Elizabeth J. Honaker
Bar No. 4104
HONAKER LAW FIRM
208 North 29th Street, Suite 206
P.O. Box 2236
Billings, MT 59013-2236
Phone: (406) 254-7172
FAX: (406) 256-1881
Email: honakerlaw@aol.com

ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

IN RE ROBERTS LITIGATION	**CV 13-26-BLG-SEH** **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (This document relates to all actions)

Come now the Plaintiff, Sherri Roberts (Roberts), and submits the following response in opposition to the Defendants' motion for summary judgment.

INTRODUCTION

Defendants have filed for summary judgment on all of Roberts' claims. In considering a motion for summary judgment, the Court is guided by Rule 56, Federal Rules of Civil Procedure. The party moving for summary judgment carries the initial burden of showing the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The court should not weigh the evidence and determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Anderson,* 477 U.S at 248. In considering a motion for summary judgment, the court may not make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *abrogated on other grounds*.

As shown in Roberts' Statement of Disputed Facts, filed concurrently herein and incorporated herein by reference, genuine

issues of material facts foreclose summary judgment on Defendants' various theories of dismissal. Likewise, the ruling in *Oliphant v Suquamish Indian Tribe,* 435 U.S. 191 (1978), controls this case.

ARGUMENT

I. INDIVIDUAL CAPACITY CLAIMS.

A. Roberts' claims against the BIA Law Enforcement Officers in their individual capacity are not barred by absolute immunity.

Roberts has brought claims individually against three BIA Officers, Haakanson, Elliot, and Scott, pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigations*, 493 U.S. 388 (1971). Roberts claims that these BIA officers violated her right to due process under the United States Constitution when they arrested, handcuffed, detained, transported, and delivered her to the Tribal jail in Lame Deer on entirely void warrants.

The Defendants assert that a *Bivens* remedy is not available in this case because the Tribal court warrants were facially valid. Conversely, each Tribal court warrant served upon Roberts was

entirely void from the start of the criminal case because the Tribal court lacked any subject matter jurisdiction over non-Indians, including Roberts, on the Northern Cheyenne Reservation.

In 1978, in *Oliphant v Suquamish Indian Tribe,* 435 U.S. 191 (1978), the United States Supreme Court held by implication that the Suquamish Tribe's judiciary had no criminal jurisdiction over non-Indians. The Court's holding stands for the principle that a small minority should not be allowed to dictate law over a large majority in a court that has less procedural protection than the majority would otherwise be entitled. *Oliphant*, 435 U.S. at 212. The Supreme Court went so far as to hold that as a whole, "Indian tribes do not have inherent jurisdiction to try and punish non-Indians." *Id.* *Oliphant* is the controlling law in this case. The Northern Cheyenne Tribal court simply does not have criminal jurisdiction over a non-Indian.

Furthermore, "[s]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction

require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 635, 640 (2002).

Moreover, these BIA officers did more than serve Roberts with a warrant or court order They detained her against her will when they put her under arrest; they handcuffed her; they transported her to jail and delivered her to the BIA detention facility to be incarcerated in a jail that only held Native Americans. (Statement of Disputed Facts (SODF) §§ 59, 60.)

Additionally, Haakanson arrested Roberts on Rosebud County land, lacking any authority to do so. (SODF § 59.) His act of choosing to arrest her on county land was clearly a discretionary act. Land owned by the United States [or a state] in fee simple is excluded from tribal jurisdiction as a matter of law. *Somday v. Thay*, 406 P.2d 931 (1965). The tribe loses plenary jurisdiction over tribal land converted into fee simple. *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251.

The warrants served on Roberts were facially deficient as they were commanding a non-Indian into a Tribal court that lacked any criminal jurisdiction over Roberts or any other non-Indian.

Defendants cite *Coverdell v. Department of Social and Health Services, State of Washington*, 834 F.2d 758, 764 (9th Cir. 1987), where the Ninth Circuit recognized that "persons who faithfully execute valid court orders are absolutely immune." The justification for its ruling was that such persons are an "integral part of the judicial process." *Id*. at 765 (citation omitted.) However, in the case at bar, these court orders [warrants] were not "valid". Likewise, these BIA officers' actions went far beyond being an integral part of the judicial process and a "ministerial" act related to the judicial process. They not only served the warrant but also detained, handcuffed, transported, and delivered Roberts to a Tribal jail for incarceration.

These BIA officers specifically knew that Roberts was a non-Indian and not the member of any Tribe. They had had

many dealings with Roberts in the past. Being Officers that specifically enforced law on an Indian Reservation, they knew that the Tribal criminal court did not extend to non-Indians. These officers exercised discretion in their actions. It would require a stretch of the imagination to think these officers did not know the proper procedures involving non-Indians in a criminal matter.

These Defendant also cite *Penn v. U.S.*, 335 F.3d 786 (8th Cir 2003), where the Eighth Circuit acknowledges that a judge is entitled to absolute immunity for all judicial actions. However, Penn involved a civil exclusion order where the issue of jurisdiction in civil matters in a Tribal court is highly technical. *Penn*, 335 F.3d at 790. In the case at bar, the warrants arose from a criminal matter involving a non-Indian who had been summoned into the Tribal court having no criminal jurisdiction. Whereas the Penn warrant was later found to be defective, the warrants in the instant case were void from the start.

A judge is typically entitled to absolute immunity for all judicial actions that are not "taken in a complete absence of all

jurisdiction." *See Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). An order can be facially invalid only if it was issued in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349, 356-57, (1978). The warrants issued by the Tribal court and utilized by these BIA officers to wrongfully arrest, detain and incarcerate Roberts were issued in the clear absence of all jurisdiction. Thus, these BIA Officers are not entitled to absolute immunity.

1. <u>The determination of jurisdiction in Indian country in criminal matters over non-Indians is straightforward and not legally or factually complex and should be known by all law enforcement officers.</u>

In the case at bar, the BIA officers were fully aware that Roberts was a non-Indian, and that the Tribal court had no jurisdiction over non-Indians. While jurisdictional tribal issues in civil cases are complex, the only issue whatsoever in the instant case is whether the person is a non-Indian. If so, there is simply no criminal jurisdiction. There may a question as to whether the individual is subject to prosecution in state or federal court as discussed in *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005),

but not complicated when it comes to the Tribal court for a non-Indian. There is simply no criminal jurisdiction over a non-Indian.

The Defendants assert that the Indian Civil Rights Act under 28 U.S.C. § 1301(2) allows the Tribal court the power to exercise criminal jurisdiction over all Indians and determining who is an Indian is complex. In the case at bar, every BIA officer involved fully knew that Roberts was a non-Indian and not the member of any Indian tribe. She had discussed and confirmed this fact with these officers on many occasions. At the minimum, there are genuine issues of material fact that would preclude summary judgment.

2. The Northern Cheyenne Tribal Court cannot exercise criminal jurisdiction over non-Indians under any circumstances.

The Northern Cheyenne Tribal court may have a rule of criminal procedure allowing the Tribal court to exercise criminal jurisdiction over a non-Indian if that person “waives” personal jurisdiction However, that rule would have no effect when

challenged since subject matter jurisdiction cannot be waived. *See United States v. Cotton*, 535 U.S. 635, 640 (2002).

Tribal Judge Brady asserts in her Declaration that Roberts "waived" the lack of personal jurisdiction over her by the Tribal court during the arraignment. Roberts does not recall anything other than entering a not guilty plea and does not believe that she waived anything. Judge Brady also asserts in her Declaration that she placed notations at the bottom of the complaint and the return of summons at the arraignment to document Roberts' waiver of the lack of personal jurisdiction. Interestingly, these same two documents obtained from the clerk of Tribal court by Roberts do not contain any notation by Judge Brady. The court minutes also do not contain any notation of a waiver of personal jurisdiction, raising genuine issues of material fact as to whether this occurred. (SODF § 62.) However, as a matter of law, the lack of criminal jurisdiction by the Tribal court cannot be waived.

B. Roberts' claims against the BIA Law Enforcement officers in their individual capacities are not barred by qualified immunity or at the minimum, there are questions of fact that preclude summary judgment.

The Defendants assert that Roberts' claims against them are barred because of qualified immunity. In *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982), the Supreme Court found that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public office should know the law governing his conduct." These BIA officers in the case at bar should have known that the Tribal court had no criminal jurisdiction over non-Indians, and they clearly knew that Roberts was a non-Indian since they had many contacts with her in the past. Just a glance at the warrant would show that it was facially deficient since it names a non-Indian. These BIA officers did cross a "constitutional bright line" as they were fully on notice that their conduct would be unlawful. Genuine issues of material fact would preclude any dismissal of Roberts' claims on the basis of qualified immunity.

The Defendants cite to *Saucier v. Katz,* 533 U.S. 194, 202

(2001), where the Supreme Court set forth a two part process for analyzing the application of qualified immunity. First, it is determined whether an officer's conduct violated a constitutional right. *Id.* In the case at bar, these officers clearly violated Roberts' right to due process by arresting and detaining her when the Tribal court had no criminal jurisdiction over her. Additionally, Officer Haakanson further violated Roberts' due process rights by arresting and detaining her on Rosebud county (not Reservation) land.

The next step is to determine whether the law was clearly established. Since 1978, *Oliphant* has made it clear that a Tribal court has no criminal jurisdiction over a non-Indian.

C. <u>Roberts' claim against BIA Officer Jim Scott is not barred.</u>

Defendants cite to a line of cases for the proposition that for an individual to be liable under *Bivens,* there must be a showing of direct personal responsibility. While Scott may not have been physically present at Veteran's Park when Haakanson arrested and detained, handcuffed and transported Roberts to the Tribal

jail, Scott was fully aware of what was taking place. He was present at the Tribal jail when Roberts was brought in. Roberts heard Scott question why they should let her try to make bail. He looked over the paperwork. He fully knew Roberts' non-Indian status. (SODF § 59.) He certainly participated in furthering her arrest at the jail. Scott does not deny his "participation". At the minimum, genuine issues of material fact exist as to Scott's participation in the constitutional violations to preclude summary judgment.

D. Roberts' claim against the BIA Law Enforcement Officer in their Individual Capacities is not barred under Heck v Humphrey.

Defendants cite to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), for the proposition that in order to recover damages for an unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, the plaintiff must prove the conviction or sentence has been previously invalidated.

While Roberts is seeking damages for the Defendants'

violation of her right to due process for a wrongful arrest and wrongful imprisonment, she is not seeking to invalidate a conviction or sentence. Likewise, Roberts is not seeking habeas relief.

Furthermore, since *Heck* and its progeny, federal courts have recognized that the *Heck* favorable-termination rule does not apply in all civil rights cases. For instance, *see Spencer v. Kemna,* 523 U.S. 1 (1998) (Supreme Court found *Heck's* "favorable termination" requirement inapplicable to a released inmate's § 1983 claim, since this was the only avenue by which he could access a federal forum) and *see Nonnette v. Small*, 316 F.3d 872, 874 (9th Cir. 2002).

BIA officers arrested a person who they knew to be a non-Indian, detained her against her will, handcuffed her at some point, transported her to a BIA jail where she was put in the general population, because she did not appear before a Tribal court that unequivocally had no criminal jurisdiction over her. The underlying trespass "conviction" has no bearing on the acts

complained of against the BIA. Heck does not apply.

II. CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

A. Roberts' claim related to her arrest on February 17, 2011 is the only claim that applies under the FTCA.

Roberts agrees that the claim involving her arrest and her incarceration on February 17, 2011 is the only claim that applies under the FTCA. Her claim involving her arrest and detainment on July 24, 2010, as well as the subsequent arrest and detainment, pertain to her claims against the individual BIA officers.

B. Roberts' claim against the United States under the FTCA can be sustained under Montana law.

Roberts relies on the Federal Torts Claims Act (FTCA) for its sovereign immunity and grant of jurisdiction in this Court. The FTCA provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . " 28 U.S.C. § 2674.

1. Roberts' claims of false arrest and false imprisonment are not precluded under Montana law, because the BIA officers were acting pursuant to orders that were entirely void.

Defendant asserts that the elements of Roberts' false arrest

and imprisonment claims are "(1) the restraint of an individual against his will, and (2) the unlawfulness of the restraint," citing *Kichnet v. Butte Silverbow County*, 274 P.3d 740 (Mont. 2012). Defendant assets that Roberts cannot establish the second element since there was a judicial determination of probable cause for the warrants. Conversely, the warrants were issued because Roberts did not appear at hearings before a Tribal court that had no criminal jurisdiction over her.

2. Defendant asserts that probable cause is a complete defense to claims of false arrest and imprisonment.

Defendant asserts that probable cause is a complete defense to claims of false arrest and imprisonment, citing a federal district court case, *Groves v. Croft,* 2011 WL 5509028*25 (D. Mont.) However, these warrants in the case at bar were not later found to be invalid as in *Strung v. Anderson*, 529 P.2d 1380 (Mont. 1975). These warrants in Roberts' case were void from the start. They were issued by a court lacking in any subject matter jurisdiction, and these BIA officers fully knew they were not valid. At the

minimum, genuine issues of material fact concerning probable cause would preclude summary judgment.

3. Roberts can establish a claim of negligent infliction of emotional distress.

Roberts has alleged a cause of action for negligent infliction of emotional distress against the Defendants. An independent cause of action for negligent infliction of emotional distress arises under circumstances where (1) serious or severe emotional distress to the plaintiff was (2) the reasonably foreseeable consequence of (3) that defendant's negligent act or omission. *Sacco v. High Country Independent Press*, 271 Mont. 209, 234, 896 P.2d 411, 416-428 (1995). The level of emotional distress suffered by Roberts as a result of the governments actions rises to the level of being actionable. The record shows she has suffered severe or serious emotional distress under the *Sacco* standard.

The Court is to first determine whether, on the evidence, serious or severe emotional distress can be found. *Renville v. Fredrickson,* 2004 MT 234, 16, 324 Mont. 86, 101 P.3d 773. If the Court makes this determination, then the fact-finder must

determine if, on the evidence, it has in fact existed. *Popisil v. First Nat. Bank of Lewistown*, 2001 MT 286, § 24, 307 Mont. 704.

In *Czajkowski v. Meyers*, 2007 MT 234, 36-37, 339 Mont. 503, 172 P.3d 94, the Montana Supreme Court found emotional distress when the Meyers endured an "unrelenting barrage of obscene gestures and verbal abuse and an on-going surveillance of plaintiffs' outdoor activities. The district court found that Ms. Meyers "was fearful, lost countless hours of sleep, lost weight, and her hand would shake." *Id.* at 33. Mr. Meyers was "extremely angry" about treatment of him and his wife, felt apprehension about going outside and felt he was always looking over his shoulder; that he had no privacy, and that he was embarrassed.

In a federal case out of Montana, *Peschel v. City of Missoula*, 664 F. Supp.2d 1149, 1165 (Mont. 2009), Peschel claimed that the police department's accusations against him have been "embarrassing to him and detrimental to his reputation." He also asserted he experienced "fright, humiliation, disgrace, [and] embarrassment [.]" The court found his suffering consistent with

the definition of serious or severe emotional distress adopted in *Sacco,* and concluded that he cited sufficient evidence on which a jury could find him in such distress. *Id.* at 1165.

Roberts experienced serious emotional distress caused by the actions of the BIA officers. Roberts had no criminal record prior to being arrested and jailed twice by these BIA officers. Being arrested was extremely traumatic. She was scared to death. Roberts was very modest and had to undress in front of cameras. She had not taken her heart medicine at that time of the day of the arrest and was scared she would have a heart attack while at the jail. (SODF § 68.) This Court in the case at bar could find Roberts' suffering consistent with the definition of serious or severe emotional distress adopted in *Sacco.*

CONCLUSION

For the foregoing reasons, Plaintiff Sherri Roberts respectfully requests that this Court deny the Defendants' motion for summary judgment and allow her to proceed to trial.

DATED this 20th day of January, 2015.

HONAKER LAW FIRM

/s/ Elizabeth J. Honaker
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

Counsel for Plaintiff hereby certifies, pursuant to Local Rule 7.1 (d)(2)(E) of the Montana United States District Court, that her *Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment* contains 3,301 words (as counted by Microsoft Word 2003), excluding caption, certificate of service, and certificate of compliance, and is double spaced and printed in at least 14 point font. I have relied on the word count of a word-processing system used to prepare the brief.

DATED this 20th day of January, 2015.

s/s *Elizabeth J. Honaker*
Elizabeth J. Honaker
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2015, a copy of Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment was duly served on the following person by the following means:

__1, 2__ CM/ECF
______ Hand Delivery
______ U.S. Mail
______ Overnight Delivery Service
______ Fax
______ E-Mail

1. Clerk, U.S. District Court, Billings

2. Timothy J. Cavan
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North
Box 3200
Billings MT 59101
Attorney for Defendants

s/s Elizabeth J. Honaker
Elizabeth J. Honaker