No. 16-35320
[NO. 2:15cv00629JCC, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CURTISS WILSON,

Plaintiff-Appellant,

v.

HORTON'S TOWING, a Washington corporation, and
UNITED STATES OF AMERICA,

Defendants-Appellees.

ANSWERING BRIEF FOR THE UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable John C. Coughenour
United States Senior District Judge

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INTRODUCTION

Plaintiff's appeal concerns the temporary seizure of his truck by the Lummi nation. After plaintiff sued the tribal law enforcement officer who served the notice of seizure and intent to institute forfeiture proceedings, the United States substituted itself as defendant in place of the tribal officer, certifying that the officer was acting within the scope of employment and carrying out a compact of self-governance between the Lummi tribe and the Bureau of Indian Affairs when he served the notice. Plaintiff challenged the certification, but the district court denied his challenge and then dismissed the resulting claim against the United States for failure to exhaust his administrative remedies as required under the Federal Tort Claims Act.

Plaintiff's only argument on appeal with respect to the United States is that the district court erred in accepting the United States Attorney's certification. That argument lacks merit because a certification by the United States Attorney is *prima facie* evidence giving rise to a rebuttable presumption that the officer was acting within the scope of his employment and carrying out the compact, and the district

court correctly concluded that plaintiff had not carried his burden of rebutting that presumption in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 1346(b). The court entered final judgment on March 29, 2016. CR 68.[1] Plaintiff filed a motion for reconsideration on April 11, 2016. CR 69. The court denied that motion on April 28, 2016. CR 70. Plaintiff filed a timely notice of appeal on April 28, 2016, CR 71, and a timely amended notice of appeal on May 5, 2016, CR 73. The jurisdiction of this court rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court, when it denied plaintiff's challenge to the United States' substitution in place of the defendant tribal police officer, correctly relied on the United States Attorney's certification that the officer was acting within the scope of his employment in carrying out a compact of self-governance between the Lummi Nation and the Bureau of Indian Affairs when he served a notice of seizure and intent to forfeit plaintiff's truck.

[1] "CR" refers to the district court docket entry number, "ER" to the Excerpts of Record filed with the plaintiff's opening brief, and "SER" to the Sealed Excerpts of Record filed with this answering brief.

STATEMENT OF THE CASE

I. Statutory Background

A. The Federal Tort Claims Act

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) (1), 2671-2680 ("FTCA"), provides a limited waiver of this immunity for suits by individuals "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

Before filing a civil action under the FTCA, a claimant must file an administrative claim with the appropriate federal agency. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2. A tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

B. The Westfall Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 6, 102 Stat. 4563 (commonly known as the "Westfall Act"), amended the FTCA to provide that, if a federal employee is sued for a negligent or wrongful act or omission, and the Attorney General certifies that the employee was acting within the scope of office or employment, the United States shall be substituted as the defendant. 28 U.S.C. § 2679(d).

The Westfall Act provides that federal employees are immune from common law actions in tort for conduct occurring within the scope of their employment. Thus, the statute provides that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding * * *." 28 U.S.C. § 2679(b) (1). The provision applies on certification by the Attorney General or her designee "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."

28 U.S.C. § 2679(d)(1). The Attorney General has delegated to United States Attorneys the authority to certify that an employee was acting within the scope of his or her employment.

C. The Indian Self-Determination and Education Assistance Act

The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 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. These contracts are sometimes referred to as 638 contracts, after the public law section that authorized them.[2]

The Secretary has delegated authority to enter into 638 contracts to the Bureau of Indian Affairs. The Bureau of Indian Affairs may contract with tribes to provide education, social services, repair and

[2] Several provisions of the Indian Self-Determination and Education Assistance Act originally codified at 25 U.S.C. § 450 *et. seq.* were recently recodified at 25 U.S.C. § 5301 *et seq*.

maintenance of roads and bridges, as well as law enforcement, detention services, and administration of tribal courts. 25 U.S.C. § 13; 25 U.S.C. §§ 5301 *et seq.* A 638 contract "transfer[s] the funding and the . . . related functions, services, activities, and programs (or portions thereof)" from the Bureau of Indian Affairs to a tribal organization. 25 U.S.C. § 5329 model agreement § (a)(2).

In 1990, Congress enacted in an Appropriations Act a provision to extend FTCA coverage to tribal employees performing functions under a 638 contract, in effect deeming tribal employees to be Bureau of Indian Affairs employees "while acting within the scope of their employment in carrying out" a contract or agreement entered into under the Indian Self-Determination and Education Assistance. Pub. L. No. 101-512, tit. III, § 314, 104 Stat. 1915, 1959-60 (1990). This provision states that, with respect to claims resulting from the performance of functions under a compact authorized by the Indian Self-Determination and Education Assistance Act that the employees of an Indian tribe "are deemed employees of the Bureau of Indian Affairs . . . while acting within the scope of their employment in carrying out the contract or agreement." *Id.* The provision also states that after September 30, 1990, "any civil action

or proceeding involving such claims brought hereafter against any . . . 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." *Id.* [3]

D. 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 Indian Self-Determination and Education Assistance Act. 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 self-governance compacts and annual funding agreements with the Secretary of the Interior to plan, consolidate and administer programs, services, and functions administered by the Bureau of Indian Affairs. Tribes may

[3] The extension of FTCA coverage to tribal employees performing functions under a 638 contract has never been codified, and is often cited as 25 U.S.C. § 450f note. In light of the recodification described in footnote 2, this brief refers to the extension of FTCA coverage as Section 314 of Pub. L. 101-512.

redesign programs, functions, and services that the Secretary was previously authorized to administer, and tribes may reallocate funds to carry out these objectives according to the tribe's priorities. 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. 140 Cong. Rec. H11140-41 (daily ed. Oct. 6, 1994).

Congress thereafter amended Section 314 of Public Law 101-512 to make FTCA coverage applicable to claims arising from the performance of functions under a "compact." Pub. L. 103-138, 107 Stat 1379 § 308 (Nov. 11, 1993).

II. Facts and Prior Proceedings

In October 2014, Curtiss Wilson was stopped by Lummi Nation Police Officer Grant Austick while driving on the Lummi Reservation. SER 4. The Lummi Tribe of the Lummi Reservation is a federally recognized tribe. *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5021 (Jan. 29, 2016).

Wilson had been drinking alcohol at the Lummi Casino. SER 5. Officer Austick developed probable cause to believe that Wilson had been

driving under the influence on the Lummi reservation and stopped him on the Lummi reservation. SER 5-6. Officer Austick called the Washington State Patrol, and a state patrol officer arrested Wilson. SER 6. Wilson consented to a search of his truck, and officers found a three-pound can containing marijuana in it. ER 23. Wilson's truck was towed by Horton's Towing and impounded at the direction of the state patrol officer. SER 6.

The following day, Lummi Tribal Police Officer Brandon Gates presented to Horton's Towing a "Notice of Seizure and Intent to Institute Forfeiture" ("Notice of Seizure") from the Lummi Tribal Court. ER 23. The seizure and intent to institute forfeiture of Wilson's truck was based on violations of the Lummi Nation Code of Laws 5.09A.110(d)(2) (Possession of Marijuana over 1 ounce), and authorized by Lummi Nation Code of Laws 5.09B.040(5)(A) (Civil forfeiture section addressing Property Subject to Forfeiture, specifically motor vehicles used, or intended for use, to facilitate the possession of illegal substances).[4]

[4] Copies of Section 5.09A.110 and 5.09B.040 are included in the appendix bound with this brief.

ER 23. Pursuant to the notice, Horton's Towing released the truck to the Lummi Tribe. SER 7.

Wilson challenged the seizure and forfeiture in the Lummi Tribal Court. SER 111. The court returned Wilson's truck to him, but denied his request for an award of fees and costs. SER 111.

Wilson then brought suit in state court alleging a claim for conversion against Officer Gates and Horton's Towing arising out of Horton's Towing's release of the vehicle to the Lummi Tribe under the order served by Gates.[5] SER 4. Officer Gates removed the case to federal court. CR 1.

The United States Attorney, as the Attorney General's designee, certified that Gates was acting within the scope and course of a compact of self-governance with the United States and within his scope of employment when he served the notice of seizure. SER 17. The United States substituted itself as the defendant under the Westfall Act for purposes of Wilson's claim against Gates. SER 16. The certification specified that the Lummi Nation is considered part of the Bureau of

[5] Wilson's suit initially alleged additional claims, but those claims were subsequently dismissed and are not relevant to this appeal. CR 25.

Indian Affairs when it acts under a compact of self-governance pursuant to Section 314 of Pub. L. 101-512. SER 17.

Wilson challenged the United States' substitution, contending that Gates was acting beyond the scope of his authority as a matter of state law because the Lummi Nation lacked jurisdiction to seize Wilson's truck from a location off of its tribal lands. CR 46. In his reply (but not in his opening motion), he also challenged the United States' certification that Gates was carrying out the compact of self-governance between the Lummi Tribe and the Bureau of Indian Affairs.[6] SER 120. Wilson argued that he was entitled to review the compact between the Lummi and the Bureau of Indian Affairs to determine whether it contemplated that Lummi police officers would have authority to seize the property of non-Indians off of tribal land. SER 120.

The district court held that the United States had properly substituted itself as defendant pursuant to the Westfall Act. The court noted that the United States Attorney had certified that "under the FTCA and the Indian Self-Determination and Education Act, the Lummi

[6] Wilson's reply acknowledged that he "did not respond" to the United States' Attorney's certification that Gates was carrying out a compact of self-governance "in his first brief." SER 115.

Nation is part of the Bureau of Indian Affairs," and that Gates was acting within the scope of his employment. ER 106. The court explained that the United States Attorney's certification was "*prima facie* evidence that the employee was acting within the scope of his employment," and that Wilson had "'the burden of presenting evidence and disproving the certification by a preponderance of the evidence.'" ER 106 (quoting *Lumarse, Inc.* v. *Dep't of Health & Human Servs.,* 191 F.3d 460 (9th Cir. 1999) (unpublished) (citing *Billings* v. *United States*, 57 F.3d 797, 800 (9th Cir. 1995)).

The Court concluded that Wilson had not met his burden of disproving the certification by a preponderance of the evidence and had instead "confused the question of tribal jurisdiction (and whether Defendant Gates's actions were legally authorized) with the question of whether Defendant Gates acted within the scope of his employment." ER 106. The court explained that there is "no basis to find that the Lummi Nation exceeded its own powers when it enacted § 5.09B.040(5)(A) of the Lummi Nation Code of Laws ("LNCL") providing for the seizure and forfeiture of motor vehicles used to facilitate the possession of illegal substances," but also that "[e]ven if there were, that

is not the heart of the Court's inquiry. The United States Attorney's Certification, rather, deals with whether or not Defendant Gates was acting within the scope of his employment as a Lummi Nation police officer when he served a forfeiture order on Horton's Towing." ER 107. Recognizing that the question of scope of employment under the Westfall Act is governed by state law, and that an employee acts within the scope of his employment under Washington law whenever he is "'engaged in the performance of the duties required of him by his contract of employment'", or "'engaged at the time in the furtherance of the employer's interest'" (quoting *Pauly* v. *U.S. Dept. of Agri.,* 348 F.3d 1143, 1151 (9th Cir. 2003) (quoting *Elder* v. *Cisco Const. Co.,* 52 Wash. 2d 241 (Wash. 1958)), the court explained that "serving a forfeiture order from the Lummi Tribal Court clearly fell under the scope of [Gates's] employment." ER 107.

Wilson moved for reconsideration. ER 44. He again challenged the United States Attorney's certification that Gates was acting within the scope and course of a compact of self-governance with the United States and within his scope of employment when he served the notice of seizure. He argued that he was entitled to discovery regarding "the precise

document which the tribe and the federal government prepared which circumscribes the Lummi Tribe's discretion as to how it would spend the money provided by the federal government." ER 47. Wilson contended that *Shirk* v. *United States*, 773 F.3d 999 (9th Cir. 2014), "changed the test for certification of tribal police officers," and required courts to examine whether the allegedly tortious activity "is encompassed by the relevant general contract or agreement with an Indian tribe" as well as whether it "falls within the tortfeasor's scope of employment under state law." ER 48.

The district court denied reconsideration. SER 121. The court explained that Wilson had not raised any new facts or legal authority, and that motions for reconsideration are disfavored. SER 121.

After the district court denied Wilson's challenge to the scope certification, the United States moved to dismiss Wilson's resulting FTCA claim on the ground that Wilson failed to exhaust his administrative remedies with the Bureau of Indian Affairs with respect to that claim, that his conversion claim was excluded from the scope of the FTCA by the Act's general exception for any claim "arising in respect

of . . . the detention of any goods," 28 U.S.C. § 2680, and that he had failed to state a conversion claim under state tort law in any event. CR 65.

The district court granted the United States' motion to dismiss Wilson's Amended Complaint. ER 4. It held that it was undisputed that Wilson failed to exhaust his administrative complaint and accordingly that his case should be dismissed under 28 U.S.C. § 2675, which provides that an action shall not be instituted under the FTCA unless it has first been presented to the appropriate federal agency. ER 12. The court did not reach the government's other arguments.

SUMMARY OF ARGUMENT

The district court correctly dismissed Wilson's claim against the United States for failure to exhaust, and its judgment should be affirmed. Wilson's sole challenge to that judgment on appeal is that the district court erred in accepting the United States' certification that Officer Gates of the Lummi Tribal Police Force was carrying out a compact of self-governance between the Lummi Nation and the Bureau of Indian Affairs when he served the notice of seizure and intent to forfeit on Horton's Towing company. But in the district court, Wilson failed to raise that challenge to the certification until his reply brief. Then, when he did

challenge that aspect of the certification, he did so based only on speculation that the Bureau of Indian Affairs would not have "endorsed" a tribal police officer's serving a tribal court notice of civil forfeiture outside of tribal lands. That speculation finds no support in the record and in any event confuses the question of a tribal officer's authority to serve a notice outside of tribal lands with the question whether a law enforcement officer's service of a notice of forfeiture outside of his jurisdiction is acting within his law-enforcement duties as authorized by the compact, which is the relevant question in this case.

For purposes of reviewing the carrying-out-the-compact component of the United States Attorney's certification, the relevant question is not whether the Lummi tribe exceeded its jurisdiction in enacting Section 5.09B.040(5)(A), but rather whether Wilson submitted any evidence calling into question the United States Attorney's certification that Gates was carrying out the compact when he served the notice. This Court should hold that the district court correctly accepted the United States Attorney's certification and affirm its decision dismissing Wilson's claim against the United States for failure to exhaust administrative remedies. Wilson did not come forward with any evidence calling the United States

Attorney's certification into question. When a plaintiff does not "come forward with any evidence, the certification is conclusive;" the plaintiff's burden is to present "specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation," which is all Wilson presented to the district court here. *Gutierrez de Martinez* v. *DEA*, 111 F.3d 1148, 1155 (4th Cir. 1997). For all these reasons, the district court correctly treated the United States Attorney's certification as dispositive and concluded that the challenge to the certification lacked merit.

ARGUMENT

I. The District Court correctly accepted the United States Attorney's Certification

Under the Westfall Act, if the Attorney General or her designee certifies that an employee was acting within the scope of his employment at the time of the relevant incident, the employee must be "dismissed from the action and the United States [] substituted as defendant." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995); 28 U.S.C. § 2679(d)(1). Although that certification is subject to judicial review, *Lamagno*, 515 U.S. at 434, it is entitled to "*prima facie* effect," and it is

the plaintiff's burden to show that the certification was incorrect. *Jackson* v. *Tate*, 648 F.3d 729, 735 (9th Cir. 2011) (citing *Kashin* v. *Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006)).

When the individual employee whose acts gave rise to the suit is a tribal officer acting under a compact or agreement between a native American tribe and the Bureau of Indian Affairs under the Indian Self-Determination and Education Act of 1975, as amended, this Court examines two questions: whether the tribal officer's acts were encompassed by the relevant compact, contract, or agreement, and whether he or she was doing so within the scope of his or her employment. *Shirk* v. *United States*, 773 F.3d 999 (9th Cir. 2014).

The party seeking review of a scope-of-employment certification "bears the burden of presenting evidence and disproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of the evidence." *Green* v. *Hall*, 8 F.3d 695, 698 (9th Cir. 1993). When a plaintiff challenges the Attorney General's certification, "[t]he United States ... must remain the federal defendant in the action unless and until the District Court determines that the employee, *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the

scope of his employment." *Osborn* v. *Haley*, 549 U.S. 225, 231 (2007) (emphasis in original). To prevail, the plaintiff must submit "specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation." *Gutierrez de Martinez* v. *DEA*, 111 F.3d 1148, 1155 (4th Cir. 1997). The plaintiff must allege, in either the complaint or a subsequent filing, specific facts "that, taken as true, would establish that the defendant['s] actions exceeded the scope of [his] employment." *Stokes* v. *Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003).

Wilson was stopped by a tribal police officer under suspicion of driving under the influence on tribal land. SER 6. "Indian tribal police forces have long been an integral part of certain tribal criminal justice systems and have often performed their law enforcement duties to the limits of available jurisdiction." *Ortiz–Barraza* v. *United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). An Indian tribe "may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power." *Id.* Tribal police have the authority to stop a non-Indian who has allegedly violated the law while on the reservation, and to detain him

until he can be turned over to state authorities to be charged and prosecuted. *State* v. *Schmuck*, 850 P.2d 1332 (Wash. 1993).

Wilson consented to a search of his truck, and the search revealed marijuana. SER 12. Wilson was arrested and his truck was seized and towed by Horton's Towing to its impound lot. SER 6. The next day, Gates presented the Notice of Seizure and Intent to Institute Forfeiture to Horton's Towing. SER 6. The notice explained that the Lummi Nation intended to forfeit the truck under Section 5.09B of the Lummi Nation Code of Laws because "it was used to transport an illegal substance." SER 12.

Wilson sued Gates alleging that Gates was liable to him for conversion. The United States Attorney certified that Gates was acting "within the course and scope of a Compact of Self-Governance with the United States (the "Compact") pursuant to Title III of the Indian Self-Determination and Education Assistance Act Amendments of 1988, P.L. 100-472." SER 16. The United State certified that "under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, and the Indian Self-Determination and Education Act of 1975, see 25 U.S.C. § 450f note, the Lummi Nation is deemed to be, for purposes of the FTCA,

part of the Bureau of Indian Affairs with respect to tort claims arising in connection with the Tribe's administration of the Compact." SER 17. The government's notice of substitution also explained that "as a Lummi law enforcement officer, acting within the scope of his employment in carrying out the Compact with the [Bureau of Indian Affairs], Gates is deemed to have been an employee of the [Bureau of Indian Affairs], and thus protected by the provisions of the FTCA." SER 17.

Wilson's original motion challenging the United States Attorney's certification contended only that Gates was acting outside of the scope of his employment when he served the notice of seizure on Horton's Towing; it did not challenge the carrying-out-the-compact component of the certification.[7] SER 20, 22. In his reply motion in the district court, however, Wilson also questioned whether Gates was carrying out the compact of self-governance between the Lummi and the Bureau of Indian

[7] Wilson has not renewed his challenge to the district court's conclusion that Gates was acting within the scope of his employment on appeal. The scope of employment under the Westfall Act is determined by reference to local *respondeat superior* law. *Green*, 8 F.3d at 698-99. The district court in this case applied Washington scope of employment law and concluded that Gates was acting within the scope of his employment because he engaged in the performance of duties required of him as a tribal officer and performed those duties under a self-governance compact. ER 107.

Affairs. SER 114-15. Wilson's reply acknowledged that "he did not respond . . . in his first brief" to the government's certification that Gates was carrying out a compact between the Lummi and the Bureau of Indian Affairs when he served the notice of seizure. SER 114-15.

Wilson's acknowledged failure to challenge the carrying-out-the-compact component of the United States Attorney's certification meant that the United States' response to his challenge to its certification did not further develop the record that Gates was acting within the scope of the compact, for example by attaching a copy of the compact to its response. The United States' response to Wilson's motion did not include the compact because the certification served as *prima facie* evidence that Gates was carrying out a compact, and Wilson had not challenged that component of the certification.

Wilson's reply to the government's response and a later motion for reconsideration nevertheless argued that he was entitled to discovery of the compact based on *Shirk*, 773 F.3d at 1008.[8] On appeal, Wilson

[8] Because the certification affects the jurisdiction of the district court over the defendant, Wilson's failure to challenge the carrying-out-the-compact component of the certification in his initial motion does not put that component of the certification beyond review.

renews the argument, contending that the district court should have assessed whether Gates's act was taken under the compact as well as whether it was within his scope of employment under state law. Wilson contends (Br. 23) that under *Shirk*, "it is necessary for the record to support the conclusion that the 638 Compact between the Lummi Nation and the [Bureau of Indian Affairs] authorized the activity in question." But his suggestion that the only way that the record can support that conclusion is to include that relevant compact misreads *Shirk,* a case in which no scope-of-employment certification was issued.

In *Shirk*, the plaintiffs sued that United States directly, not the alleged tortfeasors, who were also tribal law enforcement officers. 773 F.3d at 1001. The United States sought dismissal of the suit on the ground that it was not properly brought against the United States. *Id.* at 1001. Because the United States never certified in *Shirk* that the officers were carrying out a compact and acting within the scope of their employment when the injury occurred—and indeed denied that they were doing so—this Court analyzed whether the alleged tortfeasors were carrying out a compact and acting within the scope of their employment

without considering the evidentiary role of a United States Attorney's certification on those questions.

Because no certification was made in *Shirk*, the *Shirk* court's conclusion that a district court should review a compact to determine whether a tribal officer was acting within the course of the compact does not necessarily apply in cases in which the United States Attorney affirmatively certifies that the employee was acting within the scope of employment in carrying out a compact. When the plaintiff makes a credible challenge to that certification, reviewing the compact might be necessary to resolve the challenge. But when the plaintiff does not challenge the certification, or offers only speculation in opposition to it, then the district court may uphold the United States Attorney's certification.

The United States Attorney's certification is *prima facie* evidence of the facts certified. *Pauly* v. *U.S Dep't of Agriculture*, 348 F.3d 1143, 1150 (9th Cir. 2003). It "carries a rebuttable presumption that the employee has absolute immunity from the lawsuit and that the United States is to be substituted as the defendant." *Wilson* v. *Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008). Where the plaintiff does not "rebut the

presumption created by the certification," the certification stands. *U-Haul Intern., Inc.* v. *Estate of Albright*, 626 F.3d 498, 501 (9th Cir. 2010).

In this case, the district court had no reason to review the compact because the United States Attorney had certified that Gates was carrying out a compact, and Wilson had not made a credible challenge to the United States Attorney's certification. Wilson did not make *any* challenge to this component of the certification until his reply motion, and his late-breaking challenge to the certification is based only on his speculation (Br. 23) that it is "extremely unlikely that the [Bureau of Indian Affairs] would be endorsing the exercise of Indian power to seize property of non-Native Americans off reservation." The only evidence that he introduced in support of that speculation was a multi-year funding agreement between the Lummi and the Bureau of Indian Affairs, but that document actually *supports* the United States Attorney's certification.[9] ER 53.

[9] Wilson has not argued that the district court abused its discretion in denying his motion for reconsideration in light of his contention that that he was entitled to receive a copy of the compact in discovery. His failure to do so constitutes a forfeiture of this issue on appeal. *Arpin* v.

As explained, the Indian Self-Determination and Education Assistance Act allows Native American tribes to enter into compacts with the Secretary of the Interior under which the tribe administers federal programs established for the benefit of Indians that the Secretary otherwise would have administered. Law enforcement is among the services that tribes commonly provide under such compacts. *Salazar* v. *Ramah Navajo Chapter*, 132 S.Ct. 2181, 2186 (2012).

The multi-year funding agreement between the Lummi and the Bureau of Indian Affairs transfers to the tribe "responsibility for the implementation of programs" formerly provided by the Bureau of Indian Affairs including "law enforcement." ER 53. Serving a notice of seizure and intent to institute forfeiture would be within the purview of police officer employed directly by the Bureau of Indian Affairs: federal law provides that Secretary of the Interior may "charge employees of the Bureau with law enforcement responsibilities" and authorize them to "execute or serve warrants, summonses, or other orders relating to a

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Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001). The argument in any event lacks merit; as the district court explained, motions for reconsideration are disfavored, ER 1, and Wilson could have developed the argument and sought discovery earlier on in his case.

crime committed in Indian country and issued under the laws of" the United States or "an Indian tribe if authorized by the Indian tribe." 25 U.S.C. § 2803(2). Wilson has provided no basis to doubt that a tribal police officer providing law-enforcement functions would have that same authority. *Cf.* Lummi Nation Code of Laws § 9.04.040(f) (Lummi tribal police have authority "to prevent violations of the laws and regulations" of the Lummi Nation); *Snyder* v. *Navajo Nation*, 382 F.3d 892, 896-97 (9th Cir. 2004) (observing that "tribal officers travel off the reservation to assist other agencies engaging in investigation of crimes that affect the reservation and Navajo citizens. . . . When officers travel to provide information or to testify off the reservation, however, they do so because of a crime that occurred on the reservation or directly affected the interests of the tribal community. Thus, such services performed off-reservation nevertheless relate primarily to tribal self-government and remain part of exempt intramural activities").

Moreover, Wilson's speculation that the underlying compact might nevertheless limit the types of law-enforcement activities that tribal police officers conduct is misplaced. The underlying compact—which is not part of the record below because Wilson did not contest the

certification in a timely manner, but which is appended to a motion for judicial notice filed with this brief—contains no limitation on the Tribe's law-enforcement program.[10] It states that the "duly enacted laws of the Tribe shall be applied in the execution of this Compact," Compact at 2, and Section 5.09B.040(5)(A) of the Lummi Nation Code of Laws provides in turn for the seizure and forfeiture of a motor vehicle used to transport illegal substances on the reservation.

The lack of any limitation in the compact is another way in which this case is different than *Shirk*. In *Shirk*, the officers were purporting to enforce state law outside of Indian country, but the applicable 638 contract encompassed law enforcement only for federal and tribal

[10] Under Fed. R. Evid. 201(b)(2), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Reviewing the compact on appeal is appropriate in this instance because the issue is purely legal, no further development of the record is required, resolution of the scope of the compact is clear, and Wilson bears responsibility for failing to raise the issue in a timely manner. *David* v. *Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014). Although this Court remanded in *Shirk* so that the district court could review the compact in the first instance, there was a dispute between the parties in *Shirk* as to whether a particular agreement applied or had been superseded, 773 F.3d at 1008, but there is no similar dispute in this case.

law within Indian country. *Id.* at 1002, 1008 n.6. The United States denied that the alleged tortfeasors were carrying out an agreement between their tribe and the Bureau of Indian Affairs when they attempted to stop a motorist on a state road that was not on tribal land because of these limits in the 638 contract. [11]

Here, by contrast, the tribal officer was serving a notice of seizure related to a tribal-law violation that occurred in Indian country. As noted, Bureau of Indian Affairs law enforcement officers have authority under the Indian Law Enforcement Reform Act to serve orders related to a crime committed in Indian country. 25 U.S.C. § 2803. The Bureau of Indian Affairs transferred its authority to the tribe under the self-governance compact, and Wilson has pointed to nothing in the annual funding agreement or any other source purporting to restrict the tribe's authority in this regard.

Additionally, contrary to Wilson's contentions, Gates was not enforcing tribal criminal law against Wilson off of tribal lands when he

[11] The limits in the 638 contract at issue in *Shirk* were consistent with limits on the authority of Bureau of Indian Affairs law enforcement officers under the Indian Law Enforcement Reform Act, which limits officers to enforcing federal and tribal law in Indian country. 25 U.S.C. § 2801 *et seq.*

seized the truck and served the notice of intent to forfeit. Wilson's alleged violation of tribal law that gave rise to the seizure took place on tribal lands, and the truck was initially seized on tribal land. Also, a civil *in rem* forfeiture proceeding is a civil action, not a criminal one. *United States* v. *Bajakajian*, 524 U.S. 321, 331 (1998) ("Traditional in rem forfeitures were thus not considered punishment against the individual for an offense."). Moreover, although Gates served the notice off of tribal land, it is unremarkable for the duties of a police officer to take him outside of his law-enforcement jurisdiction—to testify in court, or serve a warrant, or to serve a different type of court order, like the notice of civil forfeiture at issue here—as illustrated by 25 U.S.C. § 2803(2). *See also Snyder*, 382 F.3d at 896-97.

Finally, although Wilson argues that Gates could not have been carrying out the compact when he served the notice because forfeiting his truck was beyond the authority of the Lummi Tribal Court, that argument confuses the question whether a tribal court has jurisdiction to conduct forfeiture proceedings against the property of a non-Indian with the question whether Officer Gates was acting within the scope of his employment in carrying out a compact when he exercised his police

powers provided for under the laws of the Lummi Nation. Even if Wilson is correct that the tribal court lacked authority to forfeit the property of a non-Indian, Gates was still acting both within the scope of his employment and within his authority as a Lummi police officer performing functions under a self-governance compact with the Bureau of Indian Affairs when he served the notice issued by the tribal court. *Cf. Aminoil U.S.A., Inc.* v. *California State Water Resources Control Board*, 674 F.2d 1227, 1234 (9th Cir. 1982) ("Official action is still action of the sovereign, even if it is wrong, if it 'do[es] not conflict with the terms of [the officer's] valid statutory authority.'") (quoting *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 695 (1949)).

Wilson's contention about the tribal court's lack of authority is irrelevant to the certification question, as the district court correctly recognized. ER 106. Because nothing in the compact or the multi-year funding agreement prohibited tribal officers from serving such a notice, the district court's denial of Wilson's challenge to the certification should be affirmed.

CONCLUSION

The judgment of the district court should be affirmed.

October 6, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a Century Schoolbook typeface of 14 points, and contains 6376 words.

Dated this 6th day of October, 2016.

s/Teal Luthy Miller
TEAL LUTHY MILLER
Assistant United States Attorney

STATEMENT OF RELATED CASES

To the best of appellee counsel's knowledge, there are no other cases pending before the Court that are related to these consolidated cases.

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2016, I electronically filed the foregoing answering brief for the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

DATED this 6th day of October, 2016.

s/ Rebecca Eaton
REBECCA EATON
Legal Assistant

STATUTORY ADDENDUM

LUMMI NATION CODE OF LAWS

5.09A.110 Prohibited Acts

(a) Manufacture of an Illegal Substance. A person who knowingly manufactures or possesses with intent to manufacture any of the substances listed in LCL §5.09A.050 shall be found guilty of the offense of manufacture of an illegal substance. Manufacture of an Illegal Substance is a class A offense.

(b) Delivery of an Illegal Substance. A person who knowingly delivers any of the substances listed in LCL §5.09A.050 shall be found guilty of the offense of delivery of an illegal substance and sentenced as follows:

(1) for a class B offense, or

(2) for class A offense when charged and convicted of delivery of an illegal substance in conjunction with an Aggravated Factor listed in LCL §5.09A.140.

(c) Possession of an Illegal Substance with Intent to Deliver. A person who knowingly possesses with intent to deliver any of the substances listed in LCL §5.09A.050 shall be found guilty of the offense of possession of illegal substance with intent to deliver. Possession of an Illegal Substance with Intent to Deliver is a class A offense.

(d) A person who knowingly administers to a human body, or who otherwise possesses any substance listed in LCL §5.09A.050 is guilty of an offense as follows:

(1) Possession of Marijuana (up to 1 ounce). Possessing up to one (1) ounce of marijuana is a class D offense.

(2) Possession of Marijuana (over 1 ounce). Possessing over one (1) ounce of marijuana is a class C offense. This is a lesser included offense of Possession of an Illegal Substance with Intent to Deliver, LCL §5.09A.110(c).

(3) Possession of Illegal Substance (up to 25 grams). Possessing a combination of up to 25 grams of any substance or combination of substances listed in LCL §5.09A.050 (excluding marijuana) is a class B offense. This is a lesser included offense of Possession of an Illegal Substance with Intent to Deliver, LCL §5.09A.110(c).

(4) Possession of Illegal Substance (over 25 grams) Possessing over 25 grams of any substance listed in LCL §5.09A.050 (excluding marijuana) is a Class A offense.

If charged with a violation of LCL §5.09A.110(d), a person may raise the affirmative defense that, at the time of the offense, the person had a valid prescription issued by a health professional authorized by law to dispense or prescribe the substance unless the substance was prescribed or dispensed as a result of fraud, deceit, misrepresentation, or subterfuge by the person, except as prohibited by LCL §5.09A.050(c).

(e) A person who knowingly possesses an item of drug paraphernalia is guilty of an offense as follows:

(1) Possession of Paraphernalia. A person who possesses any item of drug paraphernalia used, or intended to be used, to ingest, inject, inhale, consume or otherwise introduce illegal substances into the human body shall be found guilty of the offense of possession of paraphernalia. Each item of drug paraphernalia is a separate criminal act. Possession of Paraphernalia is a class D offense.

(2) Aggravated Possession of Paraphernalia. A person who possesses any item of drug paraphernalia used, or intended to be used, to sell, distribute, deliver, import, export, manufacture, compound, convert, conceal, produce, package, analyze, process, possess, store, or transport illegal drugs is guilty of the offense of aggravated possession of paraphernalia. Aggravated Possession of Paraphernalia is a class B offense.

(f) Controlled Substance Outside of Original Container. A person who knowingly possesses any amount of a controlled substance, as defined in LCL §5.09A.050(a)(1), which is not in the original container in which it was delivered to him by the person validly selling or dispensing the controlled substance shall be found guilty of controlled substance outside of original container. Controlled Substance Outside of Original Container is a class D offense.

5.09B.040 Property Subject to Forfeiture

The following property is subject to seizure and forfeiture under this Chapter:

(1) illegal substances, as defined in LCL §5.09A.050;

(2) drug paraphernalia, as defined in LCL §5.09A.090, including but not limited to all books, records, research, formulas, microfilm, tapes, and data;

(3) raw materials, plants, products, and equipment of any kind which are used, or intended for use in the manufacture, compounding, processing, delivering, importing, exporting or preparation of an illegal substance, and the products and by-products of such use;

(4) dangerous weapons (as defined in LCL §5.10.010(c)(5)) and Firearms (as defined in LCL §5.10.010(c)(9)), found in the possession or control of a person engaged in an illegal activity;

(5) property which is used, or intended for use, to facilitate the manufacture, compounding, processing, delivering, importing, exporting, preparation, sale, distribution, possession, storage, transportation, or concealment of illegal substances, including but not limited to:

(A) conveyances, including aircraft, motor vehicles, or vessels;

(B) real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements;

(C) containers, equipment, and supplies; and

(D) moneys, negotiable instruments, securities, or other things of value furnished, or intended to be furnished, by any person in exchange for an illegal substance, or with the intent to obtain an illegal substance, except those funds provided by a law enforcement official, or any person acting under law enforcement direction, as part of an investigation into illegal activity; and

(6) all proceeds from the illegal activity, including property acquired from the proceeds, including but not limited to moneys, negotiable instruments, securities, and real and personal property.

9.04.040 Duties

Duties of the tribal police shall be as follows:

(a) To obey promptly all orders of the Chief of Police or the Tribal Court when assigned to that duty.

(b) To lend assistance to fellow officers.

(c) To report and investigate all violations of any law or regulations coming to his notice or reported for attention.

(d) To arrest all persons observed violating the laws and regulations for which he is responsible.

(e) To inform himself as to the laws and regulations applicable to the jurisdiction where employed and as to the laws of arrest.

(f) To prevent violations of the laws and regulations.

(g) To report to his superior officers all accidents, births, deaths, or other events or impending events of importance.

(h) To abstain from the use of narcotics and from excessive use of intoxicants and to refrain from engaging in any act which would reflect discredit upon the police department.

(i)To refrain from the use of profane, insolent or vulgar language.

(j) To use no unnecessary force or violence in making an arrest, search or seizure.

(k) To keep all equipment furnished by the Government and the LIBC in responsible repair and order.

(l) To report the loss of any and all property issued by the Government or the LIBC in connection with official duties.

(m) To use firearms only when necessary in arresting or overtaking a person who has committed a felony or in preventing the commission of a felony against a person or property.

(n) To serve as a Deputy Special Officer if appointed and to coordinate his functions as Tribal Police Officers with his functions as a Federal Officer.