

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,

Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

BRIEF FOR THE APPELLEE

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v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

Plaintiffs purported to invoke the jurisdiction of the district court pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), and the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450f note. The district court entered a final order granting the government's motion to dismiss for lack of subject matter jurisdiction on

August 27, 2010. (ER 3).¹ Plaintiffs' notice of appeal, filed on October 26, 2010, was therefore timely. (ER 1); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly determined that coverage of the FTCA does not extend to the allegedly negligent actions of two Gila River Indian Community tribal police officers because they were not "carrying out" the Tribe's ISDEAA contract with the federal government when they tried to make contact with an erratic motorist outside of Indian country, and thus were not "deemed" federal employees at the time of their actions.

STATEMENT OF THE CASE

This is an FTCA personal injury suit against the United States arising out of a motor vehicle accident in Chandler, Arizona, on October 19, 2006. Loren Shirk sustained severe injuries when he was struck by a drunk driver who was attempting to elude contact with two law enforcement

¹ "ER" refers to the excerpts of record filed by plaintiffs-appellants along with their opening brief.

officers employed by a tribal organization that has an ISDEAA compact with the Department of the Interior, Bureau of Indian Affairs. The incident occurred outside of Indian country, while the officers were returning from a police training class in Tucson. The United States District Court for the District of Arizona granted the government's motion to dismiss on grounds that the FTCA is inapplicable because, as the incident occurred off tribal lands and the officers were not enforcing federal or tribal law in attempting to make contact with the drunk driver, they were not "carrying out" the tribal organization's ISDEAA compact with the government. Plaintiffs (Loren Shirk and his wife Jennifer Rose) now appeal.

STATEMENT OF FACTS

A. STATUTORY BACKGROUND

1. The FTCA

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA provides a limited waiver of sovereign immunity for torts committed by federal employees acting within the scope of their

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); *see also id.* § 2674 (where the FTCA applies, the United States may be liable for certain torts “in the same manner and to the same extent as a private individual under like circumstances”); *Dolan v. USPS*, 546 U.S. 481, 484 (2006); *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1018-19 (9th Cir. 2007). “Employee of the government” includes “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.

2. The ISDEAA

Enacted in 1975, the ISDEAA, Pub. L. No. 93-638, 88 Stat. 2203, (sometimes referred to as “Section 638” by the district court and the parties) encourages Indian self-determination by requiring that the Secretary of the Interior, “upon the request of any Indian tribe by tribal resolution,” enter into “a self-determination contract” with a tribal

organization “to plan, conduct, and administer programs” which the Secretary previously administered for the benefit of Indians pursuant to her statutory authority. 25 U.S.C. § 450f(a)(1). The Secretary has delegated authority to enter into ISDEAA contracts to the Bureau of Indian Affairs (BIA), a component within Interior with responsibility for administering Indian programs. Among other services, the BIA may provide or contract with tribes to provide education, social services, repair and maintenance of roads and bridges, as well as law enforcement, detention services, and administration of tribal courts. *See* 25 U.S.C. § 13; 25 U.S.C. §§ 450 *et seq.* In essence, a self-determination contract “transfer[s] the funding and the . . . related functions, services, activities, and programs (or portions thereof)” from the BIA to a tribal organization. 25 U.S.C. § 450l(c), model agreement § (a)(2).

Congress amended the ISDEAA in 1990 to extend FTCA coverage to tribal contractors “while carrying out” the terms of a 638 contract, deeming their employees to be BIA employees “while acting within the scope of

their employment in carrying out” the contract or agreement. Pub. L. No. 101-512, tit. III, § 314, 104 Stat. 1915, 1959-60 (1990) (Section 314) (codified at 25 U.S.C. § 450f note). Section 314 provides in pertinent part (emphasis added):²

With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or any other agreement or compact authorized by the [ISDEAA] . . . , 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 [BIA] . . . while acting within the scope of their employment *in carrying out* the contract or agreement:. . . [A]fter September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act. . . .

²See also 25 C.F.R. § 900.186 (providing for optional contract clause stating that “[f]or purposes of [FTCA] coverage, the contractor and its employees . . . are deemed to be employees of the Federal government *while performing work under this contract.*”) (emphasis added).

3. The Tribal Self-Governance Act

The Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, Title II, § 204, added Title IV to the ISDEAA. *See* 25 U.S.C. § 458aa-458hh. The 1994 Act made permanent the Tribal Self-Governance Demonstration Project authorized by Title III of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285. Under the Self-Governance Program, tribal contractors enter into annual funding agreements (AFAs) with the Secretary of the Interior to plan, consolidate and administer programs, services, and functions administered by the BIA. Tribes may redesign programs, functions, and services that the Secretary was previously authorized to administer, and reallocate funds to carry out these objectives. The intent of the program is to provide tribes with the flexibility to develop programs and to establish funding priorities to meet their specific needs. *See* 140 Cong. Rec. H11140-41 (daily ed. Oct. 6, 1994).

B. PERTINENT FACTS AND PROCEEDINGS BELOW

1. The BIA and Gila River Indian Community ISDEAA Contracts

In 1998, the BIA and the Gila River Indian Community Tribal Government (GRIC or Community),³ a federally recognized Indian tribe located in Sacaton, Arizona, entered into a three-year self-determination contract for “The Law Enforcement Program.” *Pub. L. 93-638 ISDEAA Agreement, 1450CTH57T61469, By & Between GRIC & DOI/BIA* [hereinafter *638 Contract*] (ER 39, 42). Under the contract, GRIC agreed “to provide Law Enforcement Services *for the Gila River Indian Community*” . . . “necessary to carry out uniform police activities, detention services, radio communications, and criminal investigations.” *638 Contract* § (a)(2). (ER 42) (emphasis added). GRIC also agreed to “administer the programs, services, functions and activities . . . listed in subsection (a)(2) of the Contract in accordance with the attached Statement of Work.” *638 Contract* § (b)(3) (ER

³GRIC is not a party to this action, but it has submitted an *amicus curiae* brief and motion for leave to file in this Court. In an order entered by the Clerk on September 17, 2013, the motion was ordered referred for resolution to the panel that will consider the merits of the case.

42). Section 102 of the “Statement of Work” stated that GRIC “shall provide all necessary qualified and licensed personnel, equipment, materials and services to perform all tribal law enforcement and detention services *on the Gila River Reservation*, including the investigation of applicable Federal violations (major crimes).” 638 Contract Attach. 1, *Statement of Work* § 102 (ER 67) [hereinafter *Statement of Work*] (emphasis added). *See also id.* § 102.3 (“The contractor shall be responsible for the investigation of all offenses enumerated in the Tribal Law and Code, United States Codes or 25 C.F.R. as applicable.”); *id.* § 102.4 (“The Contractor shall *assist* the BIA, other Federal and state [l]aw enforcement officials in the investigation of State or Federal offenses that occur *on the Reservation*.”) (ER 67) (emphasis added).

The Statement of Work further explained that the Uniform Police Program “provides police protection and enforcement of Federal laws and laws of the Gila River Indian Community” ... “to assure the health[,] safety and welfare of the Community, its visitors, and all personal and real property.” *Statement of Work* § 102.5. GRIC agreed to be responsible for

various “patrol and protective services *on the Reservation*,” including enforcement of “all Tribal criminal and traffic laws, United States Codes or 25 C.F.R. as applicable, including all tribal ordinances,” and “[p]atrol services on and off roadways and in the communities *within the boundaries of the Reservation*.” *Id.* § 102.5(B) & (G) (ER 68) (emphases added).

Under the contract, the Criminal Investigation Program had “primary investigative responsibilities for crimes committed on, or involving, the Gila River Indian Community.” *Statement of Work* § 102.8 (ER 70). This responsibility included investigation of major federal crimes and state crimes assimilated into federal statutes that were committed “within the community.” *Id.*

In 2003, GRIC and the BIA entered into an indefinite term Compact of Self-Governance (Compact) pursuant to the Tribal Self-Governance Act, which allowed the Community to continue operating all of the BIA programs it previously administered under the earlier self-determination contract, as well as new programs listed in the AFA. Compact (Preamble)

(ER 18). As is pertinent here, the compact provides that “[t]he Community is deemed by the Act to be covered under the Federal Tort Claims Act (‘FTCA’), while performing programs, services, functions and activities *under the Compact* and any funding agreement incorporated herein.” Compact Art. V, § 3(a) (ER 26) (emphasis added).

2. The Events Immediately Preceding Mr. Shirk’s Accident

On October 19, 2006, Michael Lancaster and Hilario Tanakeyowma, two police officers employed by GRIC, attended a police training class in Tucson, Arizona, carpooling in a GRIC Police Department vehicle. Tanakeyowma Aff. ¶¶ 9-11 (ER 88); Lancaster Aff. ¶¶ 9-11 (ER 91). As the officers were returning from Tucson, they observed a car being driven erratically on a state roadway in Chandler. *Id.* at Tanakeyowma Aff. ¶ 14 (ER 88); Lancaster Aff. ¶ 14 (ER 91). The officers decided to attempt to make contact with the driver of the vehicle. *Id.* at Tanakeyowma Aff. ¶ 16 (ER 88); Lancaster Aff. ¶ 16 (ER 91). They stopped behind the motorist at a red traffic light, and Officer Lancaster exited the GRIC police vehicle with

the intention to approach the driver “and tell him to settle down or try to figure out what was going on with him.” Lancaster Dep. 51 (ER 82). The officers were unable to make contact with the driver, however, because he accelerated and sped through the intersection. Tanakeyowma Aff. ¶ 18 (ER 88); Lancaster Aff. ¶18 (ER 91). Mr. Shirk, who had entered the intersection driving a motorcycle, was struck by the driver and sustained serious and permanent injuries.⁴

Both GRIC officers are Arizona Peace Officer Standards Training (AZ POST) certified, which authorizes the officers to enforce Arizona state law, including traffic laws, outside of Indian country. *See* Ariz. Rev. Stat. Ann. § 13-3874. An AZ POST certified “Indian police officer who is appointed by

⁴The driver of the car, who was later determined to have been driving under the influence of alcohol, was identified as Leshedrick Sanford, a paroled felon. He fled the scene of the accident on foot, but was shortly thereafter captured and arrested by Officers Lancaster and Tanakeyowma. Sanford later pleaded guilty in Arizona state court to aggravated assault with prior felony convictions and leaving the scene of an accident. He was sentenced to 18 years in prison. The court’s minute entry is available at: <http://www.courtminutes.maricopa.gov/docs/Criminal/072007/m2756395.pdf>

the [BIA] or the governing body of an Indian tribe as a law enforcement officer,” while “engaged in the conduct of his employment[,] . . . shall possess and exercise all law enforcement powers of peace officers in [Arizona].” *Id.* § 13-3874(A).⁵ See also *id.* §§ 13-3884, 13-3889 (“A private person [in Arizona] may make an arrest . . . when the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.”); *State v. Chavez*, 208 Ariz. 606, 608, 96 P.3d 1093, 1095 (Ariz. Ct. App. 2004) (DUI may constitute breach of the peace allowing a private citizen to stop, arrest or detain the driver). In addition, Officer Tanakeyowma was deputized under a Special Law Enforcement Commission (SLEC) at the time of the accident.⁶ (ER 84). Officer Lancaster

⁵See also Ariz. Rev. Stat. Ann. § 13-3874(B)) (“Each agency appointing any Indian police officer pursuant to this section shall be liable for any and all acts of such officer acting within the scope of his employment or authority.”).

⁶Pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2809, BIA enters into deputation agreements, under which it grants SLECs to tribal, state and local law enforcement officers. See Internal Law Enforcement Services Policies, 69 Fed. Reg. 6321-01 (Feb. 10, 2004)); Interim continued on next page

received an SLEC in 2007, after the date of the accident. *See* Reply in Supp. Mot. to Dismiss, Attach. 1 (Ex. A) (D. Ct. Doc. No. 32-1 at 1).

3. District Court Proceedings

On August 27, 2009, Shirk⁷ and his wife, Jennifer Rose, filed an FTCA suit against the United States in the United States District Court for the District of Arizona.⁸ The complaint claims that plaintiffs are entitled to money damages because the allegedly negligent actions of Officers Tanakeyowma and Lancaster were the proximate cause of the collision in

Special Law Enforcement Commission Policy, Rules & Procedures, & Interim Special Law Enforcement Commission Protocols, 76 Fed. Reg. 4369 (Jan. 25, 2011).

⁷Shirk first sued the tribal officers and the City of Chandler for damages in state court, alleging common law negligence claims. The officers moved to dismiss the complaint on the basis of tribal sovereign immunity, and the state court granted their motion and entered a judgment of dismissal in their favor on September 24, 2008. ER 93. The court also dismissed the action against the City of Chandler.

⁸Shirk and Rose submitted separate administrative claims to the BIA in September and October 2008. *See* 28 U.S.C. § 2675(a) (FTCA administrative claim requirement). The claims were not acted upon by the BIA within six months of their filing, and plaintiffs elected to file suit in district court. Compl. ¶¶ 3-4.

which Shirk was injured. Compl. ¶¶ 25-27. Plaintiffs further allege that because Tanakeyowma and Lancaster were law enforcement officers employed by the GRIC Police Department under a compact of self-governance, they are deemed to be federal employees covered by the FTCA. *Id.* at ¶¶ 11-13.

The United States moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The government argued that the ISDEAA does not extend FTCA coverage to the tribal officers because they were not "carrying out" the law enforcement compact between GRIC and the BIA when they attempted to make contact with the drunk driver outside of the boundaries of the Gila River Indian Reservation, even though they were acting within the scope of their employment as tribal police officers in enforcing Arizona law. Specifically, the government pointed out that the self-governance compact provided for law enforcement within the boundaries of the GRIC, not for enforcement of state law outside of, and unrelated to, the Community.

The district court granted the government's motion to dismiss in an order entered on August 27, 2010. (ER 3-13). In so doing, the court found it "unmistakably clear" from the language of the BIA-GRIC agreement that GRIC's law enforcement functions were to be executed "solely within the boundaries of the Gila River Indian Reservation." (ER 9). Further, the court found that the agreement contemplated "only the enforcement of federal and tribal law." (ER 9). Because the tribal officers were attempting to enforce state law, outside of Indian country, when they encountered the erratic driver, the district court reasoned that they were not carrying out the compact. (ER 10).

The district court noted that "it is undisputed that Officers Lancaster and Tanakeyowma were outside the boundaries of the Reservation when they attempted to make contact with Sanford in his vehicle," and opined that "[t]hat alone is enough to place the officers' conduct outside the scope of the Contract." (ER 10). Further, the court reasoned, "[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 district court therefore entered judgment in favor of the United States. (ER 13).

SUMMARY OF ARGUMENT

Plaintiffs Loren Shirk and Jennifer Rose brought this action against the United States under the Federal Tort Claims Act individually, and as husband and wife. Mr. Shirk was injured after his motorcycle collided with a car that was being driven by a drunk driver who ran a red traffic light while attempting to elude contact with two tribal police officers. The officers were employed by the Gila River Indian Community, which had entered into a compact with the BIA for law enforcement services on the Reservation pursuant to the Indian Self-Determination and Education Assistance Act. The tribal officers were also Arizona Peace Officer Standards Training Board certified, which authorized them to make traffic stops as Arizona peace officers enforcing state law outside of Indian country. Plaintiffs assert that the allegedly negligent actions of the tribal officers in attempting to make contact with the driver are the proximate cause of Mr. Shirk’s injuries.

Congress has provided that certain tribal contractors and their employees may be deemed employees of the United States for purposes of the FTCA when they are carrying out an ISDEAA contract or compact. Plaintiffs invoke that provision to urge that the tribal police officers should be deemed federal employees because they were acting under the scope of their employment as employees of the tribal contractor.

The district court correctly explained that Congress has cabined the waiver of immunity upon which plaintiffs rely to extend only to employees of tribal contractors who are “acting within the scope of their employment in carrying out” an ISDEAA agreement. It is not disputed that BIA contracted with the Community to provide law enforcement services *on the Reservation*. Plaintiffs do not dispute that the tribal police officers were outside of Indian country, and were not enforcing tribal or federal law, when they attempted to make contact with the drunk driver. Nor do they argue that the officers were assisting state police officers within the boundaries of the Reservation, or that they were investigating any offense

related to the Community. As we discuss, plaintiffs' arguments that the tribal officers were acting within the scope of their employment as GRIC employees under state law are unavailing because it is the authority granted by the federal ISDEAA agreement, not simply state law scope of employment, that is relevant for purposes of deciding whether the officers may be deemed federal employees.

The district court therefore correctly dismissed plaintiffs' lawsuit for lack of subject matter jurisdiction. Accordingly, that judgment should be affirmed.

STANDARD OF REVIEW

"This court reviews *de novo* a district court's determination that it lacks subject matter jurisdiction under the FTCA." *Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011). The district court's interpretation or construction of a statute is also subject to *de novo* review. *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' SUIT FOR LACK OF SUBJECT MATTER JURISDICTION.

A. The District Court Correctly Held That The Alleged Negligence Does Not Concern An "Employee Of The Government" Within The Meaning Of The FTCA.

"Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (internal quotation marks and citations omitted); accord *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011) ("Before we may exercise jurisdiction over any suit against the government, we must have 'a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver.'" (citation omitted). As is pertinent here, the FTCA grants a limited waiver of sovereign immunity by making the United States liable to the same extent as a private person for certain torts of federal employees acting within the scope of their employment. *Balser v.*

Dep't of Justice, 327 F.3d 903, 908 (9th Cir. 2003) (citing 28 U.S.C. §§ 1346(b)(1), 2674).

Congress has provided that certain employees of tribal contractors may be deemed employees of the United States government for purposes of the FTCA when they perform services under an ISDEAA contract or compact. *See* Section 314 (25 U.S.C. § 450f note). Plaintiffs rely on that provision to urge that two GRIC police officers should be deemed employees of the United States because they were acting within the scope of their employment as tribal officers when the accident occurred in this case.

The district court correctly rejected plaintiffs' argument, however. As the court held, "tribal employees are deemed federal employees for purposes of the FTCA to the extent they act within the scope of their employment, *as defined by an ISDEAA contract.*" (ER 9) (emphasis added). In this case, the court further explained (ER 11):

[T]he express purpose of the Contract . . . , is to provide for the enforcement of federal and tribal law on the Gila

River Indian Reservation. Because the officers were not acting in accordance with that purpose when they pursued Sanford for a violation of state law outside the Gila River Indian Reservation, Congress' extension of FTCA coverage to tribal employees acting pursuant to an ISDEAA contract provides no basis for jurisdiction in this case.

B. Section 314 Is The Starting And Ending Point For Analysis In This Case.

Plaintiffs argue that the “fundamental” starting point for analysis in this case is 25 C.F.R. § 900.3, an agency regulation reciting the general congressional policy that self-determination contracts should be liberally construed for the benefit of tribal organizations to transfer “the funding and related functions, services, activities and programs” (25 C.F.R. § 900.3(a)(5)) from the federal government to the Indian contractor. Appellants’ Br. 14. Relying on these general policy statements, plaintiffs claim that the ISDEAA agreements between the BIA and GRIC “warrant the same liberal construction” (*id.* at 17) so as to extend FTCA coverage to the tribal officers’ actions even though they were not enforcing tribal or federal law, were not assisting state officers within the boundaries of the Reservation, and were not investigating any offense related to the

Reservation. To the extent that previously administered BIA “functions, services, activities and programs” are “otherwise contractible,” plaintiffs are correct that Congress intended, in order to promote self-determination, that tribal contractors have flexibility in how they administer those programs and services. Plaintiffs misplace their reliance on these general policy statements, however, in arguing that the district court’s decision “runs afoul [of] express Congressional policy.” *Id.* at 15. Indeed, plaintiffs misconstrue the regulation to override the plain language of Section 314, the statutory provision that sets forth the limitations and conditions upon which the government has consented to be sued for the tortious acts of Indian contractors and their employees.

Analysis of the legal question in this case – whether Officers Tanakeyowma and Lancaster qualify as federal employees for purposes of the FTCA – begins, and ends, with the plain language of the statute at issue. *See Sauer v. U.S. Dep’t of Education*, 668 F.3d 644, 651 (9th Cir. 2012). “Statutory interpretation focuses on the language itself, the specific context

in which that language is used, and the broader context of the statute as a whole.” *Id.* (internal quotation marks and citation omitted). And “[i]f the text of the statute is clear, this court looks no further in determining the statute’s meaning.” *United States v. Mendoza*, 244 F.3d 1037, 1042 (9th Cir. 2001). The relevant statutory language here provides that with respect to claims arising from the performance of functions under an ISDEAA contract or compact, tribal employees are “deemed” employees of the BIA “while acting within the scope of their employment *in carrying out* the contract or agreement,” and will be afforded the “full protection and coverage” of the FTCA. Section 314 (emphasis added).

Plaintiffs’ arguments (Br. 16-17) gain no traction from their reliance on *Necklace v. United States*, No. 06-4274, 2007 WL 3389926 (D. S. D. Nov. 14, 2007), an unpublished, nonprecedential district court decision. In *Necklace*, a South Dakota district court found the FTCA to be applicable based upon “the breadth of” the scope of work provision in the 638 contract for road maintenance at issue and “the Congressional policy surrounding self-

determination contracts.” *Id.* at *6. The agreements at issue here contain no similarly broad scope of work provision with respect to the authority of tribal officers to enforce state law outside of Indian country. And again, general statements of policy encouraging Indian self-determination do not trump the plain language of the statutory text.

C. The Government’s Sovereign Immunity Is Not Waived By The ISDEAA Agreements Between The BIA And The Tribal Contractor

Similarly, plaintiffs are incorrect in suggesting that the government’s sovereign immunity is waived by the provisions in the 638 Contract or Compact. Plaintiffs argue that the 2003 Compact was intended to bring all GRIC 638 programs and functions under the umbrella of a single agreement. Appellants’ Br. 17. According to plaintiffs, the Compact gave GRIC the authority to decide how federal programs, services, functions and activities in the Community would be funded and enabled GRIC to re-design programs according to the priorities of the tribal organization. *Id.* at 18. While the Compact may be liberally construed to permit the tribal contractor to use federal funding to achieve Community goals, it cannot be

read to expand a statutory waiver of the federal government's immunity. *See Dep't of Treasury-IRS v. FLRA*, 521 F.3d 1148, 1155 (9th Cir. 2008) ("mere fact" parties reached contractual agreement "plainly insufficient" to show waiver of sovereign immunity).⁹

Renewing an argument correctly rejected by the district court, plaintiffs also cite the multi-year funding agreement in effect on the date of the accident in support of their claim that the tribal officers were acting within the scope of their employment. Appellants' Br. 20. Under the terms of that agreement, GRIC agreed, *inter alia*, to provide training to its officers "to maintain peace officer certification with the Arizona Peace Officers

⁹ GRIC makes similar arguments in its proposed *amicus curiae* brief (at 11-20). In essence, GRIC claims that it has expansive authority under the 2003 Compact and multi-year funding agreement to determine how programs in the Community will be funded and operated. But, as we discuss in Part C. in the text, this argument ignores that FTCA coverage cannot attach where the actions exceed the limits of services that the BIA contracted to the Tribe to carry out. The Tribe has leeway to use federal money under a compact how it chooses, but it must bear the risk of no FTCA coverage if it exceeds what the BIA contracted to the Tribe. Contrary to GRIC's arguments, greater control and autonomy in how services are provided does not mean the autonomy to do more than the BIA contracted and have FTCA coverage attach.

Standards Training Board (AZPOST).” Appellants’ Br. 20 (quoting Multi-Year Funding Agreement Sec. 2(L)). The 638 Contract, which was subsumed within the 2003 Compact, provided for tribal police to *assist* state law enforcement officials in enforcing state law “on the Reservation,” not primary enforcement by tribal police of state laws off, and unrelated to, the Reservation. *See Statement of Work* § 102.4 (ER 67).

In a related argument, plaintiffs next suggest that if a tribe has a 638 contract for law enforcement, and if a tribal police officer performs any law enforcement-related action that would be considered within the “scope of employment” under state law, then the tribal police officer is automatically “carrying out” the contract and is considered an “employee of the BIA.”¹⁰

¹⁰Similarly, GRIC proposes a “test” under which FTCA coverage would be found to apply if a tribal contractor’s employee was acting “in furtherance of” a contracted or compacted program. *Amicus* Br. 20. This Court should reject the Community’s formulation, however, because it would alter Section 314 to extend the government’s waiver of sovereign immunity beyond the plain meaning of the language that Congress enacted when it consented to be sued for torts committed by “deemed” federal employees of the BIA. *See Lake County v. Rollins*, 130 U.S. 662, 670 (1889) continued on next page

Appellants' Br. 24-27. A similar theory was soundly rejected in *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004), where this Court held that a tribe's 638 contract with the BIA to provide law enforcement on the Navajo Reservation did not mean that the tribal contractor's employees were employees of the BIA "for all purposes." *Id.* at 897. Thus, the Court held that the tribal employees were not federal employees for purposes of the Fair Labor Standards Act, and therefore could not sue the United States under that act. *Id.*

Plaintiffs' reading of the statute cannot prevail, moreover, because it renders portions of the statute superfluous and is inconsistent with a plain reading of the text. Section 314 provides that a tribal contractor will be considered "part of the Bureau of Indian Affairs" while "carrying out" an agreement authorized by the ISDEAA, and its employees will be considered "employees of the Bureau of Indian Affairs . . . while acting

(when construing a statutory phrase that is plain and unambiguous the courts should not "add to it or take from it").

within the scope of their employment *in carrying out* the contract or agreement.” 25 U.S.C. § 450f note. Thus, as the district court properly held, for a GRIC tribal police officer to be deemed an employee of the BIA, that is, to be considered a federal employee for purposes of the FTCA, the tribal police officer must act within the scope of his employment, and be carrying out the 638 agreement. (ER 9) (citing *Snyder v. Navajo Nation*, 382 F.3d at 896-97). It is the authority granted by the *federal* ISDEAA contract, not simply state law scope of employment, that is relevant for purposes of deciding whether the officer may be deemed a federal employee.

Section 1346 of the FTCA reinforces this point. *See* 28 U.S.C. § 1346(b)(1). Exclusive jurisdiction is conferred on the federal district courts over civil actions for personal injury caused by the negligent or wrongful act 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)

(emphasis added). “Law of the place” means state law. *See Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002). Thus, “scope of their employment *in carrying out* the contract or agreement” necessarily means something different than “scope of . . . employment” under state law. Plaintiffs’ interpretation would render the statutory clause “scope of their employment in carrying out the contract” meaningless – a result that should be avoided. *See Los Coyotes Band of Cahulla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1036 (9th Cir. 2013) (courts should avoid interpreting statutes in a manner that renders a provision meaningless).

Rather, the requirement that a tribal employee must be acting within the scope of his employment “in carrying out” a contract for FTCA coverage to apply has significant meaning. It satisfies the threshold inquiry of whether or not the employee can be deemed “an[] employee of the Government” for purposes of the FTCA in the first place. *See* 28 U.S.C. § 1346(b)(1). The “carrying out a contract” language in Section 314 expressly

limits the circumstances under which a tribal employee is considered an employee of the BIA. Hence, if a tribal employee's actions exceed the four corners of the ISDEAA contract, he exceeds the bounds of his limited status as an employee of the BIA, even though his actions might otherwise be considered within the scope of his employment under state law as an employee of the tribe.

Furthermore, the requirement that a tribal employee be "carrying out" an ISDEAA contract in order to be considered as an employee of the BIA serves as an important limitation consistent with the purpose of the ISDEAA. Under the Act, Congress intended for tribes to contract with the Department of the Interior only to "administer previously authorized programs otherwise administered by" the agency. S. Rep. No. 100-274, at 1 (1987), *as reprinted in* 1988 U.S.C.C.A.N. 2620. For this reason, Interior is not authorized to contract for programs that the agency would not be authorized to carry out in its own right. *See* 25 U.S.C. § 450f(a)(2)(E) (agency may decline contract proposal if tribe proposes to contract to

operate a program or activity that is beyond the scope of programs or activities previously authorized to be administered by the agency). Under the Self-Governance Act of 1994, tribes were given expanded authority to plan, conduct, consolidate, and administer programs that otherwise could be administered by the Interior Department through the BIA. 25 USC § 458cc(b)(1). But a tribe is not authorized under the ISDEAA to administer a program that Interior could not itself administer. *See id.* § 458cc(b)(1)-(2) (Each annual funding agreement shall “authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities. . . administered by the Department of the Interior through the [BIA]” as well as such programs “administered by the Department of the Interior, other than through the [BIA], that are otherwise available to Indian tribes or Indians”). Similarly, a tribe cannot expand a contractible and authorized program into activities that the Interior Department would not itself perform, and have the tribe’s own employees considered “employees of the BIA” while performing those activities.

In the law enforcement context, the BIA is authorized to enter into 638 contracts or self-governance compacts for law enforcement activities, but that authority is limited to the law enforcement activities that BIA itself is authorized to carry out. Because the BIA's authority to provide law enforcement services is expressly limited to Indian country, the 638 agreements that the BIA entered into with the GRIC by the same token expressly limited the tribe's authority under the contracts to that of providing law enforcement services in Indian country.¹¹ In this regard, the Indian Law Enforcement Reform Act (ILERA), charges the Secretary of the Interior (through the BIA) with providing, or assisting in the provision of,

¹¹There is no merit to GRIC's suggestion (Br. 18) that because tribal police departments regularly participate in multi-agency drug task forces outside of Indian country, the scope of work contemplated by the 638 Compact in this case also included enforcing state law outside of Indian country. Such cooperative arrangements between federal, state, tribal and local agencies are authorized under the direction of the United States Attorney General pursuant to 21 U.S.C. § 873, and do not extend the FTCA coverage defined by the ISDEAA. A tribal, state or local officer assigned to a Federal task force might be an employee as defined by the FTCA, but it would be pursuant to 28 U.S.C. § 2671, not the ISDEAA.

law enforcement in Indian country. *See* 25 U.S.C. § 2802(a) & (b)(1). The legislative history of the act makes clear that Congress enacted ILERA to codify the BIA's law enforcement authority in Indian country and to remove doubt about the BIA's statutory authority to perform law enforcement services. *See generally* S. Rep. No. 101-167, at 5 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 712, 713 ("In order to avoid a successful judicial challenge to the BIA's authority and to prevent lawsuits which may seek to hold BIA officers personally liable for their 'unauthorized' law enforcement actions, this bill provides comprehensive statutory authority for the Bureau of Indian Affairs to provide law enforcement services on Indian reservations and in Indian country."). As the legislative history also explains, for over 100 years prior to the ILERA's enactment, the BIA's law enforcement activities had been limited to the enforcement of federal law within Indian country and Indian reservations. *Id.* at 9, *as reprinted in* 1990 U.S.C.C.A.N. at 717 ("The Committee notes that the BIA has enforced Federal laws within Indian reservations for over 100 years, and this activity

has been continually sanctioned by Congress through appropriation Acts. Under the provisions of . . . this Act, the consent of the tribes is required before the Secretary undertakes any enforcement of tribal laws.”).

Thus, it is by express design that the BIA’s 638 contracts with tribes limit the FTCA covered law enforcement activities to “Indian country.” That is not to say that certain incidental activities, such as driving outside of Indian country in marked vehicles as circumstances may require (*see* Appellants’ Br. 20-21), are not considered within the tribal officer’s scope of employment in carrying out the contract. But primary law enforcement activity—such as making arrests, or effectuating a traffic stop, or investigating a possible crime or suspicious activity—is covered by the FTCA only when carrying out a contract in connection with “Indian country.” As the district court correctly held, the agreement at issue here makes this point “unmistakably clear,” (ER 9) and the purpose of that contractual limitation flows from the limited authority that BIA has. If a tribal officer exceeds the contractual limitation, he exceeds the terms under

which he will be considered an “employee of the BIA” and the conditions under which the government has waived its immunity pursuant to Section 314 are no longer met.

This Court’s recent decision in *Los Coyotes Band of Cahulla & Cupeno Indians v. Jewell, supra*, provides further support for the proposition that 638 contracts or compacts are necessarily limited by the authority the BIA would have to carry out the contracted programs. In *Los Coyotes*, this Court held that the BIA properly declined a tribe’s request to enter into a 638 contract for law enforcement services because at the time the tribe requested the contract, the BIA did not itself devote any funding or resources to providing law enforcement services on the Los Coyotes Reservation. 729 F.3d at 1040. Because the BIA did not perform any law enforcement services for the tribe, there was no law enforcement program for the tribe to assume under a 638 contract. The *Los Coyotes* Court held, therefore, that the tribe could not rely upon the ISDEAA to create a new program or service that the BIA itself did not perform. *Id.* at. 1037-38. In

our case, the BIA had no authority under the ISDEAA to contract for law enforcement services outside of Indian country, and the contract that it did enter into provided for law enforcement services *in* Indian country. Under *Los Coyotes*, the ISDEAA cannot be read to permit a tribe to operate an activity or perform a service—here, enforcement of state laws outside of and unrelated to Indian country—and have the United States bear the costs of liability for that service under the FTCA. To read the statute otherwise would impermissibly expand the government’s waiver of immunity for negligent or wrongful acts or omissions beyond the limitations imposed by Congress in Section 314.

D. The District Court Correctly Held That For FTCA Purposes, The Tribal Officers’ Actions Were Not Taken In Carrying Out The Compact, As Defined By The 638 Agreements

Noting that the question of law enforcement authority in and around Indian country raises issues concerning overlapping federal, tribal and state jurisdictional boundaries, plaintiffs press the argument that the tribal officers’ investigative responsibilities were not restricted to the boundaries

of the Reservation under the 638 agreements. Appellants' Br. 22-24. Plaintiffs misperceive the parameters of the contracts.

Our discussion in Part C. above applies with equal force here. As discussed, BIA officers have authority to enforce federal laws in Indian country and have limited authority to enforce tribal law if granted permission to do so by the tribes. Tribal officers derive their right to enforce tribal law from the tribe itself, and nothing in a 638 contract removes that sovereign right to enforce tribal law. *Cf.* 25 U.S.C. § 2806(d) (ILERA provisions do not alter civil or criminal jurisdiction of Indian tribes, “nor the law enforcement, investigative, or judicial authority of an Indian tribe”).

Tribal officers also have a limited right to enforce federal laws if they are properly authorized to do so by way of a Special Law Enforcement Commission. As noted earlier, pursuant to the ILERA, BIA enters into deputation agreements, under which it grants SLECs to tribal and local law enforcement officers. *See* 76 Fed. Reg. 4369 (Jan. 25, 2011) (“Deputized

officers are 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.”). A BIA policy statement explains that “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” 69 Fed. Reg. at 6321-01. The BIA has established certain minimum standards and certification requirements “[to] ensure th[at] SLEC tribal officers are fully qualified to enforce Federal law and to perform functions which would otherwise be performed by BIA officers.” *Id.* To receive a commission, an officer must be certified through either a state or the BIA. *Id.*

The grant of federal law enforcement under the ILERA in this case was defined by the Deputation Agreement between the BIA and the Community, under which the tribal officers were issued SLECs. *See Resolution Approving the Deputation Agreement Between the GRIC & the BIA*, adopted June 10, 2006 (*Deputation Agreement*). D. Ct. Doc. 32-1 at 2-14

(Attach. 1a-13a).¹² The Deputation Agreement provides that it is *not* entered into under the ISDEAA. *Deputation Agreement* p. 2 at § 1 (Attach. 4a). The agreement also explains that FTCA coverage is extended to a deputized tribal officer only while he is “enforcing or carrying out laws of the United States covered by this Deputation Agreement.” *Deputation Agreement* p. 2 (Attach. 4a).

On the other hand, BIA officers have not been authorized by the federal government to enforce state law, either historically or under the ILERA. Consequently, tribal officers are not granted any authority under a 638 contract or compact to enforce state laws either. Whether a tribe decides to authorize its officers to take law enforcement actions outside of Indian country for state law violations may be a permissible exercise of the tribe’s authority. But the 638 contract or compact restricts the circumstances under which a tribal officer may be considered an “employee of the BIA.” When tribal officers as private citizens or Arizona

¹² “Attach.” refers to the attachment included at this end of this brief reproducing the Deputation Agreement.

peace officers enforce state law which is not required by a 638 contract or compact, they do so as employees of the tribe, not employees of the BIA, and the statutory conditions waiving federal sovereign immunity are no longer satisfied. Further, in this case, the Deputation Agreement provides that “[a] commission issued by the BIA under this Agreement shall not be used to invoke any State of Arizona authority.” *Deputation Agreement* p. 4 at § 2, ¶H (Attach. 6a) .

E. The Arizona State Court Decision Dismissing Shirk’s Negligence Action Against The Officers Has No Bearing On This Case

Plaintiffs argue, finally, that “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,” and cite the holding of the Maricopa County Superior Court dismissing Mr. Shirk’s state court action against the tribal officers in support of this argument. Appellants’ Br. 27. Even assuming that the state court’s ruling would have some preclusive effect against the United States in this FTCA action, plaintiffs misconstrue the superior court’s holding.

In granting the officers' motion to dismiss on the basis of their claim of tribal sovereign immunity, the superior court found, first, that the officers were acting "[p]ursuant to their authority to enforce the law anywhere in Arizona [by virtue of their AZ POST certification]," when they elected to stop the drunk driver. (ER 94). And, because the officers "were at all pertinent times on duty and being paid in their capacities as GRIC police officers," the superior court concluded that the officers "were acting in their official capacity and within the scope of their tribal employment." (ER 94). But, as we have argued, the relevant inquiry in this FTCA case is not whether the officers were acting within the scope of their employment as GRIC police officers, or whether they had authority to enforce state law as private citizens or Arizona peace officers. Rather, the question is whether they were acting within the scope of their employment *in carrying out* the 638 Compact. Because the 638 Compact contemplated only law enforcement on the Reservation, the officers may not be deemed employees of the BIA for purposes of FTCA coverage.

Plaintiffs similarly misplace their reliance on *Garcia v. United States*, No. 3:09-cv-08033 JWS, 2011 WL 285860 (D. Ariz. Jan. 27, 2011), an FTCA action where a tribal police officer employed under a Navajo Nation self-determination contract with the BIA was involved in an automobile accident on the Reservation that caused serious injuries to the plaintiff. In *Garcia*, the district court explained that under the terms of the contract, the Navajo Nation police force was responsible for responding to citizens' complaints and providing patrol services on and off roadways within the service area. 2011 WL 285860 at *3. The court noted that under the ISDEAA contract, "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." *Id.* at *5. In concluding that the FTCA was applicable, the court found that the tribal officer was performing work under the contract whether he was following up on a citizen's complaint (as plaintiff claimed), or maintaining his police vehicle

(as the officer claimed), because either of those duties fell within the scope of work of the contract. *Id.* at *7.

Garcia is therefore distinguishable from our case.¹³ As the accident occurred on the Navajo Reservation and involved the application of tribal police department policies or directives, the question at issue here – *i.e.*, whether tribal police officers were “carrying out” the compact when they chose to enforce state law outside of and unrelated to Indian country under the terms of the compact – was not at issue there.¹⁴

¹³Plaintiffs (Br. 26) and GRIC (Br. 5-6) also rely on the *Garcia*’s court statement that if the tribal police officer “was acting within the scope of his employment, he was also performing work under the law enforcement contract,” 2011 WL 285860 at * 5, to bolster their argument that the meaning of the phrase “scope of their employment in carrying out” a 638 contract should be determined by reference to state law. With due respect, as the discussion in Parts B-D *supra* demonstrates, to the extent that *Garcia* can be read to hold that as long as a tribal contractor’s employee acts within the scope of his employment as a tribal employee, he is also carrying out a self-determination contract, it was wrongly decided. In any event, the district court’s decision is not binding on this Court. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

¹⁴Contrary to the Community’s suggestion (Br. 6-7), the Westfall Act, 28 U.S.C. § 2679(d)(1), does not control the analysis in this case. The continued on next page

In sum, the tribal officers are not entitled to the “full protection and coverage” of the FTCA because they were not “carrying out” the 638 Compact when they attempted to make contact with the erratic driver outside of Indian country.¹⁵ The district court’s order dismissing plaintiffs’ suit for lack of subject matter jurisdiction must therefore be upheld.

Westfall Act applies when a federal employee is sued in his individual capacity, and upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment, the United States is substituted as the defendant. *Id.* In our case, the threshold determination of whether the tribal employees may be deemed “employee[s] of the Government” requires an evaluation of whether the particular acts or omissions are properly considered to be “within the scope of their employment in carrying out” the Compact. As we have demonstrated, Officers Tanakeyowma and Lancaster do not qualify as federal employees; thus, the district court was correct in dismissing plaintiffs’ suit for lack of subject matter jurisdiction.

¹⁵Cases like *Allender v. Scott*, 379 F. Supp. 2d 1206 (D. N.M. 2005) (*see Amicus Br.* at 20-22), are distinguishable from our case. In *Allender*, the 638 contract expressly stated that the tribe’s law enforcement responsibilities included “investigations of all offenses and violations of [tribal] laws, Federal and State Law within the exterior boundaries of the [Indian] reservation.” *Id.* at 1209. Further, one of the defendant tribal officers was commissioned as a county deputy sheriff whose job description required him “to enforce federal, state, local and tribal laws,” *id.*, and the other defendant was commissioned both as a state peace officer and as a county deputy sheriff. *Id.* at 1215. In contrast here, as described in the text, the

continued on next page

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

GRIC's compact with the BIA did not cover enforcing state law off the Reservation and the ILERA deputation agreement expressly stated that FTCA coverage applied only while deputized tribal officers were "enforcing or carrying out laws of the United States" covered by the agreement. *Deputation Agreement* p. 2 (Attach. 4a).

Respectfully submitted,

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DECEMBER 2013

STATEMENT OF RELATED CASES

Counsel for the appellee are not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A) AND NINTH CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for the Appellee has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,580 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Jeffrica Jenkins Lee

JEFFRICA JENKINS LEE

ATTORNEY FOR THE APPELLEE

ATTACHMENT

*Resolution Approving the Deputation Agreement
Between the GRIC & the BIA, adopted June 10, 2006,
& Deputation Agreement (D. Ct. Doc. 32-1)*



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.

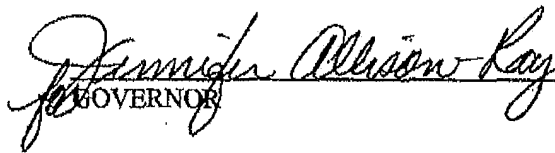
GILA RIVER INDIAN COMMUNITY
RESOLUTION GR-98-06
PAGE 2

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
BIA INDIAN AGENCY
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

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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.

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9. Appeal Procedure

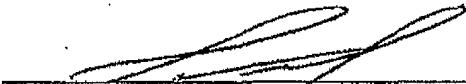
Appeals of termination or revocation of this Agreement, or suspension or revocation of a commission issued herein, shall be made within ten (10) business days of the termination, revocation, or suspension to the Associate Director of Operations, BIA, OLESS, which decision shall be the final agency action 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.

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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

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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.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which constitutes service on all parties under the Court's rules.

/s/ Jeffrica Jenkins Lee

JEFFRICA JENKINS LEE

ATTORNEY FOR THE APPELLEE