IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

LOIS M. RICHIE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-1154-M
	)	
THE UNITED STATES OF AMERICA, *ex rel.*, UNITED STATES DEPARTMENT OF THE INTERIOR,	)	
	)	
Defendant.	)	

UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

In response to the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction, Plaintiff primarily relies on the unauthorized statements of a non-federal employee made in a state court proceeding. An individual's belief that he is a federal employee, however, is not binding on the United States and in fact is irrelevant to the present question of whether or not the United States has waived its sovereign immunity. Because Officer Eversole is not a federal employee and was not carrying out an activity or service delegated to the Sac and Fox Nation by the Federal Government, Plaintiff's complaint must be dismissed for lack of jurisdiction.

I. OFFICER EVERSOLE CANNOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

The primary argument advanced by Plaintiff is that the United States' position is "contradicted by Eversole's position in state court" where he

> argued the state district court lack subject matter jurisdiction and that 'Richie's sole remedy is under the Federal Tort Claims Act' because Eversole was an employee of the Tribe, whose law enforcement funding comes directly from the United States Government. Therefore, Eversole asserted he was a federal actor immune from suit under the FTCA.

(Opp'n at 3-4, 10-11.) As a result of Officer Eversole's position, Plaintiff choose to voluntarily dismiss her state court case (without prejudice) in favor of filing in federal court under the FTCA. Ex. 1, State Court Voluntary Dismissal. Though the United States understands Plaintiff's frustration, Officer Eversole's representations are neither binding on the United States nor dispositive of the present motion to dismiss.

It is well-established that only Congress, through a statutory authorization, can abrogate the sovereign immunity of the United States. *Kansas v. Kempthorne,* 516 F.3d 833, 845 (10th Cir. 2008) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992)). "[O]fficers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court." *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Indeed, court orders and the conduct and statements of federal officers are "simply irrelevant" to the determination of whether the United States has consented to suit. *Kempthorne,* 516 F.3d at 846. Thus, if federal officers and judges cannot waive the United States' sovereign immunity, neither can Officer Eversole or the Sac and Fox Nation. Plaintiff's arguments

based on legal positions taken in the state court proceeding are misplaced and should be disregarded.

II. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIM BECAUSE OFFICER EVERSOLE'S CONDUCT WAS NOT COVERED BY AN AGREEMENT OR COMPACT BETWEEN BIA AND THE SAC AND FOX NATION.

Setting aside the invalid "waiver" argument, Plaintiff's response on the merits boils down to two points: (i) Officer Eversole was conducting a "law enforcement" service and it is irrelevant what jurisdiction's law he was enforcing; and (ii) Officer Eversole is *per se* a BIA employee because his salary was paid by funds received under an Annual Funding Agreement ("AFA"). (Opp'n at 2.) Both arguments ignore the fact that Officer Eversole's activity at the time of the accident in question was not encompassed by either the 1991 Compact of Self-Governance Between the Sac and Fox Nation and the United States of America (Mot. at Ex. 2, Doc. No. 12-2) ("1991 Compact") or the 2013 AFA (Mot. At Ex. 2, Doc. No. 12-3).

a. The Two Agreements Identified by Plaintiff Do Not Cover the Enforcement of State Law

As set forth in Mr. Eversole's factual statement, he was responding to a Stroud officer's request for assistance in a "domestic dispute, an assault call [] that involved guns and weapons and knives." Ex. 2, Eversole Stmt. at 2 (Apr. 9, 2013).[1] Officer Eversole

[1] As noted in the United States' Motion, Officer Eversole did not have an SLEC commission and was not authorized to enforce federal law. (Mot. at Ex. 1, Doc. No. 12-1.) Thus, even if Plaintiff argued that Officer Eversole believed the request for assistance

was responding to a *local county* officer's request for assistance in enforcing *state* law. The two agreements on which Plaintiff relies, however, are limited to the provision of *tribal* law enforcement services for tribal members. (Opp'n at 2.)

The 1991 Compact was entered into pursuant to the Indian Self-Determination Act Amendments of 1988. Those amendments authorized self-determination contracts whereby federally-recognized Indian tribes could contract with the United States to receive funding for the provision of various services and programs "*for the benefit of Indians*." Pub. Law 100-472, 102 Stat. 2285, at 2288-89 (Oct. 5, 1988) (emphasis added). The purpose of the 1991 Compact with the Sac and Fox Nation included "permit[ting] an orderly transition from federal domination of programs and services to allow Indian tribes meaningful authority to plan, conduct, and administer those programs and services to meet *the needs of their people*" and to "reorganize *tribal* government programs and services." (Mot. at Ex. 2 at 2 (emphasis added).)

Similarly, the 2013 AFA identifies the "programs which are funded by or flow through the Bureau of Indian Affairs within the Department of the Interior (herein referred to as the BIA) *for the benefit of the Nation*" that the Sac and Fox Nation assumed responsibility for implementing. (Mot. at Ex. 3 at 1 (emphasis added).) One of these programs is "Law Enforcement and Corrections." *Id*. But the AFA says nothing about the

potentially could have involved a violation of federal law, he still was not carrying out any agreement or delegation of authority from the United States when this accident occurred.

enforcement of state criminal law, nor could it since that enforcement power is reserved to the State of Oklahoma—not the Federal Government. *See United States v. Lara*, 541 U.S. 193, 1632 (2004); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Instead, the law enforcement program delegated to the Sac and Fox Nation under the AFA is limited to *tribal* law enforcement for the Sac and Fox Nation.

Applying the legal test set forth in *Shirk v. United States*, Plaintiff fails to meet her burden of showing that "the alleged activity is, in fact, encompassed by the relevant federal contract or agreement." 773 F.3d 999, 1006-07 (9th Cir. 2014). Instead, the two agreements Plaintiff identified are limited to tribal law enforcement activities and Officer Eversole's conduct relating to the accident in question is outside of the scope of those agreements.

This conclusion is reinforced by the 2005 Deputation Agreement between the Secretary of the Interior, federally recognized Tribes, and the State of Oklahoma that was entered into pursuant to the Indian Law Enforcement Reform Act, 25 U.S.C. § 2801, *et seq*. Ex. 3, Deputation Agreement (Apr. 28, 2005). That agreement provides for the

> cross deputation of law enforcement officers employed by the tribes, the State of Oklahoma, and political subdivisions of the State of Oklahoma which are a party to this Agreement, and the BIA so that the Law Enforcement officers will be authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests in Indian country within or near the jurisdiction of the Tribe

or outside Indian country in certain circumstances. *Id*. at 1-2. The agreement allows "commissions" to be issued that "grant the officers the same law enforcement authority as

that of officers of the entity issuing the commission." *Id.* at 2. Officer Eversole did not hold a Special Law Enforcement Commission ("SLEC") from BIA. (Mot. at Ex. 1.) The Agreement nonetheless is instructive because it expressly states:

> [A]ny Tribal or State Law Enforcement Officers who are deputized by the Bureau of Indian Affairs Special Law Enforcement Commission will only be deemed employees of the Department of the Interior for purposes of the Federal Tort Claims Act (FTCA) 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***.
>
> …
>
> Nothing in this Agreement shall be construed as a waiver of any government's sovereign immunity, not otherwise expressly waived by legislative act.

Id. at 7 (emphasis added). The laws set forth in Section 3.A and Appendix A do not include Oklahoma state criminal laws. The Secretary could have authorized commissioned officers to, "when requested, assist … any Federal, tribal, State, or local law enforcement agency in the enforcement or carrying out of the laws or regulations the agency enforces or administers." 25 U.S.C. § 2803. She chose not to in this instance.

Thus, even if Officer Eversole had received an SLEC from BIA, the Deputation Agreement expressly precludes him from being deemed a federal employee in this case because he was assisting in enforcing state law—not enforcing one of the covered laws. Plaintiff's position would lead to the illogical result that an officer receiving an SLEC Commission would not be a federal employee on these facts; while, Officer Eversole, who

did ***not*** receive a commission from BIA, would be a federal employee. That result is untenable and violates the rule that waivers of sovereign immunity must be narrowly construed and may not be extended by implication. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Lopez v. United States*, 823 F.3d 970, 975-76 (10th Cir. 2016); *Miller v. United State*s, 463 F.3d 1122, 1123 (10th Cir. 2006). Any other result allows Indian tribes to unilaterally waive the United States' sovereign immunity by expanding an individual's job responsibilities beyond those expressly delegated by BIA.

b. The Source of Funding Is Not Determinative of Whether Officer Eversole's Conduct is Covered by the FTCA

The fact that Officer Eversole's salary may have been paid with AFA funds also does not make him a federal employee for purposes of the FTCA. In *Colbert v. United States*, the Eleventh Circuit emphasized that the source of funding is not determinative; instead

> for purposes of the debated FTCA coverage, the relevant limiting principle is the alleged tortfeasor's performance of identifiable '638 contract functions—"carrying out" the self-determination contract. Thus, the *actual work performed* by [the alleged tortfeasor] is the focus of our factual inquiry.

785 F.3d 1384, 1393 (11th Cir. 2015) (emphasis in original). Here, the actual work being done by Officer Eversole was assisting a local, non-tribal law enforcement official on a potential violation of Oklahoma state criminal law. Unlike the alleged tortfeasor in *Colbert*, Plaintiff has not identified any provision in either agreement that makes the enforcement of state law a covered activity. Plaintiff's argument that anytime AFA funds

are used the employee or contractor is automatically deemed to be a federal employee covered by the FTCA would give Indian tribes a blank check to single-handedly abrogate the United States' sovereign immunity. That result is untenable and Plaintiff's argument should be rejected.

c. The Decision in *Lopez* Is Not Controlling in this Case

Last, Plaintiff claims that this case is controlled by the Court's 2010 decision in *Lopez v. Ponkilla* because it is "factually indistinguishable." (Opp'n at 9.) Plaintiff is incorrect. In *Lopez*, the plaintiff relied on the mere existence of a self-determination contract to overcome the motion to dismiss but the actual agreement itself was never presented to the Court for examination and interpretation. *See* Ex. 4, *Lopez v. Ponkilla*, CIV-08-1234-L, *Def.'s Renewed Mot. to Dismiss* at 6 (Doc. 21) (W.D. Okla. July 29, 2009) ("Regarding the requests relating to the ISDEAA agreement, Mr. Brown advised that they did not have an agreement, they could not identify an agreement, nor had they reviewed an agreement in the context of this case.").

Unlike *Lopez*, the agreements applicable in this case are before the Court for analysis and resolution of this jurisdictional question. There is no reason for the Court or the parties to expend resources litigating this case further when the record is clear that Officer Eversole's activities in responding to a state law domestic dispute were not covered by any compact between the Sac and Fox Nation and BIA. Indeed, like *Lopez*, the conduct

in question clearly falls outside the scope of the 1991 Compact and 2013 AFA, rendering the FTCA inapplicable. *See id.* at 12, 14.

For these reasons, the United States respectfully submits that Plaintiff has not met her burden of establishing an applicable waiver of the United States' sovereign immunity and the Court should grant the motion to dismiss for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

x I hereby certify that on September 15, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a notice of Electronic Filing to the following ECF registrants:

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