not common law scope of
21 employment. The United States agrees that the officers were authorized to make the stop by
22 Arizona law, but they were not carrying out the Compact, and therefore they were not employees
23 of the government for purposes of FTCA coverage when the stop was made. The Introduction
24 posits three reasons why the Court should deny the Motion to Dismiss. Number 1 argues that
25 BIA policies permit Federal officers to enforce laws outside Indian country, which is true but
26 irrelevant. Number 2 argues that BIA requires Tribal officers to be AZ-Post certified, which is
27 true (at least without a temporary waiver) but also irrelevant, and that the State of Arizona
28 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

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).

1 Department in 1999 where he was AZ-Post certified. He became employed with the GRIC
 2 Police Department in 2001, and was not issued a SLEC until 2007, after the accident. Exhibit
 3 C p. 8, l. 1 through p. 12, l. 17.

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

20 **Argument F.**

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

24
 25 ² A link to an OPM website decision on this classification follows, and the summary of
 the decision explains what an “1811” is:

26 Office of Personnel Management (OPM), accepted an appeal for the position of Marine
 27 Enforcement Officer, GS-1801-11 The appellant is requesting that his position be changed
 to Criminal Investigator, GS-1811-12 or 13.

28 <http://www.opm.gov/classapp/decision/1997/18111203.pdf>

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

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

9 Under current law, a self-determination contract with a tribal organization
 10 operates to actually relieve the United States of the liability which it had under the
 11 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

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

23
 24 ³ 1987 WL 61567, *27; S. Rep. No. 274, 100TH Cong., 1ST Sess. 1987, 1988 U.S.C.C.A.N.
 25 2620, S. REP. 100-274 (Leg.Hist.) *1*2620P.L. 100-472, INDIAN SELF-DETERMINATION AND
 EDUCATION ASSISTANCE ACT AMENDMENTS OF 1988

26 ⁴ The Court's hypothetical dicta at fn. 6 about how contractual indemnity "might" occur,
 27 quoted by Plaintiffs, is inapplicable as well because this case does not deal with a possible
 28 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...)

1 The Ninth Circuit subsequently recognized that the statute, as amended, expressly waives
 2 Tribal sovereign immunity up to the policy limits. *Demontiney v. United States*, 255 F.3d 801,
 3 813 (9th Cir. 2001) (25 U.S.C. § 450f(c) mandates that the government provide liability insurance
 4 for tribes in self-determination contracts and provides a limited waiver of tribal sovereign
 5 immunity). *Accord Walton v. Pueblo*, 443 F.3d 1274, 1279-80 (10th Cir. 2006) (“Section
 6 450f(c)(1) requires the government to obtain liability insurance for tribes carrying out
 7 self-determination contracts entered into under the ISDEAA. In exchange for insurance
 8 coverage, the tribe agrees to waive its sovereign immunity with respect to suits arising out of the
 9 tribe's performance of its contractual duties. 25 U.S.C. § 450f(c)(3).”) (footnote omitted).

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

22
 23 ⁴ (...continued)

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

27 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.
 28 App. 1990); *Dumas v. American International Specialty Lines Insurance Company*, 2009 WL
 4269951, *1 (D. Ariz. 2009).

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

5 **Argument A.**

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

13 **Argument B.**

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

25
26
27 ⁶ There is ultimately no liability here as the sole cause of the accident was the intentional
28 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

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

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.

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

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

8 Removal of this action was mandatory. Any civil action against a tribal
 9 organization, or one of its employees acting within the scope of employment, for
 10 tort claims resulting from the carrying out of an Indian Self-Determination and
 11 Educational Assistance Act ("ISDEA") contract "shall be deemed to be an action
 12 against the United States" under the FTCA. Department of the Interior and
 13 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
 14 state court therefore is removable to federal court. 28 U.S.C. §§ 1346(b)(1),
 1441(a), 2679(d)(2) (2001).

15 ***

16 In the instant case, the United States Attorney for the District of Alaska certified
 17 on behalf of the Attorney General that Walker's tort claims against Chugachmiut
 18 and Henrichs arose from the carrying out of an ISDEA contract and that Henrichs
 19 was acting within the scope of his employment during the relevant time period.
 20 This certification satisfied the requirements of the FTCA and Section 314.

21 (footnotes omitted).

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

28 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

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

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

21 The position of the United States is consistent with the published policy. A copy of the
22 entire text is attached as **Exhibit D**. Throughout, the policy refers to providing and improving
23 law enforcement “in Indian country”. Throughout, the policy discusses conveying Federal
24 authority to Tribal officers, not state authority. Nothing in the policy can be read to state that
25 Tribal officers receiving a SLEC obtain authority to enforce state laws. They obtain that
26 authority as Arizona Peace Officers, or through similar cross-deputation or mutual aid
27 agreements, depending on state law. The policy states on page 2, last paragraph:
28

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

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

7 The BIA expects that, first, liability coverage under the Federal Tort Claims
 8 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-
 9 by-case, factual basis, and their decisions are final.

10 Plaintiffs argue (page 10) that the officers in this case testified “consistently with the
 11 above policy” that they routinely perform police work off the reservation. But this is due to their
 12 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.

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

20 **Argument D.**

21 Plaintiffs’ argue at page 10 that enforcement of state law does not strip the officers of
 22 their status as Tribal or Federal officers. Plaintiffs cite the correct Arizona statute authorizing
 23 Tribal officers to obtain Arizona Peace Officer status. The statute also states that the State of
 24 Arizona disclaims any liability and places that liability with the Tribe which appointed the
 25

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

1 officers (the BIA did not appoint or employ the officers in this case). BIA and other Federal law
 2 enforcement officers are commissioned as Arizona Peace Officers under a different statute, ARS
 3 13-3875. Plaintiffs' argument therefore confusingly lumps Tribal officers and Federal officers
 4 under the same statute. In this case, regardless of some hypothetical involving a Federal officer,
 5 the Tribe is expressly liable under state law, subject to the limited waiver of sovereign
 6 immunity up to the policy limits. The United States' position is therefore consistent with the
 7 Arizona statutory scheme involving Arizona Peace Officers.

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

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

19 The tribes also possess their traditional and undisputed power to exclude persons
 20 whom they deem to be undesirable from tribal lands.

21 Tribal law enforcement authorities have the power to restrain those who disturb
 22 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.

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

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

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

13 **Argument E.**

14 In Argument E Plaintiffs argue that the officers were carrying out the purpose of the
15 ISDEA contract/compact. They mix a few concepts together which confuses the statements.
16 First, they cite dicta in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 696 (9th Cir.
17 2004) in which it was held that in California (a public Law 280 state) a Sheriff was preempted
18 from forbidding Tribal police from having light bars on their police cars outside a reservation.
19 Plaintiffs’ statement that all exercises of BIA law enforcement responsibility by a Tribal officer
20 with a SLEC is covered by the FTCA (1) overstates the holding, (2) fails to note the dicta applies
21 to enforcement of Federal laws (3) fails to include in the statement “responsibility in Indian
22 country” and (4) is irrelevant here because the officers were not exercising any BIA
23 responsibility to enforce Federal laws when they made the traffic stop in Chandler.

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

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

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

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

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

27 . . . any Gila River Indian Community Law Enforcement Officer who is deputized
28 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

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

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

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

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

- 13 1. treated as BIA officers for enforcing federal laws
- 14 2. deemed to be employees of the Department of Interior for
 15 purposes of the Federal Tort Claims Act (FTCA) while carrying out
 16 those laws applicable in Indian country; ...

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

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

20 Plaintiffs argue that the Deputation Agreement is inapplicable because “neither officer
 21 was deputized under it”. The superior officer in this case, Sergeant Tanakeyowma, held a SLEC
 22 issued in 2001 without an expiration date, and was issued a new one after the accident with a 3
 23 year expiration date. Exhibit B p. 15, l. 4 through p. 16, l. 6. He was driving, initiated his
 24 emergency lights to effectuate the traffic stop and told his subordinate to talk to the driver.
 25 Exhibit B p. 40, l. 13 through p. 42, l. 2. The Deputation Agreement was in effect at the time of
 26 the accident. Plaintiffs cite no law, because there is none, preventing parties to an agreement
 27 from revising an agreement by mutual agreement, so whatever might have been the terms of a
 28 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

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

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

17 Special maritime and territorial jurisdiction of the United States defined.

18 The term "special maritime and territorial jurisdiction of the United States", as
 19 used in this title, includes:

20 ***

21 (3) Any lands reserved or acquired for the use of the United States, and under the
 22 exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise
 23 acquired by the United States by consent of the legislature of the State in which
 24 the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other
 25 needful building.

26 Even if the events in this case occurred on a state highway within the reservation, the
 27 Assimilative Crimes Act would not apply, and the Act does not apply off the reservation in
 28 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.

DENNIS K. BURKE
United States Attorney
District of Arizona

S/ Michael A. Johns

MICHAEL A. JOHNS
Assistant U.S. Attorney

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:

TRINETTE S. SACHRISON
KAYE, ROSE & PARTNERS, LLP

BRADLEY M. ROSE
KAYE, ROSE & PARTNERS, LLP

Attorneys for Plaintiffs

S/I. Millsaps
U.S. Attorney's Office

SUPPLEMENTAL DECLARATION

I, Special Agent In Charge (SAC) Selanhongva McDonald, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a Special Agent with the Bureau of Indian Affairs (BIA) and this Declaration is based on my personal knowledge and review of official government documents.

2. My responsibilities include administering law enforcement contracts under the Indian Self-Determination and Education Assistance Act, commonly referred to as 638 contracts, and Self-Governance compacts, including the compact with the Gila River Indian Community (GRIC) and the Deputation Agreement with GRIC and Special Law Enforcement Commissions (SLECs) for Tribal officers.

3. In a Declaration I signed on April 6, 2010, at paragraph 8, I stated "The BIA had also entered into a Deputation Agreement with GRIC and issued Special Law Enforcement Commissions (SLECs) to GRIC officers Lancaster and Tanakeyoma before the October 19, 2006 incident." This statement was based on my recollection. The Deputation Agreement was entered into before the accident, but subsequent review of BIA SLEC logs and the deposition testimony of the officers indicates that Sergeant Tanakeyowma had received a SLEC prior to the accident, and another one after the accident, but Detective Lancaster received his first SLEC after the accident.

4. The GRIC Deputation Agreement explains, 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." Section 3 and Appendix A list laws applicable to Indian country the enforcement of which is covered by the FTCA, and does not include state traffic laws. A copy of the GRIC Resolution and Deputation Agreement is attached.

5. Physically, a SLEC is a card. The law enforcement authority which accompanies it is contained in statutes, regulations, and agreements with Tribes.

6. Officer Lancaster mentions in his deposition taking the Criminal Investigations Training Program (CITP) at the Federal Law Enforcement Training Center (FLETC) concerning an 1811. The number 1811 is a Federal job series applicable to Federal Special Agents. Tribal detectives attend the 1811 course but are not employees of the United States holding an 1811 series Federal job.

DATED this 24 day of June, 2010.

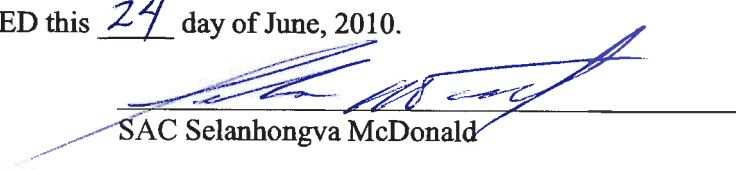

SAC Selanhongva McDonald

Exhibit A



FILE

GILA RIVER INDIAN COMMUNITY

SACATON, AZ 85247

RESOLUTION GR-98-06

A RESOLUTION APPROVING THE DEPUTATION AGREEMENT BETWEEN THE GILA RIVER INDIAN COMMUNITY AND THE BUREAU OF INDIAN AFFAIRS

WHEREAS, the governing body of the Gila River Indian Community (the "Community") is the Gila River Indian Community Council (the "Community Council"); and

WHEREAS, the Community Council is empowered, under the Constitution and Bylaws of the Gila River Indian Community, Article XV, Section 1(a)(17) to provide for the maintenance of law and order and the administration of justice by establishing a Community Court and police force and defining the powers and duties thereof; and

WHEREAS, the Community Council desires to provide public safety services and the protection and enforcement of law and order for Community residents; and

WHEREAS, the Assistant Secretary-Indian Affairs (the "Secretary") articulated policy guidance to the Bureau of Indian Affairs (the "BIA"), as published at 69 Fed. Reg. 6,321 to govern the implementation of "Special Law Enforcement Commission Deputation Agreement (the "Deputation Agreement"); and

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; and

WHEREAS, the Community Council finds that it is in the best interest of the Community to enter into an agreement under the terms of the attached Deputation Agreement.

NOW, THEREFORE BE IT RESOLVED, that the Community Council hereby approves the Deputation Agreement attached hereto.

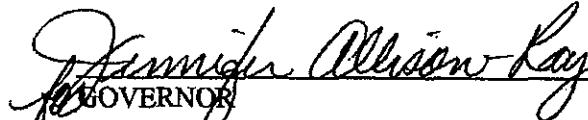
GILA RIVER INDIAN COMMUNITY
RESOLUTION GR-98-06
PAGE 2

BE IT FINALLY RESOLVED, that the Community Council authorizes and directs the Governor, or in the Governor's absence the Lieutenant Governor, to execute the attached Deputation Agreement and take all other necessary steps to effect the intent of this Resolution.

CERTIFICATION

Pursuant to authority contained in Article XV, Section 1, (a), (17), (18) and Section 4 of the amended Constitution and Bylaws of the Gila River Indian Community, ratified by the Tribe January 22, 1960 and approved by the Secretary of the Interior on March 17, 1960, the foregoing Resolution was adopted this 10th day of June, 2006, at a Special Community Council Meeting held in District 3, Sacaton, AZ, at which a quorum of 10 Members were present by a vote of: 10 FOR; 0 OPPOSE; 0 ABSTAIN; 7 ABSENT; 0 VACANCY.

GILA RIVER INDIAN COMMUNITY


GOVERNOR

ATTEST:


COMMUNITY COUNCIL SECRETARY

RECEIVED
GILA RIVER INDIAN COMMUNITY
2006 JUN 13 P 12:05
SACATON, AZ

DEPUTATION AGREEMENT

Whereas, pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801, *et seq.*, the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA), is responsible for providing, or assisting in providing law enforcement in Indian Country; and

Whereas, the Secretary has delegated this authority to the Assistant Secretary – Indian Affairs and the Assistant Secretary – Indian Affairs has redelegated this authority to the Director of the BIA, who has redelegated it to the Deputy Bureau Director, Office of Law Enforcement Services and Security (OLESS), BIA; and

Whereas, the Assistant Secretary – Indian Affairs is committed to working with tribal governments and tribal law enforcement to strengthen law enforcement in Indian country; and

Whereas, on February 10, 2004, the Assistant Secretary – Indian Affairs articulated policy guidance to the BIA -- as published at 69 Fed. Reg. 6,321 -- to govern the implementation of Special Law Enforcement Commission Deputation Agreement; and

Whereas, this policy expressly lays out issues regarding good faith efforts on behalf of all parties involved in the aforementioned agreements, including as they relate to liability.

It is therefore resolved that the BIA, Office of Law Enforcement Services and Security (OLESS) and the Gila River Indian Community enter into this Deputation Agreement to govern the BIA OLESS's issuance of Special Law Enforcement Commissions, pursuant to the Assistant Secretary – Indian Affairs' Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements, FR Doc. 04-2842, policy guidance.

This Deputation Agreement is entered into this 26th day of July, 2006, by and between the Gila River Indian Community, a federally recognized Indian tribe, and the BIA, OLESS, Department of the Interior, pursuant to the authority of the Indian Law Enforcement Reform Act, 25 U.S.C § 2801, *et seq.*, and related Gila River Indian Community tribal ordinances, which provide for cooperative agreements to promote better law enforcement services. The Gila River Indian Community has enacted Resolution GR-98-06, which authorizes the Gila River Police Department to enter into this Agreement on the Tribe's behalf and also authorizes the Gila River Indian Community law enforcement officers, under a BIA Special Law Enforcement Commission (SLEC) issued through the Secretary of the Interior, to enforce federal laws in Indian country.

The intent of this Agreement is to provide for the deputation of law enforcement officers employed by the Gila River Indian Community (hereinafter referred to as the "Community"), which is a party to this Agreement, so that the Community's law enforcement officers will be

Deputation Agreement of July 26, 2006 between the
Bureau of Indian Affairs Office of Law Enforcement Services & Security
and the Gila River Indian Community

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authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests in Indian country within the jurisdiction of the Tribe or as described in section 5. It is the express desire and intent of both parties to this Agreement to allow law enforcement officers to react immediately to observed violations of the law and other emergency situations.

Both parties to this Agreement recognize that when law enforcement officers arrest a criminal suspect, the officers may not know whether the suspect or the victim is an Indian or non-Indian, or whether the arrest or the suspected crime has occurred in Indian country, as defined by 18 U.S.C. § 1151, and that therefore there is great difficulty in determining immediately the proper jurisdiction for the filing of charges. It is further recognized that the official jurisdictional determination will be made by a prosecutor or court from one of the various jurisdictions, not by cross-deputized arresting officers who may deliver the offender to the appropriate detention facility.

The parties further expressly recognize the manifest intent of the Indian Law Enforcement Reform Act to eliminate the uncertainties that previously resulted in the reluctance of various law enforcement agencies to provide services in Indian country for fear of being subjected to tort and civil rights suits as a consequence of the enforcement or carrying out in Indian country of certain federal law. To eliminate such concerns, pursuant to the authority granted by 25 U.S.C. § 2804(a) and (f), a Tribal Law Enforcement Officer who is deputized by the Bureau of Indian Affairs Special Law Enforcement Commission will be deemed an employee of Department of the Interior for purposes of the Federal Tort Claims Act while enforcing or carrying out laws of the United States covered by this Deputation Agreement, to the extent outlined in this Agreement. Both parties to this Agreement therefore agree as follows:

1. Purpose

The purpose of this Agreement is to provide for efficient, effective, and cooperative law enforcement efforts in Indian country in the State of Arizona, and its terms should be interpreted in that spirit. Accordingly, both parties to this Agreement shall cooperate with each other to provide comprehensive and thorough law enforcement protection, including but not limited to effecting arrests, responding to calls for assistance from all citizens and also from other law enforcement officers, performing investigations, providing technical and other assistance, dispatching, and detention.

This Agreement is not entered into pursuant to the Indian Self Determination Act and Education Assistance Act, P.L. 93-638, as amended. The Secretary's revocation or termination of this Agreement is subject to the appeal and review procedure provided below.

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2. Commissions

A. The BIA as a party to this Agreement may, in its discretion, issue special law enforcement commissions to law enforcement officers of another agency, upon the application of such officers. Such commissions shall grant the officers the same law enforcement authority as that of officers of the BIA (unless specifically limited by the terms of the commission), as more specifically described in Section 3 of this Agreement. When the BIA issues such a commission, it shall provide notice of that commission, including the name of the officer receiving the commission, to any other agencies that are parties to this Agreement or that should be aware of this Agreement. The BIA further has the authority to evaluate the effectiveness of the commissions and to investigate any allegations of misuse of authority. Pursuant to such evaluation, the BIA has the authority to revoke a deputation agreement with a law enforcement agency or to revoke an individual officer's SLEC subject to the appeal and review procedures provided below.

B. A commission shall not be granted unless the applicant has complied with all the prerequisites for appointment as a police officer as set forth in 25 C.F.R. Part 12 and with the specific requirements of the commissioning agency. Those prerequisites must include the following:

1. United States citizenship;
2. A high school diploma or equivalent;
3. No conviction for a felony, a misdemeanor which restricts the ability to carry firearms, or other crime involving moral turpitude (including any convictions expunged from an individual's record);
4. Documentation of semi-annual weapons qualifications; and
5. A finding that the applicant is free of any physical, emotional, or mental condition that might adversely affect his or her performance as a police officer.

Further, an officer seeking an SLEC must not have been found guilty of, or entered a plea of *nolo contendere* or its equivalent (such as an *Alford* plea), or guilty to any felonious offense, or any of certain misdemeanor offenses under Federal, State, or tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact, or prostitution, or crimes against persons, or offenses committed against children.

C. The BIA may further impose any other requirements, including, but not limited to, an orientation course on Federal, tribal, or state criminal procedures.

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- D. If requested by the BIA, the applicant's agency shall provide a Federal Bureau of Investigation criminal history background check on the applicant.
- E. If BIA denies an officer a commission, it shall disclose the grounds for such denial in writing to the agency which employs the applicant.
- F. Both parties to this Agreement may, at any time, suspend or revoke an officer's commission for reasons solely within its discretion. The parties shall notify the officer's agency in writing of the suspension or revocation and the reasons therein and the officer's right to appeal as set forth below. Within ten (10) days after such notification, that agency shall cause the commission card and any other evidence of the commission to be returned to the issuing party.
- G. If the commissioned officer's agency possesses or comes to possess any information on the officer, which provides grounds for the suspension or revocation of the commission, it shall immediately notify the commissioning party.
- H. A commission issued by the BIA under this Agreement shall not be used to invoke any State of Arizona authority. Officers holding SLECs who are responding to a call, conducting an investigation, or otherwise exercising their authority shall, in their discretion and in the exercise of sound police judgment, address any potential violations of Federal or Tribal law.

3. Scope of Powers Granted

- A. Gila River Indian Community law enforcement officers carrying SLECs issued by the BIA pursuant to this Agreement are given the power to enforce:

All Federal laws applicable within Indian country, and specifically the Gila River Indian Community's Reservation, including the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, consistent with the authority conveyed pursuant to Federal law through the issuance of commissions or other delegations of authority. See Appendix A, which includes an illustrative list of Federal statutes that officers may be called upon to enforce; this list is not exhaustive.
- B. Both parties to this Agreement note that the applicability of Federal and tribal laws in Indian country may depend on whether the suspect or the victim is Indian, and the parties agree that nothing in this Agreement makes any law applicable to a certain person or certain conduct where it would not otherwise be applicable. (A qualified immunity defense may still be available in appropriate

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circumstances notwithstanding this limitation.) Accordingly, the purpose of this Agreement is to provide commissioned Gila River Indian Community law enforcement officers the authority to enforce applicable laws. This includes statutes set forth in the local U.S. Attorney Guidelines as well as all laws and statutes applicable in Indian country as described in Section 3.A and Appendix A.

- C. Nothing in this Agreement limits, alters or conveys any judicial jurisdiction, including the authority to issue warrants for arrest or search and seizure, or to issue service of process. Similarly, nothing in this Agreement is intended to impair, limit, or affect the status of any agency or the sovereignty of any government. Lawful actions pursuant to this federal Agreement and a commission issued under it supersede any contrary Tribal, State, or local law, ordinance, or practice.
- D. This Agreement does not create any rights in third parties. Issuance and revocation of SLECs pursuant to this Agreement are at the sole discretion of the BIA. Nothing in this Deputation Agreement is intended to create or does create an enforceable legal right or private right of action by a law enforcement officer or any other person.

4. Uniform, Vehicles and Weapons

- A. BIA policy requires that BIA police officers will as a rule be in duty-appropriate uniforms, which will conform with the parameters outlined in the BIA Law Enforcement Handbook, carry a weapon where required by their duties and, when stationed in marked police vehicles, will operate such marked police vehicles equipped with light bars. This policy is standard for police forces nationwide, and is necessary for the safety of the officer and to communicate the officer's status and authority to members of the public and to those suspected of criminal activities.
- B. Police officers that are temporarily off duty during a shift, or whose duty is temporarily interrupted for any reason are expected to remain in duty-appropriate uniforms, in a marked vehicle, if so stationed, and otherwise prepared for duty so that they are available to respond to emergency calls.
- C. Police officers and their supervisors may make exceptions to these requirements for undercover operations or otherwise on a case-by-case basis, but deviations from this rule are expected to be infrequent and will usually occur for compelling law-enforcement reasons.

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5. Travel Outside of Indian Country

- A. The ordinary duty stations of BIA police officers are located within the boundaries of Indian country. In some situations, however, BIA police officers will be required to leave Indian country as a part of or incidental to their duties. This may occur, for example, where they are responding to an incident in another area of Indian country; where they are transporting evidence or suspects to or from locations in Indian country or to or from other police, court, or prison facilities; when they reside off-reservation and are traveling to their duty station or responding to an emergency call; or when they must obtain products or services located off-reservation while on duty or in the normal course of their business day.
- B. When traveling outside of Indian country, BIA police officers retain their status as Federal law enforcement officials. They are therefore expected as a rule to be in uniform and to operate marked police vehicles as set forth in paragraph 4. They may also be armed; may transport evidence; and may exercise the authority of law enforcement officers to maintain control of suspects in such situations. They may also perform comparable incidental Federal police activities outside of Indian country, but will not as a rule conduct investigations or make arrests outside of Indian country, absent exigent circumstances or: (1) a nexus to a crime committed in Indian country, and (2) communicating and coordinating with the appropriate local or Federal authorities over procedures and methods.

6. Officers Holding SLECs

- A. Officers holding SLECs are treated as BIA police officers for enforcing Federal laws. They therefore will conform to all requirements and limitations set forth in this Agreement and in particular in paragraphs 4 and 5.
- B. In any situation in which an officer holding an SLEC might receive a call related to a potential Federal offense, that officer will as a rule be in uniform and in a vehicle equipped as set forth in paragraph 4. Such an officer may undertake off-reservation travel as set forth in paragraph 5.
- C. In any situation in which an officer holding an SLEC is responding to a call that may involve a Federal offense, or undertaking any other duties that relate to or may potentially relate to their Federal functions, he or she will conform to the provisions of this Agreement, and in particular those in paragraph 5. The officer will function as a BIA police officer as set forth in paragraph 5, irrespective of the boundaries of the Community's reservation or the location of Indian country.

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- D. When an officer holding an SLEC receives an emergency call in circumstances where a Federal offense may exist, he or she will respond in emergency mode and will travel to the site of the call as rapidly as it is possible to do without compromising safety, irrespective of the boundaries of Indian country or his or her present location. He or she will observe the restrictions on the activation of emergency mode and the precautions for the safety of bystanders required in the BIA, OLESS Law Enforcement Handbook and otherwise respond as appropriate and prudent. In instances where the State has criminal jurisdiction in Indian country, and where there is no significant reason to anticipate that a Federal offense may exist with respect to a particular emergency call, Tribal law enforcement officers will respond in accordance with policies and practices set forth under State and local law. But may, in certain circumstances, retain their Federal status.
- E. When located outside of Indian country, officers holding SLECs may respond to observed violations of Federal law in a public safety emergency as appropriate and prudent. Irrespective of their location, officers holding SLECs may only respond to violations of exclusively State law to the extent consistent with that State's law. Officers carrying SLECs may respond to concurrent violations of State and Tribal or Federal laws to the extent consistent with Tribal or Federal law.

7. Disposition and Custody

- A. Any person arrested by an officer commissioned pursuant to this Agreement shall immediately be brought to the attention of a responsible official of the apparent prosecuting jurisdiction. In order to ascertain the proper prosecuting jurisdiction, the officer shall attempt to determine, where practicable, whether the arrestee is Indian or non-Indian. The official determination of proper jurisdiction, however, will be made by a prosecutor or court, not a law enforcement officer commissioned under this Agreement.
- B. The agency with whom the arresting officer is employed shall ensure the arrestee appears before a judge of the appropriate jurisdiction for initial appearance and bond setting within the time guidelines of the tribal, State, or Federal law as may be appropriate.
- C. In the event an Indian detainee or prisoner under the jurisdiction of the Community requires medical treatment, the law enforcement agency with custody may transport the detainee or prisoner to the nearest Indian Health Service or the appropriate Tribal health care facility. In such event, tribal or BIA law enforcement officers shall be notified so that necessary protective services may be

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provided while the detainee or prisoner is admitted at such health facility.

8. Liabilities and Immunities

- A. It is understood and agreed that each agency which is a party to this Agreement, its agents, employees and insurers do not, by virtue of this Agreement, assume any responsibility or liability for the actions of officers commissioned pursuant to this Agreement which are performed outside the scope of their duties.
- B. Notwithstanding subsection A, 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 employee 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.
- C. Nothing in this Agreement shall be read as waiving or limiting any defenses to claims of liability otherwise available to law enforcement officers, such as the defense of qualified immunity.
- D. Nothing in this Agreement shall be construed as a waiver of any government's sovereign immunity, not otherwise expressly waived by legislative act.
- E. The Community specifically agrees to hold the United States harmless under this Agreement for any civil claim brought against an officer carrying an SLEC arising out of law enforcement activity, except for actions within the scope of authority delegated by this Agreement, provided, however, that this hold harmless provision shall not be applicable to any obligation of the United States arising out of a relationship between the United States and the Community not created under this Agreement.
- F. The Community agrees that the United States has no obligation under this Agreement to provide legal representation for any constitutional claim for any officer carrying a SLEC except as provided by 28 C.F.R. 50.15(a), such that (1) providing representation would otherwise be in the interest of the United States, and (2) the event from which the claim arises is within the scope of authority delegated by this Agreement.

Deputation Agreement of July 26, 2006 between the
Bureau of Indian Affairs Office of Law Enforcement Services & Security
and the Gila River Indian Community

Page 9 of 11

9. Appeal Procedure


Appeals of termination or revocation of this Agreement, or suspension or revocation of a commission issued herein, shall be made within ten (10) business days of the termination, revocation, or suspension to the Associate Director of Operations, BIA, OLESS, which decision shall be the final agency action subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 551. At the Community's option, appeal may be taken to the Interior Board of Indian Appeals (IBIA) to the extent it has jurisdiction.

Deputation Agreement of July 26, 2006 between the
Bureau of Indian Affairs Office of Law Enforcement Services & Security
and the Gila River Indian Community

Page 10 of 11

IN WITNESS WHEREOF, the parties have executed this Agreement on the day
first written above.

FOR THE BUREAU OF INDIAN AFFAIRS



Special Agent In Charge - Law Enforcement Services

8/3/06
Date

FOR THE GILA RIVER INDIAN COMMUNITY



William R. Rhodes, Governor

7-27-06
Date

Deputation Agreement of July 26, 2006 between the
Bureau of Indian Affairs Office of Law Enforcement Services & Security
and the Gila River Indian Community

Page 11 of 11

Appendix A

All Federal criminal laws applicable to Indian country, including the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153.

All Federal statutes applicable within Gila River Indian Community's Reservation in Arizona, which may include, but are not limited to:

1. The Indian country liquor laws, where applicable (18 U.S.C. §§ 1154, 1155, 1156, and 1161),
 2. Counterfeiting Indian Arts and Crafts Board Trade-mark (18 U.S.C. § 1158),
 3. Misrepresentation of Indian produced goods and products (18 U.S.C. § 1159),
 4. Property damaged in committing offense (18 U.S.C. § 1160),
 5. Embezzlement and theft from Indian tribal organizations (18 U.S.C. § 1163),
 6. Destroying boundary and warning signs (18 U.S.C. § 1164),
 7. Hunting, trapping or fishing on Indian land (18 U.S.C. § 1165),
 8. Theft from gaming establishments on Indian land (18 U.S.C. § 1167),
 9. Theft by officers or employees of gaming establishments on Indian land (18 U.S.C. § 1168),
 10. Reporting of child abuse (18 U.S.C. § 1169),
 11. Felon in possession of a firearm (18 U.S.C. § 922(g)),
 12. Youth Handgun Safety Act (18 U.S.C. § 922(x) (2)),
 13. Possession of a firearm while subject to protective order 18 U.S.C. § 922(g) (8)),
 14. Interstate domestic violence - Crossing a state, foreign, or Indian country border (18 U.S.C. § 2261(a) (1)),
 15. Interstate domestic violence - Causing the crossing of a state, foreign, or Indian country border (18 U.S.C. § 2261(a) (2)),
 16. Interstate violation of protective order - Crossing a state, foreign, or Indian country border (18 U.S.C. § 2262),
 17. Illegal trafficking in Native American human remains and cultural items (18 U.S.C. § 1170),
 18. Lacey Act violations (16 U.S.C. § 3371, *et seq.*),
 19. Archaeological Resource Protection Act violations (16 U.S.C. § 470ee),
 20. Controlled substances - Distribution or possession (21 U.S.C. §§ 841(a) (1), 844),
 21. Unauthorized taking of trees (18 U.S.C. § 1853),
 22. Unauthorized setting of fire (18 U.S.C. § 1855),
 23. Assault of a Federal officer (18 U.S.C. § 111),
 24. Bribery of tribal official (18 U.S.C. § 666(a) (2)),
- This list is not exhaustive.

Tanakeyowma Excerpt.txt

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

United States of America, On
Behalf of Its Agency, Department
of Interior, Bureau of Indian
Affairs,

Defendants.

CASE NO.
09 CV 1786 PHX NVW

DEPOSITION OF
HILARIO TANAKEYOWMA

May 18, 2010
1:00 p.m.

3800 North Central Avenue
Suite 1700
Phoenix, Arizona

MICHAEL H. DIPPEL, RPR
Arizona CR No. 50716
Nevada CCR No. 701
California CSR No. 9409

8

Q. Prior to working for the Gila River Indian
Community, where were you employed in the capacity of a
law officer?

A. The Hopi tribe.

Q. Okay. And what years were you employed with the
Hopi Police Department?

A. '94 to '96.

Q. In the state of Arizona?

A. Yes.

Q. The Hopi Police Department, is that a 638 police
department, or is it administered through the Bureau of
Indian Affairs?

A. It's a tribal-funded agency, and the BIA still
houses the majority of the law enforcement out there.

9

Q. So at the time that you were employed with the
Hopi Police Department, you were a BIA officer; is that
correct?

A. No. I was a State-certified officer. I got
State-certified through the Hopi tribe.

Q. Okay. Did you have a special law-enforcement
commission?

A. No, I did not.

10

Q. Did you ever receive any certification by the

Page 1

Exhibit B

Tanakeyowma Excerpt.txt

9 BIA for the enforcement of federal law while employed with
10 the Hopi?

11 A. No.

12 Q. Did you attend any academy or police training
13 school during the time that you were employed with the
14 Hopi Police Department?

15 A. Of the Bureau of Indian Affairs or any training?

16 Q. Any training?

17 A. Yes, I did.

18 Q. Okay. And what training programs did you attend
19 while with the Hopi Police Department?

20 A. I attended the basic law-enforcement academy in
21 Tucson as well as just various minor Arizona POST-related
22 training, basic training.

12

9 Q. So you were required to attend the SLEC course
10 in '96, and it was supervised by the Bureau of Indian
11 Affairs?

12 A. The Gila River Police Department was founded in
13 1996 where approximately ten original tribal police
14 officers were hired. I myself was one of those. Towards
15 the end of the year, when officers were graduating, there
16 was a select few of us that actually had prior
17 certifications. We're a part of a police department, but
18 we were not -- didn't have a chief of police, didn't have
19 sergeants, didn't have any kind of management. It was
20 managed by the Bureau of Indian Affairs during the
21 transition of the 638 contract. So the BIA mandated us to
22 attend those courses.

23 Q. Okay. And what years were -- was the Gila River
24 Indian Police Department supervised by the BIA?

25 A. It was '96 to, I believe, '98.

13

1 Q. Okay. Is it appropriate to say, during those
2 years, the Gila River Police Department was
3 BIA-administered?

4 A. Basically, yes.

5 Q. And you were a tribal officer supervised by the
6 BIA?

7 A. Correct.

13

14 Q. Then I take it, in 1998, the Gila River Indian
15 Community applied for a 638 contract --

16 A. That is correct.

14

3 Q. And what position were you placed in?

4 A. Administrative sergeant.

5 Q. And when you say you were placed in that
6 position, did the Bureau of Indian Affairs oversee the
7 development of the department?

8 A. No.

15

4 Q. And, once again, no commission, though, was
5 issued? You sat for the -- you sat for the --

6 A. In 2001, I want to say, that's about the year
7 we -- we went through the 638 contract with a fully
8 established organizational structure with the department.
9 We were all required to take that. And I believe that's
10 when I got my first commission card from the Bureau of
11 Indian Affairs.

12 Q. Okay. And that was in 2001?

13 A. Yes.

Tanakeyowma Excerpt.txt

14 Q. I think you mentioned that you have sat for the
 15 SLEC three times?
 16 A. Yes.
 17 Q. Okay. So when the third time came about, when
 18 was -- when did you sit for it?
 19 A. I do not recall. I want to say it was -- had to
 20 have been 2007, because 2010 is when my recent card
 21 expires. It's good for three years.
 22 Q. Okay. So did you have a card -- did you have a
 23 SLEC commission -- if you sat, in 2001, you had a
 24 commission through 2004 --
 25 A. I still have that commission. There's no

16

1 expiration date on that first initial commission card.
 2 Q. Okay. And then, in 2007, you resat --
 3 A. Approximately then. And that's when we were
 4 told that they're good for three years.

16

5 Q. Okay. Do you still have that first card?
 6 A. Yes. It's at home.
 7 Q. Are you also an AZ POST-certified officer?
 8 A. Yes.
 9 Q. And does that certification ever expire?
 10 A. It does expire if I do not stay employed and
 11 maintain my training.
 12 Q. Okay. When did you first receive your AZ POST
 13 certification?
 14 A. 1994.

18

11 Q. Other than the BIA-funded training program that
 12 you mentioned, have you ever attended any Bureau of Indian
 13 Affairs-sponsored training program? When I say,
 14 "sponsored," I mean where the program was carried out by
 15 instructors from the Bureau of Indian Affairs.
 16 A. Just an SLEC.

18

20 Q. Tell me how many there are.
 21 A. There's the Indian Police Academy in Artesia,
 22 New Mexico, which is the Bureau of Indian Affairs' basic
 23 police academy; as well as there's the Glynco, Georgia,
 24 criminal-investigation academy.
 25 Q. The one in Glynco, once again, is called what?

19

1 Is that the Federal Law Enforcement --
 2 A. Yeah, FLETC.

19

9 Q. Are you familiar with the term, for those who
 10 attend the Federal Law Enforcement Training Center, of an
 11 1811 certification?
 12 A. Yes.
 13 Q. And do you know what that pertains to?
 14 A. That you went to the federal academy. I don't
 15 know fully. I just know it's a certification you get from
 16 the federal academy.
 17 Q. Okay. But it is a certification -- does it
 18 empower a police officer, law-enforcement officer, with
 19 additional jurisdictional rights having that
 20 certification?

21 MR. JOHNS: Object. Form and foundation.
 22 Q. (By Mr. Rose) If you know.
 23 THE WITNESS: I don't think so.

Tanakeyowma Excerpt.txt

24 Q. (By Mr. Rose) Okay. Do you know one way or the
25 other what the legal significance of that certification

20

1 is?

2 A. No, I don't.

20

3 Q. Are you familiar with the deputation agreement
4 that was -- do you know whether or not the Gila River
5 Indian Community has entered into a deputation agreement
6 with the Bureau of Indian Affairs?

7 A. I do not.

20

17 Q. Were you in the criminal investigations unit in
18 2006?

19 A. Yes.

20 Q. And to your knowledge, is there any line
21 authority between law-enforcement officers and the
22 criminal investigation unit to the local office of the
23 Bureau of Indian Affairs?

24 A. There's no line authority -- the Bureau of
25 Indian Affairs has -- does not supervise the criminal

21

1 investigations division.

22

1 Q. And do those police officers -- those police
2 officers also include police officers who have SLEC
3 commissions?

4 A. The Bureau of Indian Affairs has their own
5 federal commission cards through their own office. I
6 don't know if it's an SLEC card. An SLEC card is a
7 special deputization card by -- that's authorized to any
8 tribal officer or any State agency. It's not especially
9 designed for anything. It's just a special deputization
10 card.

11 Q. And it empowers you to enforce federal crimes on
12 a reservation?

13 A. It empowers me to enforce federal crimes within
14 Indian country as far as relating to Indian country.

15 Q. Okay. And in that scope, do you have any
16 interaction with the Bureau of Indian Affairs?

17 A. No.

18 Q. Do you have interaction with the FBI?

19 A. Yes.

31

12 Q. No. 6, "I am an Arizona Peace Officer Standards
13 Training certified law enforcement officer. By virtue of
14 this certification, I am authorized to enforce state law,
15 including traffic laws, throughout Arizona."

16 Is this statement still true and correct?

17 A. Yes.

18 Q. "I am also a specially deputized law-enforcement
19 officer of the Bureau of Indian Affairs."

20 Is this statement true and correct today?

21 A. Yes.

22 Q. And was this statement true and correct on
23 October 19th of 2006?

24 A. Yes.

32

16 Q. The morning that you left for Tucson, from what
17 location did you leave?

18 A. My residence.

Tanakeyowma Excerpt.txt

19 Q. And I understand Detective Lancaster drove to
20 your residence and you -- the two of you carpooled
21 together to Tucson?

22 A. That is correct.

36

9 Q. Paragraph 13, "we returned from Tucson late in
10 the afternoon, about 5:00 p.m. or so, on
11 October 19th, 2006, and traveled through south Chandler
12 via Arizona Avenue."

13 Where were you en route to as you were returning
14 through south Chandler?

15 A. To my house.

36

16 Q. Okay. I want to hand to you what will be marked
17 as Plaintiffs' Exhibit No. 1 [sic], and I'll represent to
18 you that that is a map from Google, Google Maps --

19 MR. JOHNS: Wouldn't that be 2?

20 MR. ROSE: Yeah, right. Thank you.

21 (Exhibit 2 was marked.)

22 Q. (By Mr. Rose) -- that depict the streets in
23 south Chandler and the state highways that run through the
24 reservation.

25 Based on your personal knowledge and duties as a

37

1 law-enforcement officer, does the map look to be an
2 accurate representation of that area of south Chandler and
3 the Gila River Indian Community?

4 A. To my knowledge, those are the major streets,
5 yes.

6 Q. When you were returning from Tucson on
7 October 19th of '06, did you travel northbound on State
8 Route 587 through the Gila River Indian Community?

9 A. Yes.

10 Q. Okay. And from the map, State Route 587 turns
11 into State Route 87; correct?

12 A. Correct.

13 Q. At any time while you were returning from
14 Tucson, were you monitoring any radio traffic between your
15 dispatch officers and other law-enforcement in the field
16 within the bounds of the Gila River Indian Reservation?

17 A. Yes.

18 Q. At any time, did you hear any radio traffic
19 concerning Leshedrick Sanford?

20 A. No. Not that name, no.

21 Q. Did you hear any radio traffic pertaining to a
22 white vehicle driving at a high rate of speed while on the
23 reservation?

24 A. No.

25 Q. Do you have any personal knowledge of whether

38

1 Mr. Sanford was on the reservation prior to your coming in
2 contact with him on State Route 87?

3 A. No.

4 Q. Have you ever heard that he was -- he was
5 drinking in one of the casinos on the Indian -- on the
6 Gila River Indian Community reservation?

7 A. No.

8 Q. Were you ever apprised that Mr. Sanford exited
9 the Gila River Indian Reservation on east Riggs Road
10 before turning north on Arizona?

11 A. No.

Tanakeyowma Excerpt.txt

12 Q. Paragraph 14, "As we were traveling northbound
13 on Arizona Avenue, we noticed a vehicle driving very
14 erratically, weaving in and out of traffic."
15 Is that statement true and correct?
16 A. Yes.
17 Q. Okay. The vehicle that you noticed driving very
18 erratically, weaving in and out of traffic, did you later
19 come to learn that the driver of that vehicle was
20 Mr. Leshedrick Sanford?
21 A. Yes.
22 Q. Taking a look at Plaintiffs' Exhibit No. 2,
23 where on State Route 87, or also known as Arizona Avenue,
24 did you first come into contact with Mr. Sanford?
25 A. Around the intersections of Ocotillo Road and

39

1 Arizona Avenue.
2 Q. Okay. Can you give us a mark with an X --
3 A. Actually -- I'm sorry. I get these roads mixed
4 up. It would be approximately between Chandler Heights
5 Road and Ocotillo Road.
6 Q. Okay.
7 A. Do you want me to mark --
8 Q. Just with an X as to where you believe . . .
9 Now, there's been some testimony about whether
10 or not you had worked a prior accident before coming into
11 contact with Mr. Sanford that day.
12 Do you recall working a prior accident?
13 A. I did not work an accident. I stopped at an
14 accident with Detective Lancaster due to -- the vehicle
15 was actually blocking traffic, and there was a lady with a
16 small child, so we took it upon ourselves to start pushing
17 the vehicle out of the way to prevent this -- any more
18 accidents just at the same time Chandler Police Department
19 pulled up.
20 Q. Okay. Was that incident, I guess is the best
21 thing to call it, called out to you about
22 Commander Tony Pablo?
23 A. It wasn't called to me, no.
24 Q. But he made a general call over the radio that
25 there was a stalled motorist at Chandler Heights and

40

1 Arizona?
2 A. In that area, yes.
3 Q. And no. 15, "We are authorized to enforce state
4 law anywhere within the state when we have probable cause
5 to believe a crime is being committed."
6 Is that statement true and correct?
7 A. Yes.
8 Q. And as we mentioned earlier, you are authorized
9 to enforce state law anywhere within the state even when
10 the crime has been committed by a person -- within the
11 boundaries of the Gila River Indian Community.
12 A. That's correct.
13 Q. No. 16, "In this instance, we decided to attempt
14 to make contact the driver of the erratic vehicle. We
15 felt it important to do so because we were concerned for
16 the safety of the other motorists and believed that the
17 driver had broken the law."
18 Is that statement true and correct?
19 A. Yes.
20 Q. And at the time that you decided to make

Tanakeyowma Excerpt.txt

21 contact, did you believe that the driver was under the
22 influence of alcohol?

23 A. No.

24 Q. What law had the driver broken?

25 A. Reckless driving.

41

1 Q. And what was it about his driving that you
2 considered reckless?

3 A. As he passed the -- he had weaved towards me as
4 well as forcing another vehicle off the road and passing
5 vehicles on the right-hand side and continued driving in a
6 manner that was not safe lane usage.

7 Q. No. 17, "We stopped behind the erratic vehicle
8 at the intersection of Ocotillo Avenue and Arizona."

9 Is that statement true and correct?

10 A. Yes.

11 Q. And the erratic vehicle was the vehicle driven
12 by Mr. Sanford; correct?

13 A. It was a white vehicle, yes.

14 Q. And was he first in line at the intersection?

15 A. I'm sorry. What was that?

16 Q. Was his car first in line at the intersection?

17 A. That is correct.

18 Q. And did you instruct Mr. Lancaster, or Detective
19 Lancaster -- excuse me -- to exit the vehicle and try and
20 make contact with him?

21 A. Yes.

22 Q. And at that time, did you also activate your
23 lights and siren?

24 A. I didn't hit my siren. I hit my lights.

25 Q. And you were driving the vehicle?

42

1 A. Yes.

2 Q. You were driving your vehicle?

3 A. Yes.

4 Q. Paragraph 18, "We were unable to contact the
5 driver, however, because as soon as we stopped behind him
6 at the red light, the driver punched the gas and illegally
7 entered the intersection. We later learned the driver was
8 Leshedrick Sanford"; correct?

9 A. That is correct.

10 Q. And Detective Lancaster has testified that he
11 attempted to get out of the car, and as he was clearing
12 the passenger door is when Mr. Sanford took off through
13 the intersection. Do you recall that, as well?

14 A. Yes.

15 Q. Paragraph 19 -- we're almost there --
16 "Mr. Sanford entered the interaction" -- "as Mr. Sanford
17 entered the intersection, he struck a motorcycle. We know
18 that the motorcycle was driven by Loren Shirk, the
19 plaintiff in this case."

20 Is that statement true and correct?

21 A. Yes.

43

13 Q. Okay. Eventually -- who was the first to reach
14 Mr. Sanford? You or Detective Lancaster?

15 A. Detective Lancaster.

16 Q. And did Mr. Sanford put up a fight?

17 A. Initially, yes.

18 Q. And did he strike Detective Lancaster?

19 A. I do not recall, but he did spit in his face.

Tanakeyowma Excerpt.txt

20 Q. And I understand that -- are you aware that
21 Mr. Sanford was charged both with assault with a deadly
22 weapon as well as assaulting a police officer?

23 A. Eventually, yes.

44

24 Q. State Route 87 leads from the Gila River Indian
25 Reservation; correct?

45

1 A. Correct, a portion of it. It also exits the
2 reservation on the south boundary, southeast boundary,
3 towards the city of Coolidge.

4 Q. Do you know whether or not State Route 87 is
5 also part of the federally funded highway network within
6 the United States?

7 A. I do not know that.

8 Q. Do you know whether or not the Bureau of Indian
9 Affairs, through its road-construction program, has any
10 responsibility for the maintenance of State Route 87?

11 A. It's a state highway.

12 Q. So no?

13 A. No, they don't maintain it.

Lancaster Excerpt.txt

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Loren R. Shirk and Jennifer
Rose, individually and as
husband and wife,
Plaintiffs,
vs.
United States of America, On
Behalf of Its Agency, Department
of Interior, Bureau of Indian
Affairs,
Defendants.

CASE NO.
09 CV 1786 PHX NVW

DEPOSITION OF
MICHAEL LANCASTER

May 18, 2010
9:57 a.m.

3800 North Central Avenue
Suite 1700
Phoenix, Arizona

MICHAEL H. DIPPEL, RPR
Arizona CR No. 50716
Nevada CCR No. 701
California CSR No. 9409

8

Q. Okay. So you began your employment in 2001?

A. With Gila River, yes.

Q. And prior to employment with Gila River, where
were you employed?

A. The Pascua Yaqui Police Department in Tucson,
Arizona. It's another tribal police department.

Q. And how many years were you employed with -- I
can't even venture a guess on that.

A. 1999 to 2001.

8

Q. Okay. Have you received any formal police
training through the Bureau of Indian Affairs?

A. I have received the SLEC class about four times
throughout my career, since 1999, and I have also attended

9

the CITP course, which is the Criminal Investigators
Training Program, at the Federal Law Enforcement Training
Center in Glynco, Georgia.

9

Q. Okay. And generally speaking, what is the
course material for the SLEC?

A. It just covers Indian country jurisdiction.

Q. Okay. Does it deal with effecting -- or
detaining suspects off the reservation?

Page 1

Exhibit C

Lancaster Excerpt.txt

19 A. No.
20 Q. Other than -- and the second one was the CIT?
21 A. CITP.
22 Q. CITP. And that is an acronym for?
23 A. Criminal Investigations Training Program.
24 Q. And who sponsors that course?
25 A. We're required to -- well, we were required to

10

1 attend that course per our compact with the BIA.
2 Q. And that's at the academy in --
3 A. That's at the Federal Law Enforcement Training
4 Academy in Glynco, Georgia.
5 Q. How long does that course run?
6 A. Three months.
7 Q. Other than the SLEC, have you attended any other
8 BIA-sponsored training courses?
9 A. No.
10 Q. Are you AZ POST-certified?
11 A. Yes, I am.

10

22 Q. And was your -- what was the reason -- well, was
23 your AZ POST certification required under the compact with
24 the BIA?
25 A. My AZ POST was required under the -- for a job

11

1 for the Pascua Yaqui Police Department. That's who I
2 first hired with, and that's who I went to the academy and
3 was sponsored by.
4 Q. And then once you have the POST certification,
5 you are POST-certified --
6 A. I am POST-certified.
7 Q. -- throughout your career?
8 A. As long as I maintain a law-enforcement job.

11

9 Q. Okay. Do you know whether or not your AZ POST
10 certification is also a requirement of the agreement
11 between the BIA and the tribe?
12 A. The Arizona POST is a tribal -- it was an issue
13 that the tribe sought, to make sure that their officers
14 were Arizona POST-certified. It's not a requirement that
15 police officers on Indian reservations maintain an Arizona
16 POST certification, and you will find some police
17 departments who are sponsored by the BIA only have a BIA
18 certification and not a POST certification.
19 Q. Okay. With regard to Gila River Police
20 Department --
21 A. Uh-huh.
22 Q. -- is it a requirement that you have an AZ POST
23 certification?
24 A. With our department, it is required you have an
25 AZ -- an Arizona POST certification.

12

1 Q. And do you know one way or another whether or
2 not the Gila River community has an agreement, either in
3 the compact or the 638 agreement, that its officers
4 maintain an AZ POST certification?
5 A. I do not know that.
6 Q. Okay. So let's talk about the SLEC. Am I
7 correct that stands for Special Law Enforcement
8 Commission? Is that correct?

Lancaster Excerpt.txt

9 A. That's correct.
 10 Q. And when did you first receive your SLEC?
 11 A. November 2007.
 12 Q. When you were with the Pascua Yaqui -- excuse me
 13 if I keep getting that name wrong --
 14 A. Pascua Yaqui.
 15 Q. Yes. When you were with that tribe, did you
 16 have an SLEC?
 17 A. No, I did not.

17

4 Q. Who is your employer?
 5 A. Gila River Police Department.
 6 Q. And are you paid by the Gila River Police
 7 Department?
 8 A. Yes, I am.
 9 Q. Do you receive any type of benefits through the
 10 Gila River Police Department? Retirement benefits?
 11 A. Yes.
 12 Q. Insurance programs?
 13 A. Yes.
 14 Q. Are any of those benefits, retirement benefits,
 15 insurance programs, to your knowledge, provided through
 16 the BIA?
 17 A. No, they're not. They're provided from the
 18 community, from the tribe.

20

11 Q. Are you familiar with the deputation agreement
 12 between the Gila River tribe and the BIA?
 13 A. I'm not, no.
 14 Q. Have you ever seen the agreement?
 15 A. I've never seen the agreement.
 16 Q. Do you know what the legal effect of the
 17 deputation agreement is between the tribe and the BIA?
 18 A. I have no idea.

20

19 Q. With regard to the criminal investigations unit
 20 of the Gila River tribe, is there any line authority
 21 between that unit and the BIA?
 22 A. I don't think there's any authority between us
 23 and the BIA.
 24 Q. Are there any times that the Gila River officers
 25 within the criminal investigations unit will cowork a case

21

1 with BIA officers?
 2 A. No. We don't work with the BIA. We have two
 3 FBI agents that are assigned to us, so we work with the
 4 FBI, and they handle all our -- when we need the extra
 5 resources, we rely on them.

23

20 Q. This is the 638 contract between Gila River and
 21 the Department of Interior, Bureau of Indian Affairs.
 22 Have you ever seen this document before?
 23 A. No, I've never seen this document.
 24 Q. Do you have any responsibility with regard to
 25 negotiating these types of agreements between the tribe

24

1 and the bureau?
 2 A. I do not.
 3 Q. Okay. Do you have any personal knowledge as to
 4 the contents of this contract and what it requires?
 5 A. I have no idea what's in this contract.

Lancaster Excerpt.txt

24

19 Q. Yeah, If I could at a break. That would be
20 nice. I appreciate that.

21 What is your understanding of what this
22 commission allows you to do that you wouldn't be able to
23 do otherwise?

24 A. Well, that's a good question, because I actually
25 have no idea what it allows me to do that I haven't

25

1 already done years prior to even before receiving the SLEC
2 card.

3 I believe what it does cover me is, if I'm
4 investigating a federal case, for instance, a homicide,
5 and my suspect flees to a different state, and if I go to
6 that state and take action and something happens, then I
7 am covered by the BIA as a federal officer acting under
8 federal law. And, of course, that homicide would only be
9 if my victim or my suspect were a Native American and the
10 incident occurred on the reservation.

11 Q. So it's your understanding that it allows you to
12 conduct police work interstate, between two states?

13 A. To allow me to conduct a federal investigation,
14 whether it be off the reservation or out of state. But to
15 be honest with you, I'm not really sure what the
16 definition of what the card allows me to do that I hadn't
17 done prior, years before, as a detective, so . . .

18 Q. Prior to the incident that we're here on today,
19 had you conducted any police work off of the reservation
20 but within the state of Arizona?

21 A. Numerous times.

22 Q. Okay. Give me some examples of what would cause
23 you to conduct police work off the reservation?

24 A. Well, I gave you one example, that I worked a
25 homicide where our suspects -- we had multiple suspects --

26

1 had fled to different parts of the state and out of state.
2 So in order to get them in custody, we had to go get them.
3 I was out in California to retrieve one, so I went out
4 there to get him, and so . . .

27

1 Q. You mentioned -- was it 1811?

2 A. Yeah. That's the certification you get when you
3 go through the CITP course.

4 Q. Okay. And, once again, it's 1811?

5 A. 1811. That's what it's referred to.

6 Q. And where does that number come from?

7 A. That's what the government calls it. I have no
8 idea.

9 Q. So CITP --

10 A. Right.

11 Q. -- is administered --

12 A. Through FLETC.

13 Q. Okay. And --

14 A. It's Federal Law Enforcement Training Center.
15 we just called it FLETC.

28

7 Q. And upon graduation, you receive a
8 certification?

9 A. You receive a certificate of graduation.

10 Q. And how do you get your 1811 certification?

11 A. Well, that's just commonly what's referred to as

Lancaster Excerpt.txt

12 an 1811 certification, but it actually doesn't really do
13 anything for me, but . . .

14 Q. Do you know if that 1811 references some type of
15 code section within the United States code?

16 A. No. It references, like, a job title. Like, if
17 you look up, like, government jobs and then look for
18 criminal investigators, you'll see, like, an 1811 job.
19 And that's what it's referred to. I'm not really sure how
20 that program works, but . . .

28

21 Q. Do you know how long your special Law
22 Enforcement Commission lasts?

23 A. Mine expires in November this year. It's three
24 years.

25 Q. So it's a three-year commission?

29

1 A. Yes.

30

18 Q. No. 5 says, "To serve on the Gila River Indian
19 Community Police Department, an officer must be
20 Arizona POST-certified."

21 And that statement is correct?

22 A. That's correct.

23 Q. Okay. And you do not have any knowledge -- let
24 me ask this: Do you have knowledge as to whether or not,
25 to be in compliance with the 638 contract, that you must

31

1 also be AZ POST-certified?

2 A. Well, my understanding is that we have to be
3 Arizona POST-certified to work for Gila River.

4 Q. Okay. And whether or not that's a tribal
5 requirement or a contractual requirement under the -- are
6 you familiar with the term of a 638 contract?

7 A. Yes.

8 Q. Okay.

9 -- or a contractual requirement of the 638
10 contract, do you have an understanding as to which one
11 requires it?

12 A. I believe the tribe requires us to be
13 Arizona POST-certified.

14 Q. But you don't know whether or not the 638
15 contract also requires it?

16 A. I have no idea what the compact requires.

17 Q. No. 6, "I am an Arizona Peace Officer and
18 Standard Training law-enforcement officer. By virtue of
19 this certification, I'm authorized to enforce state law,
20 including traffic laws, throughout Arizona."

21 Is that statement true and correct to your
22 understanding?

23 A. Yes.

33

7 Q. Do you live within the boundaries of the Gila
8 River Indian Community?

9 A. No.

10 Q. Do you live in the city of --

11 A. I live in Phoenix.

12

36

24 Q. In what way was your attendance at this
25 terrorism course in 2006 fulfilling education requirements

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37

1 as a BIA deputy?

2 A. Well, not as a BIA deputy but just as a cop in
3 general, the information we sought from the Secret Service
4 on types of activities that we could expect to see coming
5 across the border. So whether as a federal agent sitting
6 in class or just a detective from Gila River, basically,
7 we were just given the same info.

8 Q. Were you a federal agent sitting in the class?

9 A. I was a Gila River detective.

10 Q. Did you view yourself as a federal officer --

11 A. No, I do not.

12 Q. -- at that time?

13 A. No.

37

24 Q. No. 11, "Sergeant Tanakeyowma" -- is that how
25 you pronounce his name?

1 A. Uh-huh.

2 Q. -- "and I carpoled to Tucson using a Gila River
3 Indian Community Police Department vehicle that was
4 assigned to Sergeant Tanakeyowma."

5 Is that statement true and correct?

6 A. That is true.

38

13 Q. No. 13, "We returned from Tucson late in the
14 afternoon, around 5:00 p.m. or so, on October 19th, 2006,
15 and traveled through south Chandler via Arizona
16 Road" [sic].

17 Do you recall that statement being true and
18 correct?

19 A. Yes, it is.

39

20 Q. Do you recall, during this time driving back
4 from Yukon [sic], receiving any radio transmissions
5 pertaining to Mr. Sanford?

6 A. No.

7 Q. Are you aware whether or not, prior to this --
8 you making contact with Mr. Sanford on Arizona, whether or
9 not he had been on the reservation?

10 A. I have no idea.

11 Q. Have you ever been told that Mr. Sanford was at
12 the casino on the reservation prior to this incident?

13 A. No.

40

24 Q. As you were returning from Tucson and prior to
25 making contact with Mr. Sanford on Arizona Avenue, what

40

1 route had you taken?

2 A. Prior to --

3 Q. Prior to making contact with him on
4 State Route 87.

5 A. Well, Arizona Avenue and State Route 87 turn
6 into the same thing.

7 We left Interstate 10 at Casa Blanca Road, which
8 is actually Route 175, and then got onto State Route 587,
9 which is also referred to as Arizona Avenue because it
10 just rolls right into Arizona Avenue.

11 Q. 587, is that a state route?

12 A. Yes, it is.

13 Q. And does 587 come through the Gila River Indian

41

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14 Community?

15 A. Yes, it does.

16 Q. So you were coming across -- or through the
17 reservation prior to making contact with Mr. Sanford?

18 A. That's correct.

19 Q. No. 14, "As we were traveling northbound on
20 Arizona Avenue, we noticed a vehicle driving erratically,
21 weaving in and out of traffic."

22 Is that statement true and correct?

23 A. Yes.

24 Q. And when you reference this vehicle driving
25 erratically, weaving in and out of traffic, was this the

42

1 vehicle that was driven by Mr. Sanford?

2 A. Yes.

3 Q. And prior to noticing Mr. Sanford driving on
4 Arizona Avenue, is it your testimony that you had received
5 no radio communication whatsoever from your chief or
6 anybody at dispatch at the police department regarding
7 this individual and/or this car?

8 A. No. Actually, I was -- the only radio traffic I
9 do recall was from Commander Tony Pablo as he passed by a
10 traffic accident at Chandler Heights and Arizona Avenue.
11 We were approximately two minutes behind that area, so we
12 stopped and noticed that there was no law enforcement on
13 scene, so we decided to go ahead and help out at the scene
14 until Chandler PD arrived.

15 Q. Once again, the commander was -- that first
16 radioed the incident was who?

17 A. Commander Anthony Pablo, or Tony.

18 Q. Tony Pablo, okay.

19 And what was the nature of the communication
20 that came across the radio at that the time?

21 A. There had been a multiple-vehicle accident
22 blocking southbound traffic on Arizona Avenue.

43

5 Q. (By Mr. Rose) And I would ask, with a pen, if
6 you could mark, on Exhibit 2, where you recall the
7 incident involving the multiple-car pileup that was
8 radioed by Commander Pablo.

9 A. It would be on Arizona Avenue, south of the
10 Chandler Heights area, the southbound lanes of Arizona
11 Avenue, probably about in here.

45

14 Q. (By Mr. Rose) When you received the radio
15 transmission from Commander Pablo, what was the substance
16 of his communication with you?

17 A. He actually did not communicate directly with
18 us, because he had no idea that we were actually -- where
19 we were. His communication was with Gila River police
20 dispatch. And, basically, his communication was, "Can you
21 notify Chandler PD? There's a multiple-vehicle accident,
22 southbound Arizona Avenue, around Chandler Heights area."
23 So the communication was never directly with us.

24 Q. Okay. And you were -- you were coming up from
25 the reservation at that time?

46

1 Were you on the reservation at the time that you
2 received that --

3 A. We were a couple of minutes behind that call,
4 maybe a minute, maybe two, so there's no telling where

Lancaster Excerpt.txt

5 exactly we were. And this map is not exactly to scale
6 here. It seems pretty close there, but -- if you've ever
7 driven this section of 587, this is a pretty lengthy road
8 right here.

9 Q. Yeah.

10 A. So we were a couple of minutes behind when we
11 came up on the accident.

12 Q. But you don't recall whether or not you were on
13 the reservation at the time that you received this call?

14 A. I don't think we were on the reservation. We
15 were pretty close to the accident. To get from Hunt
16 Highway to Riggs Road is a few-minutes ride. From Riggs
17 Road to Chandler Heights is another few minutes after
18 that, so . . .

19 Q. So 587, according to Exhibit 2, turns into 87;
20 is that correct?

21 A. Which is correct, which is also Arizona Avenue.

22 Q. Do you know whether or not 587 and State
23 Route 87 are federally funded highways?

24 A. I believe they're state highways.

25 Q. Do you know whether or not they're part of the

47

1 federal highway system?

2 A. I have no idea on that.

3 Q. Does; to your knowledge, the Bureau of Indian
4 Affairs maintain any jurisdiction over 587 or 87?

5 A. I don't know what you mean by "jurisdiction."
6 Do you mean, like, law-enforcement jurisdiction or --

7 Q. That was vague, wasn't it?

8 A. Yeah.

9 Q. Does the Bureau maintain any responsibility for
10 maintenance on 587?

11 A. Actually, 587 is under construction right now,
12 and it's the State of Arizona who is doing construction on
13 State Route 587 at this time.

47

23 Q. (By Mr. Rose) Detective, at the time that you
24 were traveling northbound on Arizona, where were you and
25 Sergeant Tanakeyowma going?

48

1 A. We were going to Sergeant Tanakeyowma's house.

2 Q. And had you started the day there?

3 A. Yes. I drove my vehicle from my home to his
4 home so we could go in one vehicle.

5 Q. Sergeant Tanakeyowma, where does he live?

6 A. He lives in Chandler.

7 Q. All right. No. 14, "As we were traveling
8 northbound on Arizona, we noticed a vehicle driving
9 erratically and weaving in and out of traffic."

10 We already established that this vehicle was
11 Mr. Sanford.

12 Where on Arizona Avenue were you at the time
13 that you first witnessed Mr. Sanford driving his car? And
14 I'll just hand you Exhibit No. 2. I see that you marked,
15 with an "X," where the accident was south of Chandler
16 Heights. If you can, with a circle, show us where you
17 first encountered Mr. Chandler's [sic] vehicle.

18 A. Mr. --

19 Q. Mr. -- excuse me.

20 A. Yeah. That's okay.

21 Q. Mr. Sanford.

Lancaster Excerpt.txt

22 A. It would probably be in about this area where 87
 23 is.
 24 Q. So between East Chandler Heights and Ocotillo?
 25 A. Right.

49

1 Q. And how long did you pursue Mr. Sanford prior to
 2 arriving at the intersection of Ocotillo? And I'm talking
 3 in terms of time.

4 A. Well, we actually never pursued him. This was
 5 rush-hour traffic, so -- and if you've ever been on
 6 Arizona Avenue during rush-hour traffic, it's pretty thick
 7 traffic, and there's not a lot of room to move here.

8 So -- but from the first time we first saw him
 9 weaving in and out of traffic all the way up to the time
 10 that he got to the light, I would say it was -- it had to
 11 be less than one minute, and probably less than that.

12 Q. Okay. What drew your attention to him?

13 A. Well, he actually passed by our vehicle at a
 14 higher rate of speed than anyone else who was traveling on
 15 the road at the time.

16 That's not so much what caught my attention off
 17 the bat, because this is Arizona and people drive around
 18 here like NASCAR, but he basically ran a vehicle up on a
 19 curb, which was a little, red Honda or a Toyota. But I
 20 saw a car have to leave the roadway to let this guy by.
 21 That's what first brought my attention to the car that he
 22 was driving.

49

23 Q. No. 15, "We are authorized to enforce state law
 24 anywhere within the state when we have probable cause to
 25 believe a crime is being committed."

50

1 Is that statement true and correct to your
 2 understanding?

3 A. Yes, it is.

4 Q. And what is your understanding of what law gives
 5 you the right to enforce state law anywhere within the
 6 state?

7 A. Actually, there is a state statute in the
 8 Arizona Revised Statutes that allows us to act as
 9 law-enforcement officers anywhere in the state as any
 10 other Arizona peace officer. I don't know the code,
 11 though, actually.

12 Q. The statute, does it reference your position as
 13 a tribal police officer that gives you that jurisdiction?

14 A. Yes. It specifically expresses two law
 15 enforcements -- or they call it Indian Police
 16 Departments -- in the statute.

17 Q. All right. Okay. No. 16: "In this instance,
 18 we decided to attempt to make contact with the driver of
 19 the erratic vehicle. We felt it important to do so
 20 because we were concerned for the safety of other
 21 motorists and believed the driver had broken the law."

22 Is that statement true and correct?

23 A. Yes, it is.

24 Q. When you said that you attempted to make contact
 25 with the driver of the vehicle, please explain how that

51

1 was done.

2 A. Well, once we pulled up behind the vehicle, I
 Page 9

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3 stepped out of our vehicle, and my intention was to
4 approach his vehicle on the passenger side and tell him to
5 settle down or try to figure out what was going on with
6 him. And I say "intent" because he was not paying
7 attention to anything other than looking left and right,
8 left and right, and then straight through the
9 intersection. So I never even had a chance to get to the
10 passenger-side window.

11 Q. How close to his vehicle did you get?

12 A. Actually, I was at the -- when you open the
13 passenger door to the vehicle, I was just on this side of
14 the passenger door, about to round the passenger door from
15 my vehicle, or from our vehicle, to approach his.

16 Q. Okay. Did you have your service revolver drawn?

17 A. No.

57

21 Q. And that made contact with you during the
22 scuffle?

23 A. No. When we cuffed him up and picked him up off
24 the ground and walked him towards the police car, as I
25 opened the rear door to the police car to have him sit

58

1 inside -- he's a tall guy, so I was much shorter than him.
2 He spit down and struck me directly in the face here,
3 so . . .



NOTICES

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Internal Law Enforcement Services Policies

Tuesday, February 10, 2004

***6321** AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes internal policies on Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements. These policies apply to all Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements.

DATES: These policies are effective February 10, 2004.

FOR FURTHER INFORMATION CONTACT: Peter Maybee, Executive Officer, Bureau of Indian Affairs, Law Enforcement Services Washington, DC Liaison Office, 1849 C Street, NW., Washington, DC 20240; Telephone No. (202) 208-4844.

SUPPLEMENTARY INFORMATION:

Introduction

This notice is published in the exercise of authority under the Indian Law Enforcement Reform Act, [25 U.S.C. 2801](#) et seq., [5 U.S.C. 552\(a\)](#), [5 U.S.C. 301](#), [25 U.S.C. 2](#) and [9, 43 U.S.C. 1457](#), and under the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary--Indian Affairs by 209 Departmental Manual 8.

To clarify the existing policies of the Bureau of Indian Affairs (BIA) Law Enforcement Services (OLES) regarding the authority and obligations of parties to Memoranda of Agreement (MOAs), Memoranda of Understanding (MOUs), Cross Deputation Agreements (CDAs), and in particular, Special Law Enforcement Commission (SLECs) Deputation Agreements, the Assistant Secretary--Indian Affairs (AS-IA) is publishing these policies. Questions regarding the current policies have been raised by Federal, tribal, and local law enforcement; therefore, the AS-IA is making these policies public so the public may have a clearer understanding of the policies which have governed all these types of agreements.

An agency may clarify its policies, procedures, and implementation of its own regulations where these clarifications do not contradict or alter the regulations. These clarified policies do not change the law enforcement regulations.

Rather, these clarifications restate to outside parties what has been and continues to be the practice and understanding of the BIA regarding such agreements. This Federal Register notice is to advise all parties to Indian country law enforcement agreements, as well as all other interested persons and organizations, of the BIA's policies, understandings, and expectations related to these agreements, though the issues raised here may not be exhaustive.

The Federal Government has an interest in promoting strong tribal governments with the ability to protect the health and welfare of their members. Inherent in this relationship is strong and effective law enforcement in Indian country. Due to variations in state policies, paired with Indian country crime rates well above the national average, there is a public health and safety need in Indian country that must be addressed. Another issue over the years has been lack of jurisdictional clarity, making state and local officials reluctant to either arrest or prosecute in Indian country. This lack of prosecution in Indian country has compounded the problem.

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

To assist the AS-IA in fulfilling the BIA's duties to provide law enforcement in Indian country and to make clear important policies and working relationships, the BIA OLES enters into MOAs, MOUs, CDAs, and SLEC agreements (pursuant to which it grants special law enforcement commissions to tribal and local law enforcement officers). SLECs support the sovereignty of tribes by allowing tribal law enforcement officers to enforce Federal law, to investigate Federal crimes, and to protect the rights of people in Indian country, particularly against crimes perpetrated by non-Indians against tribal members. Without such commissions, tribal law enforcement in many jurisdictions is limited to restraining these perpetrators until a county, State, or Federal officer arrives. It is common for tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations. For example, it is difficult to get local law enforcement to respond to domestic violence calls and illegal disposal activities in Indian country. As a result, there is a critical void in law enforcement in Indian country that these SLECs fill.

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 Federal Government has an interest in ensuring that Federal and federally commissioned officers are able to respond to calls immediately and with all of the necessary and recommended law enforcement tools. The Federal Government and the Department also have an interest in promoting strong tribal governments capable of effectively carrying out law enforcement in Indian country. The Government further has an interest in ensuring the tribes' sovereign rights to do so are respected and the boundaries of Indian country do not impede officers' travel, use of marked vehicles, emergency response, and other incidental aspects of their Indian country policing authority.

To ensure the SLEC tribal officers are fully qualified to enforce Federal law and to perform functions which would otherwise be performed by BIA officers, the BIA has established certain minimum standards and certification ***6322** requirements for potential officers. The BIA OLES conditions officer commissions on meeting these requirements. The Chief of Police of a tribe must perform an FBI criminal history check on each officer and certify the officers are both full-time employees with a law enforcement program and certified through either the State or the BIA. If an officer is not yet certified by one of the two entities, the BIA provides training before commissioning an officer. These officers must also meet other requirements such as firearms certification and maintaining a record free of any felonies.

The SLECs expire after 3 years, when the Chief of Police must recertify the qualifications of the officers, and the officers must reapply for SLECs.

For SLEC officers to be used effectively to fill this void, it is important that all parties involved in Indian country law enforcement have a clear understanding of each of their roles and expectations. 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. Second, because coordination is the foundation on which effective Indian country law enforcement is based, the BIA encourages full and open coordination between and among relevant tribal, local, and Federal law enforcement, and any relevant task forces or other similar organizations. Whenever possible the BIA encourages the relevant parties to enter agreements governing these cooperative relationships. The BIA will work with any parties to help accomplish this goal. There must also be coordination and communication among law enforcement entities, including local United States Attorney's offices, on Federal policing and prosecutorial practices and on particular cases and prosecutions where appropriate. Finally, the BIA expects that tribes and local law enforcement will maintain appropriate training and policies to ensure that their officers will be able to maintain the appropriate level of training and are otherwise prepared to perform their duties as SLEC officers. The BIA will also assist law enforcement organizations in developing these policies and training standards.

By clarifying the BIA's understandings and expectations of agencies participating in Indian country law enforcement, it is the AS-IA's intent to provide a strong basis on which to build and strengthen these essential relationships. With strong relationships and communication, the BIA and tribal, local, and other Federal law enforcement can better meet the law enforcement, public health, and safety needs of people in Indian country.

Dated: January 22, 2004.

Aurene M. Martin,

Principal Deputy Assistant Secretary--Indian Affairs.

[FR Doc. 04-2842 Filed 2-9-04; 8:45 am]

BILLING CODE 4310-G6-J

69 FR 6321-01, 2004 WL 234214 (F.R.)
END OF DOCUMENT

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.

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

2 The federal District Courts may adjudicate only those
3 cases that the Constitution and Congress empower them to
4 adjudicate. See Kokkonen v. Guardian Life Ins. Co., 511 U.S.
5 375, 377, 114 S. Ct. 1673, 1675 (1994). Once the Court's
6 jurisdiction over a claim is challenged, the party asserting
7 subject matter jurisdiction has the burden of proving its
8 existence. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195
9 (9th Cir. 1988).

10 Federal Rule of Civil Procedure Rule 12(b)(1) allows
11 the Court's jurisdiction to be challenged either facially, based
12 on the legal sufficiency of the claim, or factually, based on
13 the sufficiency of jurisdictional fact. See White v. Lee, 227
14 F.3d 1214, 1242 (9th Cir. 2000); Thornhill Publ'g Co. v. General
15 Tel. & Elecs., 594 F.2d 730, 733 (9th Cir. 1979). "In a facial
16 attack, the challenger asserts that the allegations contained in
17 a complaint are insufficient on their face to invoke federal
18 jurisdiction. By contrast, in a factual attack, the challenger
19 disputes the truth of the allegations that, by themselves, would
20 otherwise invoke federal jurisdiction." Safe Air for Everyone
21 v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). See also Wright
22 v. Incline Vill. Gen. Improvement Dist., 597 F. Supp. 2d 1191,
23 1198-99 (D. Nev. 2009).

24 When considering a factual attack on its jurisdiction,
25 the Court is not confined to allegations in the complaint, but
26 can consider affidavits, depositions, and testimony to resolve
27 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 9th day of June, 2010.

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20 
21 Mark E. Asper
United States Magistrate Judge
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