No. 10-17443

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOREN R. SHIRK and JENNIFER ROSE,
Individually, and as Husband and Wife,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, on behalf of its Agency, DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS,

Defendants-Respondents.

On Appeal from the United States District Court of Arizona
Case No. 09-CV-01786-NVW
The Honorable Neil V. Wake, United States District Court Judge

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APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Plaintiffs-Appellants Loren R. Shirk and Jennifer Rose hereby certify that they are individuals and, therefore, have no disclosures to make.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants Loren R. Shirk and Jennifer Rose respectfully request the Court hear oral argument in this case as oral argument would aid the Court in understanding and deciding the issues presented herein.

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I.

STATEMENT OF JURISDICTION

This is an action brought against the United States under the Federal Tort Claims Act ("FTCA"). The district court had original jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1346(b)(1). The district court entered a final judgment in favor of the United States on August 26, 2010. Plaintiffs timely filed a Notice of Appeal on October 26, 2010. Excerpt of Record ("ER") 1. This Appeal falls within this Court's appellate jurisdiction under 28 U.S.C. § 1291.

II.

ISSUES PRESENTED

Did the district court err in determining two Gila River Indian Community police officers did not qualify as federal employees acting in the course of their employment as defined by the Tribe's Self Determination or Public Law 93-638, at the time of their encounter with paroled felon Leshedrick Sanford, so as to deny these Officers protection and coverage under the FTCA?

III.

STATEMENT OF THE CASE

This action arises as a result of a motor vehicle accident occurring in October of 2006, in the city of Chandler, Arizona. An accident which would not have occurred, but for the actions of two Gila River Indian Community (hereinafter

referred to as the "GRIC") police officers.[1] An accident that left Plaintiff-Appellant Loren Shirk ("Shirk"), an innocent bystander, severely and permanently disabled.

Shirk has sought redress for his injuries for over five years, pursuing his claims in both state and federal court. Yet, contrary to the ideal espoused by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," this matter has presented contradictory statutory and contractual claims of sovereign immunity shrouded within a complex federal regulatory regime governing Indian lands that has denied Shirk his day in court.

Shirk originally filed suit against the Officers in 2007 in the Maricopa County Superior Court, alleging claims of common law negligence.[2] The matter was dismissed for lack of subject matter jurisdiction after the Officers prevailed on the argument they enjoyed sovereign immunity from suit and, more importantly to the present appeal, that as federal employees acting within the course and scope of employment under the GRIC's Self Determination or 638 Contract with the Bureau of Indian Affairs ("BIA") were covered under the FTCA. The Officers' Motion to

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[1] The GRIC is a federally recognized Indian tribe located in Sacaton, Arizona. *See*, Federal Register/Vol. 67, No. 134/July 12, 2002.

[2] *Shirk v. City of Chandler, et al.,* Maricopa County Superior Court, Case No. CV2007-018088.

Dismiss was granted on September 24, 2008, and judgment entered in their favor on December 17, 2008. ER 93-94.

Thereafter, in August of 2009, Plaintiffs brought suit against the United States pursuant to the FTCA in the United States District Court for the District of Arizona, after having satisfied the jurisdictional prerequisites of 28 U.S.C. § 2675(a). Dkt. 1. The United States, however, too filed a Motion to Dismiss for lack of subject matter jurisdiction. Dkt. 19.

Specifically, the United States argued the FTCA did not apply because the Officers were not "carrying out" the GRIC's 638 Contract at the time of the incident. Thus, absent the FTCA's limited waiver of immunity, there was no basis for subjecting the United States to suit. The district court agreed, having concluded as follows:

> In this case, it is unmistakably clear from the language of the GRIC's Contract with the BIA, as incorporated into the Compact, that the BIA contemplated the execution of GRIC law enforcement functions solely within the boundaries of the Gila River Indian Reservation… Furthermore, aside from section 102.4, which merely requires the GRIC to *assist* federal and state law enforcement offenses that occur on the Reservation, the Contract contemplates only the enforcement of federal and tribal law.

ER 9:9-12; 21-24. Judgment was entered in the United States' favor on August 27, 2010. Dkt. 44.

Plaintiffs, now Appellants, seek reversal of the district court's ruling. Indeed, as explained below, the Tribe's 638 Contract (and governing ISDEAA Agreements) authorized the Officers to engage in the very activity giving rise to their liability. Plaintiffs therefore ask the Court to reverse and vacate the underlying order, thereby finding the United States may be held liable under the FTCA for the alleged negligent acts of the Officers.

IV.

STATEMENT OF FACTS

A. Relevant Background

In 1975, Congress enacted the Indian Self-Determination and Education and Assistance Act ("ISDEAA"), Pub. Law No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n). Title I of the ISDEAA permits the Secretary of Interior to enter into self-determination contracts with tribal organizations in which the tribal organizations agree to administer federally funded services that would otherwise be provided by the BIA. 25 U.S.C. §§ 450b(j), 450f(a)(1). These self determination agreements or 638 contracts, generally have a maximum term of three years. 25 U.S.C. § 450j(c)(1)(A). Once a contract has operated for a continuous period of at least three years, it achieves mature status. 25 U.S.C. §

450b(h). Upon mature status, the tribal organization is eligible to provide the services identified in the contract for an indefinite period of time. 25 U.S.C. § 450j(c)(1)(B).

In 1994, Congress followed the ISDEAA with the Tribal Self-Governance Act, Pub. Law No. 103-413, Title II, 108 Stat. 4270 (1994) (codified at 25 U.S.C. §§ 458aa-458hh). The goal of the Tribal Self-Governance Act is to transfer control over programs, services, functions and activities traditionally provided by the Department of Interior ("DOI") to participating tribes in an effort to promote tribal self-governance. *See,* 25 U.S.C. § 458aa Note. The Act furthers that goal by authorizing the Secretary of Interior to negotiate annual funding agreements with participating tribes. 25 U.S.C. § 458cc(a). The agreements permit tribes to consolidate, re-design, administer and reallocate funds among programs, services, functions and activities traditionally administered by the DOI. 25 U.S.C. § 458cc(b). They are typically negotiated in what are known as self-governance compacts.

In 1998, the BIA entered into a three year Self Determination or 638 Contract with the GRIC, in which the GRIC agreed to provide its own law enforcement services through the administration of a federally funded Law Enforcement Program. ER 38. According to subsection (a)(2) of the 638 Contract, the purpose of the Program is to provide "Law Enforcement Services for the Gila

River Indian Community" through provision of funds "necessary to carry out uniform police activities, detention services, radio communications, and criminal investigations." ER 42.

In 2001, the GRIC reached "mature status" and, as a result, was eligible to provide law enforcement services for an indefinite period of time. In 2003, the GRIC entered into a Self-Governance Compact with the BIA. ER 18-33. The Compact authorized the GRIC to administer any programs previously administered under the authority of the ISDEAA, as well as any new programs identified in the Annual Funding Agreements ("AFA") incorporated therein. *Id.* ("[T]he United States of America and the Community hereby mutually agree to enter into a government to government agreement for the administration and operation of all BIA programs previously administered by the Community under the authority of Title I and Title IV of the [ISDEAA], as amended, and any new programs, all of which are listed in the Annual Funding Agreement attached hereto and incorporated herein for all purposes"). *See also*, Exhibit 1 to Appellants' Request for Judicial Notice ("RJN") filed concurrently herewith.

B. Liability Under The FTCA

While the United States typically enjoys immunity from suit, the FTCA provides a limited waiver of sovereign immunity for suits brought alleging that a

federal government employee's negligence, wrongful act or omission caused a person's personal injury. The FTCA provides for:

> … civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). It is the exclusive remedy for torts committed by federal employees while acting within the course and scope of their employment. 28 U.S.C. § 2679(b)(1). For purposes of the FTCA, federal employees include "officers or employees of any federal agency" and "persons acting on behalf of a federal agency in an official capacity." 28 U.S.C. § 2671.

Significantly, Congress amended the ISDEAA in 1988, to allow recovery under the FTCA for certain claims arising out of the performance of 638 contracts entered into by Indian tribes or tribal organizations and the Federal Government. *Necklace v. United States*, 2007 WL 3389926 at *12 (D.S.D. Nov. 14, 2007) (Not reported in F.Supp.2d); *Demontiney v. U.S. ex rel. Dept. of Interior, Bureau of Indian Affairs*, 255 F.3d 801, 805 (9th Cir. 2001) (acknowledging the expansion of

the United States' liability under the FTCA by the ISDEAA). In so amending the ISDEAA, Congress acknowledged that tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the Federal Government in these agreements. *Necklace, supra,* 2007 WL 3389926 at *12. Congress therefore provided the United States would subject itself to suit under the FTCA for "torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA." *Snyder v. Navajo*, 382 F.3d 892, 897 (9th Cir. 2004). Specifically, Section 314 of the 1990 amendments to the ISDEAA provides:

> With respect to claims resulting from the performance of functions...under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-determination and Education Assistance Act... 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...while carrying out any such contract or agreement and its employees are deemed employees of the Bureau...while acting within the scope of their employment in carrying out the contract or agreement.

Pub. Law No. 101-512, Title III, § 314, 104 Stat.1915, 1959-60 (1990) (codified at 25 U.S.C. § 450f Note).

C. Events Giving Rise to the Accident

On October 19, 2006, at approximately 5:00 p.m., GRIC Detective Michael Lancaster and Sergeant Hilario Tanakeyowma were traveling northbound on State Route 587 which becomes State Route 87 (also known as Arizona Avenue). ER 87, ¶¶ 13-14; 91, ¶¶ 13-14. The Officers were returning to Sergeant Tanakeyowma's residence in Chandler from where they had carpooled to a U.S. Secret Service police terrorism training course in Tuscon, Arizona. ER 88, ¶¶ 9-11; 90-91, ¶¶ 9-11. Both Detective Lancaster and Sergeant Tanakeyowma are, and all relevant times were, in the criminal investigations division of the Gila River Police Department. Each is a specially deputized law enforcement officer of the BIA and Arizona Peace Officer Standards Training Board (AZ POST) certified.[3] ER 87, ¶¶ 6-7; 90, ¶¶ 6-7. They were driving an official Gila River Police Department sports utility vehicle (SUV), which was assigned to Sergeant Tanakeyowma. ER 88, ¶ 11.

As the Officers were approaching the intersection of Chandler Heights and Arizona Avenue, the Officers observed a white compact car driving erratically. ER 88, ¶¶ 13-14; 91, ¶ 14. The white car passed the Officers' vehicle and came to a stop at the red light at Ocotillo and Arizona Avenue. ER 96. The Officers later

[3] Sergeant Tanakeyowma has been Special Law Enforcement Commissioned (SLEC) since 2001. ER 84:6-13. Detective Lancaster received his formal card in 2007, yet received the SLEC class four times throughout his career, since 1999. ER 79:24-25; 80:10-11, 18-21.

learned the car was being driven by paroled felon Leshedrick Sanford. ER 88, ¶ 18; 91, ¶ 18.

At the intersection, Officers Lancaster and Tanakeyowma pulled up behind Sanford's vehicle. ER 96. Sanford was first in line at the red light. Sergeant Tanakeyowma reportedly instructed Detective Lancaster to exit the vehicle and "make contact" with the driver.[4] ER 96. According to Detective Lancaster's deposition testimony, his "intention was to approach [Sanford's] vehicle on the passenger side and tell him to settle down or try and figure out what was going on with him." ER 82:3-6. As Detective Lancaster exited the vehicle and started to clear the door, Sanford punched the gas pedal, disregarding the red light, and drove into the intersection. ER 88, ¶ 18; 91, ¶ 18. Sanford's vehicle struck Plaintiff Loren Shirk, who had rightfully entered the intersection on his motorcycle with the green light. ER 88, ¶ 19; 91, ¶ 19.

Detective Lancaster got back in the vehicle and Sergeant Tanakeyowma activated the SUV's grill lights and siren to clear the intersection. ER 82:20-24. Sanford exited his vehicle and attempted to flee on foot, but was ultimately apprehended and detained by the Officers. ER 96. Chandler Police arrived and effectuated the arrest. Sanford pled guilty to one count of Aggravated Assault with prior felony convictions and one count of leaving the scene of a Serious

[4] Sergeant Tanakeyowma is Detective Lancaster's superior. ER 86:3-4.

Injury Accident in the Maricopa County Superior Court and was sentenced to 18 years in prison.

Shirk, who was thrown from his motorcycle, sustained serious injuries. His right leg was amputated on impact; the bones in his left leg were shattered, as was his left arm and shoulder. To this day, Shirk remains partially confined to a wheelchair.

V.

SUMMARY OF THE ARGUMENT

For purposes of FTCA coverage, Congress provided the United States would subject itself to suit for torts of tribal employees hired and acting pursuant to self determination contracts under the ISDEAA. *Snyder v. Navajo*, *supra*, 382 F.3d at 897 (9th Cir. 2004); *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995) (acknowledging application of FTCA coverage to "tort claims resulting from the performance of functions under a contract, grant agreement, or cooperative agreement authorized by the ISDEAA"); *Walker v. Chugachmiut*, 46 Fed. Appx. 421, 423 (9th Cir. 2002) ("Any civil action against a tribal organization, or one of its employees acting within the scope of employment, for tort claims resulting from the carrying out of an ISDEAA contract shall be deemed to be an action against the United States under the FTCA").

Ignoring this basic principle, the district court here erred in determining the FTCA did not apply. Specifically, the GRIC's 638 Contract mandates that its officers receive in service training and continuing education to maintain their peace officer and BIA certifications. ER 67, 73; *See also*, Exhibit 1 to RJN (Multi-Year Agreement). Sergeant Tanakeyowma and Detective Lancaster were returning from having attended a course in Tucson to fulfill and comply with this requirement, when they encountered Leshedrick Sanford. ER 88, ¶¶ 9-10; 90-91, ¶¶ 9-10. More importantly, even in their attempt to make contact, each remained under the auspices of the Tribe's ISDEAA Agreements. As the Officers were in the scope of their employment in carrying out the 638 Contract at the time of the incident, they are properly deemed federal employees and are entitled to the full protection of the FTCA. *See, e.g. Allender v. Scott,* 379 F.Supp.2d 1206, 1216-1217 (D.N.M. 2005) (determining Congress afforded protection to these tribal employees "regardless of whether they were enforcing tribal, federal or state law, so long as they were engaged in the performance of their official duties rather than on a personal frolic").

VI.

STANDARD OF REVIEW

An order granting a motion for dismissal pursuant to Fed. R. Civ. P. Rule 12(b)(1) is reviewed *de novo*. *FDIC v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989);

Leeson v. Transamerica Disability Income Plan, 671 F.3d 969, 974 (9th Cir. 2012) ("We review *de novo* a district court's dismissal for lack of subject matter jurisdiction"). A *de novo* standard is similarly applied to the question of whether a tribal officer was acting as a federal employee within the scope of his employment under an ISDEAA contract so as to merit coverage and protection under the FTCA. *Allender v. Scott*, 379 F.Supp.2d 1206, 1211 (D.N.M. 2005); *see also Herbert v. United States of America*, 438 F.3d 483, 486 (5th Cir. 2006) ("We apply a *de novo* standard of review to the question of whether an individual is an employee of the government for purposes of the FTCA").

When considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the district court "is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In resolving a factual attack under Rule 12(b)(1), the Court is not limited to the allegations in the pleadings if the jurisdictional issue is separable from the merits [of the] case").

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VII.

ARGUMENT

A. The District Court's Order Runs Afoul Congressional Policy

25 C.F.R. § 900.3 is a fundamental starting point for the resolution of this appeal. In § 900.3(a)(5), Congress has declared each provision of the ISDEAA, and each provision of any contract entered thereunder, shall be liberally construed for the benefit of the tribe, establishing:

> Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof, that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the Contractor.

25 C.F.R. § 900.3(a)(5).

Similarly, it is the express policy of the Secretary of Interior to make best efforts to "remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration" of self-determination contract programs. 25 C.F.R. § 900.3(b)(1). In addition, the "Secretary shall afford Indian tribes and tribal organizations the

flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs." 25 C.F.R. § 900.3(b)(3).

The GRIC Compact mandates the same liberal interpretation, "This Compact shall be liberally construed to achieve its purposes." ER 19, Article I, Section 2. *See also*, ER 28, Article V, Section 15 ("In the implementation of this Compact, the Secretary shall interpret all Federal laws, executive orders, regulations and this Compact in a manner that effectuates and facilitates the purposes of this Compact and achievement of the Community's goals and objectives").

The mandate was likewise reflected in the original contract. ER 42 ("Each provision of the ISDEAA and each provision of this contract shall be liberally construed for the benefit of the Contractor").

Despite the foregoing, the district court concluded, "[T]he BIA contemplated the execution of GRIC law enforcement functions solely within the boundaries of the Gila River Indian Reservation." ER 9:9-12. As a preliminary matter, such a literal interpretation runs afoul express Congressional policy. *Necklace v. United States, supra*, 2007 WL 3389926, is instructive in this regard.

The facts of *Necklace* are as follows: On January 23, 2006, Justin Necklace and Walter Theodore were travelling in a vehicle southbound on 395th Avenue near Wagner, South Dakota; Isaac Primeaux was northbound on 395th Avenue, driving a pickup and towing a flatbed trailer loaded with a skid loader. *Id.* at *2 The trailer disengaged from the pickup and crossed the center line directly into the path of Necklace's vehicle. *Id.* Necklace and Theodore were both killed as a result of the collision.

Primeaux had been hired that morning by the Yankton Sioux Tribe to clear ice from a pedestrian pathway, which was adjacent and parallel to 395th Avenue. *Id.* at *2. At the time of the accident, there was a 638 Contract in existence between the Tribe and the BIA. *Id.* at *3. The original contract was entered into in 1996, six years prior to the construction of the pathway Primeaux was hired to clear. *Id.* Notably, the 1996 Statement of Work was incorporated into successive contracts without any changes. *Id.* at *6.

The United States contended that because the 1996 638 Contract did not include maintenance or snow removal for the pedestrian pathway on which Primeaux intended to work, the FTCA did not apply. *Id.* at *12. The court disagreed, finding instead that the scope of the 1996 Contract was "sufficiently broad" to cover work on the pathway and that a liberal construction of the Contract supported its maintenance. *Id.* at *14. Specifically, the court held as follows:

> Given the breadth of the original scope of work provision, the fact that the original contract included all of the BIA routes that existed in 1996, and the Congressional policy surrounding self determination contracts, the Court concludes that the Route 11 pathway was contemplated with the self determination contract for snow removal and road maintenance at the time of the 2006 accident.

Id. at *15-16. The case at hand and the ISDEAA Agreements at issue warrant the same liberal construction. *See also*, *Andrade v. United States*, 2008 WL 4183011 (D. Ariz.).

B. The District Court Erred in Determining The Officers Were Not Acting Within the Scope Of Their Employment, As Defined By The Governing ISDEAA Agreements

The 2003 Compact was intended, in part, to bring all GRIC 638 programs and functions under the umbrella of a single agreement. *See*, ER 32 ("The Community now wishes to Compact under the authority of Title IV of the ISDEAA, and place all of its existing Title I of the ISDEAA programs under the Compact" … "The Community [] has determined that it would be in the Community's best interest to Compact the [programs, functions, services and activities] associated with the above-mentioned self-determination contracts []

under a single Self-Governance Compact"). The Compact transferred to the GRIC "the power to decide how federal programs services, functions and activities in the community will be funded and operated," enabling the GRIC "to re-design those programs, functions, services and activities listed in the AFA according to the priorities of the Community," and "exercise meaningful authority to plan, conduct, and administer programs, services, functions and activities to meet the needs of the Community." ER 19, Article I, Section 2. *See also*, ER 25, Article III, Section 4 (allowing the GRIC to redesign or consolidate programs, services, functions and activities "in any manner which the Community deems in the best interest of the health and welfare of the Community being served").

According to Article V, Section 3, "The Community is deemed by the [ISDEAA] 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." ER 26. The Compact also expressly provides:

> **Section 9- Use of Federal Employees.** Section 104 of the [ISDEAA] shall apply to this Compact and to any individuals assigned or detailed to the Community performing functions under this Compact.

ER 27.

The GRIC originally assumed responsibility for the Law Enforcement Program in 1998 under the 638 Contract. ER 39, Section (a)(2). (transferring "the funding and the following related functions, services, activities and programs (or portions thereof)…including all related administrative functions from the Federal Government to the Contractor for the Law Enforcement Program. The program function is to provide Law Enforcement Services for the Gila River Indian Community"). The Tribe agreed to administer the Law Enforcement Program in accordance with the attached statement of work, as well as all applicable Federal Regulations." ER 55, Section 2.

Pursuant to the Statement of Work, the GRIC agreed to "*provide all necessary qualified and licensed personnel* . . . to perform all tribal law enforcement and detention services on the Gila River Indian Reservation, including the investigation of applicable Federal violations." ER 67, Section 102 (Emphasis added). The GRIC further agreed to perform the contracted law enforcement program "in accordance with the qualifications, training, code of conduct, inspection and evaluation, and other standard applicable to Bureau law enforcement personnel." ER 71, Section 104. In compliance with these standards, the GRIC guaranteed its officers performing criminal investigations would be AZ POST certified, satisfactorily complete the Basic Criminal Investigator course provided by the Treasury Department at the Federal Law Enforcement Training

Center, and receive a minimum of 40 hours in-service training per year. ER 73, Section 104.3. Notably, the Multi-Year Funding Agreement in effect at the time of the accident, which Appellants respectfully request the Court take judicial notice, similarly required:

> Law Enforcement Program: the Community shall provide the necessary, continuing and proficiency training to its officers and criminal investigators, and ensure that they maintain peace officer certification with the Arizona Peace Officers Standards Training Board AZPOST. The Community will continue to apply for training slots for the BIA's Criminal Investigator Training Program (CITP) until all criminal investigators have completed said course.

On the evening of October 19, 2006, the Officers were returning from a mandatory training course in Tucson, Arizona. ER 88, ¶¶ 9-10, 13; 90-91, ¶¶ 9-10, 13. Their attendance was in furtherance of, and in compliance with, not only the GRIC's 638 Contract but also the Multi-Year Funding Agreement. *See* RJN, Exhibit 1.

Moreover, even in their attempt to make contact with Leshedrick Sanford, the Officers remained in the purview of the Tribe's ISDEAA Agreements. The Officers carpooled in an official GRIC vehicle assigned to Sergeant Tanakeyowma. ER 87, ¶ 11. Pursuant to Gila River Police Department General

Orders, "Employees who have been assigned unmarked units for their use, such as detective personnel, shall use their assigned vehicles to attend authorized training." ER 17. The General Orders further provide:

> Personnel who are authorized a take home vehicle may take enforcement action outside the community when the officer has reason to believe the violator has committed an offense that is a danger to public safety (i.e.: DUI) and is classified under the Arizona Revised Statues as a misdemeanor or felony.[5]

ER 16. BIA directives, with which Officers Tanakeyowma and Lancaster must comply, are in accord. United States Department of the Interior Bureau of Indian Affairs, Office of Justice Services, Law Enforcement Written Directives Handbook (2nd Edition) (Revised 7/1/08), § 2-02-02 ("An officer may initiate a contact in any place that the officer has a right to be").

Regardless, the district court here found the mere fact the Officers were outside the boundaries of the Reservation was enough to "place the Officers' conduct outside the scope of the Contract." ER 10:5-9. The court went on to state

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[5] *See* Ariz. Rev. Stat. ("A.R.S.") § 13-3874(A) (2001) ("While engaged in the conduct of his employment any Indian police officer who is appointed by the bureau of Indian affairs or the governing body of an Indian tribe as a law enforcement officer and who meets the qualifications and training standards adopted pursuant to section 41-1822 shall possess and exercise all law enforcement powers of peace officers in this state").

that "[e]ven if that were not enough, the Officers were not attempting to enforce either federal or tribal law, the only law contemplated by the Contract." *Id.* The court's determination is both legally and factually unsound.

1. The Officers' Scope of Work under the 638 Contact Is Not Confined to the Boundaries of Reservation

As an initial matter, it is unclear what law, if any, the Officers were attempting to enforce at the time of their encounter with Sanford.[6] Admittedly, the Officers did not stop or detain the vehicle, but solely intended to "make contact" and instruct the driver "to settle down." ER 82:3-6; ER 96. Contrary to the district court's Order, the Officers did not activate their emergency lights and siren, nor did they pursue Sanford prior to the collision. *Cf* ER 7:4-5. *See* ER 82:20-24. In addition, upon approach, the Officers would not know, nor could they know, whether the driver was an Indian or, alternatively, whether a crime had occurred on the Reservation.[7] Law enforcement officers are expected to react immediately to observed violations of the law and other emergency situations. Official jurisdictional determinations follow in due course, whether made by a prosecutor or a court.

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[6] *See generally*, *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009). In *Bressi*, this Court held that tribal officers can enforce more than one body of law at a time.

[7] State Route 587, upon which the Officers were travelling, is entirely within the Gila River Indian Reservation. It becomes State Route 87 once the boundary of the Reservation is crossed.

Nevertheless, the DOI has directly addressed the "checkerboard" jurisdictional issues in and around Indian Country. In a formal notice in the Federal Register: February 10, 2004, Volume 69, Number 27, the DOI established:

> To increase the effectiveness of law enforcement in Indian Country, the authority and status of law enforcement officers, relationship among and between 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 arrest outside Indian country, they maintain their law enforcement officers' responsibility and certain authorities irrespective of whether they are located in Indian country.**
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> ***
>
> The Government further has an interest in ensuring the tribes' sovereign rights to [carrying out law enforcement in Indian country] 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.**

69 Fed. Reg. 6321-01, 2004 WL 234214. (Emphasis added).

In deposition, Officers Tanakeywoma and Lancaster testified consistently with the above cited BIA internal policy, admitting they routinely perform police work off the Reservation. ER 81:18-21; 86:21-25. As the GRIC agreed to administer its Law Enforcement Program in accordance with all applicable Federal

Regulations, incorporating them into the 638 Contract by reference [ER 55, Section 2], the court was in error to conclude the Officers here were no longer carrying out its terms. Moreover, the 638 Contract itself establishes that Sergeant Tanakeyowma and Detective Lancaster, as criminal investigators, have primary investigative responsibility "for crimes committed on, *or involving*, the Gila River Indian Community." ER 70, Section 102.8. (Emphasis added). Contrary to the court's findings, they are not restricted to the Reservation's boundaries.

2. The Officers Have Judicially Been Determined To Have Been Acting Within The Scope Of Their Employment At The Time Of The Accident

This case presents a matter of first impression. However, since the district court's order, an analogous case has been decided. *Garcia v. United States*, 2011 WL 285860 (D. Ariz 2011), involved a motor vehicle collision that occurred when a police vehicle driven by Officer Karl Etsitty went off the highway, striking and rolling over a parked car occupied by plaintiff Mildred Garcia. *Id.* at *1. Etsitty was a commissioned police officer with the Navajo Nation. *Id.* The Navajo Nation contracted with the BIA to provide law enforcement under a § 638 Contract; Etsitty was hired to perform work under that Contract. *Id.* at *5. His work assignment included patrolling the roads and highways around Chinle, Arizona. *Id.* at *1.

On October 29, 2007, while off duty, Etsitty purchased an 18 pack of beer and a half pint of rum. *Id.* at *1. Between the evening of October 29, and the collision occurring at 2:50 p.m. on October 30th, Etsitty consumed all the alcohol he had purchased. *Id.* Officer Etsitty's next shift was not scheduled to begin until 9:00 p.m. on October 31, 2007. *Id.* at *2.

In an interview after the accident, Etsitty testified he believed he was scheduled to begin work the evening of the 30th. *Id.* at *2. He claimed to have taken his assigned vehicle for a test drive in preparation for his shift. *Id.* He blacked out while driving. *Ibid.*

Garcia sustained multiple fractures and had to be removed from her vehicle with the "jaws of life." *Id.* at *2. She filed suit against the United States under the FTCA. *Id.* at *4. The United States moved for summary judgment on the grounds Etsitty was not performing work under the Tribe's 638 Contract at the time of the collision. *Id.*

The Court explained:

> The Contract provides, "For purposes of FTCA coverage, the Navajo Nation and its employees are deemed to be employees of the Federal government while performing work under the contract." Consequently, the United States agreed to assume liability under the FTCA for the tribal officers' torts, to the extent

> that such officers were performing work under the law enforcement contract. Based on the facts of this case, if Etsitty was acting within the scope of his employment, he was also performing work under the law enforcement contract.

Id. at *5. (Citations omitted.)

Accordingly, the court's analysis turned on whether Etsitty was acting within the scope of employment at the time of the allegedly tortious act. *Id.* at *5. Under Arizona law, an employee is acting within the scope of employment while he is doing any reasonable thing in which his employment expressly or impliedly authorizes him to do or which may reasonably be said to have been contemplated by that employment as necessarily or probably incidental to the employment. *McCloud v. Kimbro*, 224 Ariz. 121, 228 P.3d 113, 115 (Ariz. App. 2010).

Under the facts of *Garcia*, it was undisputed that shortly before the collision Etsitty was off duty and intoxicated. At the time of the collision, however, the evidence suggested Etsitty was either responding to a neighbor's request for a property damage report or maintaining his assigned vehicle. 2011 WL 285860 at *7. The court held, "whether Etsitty was following up on a property damage report or taking his police vehicle for a test drive before his purported shift, either action is the kind of conduct he is employed to perform." *Id.* The United States' motion was therefore denied in this regard. *Id.* at *10.

Notably, the United States attempted to further its argument by contending Etsitty's conduct could not be within the scope of employment because applicable rules forbade officers from driving while intoxicated. *Id.* at *7. Yet, the court found the argument unpersuasive, stating "[u]nder Arizona law, a wrongful act committed by an employee while acting within his employer's business does not take the employee out of the scope of employment, even if the employer has expressly forbidden the act." *Id.,* citing *Ortiz v. Clinton*, 187 Ariz. 294, 928 P.2d 718, 723 (Ariz. App. 1996).

Significantly, Sergeant Tanakeyowma and Detective Lancaster have been judicially determined to have been acting within the course and scope of their employment at the time of the accident. ER 93-94 ("Defendants were at all pertinent times on duty and being paid in their capacities as GRIC police officers. Moreover, they were returning to the tribal community, in their official GRIC vehicle, after conducting mandatory AZ POST training class for the benefit of the GRIC"). Each Officer submitted sworn testimony in this regard. ER 87-89; 90-92.

VIII.

CONCLUSION

By the express terms of the GRIC Compact with the BIA, Sergeant Tanakeyowma and Detective Lancaster are deemed federal employees. *See also*, 5 U.S.C. § 3374(c)(2) ("SLEC officer acting within scope of his or her duties shall

be considered a federal employee for all purposes.") In acting in the scope of their employment in carrying out the GRIC ISDEAA Agreements, the United States agreed to be liable for their actions, expressly waiving its sovereign immunity under the FTCA.

Plaintiffs-Appellants therefore respectfully request this honorable Court reverse and vacate the district court's order, thereby finding the Officers are entitled to FTCA protection, and remand this case to the district court for further proceedings.

Respectfully Submitted,

Dated: August 16, 2013

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,400 words.

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 16, 2013

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