COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Loren R. Shirk, Plaintiff-Appellee, v. Michael Lancaster, Hilario Tanakeyowma, and Michelle Tanakeyowma, Defendants-Appellants.	)	Court of Appeals Division One No. 1 CA-CV 12-0131 Maricopa County Superior Court No. CV 2007-018088

BRIEF OF *AMICUS CURIAE* GILA RIVER INDIAN COMMUNITY

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Gila River Indian Community ("Community") is a sovereign Indian nation and federally-recognized Indian tribe[1] located in the State of Arizona. Defendants-Appellants Michael Lancaster and Hilario Tanakeyowma ("Officers") were employed by the Gila River Police Department when the accident which is the subject of this case happened. The Community's interest in this matter is that the contracts referred to in the federal Indian self-determination statutes are contracts to which the Community is a party, and the Community is uniquely situated to inform this Court on the law governing those contracts. The Community is also interested in this matter as a result of the trial court's rulings that (1) the *Community* waived its sovereign immunity for the activities of the Officers; and (2) the *Community* has a duty to defend the Officers as a matter of law. These rulings were made *without* the presence of the Community as a party.

The Community has a general interest, as should any federally-recognized Indian tribe, in the Superior Court's (1) use of Ariz. R. Civ. P. 60(c) to remedy the failure to make a showing in response to a motion to dismiss under Ariz. R. Civ. P. 12(b)(1), effectively reversing the burden of proof; and (2) holding that,

[1] 75 *Fed. Reg.* 60810, 60811 (2010).

to the extent the Officers' activities are not covered under the Federal Tort Claims Act ("FTCA"), they are covered by the Community's liability insurance and the tribe waives its sovereign immunity from suit in Arizona state court pursuant to 25 U.S.C. § 450f(c).

STATEMENT OF THE ISSUES

1. Can Ariz. R. Civ. P. 60(c) be used to grant relief to a party who failed to meet his burden of proof in responding to a Ariz. R. Civ. P. 12(b)(1) motion to dismiss?

2. Does 25 U.S.C. § 450f(c) expressly and unambiguously waive the sovereign immunity of an Indian tribe or tribal employee for a tort action in a state court?

ARGUMENT

I. BECAUSE PLAINTIFF HAD THE BURDEN OF PROOF TO ESTABLISH A WAIVER OR ABROGATION OF SOVEREIGN IMMUNITY, THE TRIAL COURT ABUSED ITS DISCRETION IN REVERSING THIS BURDEN THROUGH GRANTING RULE 60 RELIEF.

This Court reviews an order granting relief under Rule 60(c) for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). The discretion of the trial court is not unlimited; it may not "misapply law or legal principle[s]," act "arbitrarily or inequitably, nor … make decisions unsupported by facts or sound policy." *Gorman v. City of Phoenix*, 152 Ariz. 179, 182, 731 P.2d 74, 77 (1987) (citing *Geyler*, 144 Ariz. at 328-29, 697 P.2d at 1078-79). This case involves a clear misapplication of the law. Because Mr. Shirk failed to carry his initial burden of proving a waiver or congressional abrogation of sovereign immunity, allowing him to use Ariz. R. Civ. P. 60(c) to overcome this failure renders the burden of proof and process under Ariz. R. Civ. P. 12(b)(1) meaningless.

A. Rule 12(b)(1) imposes the burden of proof on the party asserting subject matter jurisdiction.

The Officers[2] sought dismissal of the complaint pursuant to Rule 12(b)(1), challenging the subject matter jurisdiction of the trial court on the basis that the

[2] The defendants-appellants are referred to collectively as "Officers."

Officers were entitled to sovereign immunity. Rule 12(b)(1) provides a mechanism for a party to raise, as a defense, "lack of jurisdiction over the subject matter."[3] This case intersects a procedural rule which operates unlike other rules—Rule 12(b)(1)—with an immunity that is generally unfamiliar to state trial courts—tribal sovereign immunity. The procedural rule and the substantive immunity independently impose the burden of proof on the plaintiff.

Gatecliff v. Great Republic Life Ins. Co., 154 Ariz. 502, 744 P.2d 29 (1987) provides some guidance on the nature of subject matter jurisdiction and the unique operation of Rule 12(b)(1). Quoting a line of cases dating to 1894, the Supreme Court of Arizona defined subject matter jurisdiction as follows:

> Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question.

[3] Rule 12(b)(1) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
> 1. Lack of jurisdiction over the subject matter.

154 Ariz. at 507, 744 P.2d at 34 (citations omitted). The question, in this matter, is whether the Superior Court could properly invoke its jurisdiction over the subject matter in light of the claim of sovereign immunity.

Rule 12(b)(1) is unique. A trial court may appropriately consider factual assertions in deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Gatecliff*, 154 Ariz. at 506, 744 P.2d at 33. It also allows the court to receive evidence:

> When the court's subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the court may take evidence and resolve factual disputes essential to its disposition of the motion; but such preliminary jurisdictional fact-finding is not equivalent to summary judgment.

Id. (citations omitted). Quoting Moore's *Federal Practice*, the Supreme Court noted that, while a trial court may consider evidence outside the pleadings in resolving a Rule 12(b)(1) motion, "[c]onsideration of such material does not convert a Rule 12(b)(1) motion into one for summary judgment." *Gatecliff*, 154 Ariz. At 506, 744 P.2d at 33 (citing 2A Moore's *Federal Practice* § 12.07 at 12-48).

Case law discussing the similar federal rule furthers the analysis.[4] An attack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) may be

[4] Fed. R. Civ. P. 12(b)(1) provides:

facial or factual. *Safer Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005). In a facial attack, the moving party asserts that the allegations of the complaint are insufficient on their face to invoke federal court jurisdiction. *Id.* In a factual attack on subject matter jurisdiction, the moving party disputes the truth of allegations made in the complaint that, standing alone, would otherwise support federal jurisdiction. *Id.*

In resolving a factual attack on subject matter jurisdiction, the trial court may review evidence beyond the complaint without converting the motion into one for summary judgment. *Safer Air,* 373 F.3d at 1039 (citations omitted). The court need not presume the truthfulness of the allegations of the complaint. *Id*. (citation omitted). When a factual attack is made, the procedure to be followed in the federal Ninth Circuit is clear:

> Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.

Id. (citation omitted). This is consistent with the general principle of jurisdiction, that the burden of establishing jurisdiction "rests upon the party asserting

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> (b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction.

jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)); *see, also, Valles v. Pima County*, 642 F.Supp.2d 936, 943 (D. Ariz. 2009) (burden of proof on a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction).

The standards governing a Rule 12(b)(1) motion permit a court to proceed as it never could under either Rule 12(b)(6) or Rule 56. *Thornhill Pub. Co. v. Gen. Tel. & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The allegations of a complaint are not accepted as true, as would be the case in a Rule 12(b)(6) motion, and the plaintiff has the burden of proving facts establishing subject matter jurisdiction, a burden shifting quite different than Rule 56. Because no presumptive truthfulness attaches to the plaintiff's allegations, the trial court may weigh and decide the evidence on the issue, even if material facts are disputed. *Thornhill,* 594 F.2d at 733 (citation omitted).

B. The claim of sovereign immunity imposes the burden of proof on the party challenging immunity.

Like subject matter jurisdiction, the claim of sovereign immunity also embodies a burden-shifting function. This court has previously recognized that tribal sovereign immunity "bars lawsuits against Indian tribes in state court absent a clear waiver by the tribe or congressional abrogation." *Filer v. Tohono*

O'odham Nation Gaming Enter., 212 Ariz. 167, 170, 129 P.2d 78, 81 (Ariz. App. 2006) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). The doctrine, which has been recognized in a number of Arizona cases, "is a matter of federal law and not subject to diminution by States." *Filer*, 212 Ariz. at 170, 129 P.2d at 81 (quoting *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)). Sovereign immunity also extends to tribal employees, "so long as their alleged misconduct occurred while they were acting in their official capacity and within the scope of their authority." *Filer*, 212 Ariz. at 85, 129 P.3d at 174 (citations omitted); *see, also, Cook v. Avi Casino Enters.*, 548 F.3d 718, 727 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2159 (2009) (tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority).

Because sovereign immunity is an issue of subject matter jurisdiction, *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1303 (10th Cir. 2001), on a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Garcia v. Akwesane Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001). When courts dismiss cases on the basis of sovereign immunity, it is generally phrased as lack of subject matter jurisdiction. *See, e.g., Vulgamore v. Tuba City Reg'l*

Healthcare Corp., No. CV-11-8087-PCT-DGC, 2011 WL 3555723 (D. Ariz. Aug. 11, 2011) (granting motion to dismiss case for lack of subject matter jurisdiction based on tribal sovereign immunity).

The procedure for asserting tribal sovereign immunity was recently addressed in detail by the Supreme Court of Colorado. *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010). In *Cash Advance*, the intermediate appellate court held that the state bore the burden of proof to establish by a preponderance of evidence that subject matter jurisdiction was proper. 242 P.3d at 1112. The state countered that because a claim of tribal sovereign immunity is an affirmative defense, its proponent bore the burden of proof. *Id.* The Colorado Supreme Court agreed with the court of appeals. *Id.*

First recognizing that a "claim of tribal sovereign immunity is jurisdictional in nature," the court observed that some courts have found it to be a question of subject matter jurisdiction, while others have noted its jurisdictional nature. *Cash Advance,* 242 P.3d at 1112-13 (citations omitted). Not directly addressing the issue, the court concluded that:

> . . . tribal sovereign immunity bears a substantial enough likeness to subject matter jurisdiction to be treated as such for procedural purposes. Consequently, the tribal entities properly raised their claim of tribal sovereign immunity in a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Id. at 1113. Regardless of whether sovereign immunity is an issue of subject matter jurisdiction, "the claim is generally raised in a rule 12(b)(1) motion, pursuant either to federal or state rules of civil procedure." *Id.* (citations omitted). The court agreed with the court of appeals that the state bears the burden of proving the tribal entities are not entitled to immunity by a preponderance of the evidence. *Id.*

Having established that both Rule 12(b)(1) and the claim of sovereign immunity require the plaintiff to bear the burden of proof, this Court should consider the dramatic effect shifting the burden of proof would have on existing law and practice.

C. Granting relief to Plaintiff under Rule 60(c) improperly shifts the burden of proof and renders the process under Rule 12(b)(1) and for resolving claims of sovereign immunity meaningless.

In the context of tribal sovereign immunity, Mr. Shirk's initial burden in responding to the Officers' Rule 12(b)(1) motion was to prove, by a preponderance of the evidence, that (1) the Officers' immunity was waived; or (2) the Officers' immunity was congressionally abrogated. The basis of Mr. Shirk's motion to set aside the judgment is that 25 U.S.C. § 450f(c) is a waiver of the Community's sovereign immunity (and, ostensibly, the Officers' sovereign immunity). The practical impact of the relief granted by the trial court

is to shift the burden of proof on the claim of sovereign immunity from Mr. Shirk to the Officers. If this Court affirms the Superior Court, it will communicate to future plaintiffs that it is acceptable to fail to make a showing in response to a Rule 12(b)(1) motion, because relief is always available under Rule 60(c).

Indeed, the entire thrust of Mr. Shirk's Rule 60(c) motion was to place the burden on the Officers, the moving parties under Rule 12(b)(1), to show a complete absence of sovereign immunity; the motion does not mention or acknowledge, in any way, that Mr. Shirk—the plaintiff—carried the burden of proof in responding to the Rule 12(b)(1) motion. Or, perhaps, to put it more bluntly, what Mr. Shirk claims to have "now learned" in moving for Rule 60(c) relief, should have been learned prior to responding to the Rule 12(b)(1) motion. And the burden is easily identified and stated that, "sovereign immunity bars lawsuits against Indian tribes in state court absent a clear waiver by the tribe or congressional abrogation." *Filer, supra*, 212 Ariz. at 170, 129 P.3d at 81 (citations omitted).

In addition to reversing the burden of proof, permitting Mr. Shirk to obtain relief through Rule 60(c) also thwarts a primary purpose of an immunity. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed

upon those defending a long drawn-out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). In *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the Supreme Court of the United States explained, in the context of qualified immunity, that "[t]he entitlement is an *immunity from suit*, rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[5] "[T]he essence of the immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial." *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987). Permitting relief under Rule 60(c) is contrary to the basic principles governing immunities. Issues involving immunity should be made early and decisively in litigation, which is exactly what happened in this lawsuit in 2008.

Under the trial court's ruling on Mr. Shirk's Rule 60(c) motion, a party who fails to meet his or her burden in responding to a Rule 12(b)(1) motion need not worry—relief is available through Rule 60(c). A party making a Rule 12(b)(1) motion on the basis of sovereign immunity now has the additional burden of proving that there is no waiver or abrogation. This is contrary to Rule

[5] This is also why appeals are permitted from interlocutory orders denying immunity. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (claim of absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (qualified immunity). Immunity issues should be decided quickly and decisively.

12(b)(1), the well-established law of sovereign immunity and the basic purpose of an immunity.

II. 25 U.S.C. § 450f(c) DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE GILA RIVER INDIAN COMMUNITY OR ITS POLICE OFFICERS FROM SUIT IN STATE COURT.

The substantive premise of Mr. Shirk's claim for Rule 60(c) relief is that 25 U.S.C. § 450f(c) waives the Officers' sovereign immunity. It does not. Section 450f(c) does not meet the legal test for a waiver of tribal sovereign immunity, as it does not expressly or unequivocally waive the immunity of the Community or the Officers. Second, case law interpreting section 450f(c) has held that it is not a waiver. Third, the legislative history of section 450f(c) indicates that there was a clear intent to replace the liability insurance provision—upon which Mr. Shirk relies—with coverage under the Federal Tort Claim Act, 28 U.S.C. § 1346(b). Finally, even if section 450f(c) applies, it requires additional facts to determine whether immunity was waived.

A. The plain language of section 450f(c) is not an express or unequivocal waiver of the sovereign immunity of an Indian tribe or tribal employee sued for a tort claim in state court.

As sovereign powers, Indian tribes have long been recognized as possessing a common-law immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). Absent a waiver, without congressional authorization the Indian nations are exempt from suit. *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). In *Santa*

Clara Pueblo v. Martinez, the Supreme Court of the United States acknowledged the settled principle that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." 436 U.S. at 58-59 (citation omitted). This standard has been specifically applied to the Indian Self-Determination and Education Assistance Act.[6] *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). Finally, any waiver of sovereign immunity must be interpreted liberally in favor of the tribe and restrictively against the party claiming waiver. *S. Unique, Ltd. v. Gila River Pima- Maricopa Indian Cmty.*, 138 Ariz. 378, 383, 674 P.2d 1376, 1381 (Ariz. App. 1983).

In 1975, Congress enacted Pub. L. No. 93-638, the Indian Self-Determination and Education Assistance Act ("ISDEA"). Pub. L. No. 93-638, 88 Stat. 2206 (1975). Title I of this groundbreaking legislation, which is also referred to as the Indian Self-Determination Act ("ISDA"), permitted Indian tribes and tribal contractors to enter into contracts (sometimes informally referred to as "638 contracts") to provide essential services[7]— part of the trust

[6] The Court may notice that the abbreviations ISDA and ISDEAA are used by the parties, sometimes interchangeably. The ISDEAA refers to the entirety of Pub. L. No. 93-638, 88 Stat. 2206 (1975), which is the Indian Self Determination and Education Assistance Act of 1975. ISDA refers to the Indian Self-Determination Act, which is Title I of the ISDEAA.

[7] Examples of these services include law enforcement, detention, tribal courts, social services and health care.

obligation of the United States—which were previously provided by the United States. 25 U.S.C. § 450f is a specific statutory provision authorizing such contracts. One issue to resolve in the transfer of such services is tort liability, which is where section 450f(c) comes in.

25 U.S.C. § 450f(c) is not a waiver of the sovereign immunity of an Indian tribe or of tribal employees. It was enacted as part of the ISDA in 1975, and currently provides:

> **(c) Liability insurance; waiver of defense**
>
> (1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.
>
> (2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.
>
> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

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

25 U.S.C. § 450f(c).[8] This is not a well-drafted statute. Subsection (3)(B) refers to the waiver of the sovereign immunity of an Indian tribe; yet no other part of the statute provides for such a waiver.

What does this statute actually do? First, it imposes an obligation on the United States to provide liability coverage "or equivalent coverage, on the most cost-effective basis" for Indian tribes or tribal organizations carrying out 638 contracts pursuant to the statute. Second, in obtaining or providing the coverage, the Secretary of the Department of the Interior must take into consideration whether such contracts or agreements are covered under the FTCA. Third, if a policy of insurance is obtained pursuant to the statute, it must contain a provision that "the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit;" however, the waiver extends only to the policy limits. The last section of the ISDA, now codified at 25 U.S.C. § 450n, provides that, "Nothing in this subchapter shall be

[8] A complete copy of 25 U.S.C. § 450f is attached at Appendix A.

construed as—(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."

As to the issue of insurance coverage, 25 U.S.C. § 450f(c) leaves it to the discretion of the Secretary to determine (a) whether liability insurance is required, and (b) what amount would be adequate. The phrase "or equivalent coverage" is an express acknowledgement that liability insurance is not necessarily required. Subsection (1) does not specify an amount of coverage; only that coverage is to be provided on the most cost-effective basis. Arguably, because Indian tribes retain sovereign immunity from suit under 25 U.S.C. § 450n, it is cost effective for the United States to not require tribes to procure insurance coverage beyond FTCA coverage, which is automatically provided.

Next, 25 U.S.C. § 450f(c) does not require an Indian tribe or tribal employee to waive sovereign immunity; by its terms, it applies only to insurers which provide insurance coverage through the United States. By its express language, subsection (3)(A) operates *only against the insurance carrier*, which waives its right to raise the sovereign immunity of an Indian tribe from suit. Nothing in the statute precludes a tribe or tribal employees—who are not insurance carriers—from raising the claim of tribal sovereign immunity. Because statutory waivers of sovereign immunity must be narrowly construed in favor of the sovereign, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985),

this Court should reject the argument that 25 U.S.C. § 450f(c) applies based upon either the plain language of the statute or because any ambiguity should be construed in favor of the Community.

Notwithstanding the special rules applicable to construction of waivers of sovereign immunity, this analysis is not inconsistent with Arizona law of statutory interpretation. "A statute's plain language is the best indicator of legislative intent," and courts will not "engage in other means of statutory interpretation unless a statute is ambiguous." *Farris v. Advantage Capital Corp.*, 217 Ariz. 1, 2, 170 P.3d 250, 251 (2007) (citations omitted). Words have their ordinary meaning unless the context of the statute requires otherwise. *Carrow Co. v. Lusby,* 167 Ariz. 18, 20, 804 P.2d 747, 749 (1991). Where language is unambiguous, it is normally conclusive, absent a clearly expressed legislative intent to the contrary. *Corbin v. Pickrell,* 136 Ariz. 589, 592, 667 P.2d 1304, 1307 (1983).

In this case, the words of the statute are clear: any waiver of immunity is applicable to the insurance carrier only, and only upon a showing that the insurance was procured by the United States pursuant to the statute and contains the statutory language.

B. Tribal sovereign immunity is an issue of federal law and, in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), the United States Court of Appeals held that section 450f(c) is not a waiver of sovereign immunity.

Tribal sovereign immunity is a matter of federal law, *Filer,* 212 Ariz. at 170, 129 P.3d at 81, and Arizona courts—including this court—have often relied on federal law in analyzing sovereign immunity issues. Fortunately, 25 U.S.C. § 450f(c) was discussed at length in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). The plaintiffs in the case (collectively "Evans") were non-Indians residing in Browning, Montana, a city located within the boundaries of the Blackfeet Indian Reservation. 869 F.2d at 1343. They were arrested on two separate occasions by law enforcement personnel of the Blackfeet Tribe of Indians, and police attempted to seize cigarettes and tire repair equipment from Evans' gas station pursuant to tribal court orders. *Id.* at 1343-44. The Evans brought an action against a lot of defendants, most notably the Blackfeet Tribe and tribal officials and employees. *Id.* at 1343.

All of the defendants moved the federal district court for dismissal; the Tribe and the tribal officials and employees moved to dismiss on sovereign immunity grounds. *Evans v. Littlebird*, 656 F.Supp. 872, 873 (D.Mont. 1987). The district court held that Evans' suit against the Tribe was barred by sovereign immunity and that the claims against the individual tribal defendants were

beyond the jurisdiction of the court. *Id.* at 874-75. Evans argued, in a claim for declaratory relief, that Section 102(c) of the ISDA, codified at 25 U.S.C. § 450f(c), operated to waive the sovereign immunity of the Tribe. *Littlebird,* 656 F.Supp. at 876.

The district court rejected this argument, noting that the language of 25 U.S.C. § 450f(c) is explicit: "A tribe *may* be required to obtain a liability insurance policy to cover any damages emanating from by the tribe's performance of its duties under a contract authorized by the Secretary under section 102. The caveat of subsection (c) requires that any such liability policy shall expressly preclude the insurer from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity." *Littlebird*, 656 F.Supp. at 876. However, the court reasoned, "the waiver of sovereign immunity contemplated by the express language of section 102(c) cannot be equated with a congressional waiver of a tribe's immunity from suit in federal court." *Id.* at 876-77.

The United States Court of Appeals for the Ninth Circuit affirmed this holding of the federal district court, providing extensive analysis of the interpretation of 25 U.S.C. § 450f(c). On appeal to the Ninth Circuit, the Evans argued that section 450f(c) constituted a waiver of the Tribe's sovereign immunity; "it is this section of the ISDA upon which the appellants primarily

rely to support their argument that the Tribe has waived its sovereign immunity." *Evans*, 869 F.2d at 1346. While noting that the statute requires a tribe to obtain liability as a condition precedent to a contract, section 450f(c) "clearly addresses, as is evident in the caveat of that subsection, *the rights and limitations of the insurance carrier, not the Tribe*." *Id.* (emphasis added) Thus, 25 U.S.C. § 450f(c) "expressly precludes the *insurer* from defeating a claim covered by the policy by an invocation of the tribe's sovereign immunity." *Evans*, 869 F.2d at 1346 (emphasis in original).

Next, the plaintiffs pointed to a provision in the then-standard form ISDA Tribal-BIA contract which provides that, "The contractor [tribe] shall indemnify and save and keep harmless the Government…" *Evans,* 869 F.2d at 1346 (citation omitted). In this provision, however, "the Tribe agrees only to indemnify the *government* should the *government* become liable in connection with any program included as part of the contract." *Id.* (emphasis in original). If any waiver of sovereign immunity is created by section 450f(c), it is "a very limited waiver authorizing the United States government to claim indemnity against the Tribe." *Id.* at 1347.

The court also relied on the last provision of the ISDA to bolster its conclusion:

Nothing in this Act shall be construed as—

> (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.

Evans, 869 F.2d at 1347 (citing 25 U.S.C. § 450n(1)). The court concluded, "we hold that neither section 102(c) nor the Tribe-BIA contract constitute a waiver of the Tribe's sovereign immunity." *Id.* How this holding could be characterized as "dicta" by the United States in the Superior Court defies logic.

While 25 U.S.C. § 450f(c) was later amended to account for coverage under the FTCA, the operative provisions relating to obtaining insurance coverage and restricting an insurer from raising sovereign immunity as a defense—(3)(A)—remain the same as when the ISDEAA was enacted in 1975. *Evans* was not limited to claims under 42 U.S.C. § 1983, as argued by the United States, but made a general holding that 25 U.S.C. § 450f(c) is not a waiver of a tribe's sovereign immunity. On the issue of whether 25 U.S.C. § 450f(c) waives the sovereign immunity of the Community or the Officers, *Evans* is as applicable today as it was in 1989.

The holding of *Evans v. McKay* has been followed by at least one state appellate court. *Kelley v. Graves*, No. CX-90-511, 1990 WL 128315 (Minn. App. Sept. 11, 1990). In *Kelley*, the plaintiff was injured when a Fond du Lac Conservation Service officer attempted to pull his car out of a snow bank using a snowmobile. 1990 WL 128315 at *1. In a thorough discussion of the

applicability of section 450f(c) and the sovereign immunity of the Fond du Lac Tribe's Conservation Service, the Court of Appeals of Minnesota rejected the argument that section 450f(c) waived the tribe's sovereign immunity.

Beginning with the familiar proposition that sovereign immunity cannot be waived by implication, but must be unequivocally expressed, the court first analyzed whether the Tribe waived immunity. *Id.* at *1. As a basis for the Tribe's alleged waiver of sovereign immunity, the plaintiff argued that section 450f(c) was a waiver because the Tribe's self-determination contract with the BIA required the Tribe to obtain automobile liability insurance. *Id.* at *2. Relying on *Evans v. McKay*, the court rejected this argument:

> Based on *Evans*, we are forced to conclude that this harsh result must follow. The provisions of the contract between the Tribe and the BIA do not waive the Tribe's right to assert the defense of sovereign immunity to defeat appellant's claim against the Service. Similarly, we must reject appellant's claim that Congress abrogated the Tribe's right to assert tribal sovereign immunity by enacting 25 U.S.C. § 450f(c)

Id. Because the Tribe's conservation officer was acting in his official capacity and within the scope of his authority, the court held he was also protected from liability by the Tribe's sovereign immunity. *Id.* at *3 (citations omitted).

Evans v. McKay remains a strong precedent of the Ninth Circuit. As of the date of filing of this brief, a Westlaw search indicates that it has been cited 17

times in separate cases involving tribal sovereign immunity and as recently as February 16 of this year.[9]

C. The legislative history of section 450f(c) indicates a clear intent to replace the limited liability insurance provision with coverage under the Federal Tort Claims Act.

Section 450f(c) was originally adopted as part of the ISDEAA in 1975. Pub. L. No. 93-638, 88 Stat. 2203 (1975). Title I of the Act, also known as the ISDA, empowered the Secretary of the Interior to enter into contracts with Indian tribes or tribal organizations to plan, conduct or administer programs which the Secretary was otherwise authorized to provide for the benefit of Indian tribes and their members. Section 102(c) of the ISDEAA, codified as 25 U.S.C. § 450f(c) originally read as follows:

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

Pub. L. No. 93-638, § 102(c), 88 Stat. at 2206.[10]

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[9] *Fontanez v. MHA Nation*, No. CV 11-148-M-DWM-JCL, 2012 WL 928290 (D. Mont. Feb. 16, 2012).

The language adopted in 1975 remained that way until 1988, when the Indian Self-Determination Act Amendments of 1987 ("1987 ISDEAA Amendments") were enacted on October 5, 1988.[11] Pub. L. No. 100-472, 102 Stat. 2285 (1988). The 1987 ISDEAA Amendments contain the current language of the statute:

> (c)(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.
>
> (2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452, title 25, United States Code, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.
>
> (3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.
>
> (B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability

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[10] Relevant portions of Pub. L. No. 93-638 are attached as Appendix B.

[11] Relevant portions of Pub. L. No. 100-472 are attached as Appendix C.

> for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

25 U.S.C. §450f(c).

From a purely textual standpoint, the 1987 ISDEAA Amendments made the following changes: First, the obligation to purchase liability insurance was shifted from the Indian tribe or tribal organization to the Secretary of the Interior of the United States (i.e., the Bureau of Indian Affairs). Second, subsections (c)(1) and (2) were added to outline the extent of this obligation. In determining whether to obtain liability insurance "or equivalent coverage," the Secretary is directed to "take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act." Reference to the FTCA was new to the ISDEAA and played a significant role in the legislative history of the 1987 ISDEAA Amendments and subsequent amendments. Finally, a provision was added which further limited any liabilities imposed on an Indian tribe's insurer prohibiting recovery of pre-judgment interest and punitive damages.

The reasons for the amendment are expressed in the Senate Report accompanying S. 1703, the Senate version of the 1987 ISDEAA Amendments. In assessing the original language of the ISDEAA, the report noted that the act authorized either secretary (DOI or HEW) to require that tribal contractors

obtain liability insurance, and that it precluded insurers from asserting a tribe's sovereign immunity from suit. S. Rep. 100-274 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2645. The reality of the matter was that the costs of liability insurance were taken from the amounts of funds provided to the tribes for program costs. *Id.* The Senate Select Committee on Indian Affairs was concerned that using program funds to pay for insurance resulted in decreased levels of service for Indian beneficiaries. *Id.*

The Senate Report also recognized that the "tribal contractors are carrying out federal responsibilities." *Id.* Because the liabilities should remain the same, regardless of whether the activities are carried out by the federal government or the tribal contractor, the federal government "should provide liability insurance coverage in the same manner as such coverage is provided when the Federal Government performs the function." *Id.* When the federal government performs carries out those responsibilities, it is covered under the FTCA. The Senate version of what became the 1987 ISDEAA Amendments, included a later-adopted provision specifying that, for purposes of the FTCA, employees of Indian tribes carrying out self-determination contracts were considered employees of the federal government. *Id.*

The mention of the reason for continuing insurance coverage in the 1987 ISDEAA Amendments is enlightening. The Senate Report indicated that, as to

the insurance provision, "[t]his provision is intended to cover claims against a tribal contractor for acts or omissions that occurred prior to the bill's enactment but for which the statute of limitations has not yet expired." 1988 U.S.C.C.A.N. at 2646. Thus, as opposed to the claim made by the United States that the insurance requirement is intended to function as "gap" coverage, the actual legislative history suggests that the insurance requirement was intended only to cover claims that occurred *prior* to coverage under the FTCA (i.e., tail coverage). This also explains why the insurance provision remained in the 1987 Amendments in light of FTCA coverage.[12]

While the Senate version mandating FTCA coverage was not directly included in the 1987 ISDEAA Amendments, it *was* later included in Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989) and Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959-60 (1990), *codified at* 25 U.S.C. § 450f note.[13] Along with the provision mandating FTCA coverage for Indian tribes or tribal contractors was a clear expression that the FTCA coverage would *replace* the insurance coverage mandated by the 1987 ISDEAA Amendments for lingering claims. The provision mandating FTCA coverage provides:

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[12] This should also alleviate any concern that "[e]ach word, phrase, and sentence must be given meaning so that no part will be [void], inert, redundant, or trivial." *City of Phoenix v. Yates,* 69 Ariz. 68, 72, 208 P.2d 1147, 1149 (1949).

[13] These were Department of Interior appropriations bills.

> With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter, or claims asserted after September 30, 1990, but resulting from the performance of functions prior to fiscal year 1991, under a contract, grant agreement, or cooperative agreement authorized under the Indian Self-Determination and Education Assistance Act of 1975, as amended . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau of Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection of the Federal Tort Claims Act . . .

Pub. L. No. 101-512, Title III, § 314, 104 Stat. at 1959-60, *codified at* 25 U.S.C. § 450f note.[14] The plain language of this amendment provides FTCA coverage going forward, and also covers the "tail;" that is, coverage for claims asserted after September 30, 1990, but for performance of functions prior to fiscal year 1991.

This intent is clearly confirmed by the House Report accompanying the 1991 appropriations bill. Its short, but insightful, analysis of the provision extending FTCA coverage is as follows:

> The Committee has included language to make the extension of the Federal Tort Claims Act protection to tribal P.L. 93-638 contractors

[14] Relevant portions of Pub. L. No. 101-512 are attached as Appendix D.

> permanent. It is unfortunate that the Department did not respond in a timely manner to the Committee's direction last year to undertake a study to show if other means of meeting the legal requirement for the Secretary to provide liability coverage for tribal contractors would be preferable. However, since the Department delayed taking action to respond to this directive, *the Committee has no choice but to provide the required liability coverage on a permanent basis by extending the Federal Tort Claims Act coverage.*

H.R. Rep. No. 101-789 (1990), *reprinted in* 1990 WL 252115, *45 (emphasis added).[15] There could not be a clearer expression of legislative intent—FTCA coverage was extended to tribal contractors to *replace* the liability insurance coverage for lingering claims.

In the trial court, the United States suggested in its *amicus* brief that the liability insurance coverage should apply because the FTCA did not apply. There is *nothing* in the legislative history of the 1987 ISDEAA Amendments which expresses or even implies that the purpose of the liability insurance requirement is to cover occurrences that fall outside the scope of the FTCA. The rationale for extending FTCA coverage to replace liability insurance coverage was that the liability of an Indian tribe or tribal contractor should be the *same* as

[15] The reference to making the extension of the FTCA permanent is to Pub. L. No. 101-121, § 315, 103 Stat. 701, 744 (1989), which extended FTCA coverage during fiscal year 1990 only and directed the Bureau of Indian Affairs and Indian Health Service to provide a report to the Committee identifying the costs and benefits of various liability coverage alternatives. H.R. Conf. Rep. No. 101-264, at 33 (1989). Obviously, this did not happen and FTCA coverage was extended on a permanent basis.

it is for the federal government, not expanded through liability insurance. Unfortunately, FTCA liability is limited for law enforcement officers. *See, e.g., Washakie v. United States*, No. CV-05-462-E-BLW, 2006 WL 2938854 (D. Idaho Oct. 13, 2006) (tribal law enforcement officers not enforcing federal law are not covered under FTCA).[16]

The Department of the Interior, through its rulemaking, has acknowledged that the FTCA is the exclusive remedy for tort claims arising out of a self-determination contract:

> **§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?**
>
> Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

25 C.F.R. § 900.204. It is possible that the Officers were performing under the Community's self-determination contract and the matter may still not be covered under the FTCA, which is only a limited waiver of sovereign immunity.

[16] It is interesting and significant to note that *none* of the cases from the federal appeals courts holding that the actions of tribal police officers are not covered under the FTCA mention the possibility coverage under a tribe's liability insurance. *Dry v. United States*, 235 F.3d 1249 (10th Cir. 2000); *Hebert v. United States*, 438 F.3d 483 (5th Cir. 2006).

25 U.S.C. § 450f(c), which is a part of the ISDEAA, is not a waiver of the sovereign immunity of an Indian tribe or tribal employees for personal injury lawsuits in a state court. The statute does not expressly and unequivocally abrogate tribal sovereign immunity, the case law construing section 450f(c) holds that it is not a waiver of tribal sovereign immunity, and the legislative history of section § 450f(c) clearly indicates an intent to replace the liability insurance coverage requirement with coverage under the FTCA.

D. The trial court abused its discretion in finding that the Community waived its sovereign immunity from suit where the Community was not a party to the lawsuit and the statute involved requires additional facts not before the court.

Even if 25 U.S.C. § 450f(c) permits a limited waiver of sovereign immunity, section 450f(c) requires proof of facts that are not a part of the record in this matter, and it was an abuse of discretion for the trial court to find a waiver of sovereign immunity in the absence of certain facts. First, the statute requires proof that the United States provided liability insurance to the Community under its contract with the Community. The 2003 *Compact of Self-Governance Between the Gila River Indian Community and the United States of America* does not require either the United States or the Community to purchase or provide liability insurance. In its filings in this matter, the United States has

not indicated whether it has purchased liability insurance to cover what it perceives are its obligations pursuant to section 450f(c).[17]

Second, in addition to the presence of insurance coverage—a fact not in the record—section 450f(c) requires that the insurance policy procured by the United States must contain specific statutory language. The insurance policy:

> . . . shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit . . .

25 U.S.C. § 450f(c)(3)(A). The record is devoid of any fact finding regarding whether the United States procured an insurance policy to cover its obligation, whether the Community has an insurance policy procured pursuant to the ISDA, or the content of any provision contained in any such policy.[18] Absent these

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[17] The Community has requested that the United States provide this information to the other parties and the Superior Court, but the United States has failed or refuses to do so.

[18] Although not part of the record, the Community does maintain a liability insurance policy. It is paid for with Community monies—not federal monies. Because it is not insurance provided by the Secretary of the Interior, it does not contain the language required in 25 U.S.C. § 450f(c) and does not permit the insurance carrier to waive the sovereign immunity of the Community or its employees. Of course, this Court understands that the mere fact the Community has insurance coverage does not constitute a waiver of sovereign immunity. *See Graves v. White Mtn. Apache Tribe*, 117 Ariz. 32, 34, 570 P.2d 803, 805 (Ariz. App. 1977) (rejecting argument that tribe waived its immunity by taking out insurance).

facts, it was clearly erroneous for the trial court to conclude that the Community waived its sovereign immunity.[19]

CONCLUSION

The Gila River Indian Community requests that the Court of Appeals reverse the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 29th day of June, 2012.

GILA RIVER INDIAN COMMUNITY

By /s/ Thomas L. Murphy

[19] The express finding that the Community waived its sovereign immunity is shocking, given that that Community was not a party to this action.