

Montana Law Review  
Winter 2010

## Articles

**\*115 AN INTRODUCTION TO THE FEDERAL TORT CLAIMS ACT IN INDIAN SELF-DETERMINATION  
ACT CONTRACTING**

Thomas W. Christie [FN1]

Copyright (c) 2010 Montana Law Review; Thomas W. Christie

## I. Introduction

Barack Obama began his presidency by reminding Americans that we are in a “new era of responsibility.” [FN1] For Indian Country, the word “responsibility” is often understood in terms of the “Federal Trust Responsibility”—that is, the obligation of the trustee, the United States, to its beneficiary, the tribes. [FN2] The concept of a trust responsibility has evolved over time and, at times, has been all but repudiated. [FN3] However, in the context of the Indian Self-Determination Act, both the federal and tribal governments have responsibilities. [FN4] One such area concerns responsibilities to third parties who are injured during the performance of a Self-Determination Act contract, injuries which would be recognized as compensable under the Federal Tort Claims Act (“FTCA”). Because the FTCA and the interplay between the federal and tribal governments can be challenging, it behooves the practitioner in Indian Country to have a fundamental understanding of FTCA and Self-Determination Act issues, as they are likely to impact representation of injured plaintiffs as well as tribes and tribal organizations.

**\*116 II. Historic Background**

In the 1970s, the United States government developed a new federal Indian policy of self-determination. [FN5] Passed in 1975, the Indian Self-Determination and Education Assistance Act (“Act”) provides a mechanism for tribes or tribal organizations to conduct activities previously performed for them by the Department of the Interior (“Bureau of Indian Affairs” or “BIA”) and the Department of Health and Human Services (“Indian Health Service” or “IHS”). [FN6] The Act authorizes (and directs) the Secretaries of these two Departments to enter into contracts with tribes at the tribes’ request. [FN7] Through these contracts the tribes assume control of programs, functions, services, and activities previously provided by that Department. [FN8] Additionally, this Act provides an opportunity for tribes to “redesign” these contracted programs consistent with specific needs of individual tribes. [FN9]

A critical component of the Act concerns funding. Tribal contractors under the Act receive a base amount, which “shall not be less than the appropriate Secretary would have otherwise provided.” [FN10] Then the statute directs the Secretary to add amounts necessary “to ensure compliance with the terms of the contract and prudent management . . .” [FN11]

Prudent management includes maintaining adequate liability coverage. [FN12] The logical result of this provision is that a tribe or tribal organization contracting under the Act would include liability insurance coverage as part of its routine overhead expenses. These overhead-type costs are applied primarily through indirect cost charges and are effectively passed on to those with whom the tribe or tribal organization contracts. For example, many tribal governments have vehicles for governmental use that are often used for performing work under a grant or contract. Theoretically, it is possible to determine what costs are associated with insurance coverage for a vehicle, based on mileage or some similar attribution system, and then assign those costs to particular grants, contracts, or tribally-funded programs. However, it is usually easier and much more cost effective simply \*117 to pool those costs as part of the indirect cost or administrative overhead cost associated with performing the grant or contract. [FN13]

During the 1980s, many parts of the United States, including local governments, experienced what has sometimes been referred to as an “insurance crisis.” [FN14] Similar kinds of cost increases were faced in the medical malpractice area. [FN15]

Ironically, these costs were not incurred by the federal government. Because of United States sovereign immunity and the nature of the FTCA, the federal government does not purchase insurance for itself. [FN16] Federal facilities providing services are covered under the FTCA, so if an individual was injured by an agent or employee of the federal government, that injury would either be covered by the FTCA or would not be compensable because of United States sovereign immunity. [FN17]

At least in part because of the rapid increase in liability insurance costs, Congress amended P.L. 93-638 in the 1990 and 1991 annual appropriations by providing that the FTCA would be available for tribal contractors in health care settings. [FN18] Over time this coverage was extended beyond the health care setting to tribes and tribal organizations for activities generally contracted under the Act. [FN19]

The actual extension process was gradual and piecemeal. [FN20] Currently, the Act states that after 1990, the Secretary is to obtain liability insurance for tribes and tribal organizations for coverage of contracted activities. [FN21] Congress specified that in fulfilling this requirement, the Secretary was to consider the extent of FTCA coverage. [FN22]

\*118 Based on the Act and attendant regulations promulgated in 1996, [FN23] it appears that it was the intent of Congress and the Clinton Administration that, to the extent an injury arose from the operation of a Public Law 93-638 contract, injury would be addressed through FTCA.

### III. FTCA Coverage

Prior to 1946, there was no statute that made the United States generally liable for injuries to third persons resulting from the actions of its agents. [FN24] Historically, the United States relied on sovereign immunity--the judicial doctrine which precludes a law suit brought against the government, without its consent, based on its sovereign governmental status. [FN25] Because of this sovereign immunity, either the United States suffered no liability, or a special act of Congress was required to compensate an individual for tort-type injuries. [FN26] Sovereign immunity is a doctrine which holds that governments, with sovereign authority, cannot be sued for their acts, errors, and omissions unless they agree to be sued. [FN27] In 1946, Congress passed the Legislative Reorganization Act, which included the FTCA. [FN28] The Act provided a limited waiver of sovereign immunity. [FN29]

The FTCA allows the United States to be sued and a monetary recovery to be made against the federal government for certain tort actions. [FN30] This law makes the United States responsible to injured individuals for common law torts (i.e. torts as defined through judicial precedents rather than by statutes). [FN31]

Since 1946, Congress has amended the FTCA several times to expand its scope. [FN32] The history of the FTCA and its application to Self-Determination\*119 Act contracts, as well as certain critical ideas and concepts regarding FTCA coverage, are crucial to an analysis of any tort claim arising during the operation of a P.L. 93-638 contract. [FN33]

The FTCA states that “the remedies provided by this title in such [tort] cases shall be exclusive.” [FN34] Additionally, the 1996 regulations made clear that the FTCA is an exclusive remedy for tort claims arising from Public Law 93-638 contract activities. [FN35] Given that the United States Supreme Court has held that Congress has plenary power over Tribes, [FN36] and the exclusivity of the FTCA as a remedy, there is a strong argument to be made that even if the particular tribal government has waived its sovereign immunity and allowed itself to be sued, when a lawsuit arises from the operation of a contract under the Act, the FTCA is the only available remedy. [FN37]

The FTCA requires that a claim be filed within two years from the date of injury or the time when a claimant knew or should have known of the injury. [FN38] Upon filing with the appropriate federal office, the federal government has six months to investigate the claim and attempt an administrative resolution. [FN39] After the six-month period, the claimant may file an action in federal district court against the United States. [FN40] For the purposes of FTCA coverage for tribes or tribal organizations, the claim is to be handled as \*120 though an agency of the federal government had committed the alleged injury. [FN41]

Even though the FTCA gives the U.S. Department of Justice primary authority over FTCA claims, as a practical matter, the Department of the Interior and the Department of Health and Human Services have great latitude to address FTCA claims. [FN42]

The determination of when a claim may be filed under the FTCA is made on a case-by-case basis. Still, to the extent that any summary can be made, my experience has led me to conclude that it might be well stated as follows:

When a tribal contractor's employee is working within the scope of work of an Indian Self-Determination and Education Assistance Act contract or grant and injures another, the United States will become the defendant; the case (if any) against the tribal contractor is dismissed, and the United States will defend the claim in federal district court.

While my restatement is a simplification of FTCA coverage, it forms a basic starting point as well as an analytical frame work for considering certain aspects of the FTCA that merit more attention.

A tribal contractor's employee will receive FTCA coverage only in certain circumstances. Although it may seem that an individual paid or employed under a P.L. 93-638 contract would be covered, the regulations focus more on the activities performed by an employee rather than the person performing activities. [FN43] The scope of the individual's employment will have an impact on FTCA coverage. [FN44] FTCA coverage in the context of Indian Self-Determination is tied to activities that occurred within the scope of work of the contract or grant entered into pursuant to the Self-Determination Act. [FN45]

The FTCA waives sovereign immunity only for certain tortious conduct. [FN46] A tort is a civil wrong that

is not a breach of contract for which a \*121 remedy may be obtained. [FN47] It should be noted that not all torts are covered by FTCA; intentional torts, for example, are usually excluded. [FN48]

The FTCA generally provides means for the United States to be responsible for the negligent actions of federal employees and agents. [FN49] The United States, by the Indian Self-Determination Act and its regulations, extended FTCA coverage to tribal contractors just as if they were employees of the federal government. [FN50] Both the amendments to the Act and the 1996 regulations clearly indicate that the FTCA extends to only tribes or tribal organizations contracting under the Act. [FN51] It does not extend to tribal subcontractors, with the exception of constituent tribes of the California Rural Indian Health Board, Inc. [FN52]

Federal courts have exclusive jurisdiction over FTCA cases. [FN53] While no reported cases have considered an FTCA claim initially brought in tribal court, case holdings have recognized the exclusive authority of the federal district courts to hear FTCA claims. [FN54] Given that state courts cannot hear FTCA claims, it is likely courts would also hold that tribal court is an inappropriate forum. While tribal court may not be the correct forum, it is conceivable that tribal tort law would control the outcome of a tribal FTCA case brought in federal district court.

#### IV. FTCA Issues and Concerns

The application of the FTCA in a tribal context should be straightforward; after all, it is based on a statutory scheme. But a host of practical issues have arisen in the years since Congress made the FTCA generally applicable to P.L. 93-638 contracts. Many of these issues arise from a lack of resources, others from a lack of coordination between the United States \*122 and tribes, and still others simply arise from a failure of the United States to meet statutory direction.

##### A. Insufficient Funding

The federal government has historically provided inadequate funding to the Bureau of Indian Affairs and Indian Health Service and their tribal contractors. [FN55] These funding difficulties are aggravated when tribes are required to purchase liability insurance; if tribal program funds are used to purchase insurance, it will necessarily reduce funding for program services. This was exactly the situation in the mid to late 1980s when Congress applied FTCA to tribal contractors under P.L. 93-638. [FN56]

One of the goals of the Act is to provide tribal contractors with the ability to operate P.L. 93-638 programs in ways that best meet the needs of the tribal members they serve. [FN57] Adequate funding remains a critical component of providing these services. Use of the FTCA to address tribal contractor liability should eliminate the need to purchase a specific liability policy for FTCA covered claims, which, in theory, will reduce costs.

##### B. Lack of Consistent Internal Rules on Discretionary Judgment Funds

While the FTCA provides federal agencies with some latitude for compromise of small claims, [FN58] tribes and tribal organizations do not generally benefit from this flexibility. [FN59] Under the FTCA, federal agencies have discretion to settle claims under 2,500 dollars. [FN60] An additional difficulty is introduced in this option for settlement when P.L. 93-638 is involved. As with virtually every federal grant and contract, the United States Office of Management and Budget (“OMB”) has developed a circular that is used to determine whether the ex-

penditure is allowable. [FN61] Except in extraordinary circumstances, that circular does not allow the use of federal grant or contract\*123 funds for penalties or for compromises of claims. [FN62] Consequently, if a tribe or tribal organization were to use P.L. 93-638 contract funds to settle claims under 2,500 dollars, according to the Circular, such expenditures could be deemed a cost disallowance and the tribe or tribal organization would be forced to repay that amount to the United States. [FN63] Such a result would certainly seem contrary to the intended flexibility in the Self-Determination Act itself.

### C. The Fiction of the FTCA as the “Exclusive” Remedy

Notwithstanding statutory and regulatory language that makes the FTCA the “exclusive” remedy for covered torts, plaintiffs may also bring suit against the tribe or tribal organization consistent with the particular tribe's sovereign immunity laws. [FN64] The same set of facts could lead to lawsuits in both federal and tribal court. The defendant in the federal lawsuit would be the United States, substituted for the tribe or tribal organization under the FTCA, while the defendant in tribal court would be the tribe or tribal organization itself. [FN65] The tribe or tribal organization's resources may be required for both cases. The Office of the United States Attorney handling the federal court FTCA claim may have little regard for the possibility that a tribe or tribal organization may also face a suit in tribal court, which could also be part of an overall settlement or compromise. [FN66] If the FTCA is to be an exclusive remedy, no tribal court should entertain a tort action resulting from a contract under the Act, and the United States should assist tribes in making sure these actions are appropriately heard in federal district court.

\*124 Notwithstanding the benefits of making maximum use of the FTCA, some tribal courts have viewed the exclusivity of the FTCA inconsistently. Thus, even though the FTCA is to be an “exclusive” remedy, at least one tribal court has decided that the tribe or tribal organization remains liable for certain employment cases under tribal law. [FN67] This raises the question of whether the FTCA is truly exclusive as to tort claims arising from the operation of a contract under the Act, as provided in the regulations, [FN68] or if a tribal court can extend a cause of action beyond the FTCA, making the tribal government liable. The United States could easily address this concern by working with the tribe's FTCA liaison to include any tribal court claims in a federal court case settlement; this would eliminate the potential of two parallel lawsuits, one in federal court and one in tribal court concerning the same set of facts, and a later potential contribution claim in federal court against the United States resulting from a tribal court decision holding the tribal organization liable for a tort, which more properly should have been heard to federal district court. [FN69]

### D. Problematic Release of Confidential Information

The federal government's failure to coordinate can also negatively impact a tribe's ability to protect confidential information. Particularly during the discovery phase of litigation, the release of tribal information becomes worrisome. In order to properly defend the federal district court case, the tribe or tribal organization may be required to turn over documents that in the hands of the tribe or tribal organization are protected or privileged. [FN70] However, in the hands of the United States, documents may lose that protection. [FN71] If discovered, the documents would become available for use in tribal court. This may be problematic for the tribe, particularly when the United States does not assist in dismissing a tribal court action. In order to address this issue, a decent working relationship must be forged between tribes and the Office of the United States Attorney who handles these cases.

\*125 Tribes must exercise care in these disclosures because the United States is not always able to keep such materials confidential. [FN72] Tribal materials given to the United States may be subject to discovery, which means that the documents could be used to subject the tribe to tort liability in tribal court.

#### E. Use of Information to Create Contract Disallowance and Compliance Issues

In a related area, there are no safeguards to prevent the United States from using information produced in discovery to assess a questioned cost or raise a contract compliance issue against the tribe or tribal contractor under the P.L. 93-638 contract. This is perhaps the clearest example of an as-yet unrecognized conflict of interest regarding FTCA claims involving tribes and the Department of the Interior. It is also related to the question of whether the United States Attorney also represents the tribal employee, who is deemed to be a federal employee acting in the course and scope of a contract under the Act. [FN73] In this situation, the United States plays several different, and potentially inconsistent roles--it defends the tribal contractor's employee, as though the employee was a federal employee; it is still the tribe's trustee; and finally it is also attempting to ensure contract compliance. It is entirely possible that information showing negligence in contract performance could have an impact on contract compliance issues. It is inappropriate for an attorney to use information received from a client against that client in another action. [FN74] In part this conflict is resolved by limiting the nature of representation of tribes, tribal organizations and tribal employees. [FN75]

#### F. Use of Tribal Insurance to Address Claims

Tribally purchased insurance should never be used as a resource to supplement the FTCA because it wastes tribal resources for protections that the Federal Government has a duty to provide. If the tribe or tribal organization has any non-FTCA insurance coverage intended to protect the tribe against non-FTCA claims, the Office of the United States Attorney will sometimes affirmatively defend FTCA claims by stating that (1) the tribe or tribal organization has insurance, and (2) non-FTCA insurance should be \*126 the resource used. [FN76] As noted above, the only section of the Act which considers insurance is 25 U.S.C. 450f(c), requiring the Secretary to obtain insurance. Logically then, the only insurance which should be available for tort claims in a contracted program would be that obtained by the Secretary. [FN77] Absent this insurance, the FTCA becomes the sole mechanism to address these tort claims. [FN78]

FTCA exclusivity is supported by the regulations which implement the 1994 amendments. In particular, the regulations state:

Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?

Yes. Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA. [FN79]

To avoid duplicative coverage, tribes and tribal organizations would be well advised to ensure that current liability **policies** include a provision expressly excluding **FTCA**-eligible tort claims resulting from the operation of a contract, grant, or compact pursuant to the Act. Moreover, tribes and tribal organizations contracting under P.L. 93-638 should take care to see that none of the indirect funds provided to address "overhead" costs are used to buy tort liability coverage. Not only could such funds be more productively used elsewhere, but these steps

will also make it more difficult for the federal government's attorney to attempt to claim that a tribe or tribal organization may have insurance which would be a possible resource in FTCA claims. Given the Congressional direction for the Secretary to provide insurance and the use of the FTCA, [FN80] it is inappropriate for any United States Attorney to attempt to avoid federal responsibility for an FTCA claim involving a tribal department by claiming an affirmative defense of tribal insurance.

#### G. Fundamental Lack of Coordination

Coordination between the tribes and the United States is key for a successful tort defense. To assist in achieving this goal, federal regulations \*127 require that each tribe or tribal organization with a Self-Determination Act contract appoint an individual to help coordinate FTCA claims. [FN81] This individual assists by arranging interviews and obtaining information to be used in the defense of these claims. [FN82] However, there is no requirement that this coordinator have any legal background or training, nor does the federal government require the tribe's FTCA coordinator to have any understanding of the FTCA. [FN83] Coupled with the widely divergent situations of tribal governments, the unfamiliarity with the FTCA may result in an uneven coordination of claims by tribal FTCA coordinators.

Coordination failures result in frustration and costs that might have been avoided. It is helpful if a person knowledgeable about FTCA is appointed as the FTCA coordinator, both to ensure that appropriate information is compiled for the United States to defend the tort claims, as well as to protect the tribe in the event that a separate tribal court suit is brought. Similarly, positive working relationships among the BIA, IHS, and USAA can prevent frustration and save costs.

#### H. Need to Use Tribal Law in Determining Tort Claims

One of the complexities of FTCA is that it looks to the law of the place where the tort occurred to determine United States liability. [FN84] This section has been interpreted to require that the law of the jurisdiction where the incident occurred governs what acts constitute either a tort or a defense in actions brought against the United States. [FN85] This means that if a federal employee commits an act in New York then New York law defines the tort. The federal district court in each jurisdiction will apply that jurisdiction's tort law.

The question then is whether this "law of the place" analysis would apply to Indian tribes. Presently, there is no guiding case law from the United States Supreme Court. However, the Eighth Circuit has considered this issue and ruled against the use of tribal law. [FN86]

\*128 One of the more controversial developments in FTCA law, at least for United States Attorneys, is embodied in *Cheromiah v. United States*. [FN87] In that case, the federal district court for New Mexico determined that tribal law would be applied to determine the claim, including whether the New Mexico Medical Malpractice Cap would apply.

"[T]he law of the place" does not mean simply "the law of the state." Rather, it means just what it says, "the law of the place." Thus, in the District of Columbia, the law of the District is applied to FTCA claims, . . . in Puerto Rico, the law of Puerto Rico is applied, . . . in Guam, the law of Guam is applied, . . . in the U.S. Virgin Islands, the law of the Virgin Islands is applied, . . . and in the Canal Zone the law of the Canal Zone is applied . . . . None of these entities are states. Yet, they are the "political entities" in

whose jurisdiction the alleged tort occurred. Thus, theirs is the “law of the place” which controls the FTCA action. [FN88]

Nevertheless, as Lafromboise indicates, other federal district courts have chosen to apply state law rather than tribal law to FTCA claims. [FN89]

The application of tribal law in federal district courts is particularly appropriate when adjudicating tort claims arising from the application of tribal contract and employment preference in the operation of a contract or grant under the Act. Congress has specifically stated that tribal law, not federal or state law, will be used to resolve conflicts arising out of a self-determination contract. [FN90]

#### I. Lack of Clear and Consistent Guidelines on Covered Torts

One of the difficulties in processing claims under the FTCA is the lack of guidelines in predicting whether a claim will be recognized. The first determination of liability is generally made by agency personnel. [FN91] However, because IHS and BIA are different agencies with different regional offices and different legal staffs, there is a high probability that reviewers \*129 may not always view the same action the same way. [FN92] Consequently, it is possible that one agency might find clear liability for an injury while another agency might deny liability for the same or similar injury. This lack of uniform guidance exacerbates confusion concerning the elements designated by applicable local law to define what constitutes a tort.

#### J. Police and Law Enforcement Claims

Torts involving law enforcement claims in Indian Country raise particular concerns. A General Accounting Office review of the use of FTCA in P.L. 93-638 contracts found that for the period 1997-1999, 77% of FTCA claims filed with the Bureau of Indian Affairs resulted from law enforcement activities. [FN93] While these numbers alone would justify a closer examination of the FTCA and law enforcement, there are also other related complexities.

Law enforcement in Indian Country, whether by the BIA or by contract with tribes, is provided under authority granted in the Indian Law Enforcement Reform Act. [FN94] Specifically, Congress has charged BIA law enforcement with “the enforcement of Federal law and, with the consent of the Indian tribe, tribal law.” [FN95] While there are other federal law enforcement entities involved, the BIA Office of Law Enforcement Services (“BIA-OLES”) is particularly identified with this function. [FN96]

Historically, the term “federal law enforcement officer,” when applied to tribes, was important in the context of ensuring that criminal cases arising on reservations and investigated by tribal law enforcement would be prosecuted by the United States Attorneys. [FN97] The question of federal law enforcement arose in the context of charging defendants pursuant to 18 U.S.C. §§ 1111 and 1114. Where tribal law enforcement officers were also \*130 recognized as federal law enforcement officers, special provisions would enhance the charging and sentencing of a defendant. [FN98]

Perhaps the most important aspect arising from whether a tribal officer is also a federal law enforcement officer surrounds the question of FTCA coverage for Bivens-type actions. In *Bivens v. Six Unknown Federal Narcotics Agents*, the United States Supreme Court held that a plaintiff could recover for a violation of a constitutional right by federal employees acting under color of federal authority. [FN99] After *Bivens*, Congress attempt-

ted to clarify the United States' liability for constitutional torts by waiving sovereign immunity for claims arising from allegations of “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution,” if committed by an “investigative or law enforcement officer of the United States.” [FN100]

A tribal government might not have FTCA coverage for torts committed by law enforcement officers it employs. Recently, in *Locke v. U.S.*, a court denied FTCA coverage because a federal employee was held not to be a federal officer. Even if an employee is a federal officer, [FN101] the SLEC deputation agreement also attempts to artificially limit the liability of the federal government and the application of FTCA. [FN102] In Section 8(B) of the SLEC deputation agreement, the BIA forces tribes to agree that the tribal law enforcement officer will only have FTCA protections when enforcing Federal law. This excludes enforcement of tribal law and state law. [FN103] This then raises serious questions about FTCA coverage for tort claims arising from joint tribal-federal task forces; when an arrest results, but the United States Attorney declines to prosecute: will the tort still have occurred while the officer was enforcing federal law? [FN104]

**\*131** This situation is made even more confusing by jurisdictional questions. Consider the situation where a tribal law enforcement officer is patrolling a highway which includes both trust and non-trust (fee) lands. [FN105] If a non-Indian is intoxicated and driving on the highway, the tribal law enforcement officer may not always have jurisdiction to stop the person. If the non-Indian is on non-trust or fee land at the time of the stop, tribes would not have jurisdiction to make the arrest. [FN106] The tribal officer might be able to detain the person temporarily and deliver the individual into state or federal custody. [FN107] If a tribal SLEC deputation agreement has not been signed, the United States can deny coverage for the detention of the non-Indian by tribal police on non-trust land. [FN108] These jurisdictional and liability issues make Indian country law enforcement even more complicated. [FN109]

A tribe should carefully consider whether execution of the SLEC deputation agreement is advantageous. Tribes could be sacrificing FTCA coverage for torts arising in the enforcement of their own tribal laws to gain coverage only when a Bivens-type claim has been brought. [FN110] *Hopland Band of Pomo Indians v. Norton* shows one example of a creative mechanism to force the BIA into considering alternative approaches to the SLEC deputation agreement. [FN111] In that case, the Hopland Band of Pomo Indians (“Hopland”) requested SLEC deputation agreements for its police chief and two other officers. [FN112] At the time, the BIA was reviewing the SLEC process and had imposed a moratorium on issuing SLEC deputations, even though the BIA had all but approved the three commissions for the Hopland police officers. [FN113]

**\*132** Faced with this moratorium, Hopland attempted to contract federal law enforcement functions and the attendant SLEC deputation through the Indian Self-Determination Act. [FN114] Not too surprisingly, the Secretary declined. [FN115]

In reviewing the declination, the Court found the Secretary had wrongly determined federal law enforcement not to be subject to the Indian Self-Determination Act. [FN116] The Court ordered the Secretary to begin negotiations for a Self-Determination Act contract which included SLEC provisions with Hopland. [FN117]

Although the tenor of the case clearly indicates that the Court expected the BIA to execute a contract, the Court noted that a contract was not the only issue to be overcome:

Once the contract for law enforcement services is in place, if ever, the individual officers at issue can be assessed by the BIA on a case-by-case basis under the BIA's regulations (25 C.F.R. [§] 12.21) to determine whether they qualify for SLECs. If any are denied commissions, judicial review will be available

under the Administrative Procedure Act. [FN118]

While it may be cumbersome to go through the contract declination appeal process, avoiding separate deputation agreement puts tribes in a better position to escape the more limiting and arbitrary requirements of the current form SLEC deputation agreements.

## V. Conclusion

After nearly two decades of FTCA availability to tribes and tribal organization for tort claims arising from the operation of P.L. 93-638 programs, many problems remain unresolved. Consideration of tribal issues will alleviate some problems related to FTCA and P.L. 93-638. [FN119]

The idea behind the extension of the FTCA to tribes and tribal organizations to cover torts arising within the operation of a Self-Determination Act contract is easily understood. Tribal contractors taking on activities previously performed by the federal government should have the same protections as the federal government.

\*133 However, the use of the FTCA and its benefits have been complicated, principally in three areas: (1) the limitation of available resources, including funding and personnel; (2) a general failure to coordinate, with the result that FTCA may not actually be an exclusive remedy; and (3) the occasional failure of the United States to comport with federal law. While these failings do not necessarily mean that the extension of the FTCA in Indian Country is a failure, it does mean that the United States, tribes, and their attorneys, need to have a better understanding of how to use FTCA to their best advantages. Also, it is critical that plaintiff's attorneys practicing in Indian Country understand the application of FTCA to ensure effective representation of their injured clients.

Undoubtedly, education about these issues will help. It is important for tribal governments to understand the FTCA and its coverage, and tribal FTCA coordinators should be educated about FTCA's pitfalls and benefits. But this education must also include a fundamental respect and understanding that tribal governments are just that--governments, with the same kinds of responsibilities that all governments share. The FTCA, if implemented appropriately, can be a useful tool for a tribal government to carry out its responsibilities.

[FN1]. Thomas W. Christie works for the Office of Reservation Attorney, Confederated Tribes of the Colville Reservation, Nespelem, WA. Previously Mr. Christie was an Assistant Attorney General for the Navajo Nation Department of Justice. He graduated from the University of Montana, School of Law in 1989. The views contained in this document are those of the author and do not necessarily reflect the position of any of the author's clients, past or present. All rights are reserved by the author. Certain parts of this article have appeared previously in presentations made by the author at Navajo Nation Insurance Expositions and at the 19th Annual Indian Law CLE, held in Seattle, Washington, on May 4, 2007. This article would not have been possible without the many wonderful people the author has worked with and learned from, especially Arita Yazzie, Luke Macik, Britt Clapham, and the late David F. Shortey.

[FN1]. Barack Obama, Speech, Inaugural Address (Washington, DC, Jan. 20, 2009) (available at <http://www.npr.org/templates/story/story.php?storyId=99590481>).

[FN2]. The concept of a trust responsibility to tribes originated with *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In that case, Chief Justice Marshall likened the relationship between the United States and tribes to that of a guardian and ward. *Id.*

[FN3]. See e.g. *U.S. v. Navajo Nation*, 537 U.S. 488 (2003).

[FN4]. Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq. (2006).

[FN5]. Richard M. Nixon, Speech, Special Message on Indian Affairs, (Cong., July 8, 1970) (available at <http://www.epa.gov/tribalportal/pdf/president-nixon70.pdf>).

[FN6]. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as 25 U.S.C. §450). This Act is frequently referred to as “P.L. 93-638” or simply “638.” Contracts are usually, but not exclusively, for BIA and IHS programs, functions, services, and activities.

[FN7]. 25 U.S.C. § 450f(a)(1).

[FN8]. *Id.*

[FN9]. *Id.* at §450j(j).

[FN10]. *Id.* at § 450j-1.

[FN11]. *Id.*

[FN12]. In fact, the federal government routinely inserts provisions requiring liability insurance in contracts entered into under the Federal Acquisition Regulations and in competitive grants. See 48 C.F.R. § 28.301 (2009).

[FN13]. These costs are often included in the “administrative pool,” which helps form the basis for an “indirect cost rate.” See U.S. Gen. Acctg. Off., *Indian Self-Determination Act: Shortfalls in Contract Support Need to be Addressed* 25 (U.S. Gen. Acctg. Off. 1999). Although a full discussion of this topic is beyond the scope of the present work, it is noteworthy that federal agencies regularly underfund this critical area of contract operations. *Id.*

[FN14]. See Georges Dionne, *Handbook of Insurance* vol. 22, § 9.6 (Springer, 2000).

[FN15]. In 1987, the General Accounting Office reported that malpractice insurance costs had increased from \$2.5 billion in 1983 to \$4.7 billion in 1985. U.S. Gen. Acctg. Off., *Medical Malpractice: A Framework for Action* 2 (U.S. Gen. Acctg. Off. 1987).

[FN16]. U.S. Government Accountability Office, *Matter of: Debra Dreisbach* File: B-261141, <http://redbook.gao.gov/11/fl0050285.php> (November 9 1995). Rather than purchasing insurance, FTCA contemplates that the United States will be self-insuring. See 28 C.F.R. pt. 14.

[FN17]. See 28 U.S.C. § 2674.

[FN18]. Pub. L. No. 101-121, 103 Stat. 701 (1989); Pub. L. No. 101-512, 104 Stat. 1915 (1990).

[FN19]. Pub. L. 103-413 (1994).

[FN20]. See Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-446, 102 Stat. 1774 (1988); Pub. L. No. 100-472, 102 Stat. 2285 (1988); 103 Stat. 701; 104 Stat. 1915; Pub. L. No. 103-413, 108 Stat. 4250 (1994).

One of the best overall explanations of this development is found in Phyllis C. Borzi et al., *Assessment of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts attachment 1* (George Wash. U. Med. Ctr. 1998).

[FN21]. 25 U.S.C. § 450f(c).

[FN22]. 25 U.S.C. § 450f(c) (citations omitted).

[FN23]. *Indian Self-Determination and Education Assistance Act Amendments Final Rule*, 61 F.R. 32482, (Dept. Int. & Health & Human Servs. June 24, 1996) (issuing 25 C.F.R. pt. 900).

[FN24]. FTCA was enacted in 1946 and 1948. 60 Stat. 842 (1946); 62 Stat. 982 (1948). Prior to this, if the United States waived sovereign immunity, it would do so through particular pieces of legislation providing for specific compensation.

[FN25]. *Gibbons v. U.S.*, 75 U.S. 269 (1868).

[FN26]. A more modern example of this approach is the Radiation Exposure Compensation Act of 1990, 42 U.S.C. § 2210.

[FN27]. For tribal governments, one of the more recent, and critical cases considering sovereign immunity was *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). Although a discussion of sovereign immunity is beyond the scope of this paper, the concept of sovereign immunity is usually associated with the infallibility of the crown, and the nature of a monarch as a representative of God.

[FN28]. Legislative Reorganization Act, 60 Stat. 842.

[FN29]. 28 U.S.C. §§ 1346, 2674.

[FN30]. *Id.*

[FN31]. *Id.*

[FN32]. See e.g. Pub. L. No. 89-311, 79 Stat. 1154 (1965) (codified as amended at 38 U.S.C. § 7316); Medical Malpractice Immunity Act of 1976, Pub. L. No. 94-464, 90 Stat. 1985 (1976) (codified as amended at 10 U.S.C. §1089).

[FN33]. As a practical matter, an FTCA claim is initiated by the filing of “Form 95,” which must indicate the claimants, the alleged injury, the amount of the damage claimed and describe the circumstances surrounding the injury. Claims arising from a P.L. 93-638 contract with the Department of the Interior (non-medical torts) are to be filed with the Assistant Solicitor, Procurement and Patents, Officer of the Solicitor, the Department of the Interior, Room 6511, 1849 C Street NW, Washington, DC 20240. 25 C.F.R. § 900.208. For medically related claims, 25 C.F.R. § 900.201 provides that the completed form 95 should be sent to the Chief, PHS Claims Branch, Room 18-20, Parklawn Bldg, 5600 Fishers Lane, Rockville, MD 20857. As a practical matter, the individual Regional or Area Office and the particular tribe may have established an alternative contact point which may “speed up” claims handling.

[FN34]. 28 U.S.C. § 2679(a). In 1988, Congress enacted the Federal Employees Liability Reform and Tort Com-

pensation Act of 1988 (FELRTCA). *Id.* This clarified that FTCA was the sole remedy for wrongs committed by federal employees acting within their scope of work, regardless of whether that act was discretionary. *Id.*

[FN35]. See 25 C.F.R. §§ 900.190, 900.204. However, in addition to the exclusion of certain torts, some claims fall outside of FTCA when another compensation scheme is available. For example, courts have found that claims for injuries occurring under military authority should be decided under the Military Claims Act. *Lundeen v. Dept. Lab. & Indus.*, 469 P.2d 886 (Wash. 1970) (en banc). Usually when the claim fits within the Federal Employees Compensation Act (FECA), courts find relief under FECA, not FTCA. *Baker v. Barber*, 673 F. 2d 147 (6th Cir. 1982).

[FN36]. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

[FN37]. For example, the Court of Appeals for the Confederated Tribes of the Colville Reservation held an action under the FTCA provided the exclusive remedy in *Palmer v. Millard*. 3 CCAR 26 (1996).

[FN38]. 28 U.S.C. § 2401.

[FN39]. See 25 C.F.R. §§ 900.184-900.185.

[FN40]. 25 C.F.R. § 900.185.

[FN41]. See *id.* at § 900.186(a).

[FN42]. 28 U.S.C. §§ 2672, 2675.

[FN43]. 25 C.F.R. § 900.197 states:

Does FTCA cover employees of contractor who are paid by the contractor from funds other than those provided through the self-determination contract?

Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

Although this particular regulation relates to medical claims, there is no reason to believe that this analysis would apply only to medical claims. The regulations in 25 C.F.R. § 900.186 contain language supporting this interpretation.

[FN44]. See *Mentz v. U.S.*, which denied FTCA coverage where a tribal employee was off duty, not at his duty station, and involved in matters which had nothing to do with his employment duties. 359 F.Supp.2d 856 (N.D. Dist. 2005).

[FN45]. See 25 C.F.R. § 900.180 (clarifying that coverage follows the functions contracted in a Self-Determination Act contract).

[FN46]. 28 U.S.C. § 2674.

[FN47]. *Black's Law Dictionary* 1626 (Bryan A. Garner ed., 9th ed., West 2009).

[FN48]. FTCA provides two sets of exclusions, those provided in 28 U.S.C. § 2679(b)(2) and a litany of exceptions provided in 28 U.S.C. § 2680. This latter section contains 13 separate exceptions to FTCA; although all might be conceivably important, several have rather limited applicability (tort exclusions for activities arising

from: combat, a foreign country, Tennessee Valley Authority, Panama Canal Company, federal land banks, treasury monetary regulation, suits in admiralty, loss etc. of a postal matter, assessment/detention of goods for customs or taxes, and the Trading with the Enemy Act). 28 U.S.C. § 2680. Of greater importance for this discussion are the exceptions covering intentional torts. *Id.* at §2680(h). Congress has provided a law enforcement exception from the intentional tort exclusion, which also applies to tribal law enforcement, at least sometimes. See, *Bivens* discussion *infra* n. 100.

[FN49]. *Id.* at § 2674.

[FN50]. 25 C.F.R. § 900.186.

[FN51]. 25 C.F.R. § 900.189.

[FN52]. See *id.* at § 900.181.

[FN53]. 28 U.S.C. § 2679 (d)(1).

[FN54]. *Id.* at § 1346(b)(1); see e.g. *Smith v. Swarthout*, 491 N.W.2d 590, 592 (Mich. App. 1992); *Houston v. U.S. Postal Serv.*, 823 F.2d 896, 903 (5th Cir. 1987).

[FN55]. See e.g. U.S. Gen. Acctg. Off., *supra* n. 12 at 2; see also National Congress of American Indians, Testimony of the National Congress of American Indians on FY2003 Appropriations for the Indian Health Service (Subcommittee on Interior Appropriations, Apr. 15, 2002) (available at <http://www.ncai.org/ncai/advocacy/otherissue/docs/IHS03.pdf>); National Congress of American Indians, NCAI Testimony to the Senate Committee on Indian Affairs on the FY 2010 Budget (Mar. 10, 2009) (available at [http://indian.senate.gov/public/\\_files/TestimonyfromNCAI.PDF](http://indian.senate.gov/public/_files/TestimonyfromNCAI.PDF)); National Rural Health Association, American Indian and Alaska Native Health Issue Paper 2 (Nov. 2006) (available at <http://www.ruralhealthweb.org/index.cfm?objectid=3F9CB56A-1185-6B66-8843A2E479EC8794>).

[FN56]. See e.g. Indian Self-Determination Amendments of 1987, 102 Stat. 2285.

[FN57]. 25 U.S.C. § 450a.

[FN58]. 28 U.S.C. § 2672.

[FN59]. 28 C.F.R. §§14.3, 14.5.

[FN60]. 28 U.S.C. § 2672; 28 C.F.R. § 14.2.

[FN61]. U. S. Off. Mgt. & Budget, OMB Circular A-87 Revised P 1 (U.S. Off. Mgt. & Budget May 10, 2004). After passage of the Federal Financial Award Management Improvement Act of 1999, *Pub. L. No. 106-107*, A-87 was revised to be applicable to all recipients of federal funds. *Id.* (generally).

[FN62]. *Id.* at Attachment B, § 16. “[f]ines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with, Federal, State, local, or Indian tribal laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the Federal award or written instructions by the awarding agency authorizing in advance such payments.” *Id.*

[FN63]. This type of post-award dispute is governed by 25 C.F.R. §§ 900.215-900.230, the Contract Disputes

Act of 1978, [41 U.S.C. §§ 601 et seq.](#); the Equal Access to Justice Act, [5 U.S.C. § 504](#) and [28 U.S.C. § 2412](#); and the Rules and Procedures of the Interior Board of Contract Appeals, [43 C.F.R. § 4](#).

[FN64]. Many tribal governments have waived sovereign immunity and allow themselves to be sued in tribal court. E.g. Navajo Sovereign Immunity Act, [1 Navajo Nation Code §§ 554 et seq.](#) (2007); Colville Tribal Civil Rights Act, Colville Tribal Law & Order Code §§ 1-5-1 et seq. (2009). These waivers of sovereign immunity exist independent of any federal laws.

[FN65]. Thus for example, *Covington v. Quirk* existed simultaneously in Colville Tribal Court (CV-OC-2005-25443) and in the United States District Court, Eastern District of Washington (CV-05-0378-LRS).

[FN66]. This would be difficult enough if only the civil side were involved for both the tribe and the federal government. It becomes more complicated if the tribe faces a civil tort claim arising from a law enforcement action with its attendant prosecution. As a policy matter, the prosecution will want first cut at the case to ensure a conviction, even if this may tend to undercut a civil defense.

[FN67]. See *Stago v. Wide Ruins Community Sch., Inc.*, No. SC-CV-63-99 at 11 (Sup. Ct Navajo Nation 2002).

[FN68]. [25 C.F.R. § 900.204](#).

[FN69]. [28 U.S.C. § 2679\(d\)\(2\)](#) provides specifically for removal from state court to federal court. However, there is no specific similar authorization for removal from tribal court. The United States has identified this omission as a barrier to appearing and moving the tribal court for a dismissal based on the federal court having exclusive jurisdiction over FTCA claims. Ethan M. Posner, Dep. Assoc. Atty. Gen., Statement, Federal Tort Claims Act Cases in Indian Country (Committee on Indian Affairs U.S. Senate July 12, 2000) (available at <http://www.justice.gov/archive/aag/testimony/2000/posnerftcatestimony.htm>).

[FN70]. For example, *Hickman v. Taylor*, [329 U.S. 495](#) (1947) and *Fed. R. Civ. P. 26* recognize the attorney work product rule.

[FN71]. See *Dept. Int. v. Klamath Water Users Protective Assn.*, [532 U.S. 1](#) (2001).

[FN72]. *Id.*

[FN73]. [25 C.F.R. § 900.186](#).

[FN74]. See Model R. Prof. Conduct, 1.6, 1.7, 1.8 (ABA 2004).

[FN75]. For example, in *Nevada v. U.S.*, the U.S. Supreme Court determined that the United States does not owe tribes the same fiduciary standard expected in the private sector when representing tribal interests in litigation. [463 U.S. 110](#), [128](#) (1983).

[FN76]. See U.S. Gen. Acctg. Off., Federal Tort Claims Act, Claims History and Issues Affecting Coverage for Tribal Self-Determination Contracts 10 (U.S. Gen. Acctg. Off. 2000).

[FN77]. *Id.*

[FN78]. [25 U.S.C. § 450f\(c\)\(1\)](#) .

[FN79]. 25 C.F.R. § 900.204. Section 900.183 refers to assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless these claims are authorized under 28 U.S.C. 2680(h). *Id.* at § 900.183; 28 U.S.C. § 2680. The torts listed are those generally referred to as “civil rights” or “constitutional” torts. See 28 U.S.C. § 2680. Section 2680(h) addresses the aftermath of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* at § 2680(h).

[FN80]. 25 U.S.C. § 450f(c)(1) .

[FN81]. 25 C.F.R. § 900.188.

[FN82]. *Id.*

[FN83]. The Federal Regulations merely require the designation of an FTCA liaison, without any statement of qualification, background or training. *Id.*

[FN84]. 28 U.S.C. § 1346(b)(1).

[FN85]. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994); see also *Rayonier, Inc. v. U.S.*, 352 U.S. 315, 319 (1957).

[FN86]. *Lafromboise v. Leavitt*, 439 F.3d 792 (8th Cir. 2006). The Lafromboise Court determined that state law, not tribal law should apply for three reasons: (1) because the ability to use either tribal or state law could cause “tension” in the statute, as the statute contemplated only one applicable law; (2) other cases concerning torts occurring in a federal enclave (e.g., a national park) looked to the territorial or political boundaries, as opposed to jurisdiction; and (3) the Court believed it was unlikely that Congress had intended the United States' action to be judged under the laws of 550 tribes. *Id.* at 794. Interestingly, Congress did specifically provide for the option of tribal court consideration of Self-Determination Act contract disputes. 25 U.S.C. § 450l(c)(14)(ii).

[FN87]. *Cheromiah v. U.S.*, 55 F. Supp. 2d 1295 (N.M. Dist. 1999).

[FN88]. *Id.* at 1302 (citations omitted).

[FN89]. See *Lafromboise*, 439 F.3d 792.

[FN90]. 25 U.S.C. § 450e(c). It may be helpful to reflect that fundamentally all common law civil actions are either a tort or a contract claim; while statutory schemes may be imposed on top of these claims, the analysis used, the defenses available and the very actions themselves arise from the basic distinction between tort and contract. Under any definition of sovereignty, a tribal government possesses the authority to determine whether a particular wrong is a tort. Under the simple, straight forward language of the FTCA, and as has been recognized in a least one federal district court, tribal law should govern the determination of what constitutes a tort in that tribal jurisdiction. *Cheromiah*, 55 F. Supp. 2d 1295.

[FN91]. 28 C.F.R. § 14.2(b)(1).

[FN92]. Unless the proposed compromise of a claim exceeds \$5,000.00, no agency legal review is required. 28 C.F.R. § 14.5.

[FN93]. Barry T. Hill, *Federal Tort Claims Act Claims History and Issues Affecting Coverage for Tribal Self-*

Determination Contracts: Statement of Barry T. Hill 6 (U. S. Gen. Acctg. Off. 2000).

[FN94]. [25 U.S.C. §§ 2801 et seq.](#) There may be other possible sources of authority for law enforcement in Indian Country, including treaty provisions. However, the Indian Law Enforcement Reform Act is arguably the most comprehensive and direct statement of such authority.

[FN95]. [25 U.S.C. § 2802\(e\)\(1\)](#).

[FN96]. [25 U.S.C. § 2802](#). Other entities involved in on-reservation law enforcement include the FBI. See [28 U.S.C. § 533 et seq.](#) and the United States Marshall's Service see [28 U.S.C. § 566](#).

[FN97]. See [Hopland Band of Pomo Indians v. Norton](#), [324 F.Supp.2d 1067, 1072-1074 \(N.D. Cal. 2004\)](#). This case also contains an excellent description of the BIA Special Law Enforcement Commissioning process, as well as the odd history of the commission process itself (for example, even though the BIA required commissions, it imposed a moratorium on issuing them). *Id.* at 1069. While the Court in this case took at face value the BIA contention that the commission is required, it notes that the commission agreement is subject to Self-Determination Act procedures. *Id.* at 1077.

[FN98]. See e.g. [U.S. v. Oakie](#), [12 F.3d 1436 \(8th Cir. 1993\)](#); [U.S. v. Bettelyoun](#), [16 F.3d 850 \(8th Cir. 1994\)](#).

[FN99]. [403 U.S. 388, 397 \(1971\)](#).

[FN100]. [28 U.S.C. § 2680\(h\)](#).

[FN101]. See e.g. [Locke v. U.S.](#), [215 F. Supp. 2d 1033 \(D.S.D. 2002\)](#). One of the more difficult conceptual aspects to address in this situation is that the SLEC is given to individual officers who meet appropriate training standards, while the deputation agreement itself is between the tribe and the BIA-OLES. The individual officers are not a party to this contract. It seems odd that the determination of whether an individual officer is a federal law enforcement officer hinges first on whether there is a tribal deputation agreement and not on the officer's training and actions. Of course, the only basis BIA-OLES has for forcing tribes to sign the deputation agreement (which itself is inconsistent with [P.L. 93-638](#)) is [25 U.S.C. § 2804](#).

[FN102]. See *infra* n. 104.

[FN103]. [Off. of Law Enforcement Servs., Bureau of Indian Affairs, Tribal Law Enforcement Deputation Agreement § 8\(B\)](#).

[FN104]. Thus, the Federal Government has declined FTCA coverage for Bivens-type claims when the officer was enforcing tribal law. [LaVallie v. U.S.](#), [396 F. Supp. 2d 1082 \(D.N.D. 2005\)](#). Again, it should be recalled that [25 U.S.C. § 2802\(c\)\(1\)](#) (2008) specifically allows BIA law enforcement to enforce tribal law with the consent of the tribe. The question must be asked, would the federal government also deny Bivens FTCA coverage to a BIA law enforcement officer who was enforcing tribal law pursuant to [25 U.S.C. § 2802\(c\)\(1\)](#)? Title 25 provides that “when requested, [BIA law enforcement may] assist (with or without reimbursement) 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\(8\)](#). While this would seem to be all the authority needed to assist state or county law enforcement, the BIA has stated that such assistance is only on a case-by-case basis, requiring a request for each case.

[FN105]. Many tribes have this checkerboarded trust and nontrust land on and near the reservation.

[FN106]. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[FN107]. *Ortiz-Barraza v. U.S.*, 512 F.2d 1176, 1180 (9th Cir. 1975); *Wash. v. Schmuck*, 850 P.2d 1332 (Wash. 1993). This assumes that the tribal law enforcement officer is not already cross-deputized by the state or county independently of BIA-OLES issues.

[FN108]. That is, the United States could deny that the tribal officer was enforcing federal law applicable to non-Indians, and under *Oliphant*, the tribe does not have criminal jurisdiction over non-Indians. See *Oliphant*, 435 U.S. 191.

[FN109]. An injured plaintiff would be advised to include both *Bivens* and ordinary negligence claims to avoid a complete denial of the claims if the particular tribal officer is not covered by the SLEC deputation agreement.

[FN110]. *Id.*

[FN111]. 324 F. Supp. 2d 1067.

[FN112]. *Id.* at 1069.

[FN113]. *Id.*

[FN114]. *Id.* at 1069.

[FN115]. *Id.* at 1070.

[FN116]. *Id.* at 1077.

[FN117]. *Hopland*, 324 F. Supp. 2d at 1077.

[FN118]. *Id.*

[FN119]. Some of these problems have been subjected to extensive review. In 1990 and again in 1994, the federal government, at the direction of Congress, commissioned studies of liability concerns in the tribal operation of programs under the Act. Although work occurred, the final evaluations were never released. More recently, the United States General Accounting Office released *Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts*, a report developed without tribal coordination and consultation. U.S. Gen. Acctg. Off., *supra* n. 72. However, the report suffers from a lack of tribal input and participation.

71 Mont. L. Rev. 115

END OF DOCUMENT