The Future of Cross-commissioning: What Every Tribal, State and County Lawyer Should Consider post Loya v. Gutierrez

November 5, 2015

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Presenter Biographies

Levon Henry is a member of the State Bar of New Mexico and the Navajo Nation Bar Association. He manages the Office of Legislative Council, which is independent of the tribe's Department of Justice, and provides legal advice and representation to the council, its standing committees and programs. Henry has a J.D. from the University of New Mexico School of Law and a B.A. from Calvin College, Grand Rapids, Mich.

Andrew Johnson is an attorney in the litigation bureau of the New Mexico Association of Counties specializing in employment and civil rights claims. Prior to joining NMAC, he was in private practice focusing on insurance defense. Johnson graduated from the Sandra Day O'Connor College of Law at Arizona State University.

Michael Dickman received his J.D. degree from Georgetown University Law Center in 1977, having deferred his admission for a year to work at the Watergate Special Prosecution Force under Archibald Cox and Lean Jaworski. After graduation from law school, Dickman spent five years as a public defender in Santa Fe and then worked at the New Mexico Attorney General's office for a decade where he was director of the Civil Litigation Division. He opened his private practice in 1993 and has focused primarily on the defense of New Mexico state and local governments, in civil rights and tort cases.

Carl Bryant Rogers is a specialist in Federal Indian Law through the New Mexico Board of Legal Specialization. He graduated *cum laude* from Harvard Law School and focuses his practice on tribal representation and litigation in disputes involving jurisdiction and tribal rights.

The Future of Cross-commissioning

Michael Dickman

November 5, 2015

41-4-12 . Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

History: 1953 Comp., § 5-14-12, enacted by Laws 1976, ch. 58, § 12; 1977, ch. 386, § 9.

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 through 28-22-5 NMSA 1978] and by Sections 41-4-5 through **41-4-12** NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 through 41-13-3 NMSA 1978].

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorney fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort that was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

I. A jointly operated public school, community center or athletic facility that is used or

maintained pursuant to a joint powers agreement shall be deemed to be used or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978.

J. For purposes of this section, a "jointly operated public school, community center or athletic facility" includes a school, school yard, school ground, school building, gymnasium, athletic field, building, community center or sports complex that is owned or leased by a governmental entity and operated or used jointly or in conjunction with another governmental entity for operations, events or programs that include sports or athletic events or activities, child-care or youth programs, after-school or before-school activities or summer or vacation programs at the facility.

K. A fire station that is used for community activities pursuant to a joint powers agreement between the fire department or volunteer fire department and another governmental entity shall be deemed to be operated or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978. As used in this subsection, "community activities" means operations, events or programs that include sports or athletic events or activities, child care or youth programs, after-school or before-school activities, summer or vacation programs, health or education programs and activities or community events.

History: 1953 Comp., § 5-14-4, enacted by Laws 1976, ch. 58, § 4; 1977, ch. 386, § 3; 1978, ch. 166, § 1; 1981, ch. 267, § 1; 1982, ch. 8, § 1; 1989, ch. 369, § 1; 1996, ch. 68, § 1; 1999, ch. 268, § 1; 2000 (2nd S.S.), ch. 17, § 6; 2001, ch. 211, § 1.

41-4-3. Definitions.

As used in the Tort Claims Act:

A. "board" means the risk management advisory board;

B. "governmental entity" means the state or any local public body as defined in Subsections C and H of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978;

D. "law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor;

E. "maintenance" does not include:

(1) conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner; or

(2) an activity or event relating to a public building or public housing project that was not foreseeable;

F. "public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10), (14) and (17) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act [Chapter 21, Article 21A NMSA 1978], the Small Business Investment Act [Chapter 58, Article 29 NMSA 1978] or the Mortgage Finance Authority Act [Chapter 58, Article 18 NMSA 1978] or a licensed health care provider, who has no medical liability insurance, providing voluntary services as defined in Paragraph (16) of this subsection and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or department of health, but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act [Chapter 33, Article 9 NMSA 1978];

(6) members of state or local selection panels established pursuant to the Juvenile Community Corrections Act [Chapter 33, Article 9A NMSA 1978];

(7) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(8) members of the board of directors of the New Mexico medical insurance pool;

(9) individuals who are members of medical review boards, committees or panels established by the educational retirement board or the retirement board of the public employees retirement association;

(10) licensed medical, psychological or dental arts practitioners providing services to the

children, youth and families department pursuant to contract;

(11) members of the board of directors of the New Mexico educational assistance foundation;

(12) members of the board of directors of the New Mexico student loan guarantee corporation;

(13) members of the New Mexico mortgage finance authority;

(14) volunteers, employees and board members of court-appointed special advocate programs;

(15) members of the board of directors of the small business investment corporation;

(16) health care providers licensed in New Mexico who render voluntary health care services without compensation in accordance with rules promulgated by the secretary of health. The rules shall include requirements for the types of locations at which the services are rendered, the allowed scope of practice and measures to ensure quality of care;

(17) an individual while participating in the state's adaptive driving program and only while using a special-use state vehicle for evaluation and training purposes in that program;

(18) the staff and members of the board of directors of the New Mexico health insurance exchange established pursuant to the New Mexico Health Insurance Exchange Act [59A-23F-1 through 59A-23F-8 NMSA 1978]; and

(19) members of the insurance nominating committee;

G. "scope of duty" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance; and

H. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

History: 1953 Comp., § 5-14-3, enacted by Laws 1976, ch. 58, § 3; 1977, ch. 386, § 2; 1983, ch. 123, § 2; 1983, ch. 242, § 1; 1985, ch. 76, § 1; 1988, ch. 31, § 1; 1991, ch. 29, § 1; 1991, ch. 205, § 1; 1993, ch. 195, § 1; 1993, ch. 203, § 1; 1994, ch. 123, § 1; 1995, ch. 173, § 2; 2003, ch. 399, § 3; 2007, ch. 104, § 1; 2009, ch. 8, § 2; 2009, ch. 129, § 2; 2009, ch. 249, § 2; 2013, ch. 54, § 11; 2015, ch. 11, § 2.

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

JOSE LUIS LOYA,

Plaintiff,

vs.

No. D-101-CV-2010-3854

GLEN GUTIERREZ,
Commissioned Officer of Santa Fe County,

Defendant/Third Party Plaintiff,

vs.

COUNTY OF SANTA FE,

Third Party Defendant.

JUDGMENT IN FAVOR OF COUNTY OF SANTA FE

THIS MATTER having come before the Court upon a Motion for Declaratory Judgment and Summary Judgment filed on October 20, 2011 by Third-Party Defendant County of Santa Fe ("County"), and a Motion for Summary Judgment filed on November 10, 2011 by Defendant and Third-Party Plaintiff Glen Gutierrez ("Officer Gutierrez"), and the Court having reviewed the motions, responses, replies, affidavits and other exhibits filed by the parties, and the Court having conducted a hearing on July 24, 2012, at which counsel for the County and Officer Gutierrez appeared and were heard, and the Court being fully advised in the premises,

THE COURT FINDS AND CONCLUDES that there is no genuine dispute as to any material fact and that summary judgment is appropriate on the issue raised by the two motions, to wit: whether Santa Fe County has a duty and obligation to defend and/or potentially indemnify Officer Gutierrez, who, according to the undisputed evidence, was at all material times a law enforcement officer employed by the Pueblo of Pojoaque Tribal Police Department and commissioned as a Deputy Sheriff

by the Santa Fe County Sheriff, based on allegedly unconstitutional and/or tortious acts allegedly committed by Officer Gutierrez as to a non-Indian Plaintiff who, at the time of the alleged acts, was traveling on a state highway within the exterior boundaries of Pojoaque Pueblo, and where the officer's jurisdiction to act was based on the officer's commission as a Deputy Sheriff.

THE COURT FURTHER FINDS AND CONCLUDES that the foregoing issue is governed by the New Mexico Tort Claims Act and that under the defense and indemnification provisions of the Tort Claims Act, Officer Gutierrez at the material times was not a "public employee" and was not a "law enforcement officer" of a "governmental entity" as those terms are defined by the Tort Claims Act, because the officer was not a full-time or part-time salaried officer employed by the County, but rather, was a police officer hired, trained, supervised, subject to discipline and employed by the Pueblo of Pojoaque, which constitutes a sovereign Indian tribe that is not a "governmental entity" as defined by the Tort Claims Act, and that the County therefore does not have a duty to defend and/or indemnify Officer Gutierrez.

THE COURT FURTHER FINDS AND CONCLUDES that a letter from the Sheriff to the Chief of the Pojoaque Pueblo Tribal Police Department (Exhibit A in the summary judgment record) is consistent with the pertinent provisions of the Tort Claims Act and the Court's findings of fact and conclusions of law set forth herein, and that the applicable case law also supports the Court's ruling.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the County's motion should be and hereby is granted, and that Officer Gutierrez's motion should be and hereby is denied, and that declaratory judgment and summary judgment hereby are entered in favor of the County on the issues raised by the Third Party Complaint and Counterclaim, and that the Third Party Complaint should be and hereby is dismissed with prejudice. The parties shall bear their own costs and fees.

THE COURT FINDS that because this judgment adjudicates all of the claims made by the Third-Party Plaintiff Glen Gutierrez against Third-Party Defendant County of Santa Fe, it constitutes a final judgment under Rule 1-054(B)(2) NMRA as to those parties as to all of the issues raised in the Third Party Complaint and Counterclaim.

BARBARA J. VIGIL
District Court Judge

Submitted By:

/s/ Michael Dickman

MICHAEL DICKMAN
Attorney for Third-Party Defendant
County of Santa Fe

Approved as to Form By:

/s/ Ray A. Padilla

RAY A. PADILLA
Attorney for Defendant/
Third Party Plaintiff
Glen Gutierrez

Noted By:

/s/ Joseph P. Kennedy

JOSEPH P. KENNEDY
Attorney for Plaintiff

Loya v. Gutierrez

Court of Appeals of New Mexico

November 13, 2013, Filed

Docket No. 32,405

Opinion by: LINDA M. VANZI

Opinion

[657] VANZI, Judge.**

[*1] In this case, the issue before us is whether the County of Santa Fe (the County) has a duty to defend or indemnify a tribal police officer who, while exercising his authority as a commissioned County sheriff's deputy, unlawfully arrested a non-Indian person within the exterior boundaries of the Pueblo of Pojoaque (the Pueblo). The district court concluded that the County did not have a duty to defend and/or indemnify Officer Glen Gutierrez because he was not a "public employee" or "law enforcement officer" of a "governmental entity" as those terms are defined by the New Mexico Tort Claims Act (the TCA), *NMSA 1978, §§ 41-4-1 to -30* (1976, as amended through 2013). *See § 41-4-3*. We agree with the district court and affirm.

BACKGROUND

[*2] The parties do not dispute the facts. The essential allegations in the underlying complaint are that Appellant Officer **[***2]** Gutierrez, while on official duty for the Pueblo police department, made a traffic stop of Plaintiff Jose Luis Loya's vehicle. The stop occurred on U.S. Highway 84/285, a state-maintained road within the exterior boundaries of the Pueblo. At the time of the stop, Officer Gutierrez was dressed in his full tribal police uniform, displaying his tribal badge of office, and driving his tribally issued police vehicle. In addition to acting under tribal law, Officer Gutierrez was also on duty as a duly commissioned Santa Fe County Deputy Sheriff, which gave him the authority to arrest, charge, and jail non-Indians, such as Loya, for violations of New Mexico state law.

[*3] Ultimately, Officer Gutierrez, along with two other tribal officers, arrested Loya for reckless driving under *NMSA 1978, Section 66-8-113* (1987) and took him to the tribal police department for processing. Loya was subsequently transported to the Santa Fe County jail and later prosecuted for **[**658]** the offense in the Santa Fe County Magistrate Court.

[*4] As a result of the incident, Loya filed a complaint against Officer Gutierrez and brought claims against him under *42 U.S.C. § 1983 (1996)* for false arrest, malicious prosecution, and use **[***3]** of excessive force. In his answer to Loya's complaint, Officer Gutierrez filed a third-party declaratory judgment action against the County, stating that the County was required to defend and indemnify him in the matter. On cross-motions for summary judgment, and after hearing argument from the parties, the district court ruled that the County did not have a duty to defend and/or indemnify Officer Gutierrez. The court based its decision on the grounds that the issue was governed by the TCA and that to receive the benefit of the defense and indemnification provisions of the TCA, Officer Gutierrez had to be a "public employee" or "law

enforcement officer" of a "governmental entity" as those terms are defined. The district court found that Officer Gutierrez was not a full-time or part-time salaried officer employed by the County, but rather, he was a police officer hired, trained, supervised, subject to discipline, and employed by the Pueblo. Further, the court found that the Pueblo is a sovereign Indian tribe that is not a "governmental entity" as defined by the TCA. Therefore, the district court ruled that the County had no duty to defend and/or indemnify Officer Gutierrez. This appeal **[***4]** timely followed.

DISCUSSION

Standard of Review

[*5] "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582*. We review the grant of summary judgment under a de novo standard of review. *Id.*; *City of Albuquerque v. BPLW Architects & Eng'rs, Inc., 2009-NMCA-081, ¶ 7, 146 N.M. 717, 213 P.3d 1146* (holding that "if no material issues of fact are in dispute and an appeal presents only a question of law, we apply de novo review").

[*6] In addition, we review the district court's interpretation of the TCA as a question of law subject to de novo review. *Am. Fed'n of State, Cnty. & Mun. Emps., Council 18 v. City of Albuquerque, 2013-NMCA-012, ¶ 6, 293 P.3d 943, cert. quashed, 2013-NMCERT-008, 309 P.3d 101*. "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135*. "In discerning the Legislature's intent, we are aided by classic canons of statutory construction, and we look first to the plain language **[***5]** of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* (alteration, internal quotation marks, and citation omitted). "We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236*.

The New Mexico Tort Claims Act

[*7] The TCA is the primary vehicle by which the state may be held liable for injuries caused by the negligence of its employees. The TCA entitles public employees to a legal defense provided by his or her employer or the state when a plaintiff alleges that the employee committed certain enumerated torts for which immunity has been waived, or if the employee violated the plaintiff's constitutional rights. *See § 41-4-4(B)*. Similarly, a state employer must pay a judgment or a settlement entered against a public employee if the employee acted within the scope of his duties. *See § 41-4-4(D)*.

[*8] In this case, Loya's lawsuit against **[***6]** Officer Gutierrez alleges only violations of federally protected constitutional rights under *42 U.S.C. § 1983*. *See § 41-4-4(A)* (noting the state's immunity from tort liability and its exceptions). The parties agree that the question of whether the County must defend and/or indemnify Officer Gutierrez is governed by the TCA.

Section 41-4-4(B) of the TCA requires that, unless an insurance **[**659]** carrier provides a defense, governmental entities shall provide a public employee a defense for:

> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States . . . when alleged to have been committed by the public employee while acting within the scope of his duty.

Likewise, the governmental entity must provide indemnification to a public employee who has been sued for damages. Section 41-4-4(D) provides:

> A governmental entity shall pay any settlement or any final judgment entered against a public employee for:
>
> . . .
>
> (2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States . . . that occurred while the public employee was acting within the scope of his duty.

[*9] [*7]** At issue is whether Officer Gutierrez, acting in his capacity as a commissioned County Sheriff's Deputy, is a "public employee" of a "governmental entity" entitled to the defense and indemnification provisions above. *See* § 41-4-4(B), (D). The TCA defines a "public employee," in pertinent part, as "an officer, employee or servant of a governmental entity, excluding independent contractors[.]" Section 41-4-3(F). This definition goes on to include fourteen categories of persons who are considered "public employees," including, as we discuss further below, "law enforcement officers" and those working "on behalf or in service of a governmental entity in any official capacity[.]" *See* § 41-4-3(F)(2), (3). A "governmental entity" means the State of New Mexico and its agencies, or any local public body and its agencies. *See* § 41-4-3(B), (C), (H). It does not include sovereign Indian pueblos and tribes.

[*10] Here, Officer Gutierrez seeks the benefit of a defense and/or indemnification for claims involving the conduct of law enforcement officers. Officer Gutierrez concedes that he is not a "law enforcement officer" within the meaning of the TCA; however, he argues that he fits within another of the **[***8]** enumerated definitions of "public employee." For the reasons that follow, while we agree that Officer Gutierrez is not a "law enforcement officer" within the meaning and definitions of the TCA, we disagree that he meets any alternate definition of a "public employee."

Officer Gutierrez Is Not a "Law Enforcement Officer" of a "Governmental Entity"

[*11] As we have noted, the County's obligation to provide Officer Gutierrez a defense and/or indemnification arises only if he is a "public employee" of a "governmental entity."[1] And the TCA

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[1] Under a similar factual scenario, this Court has previously held that the TCA's definition of "public employee" under Section 41-4-3(F) and "governmental entity" under Section 41-4-3(B) did not include a cross-deputized Navajo police officer who was sued after issuing a Navajo speeding ticket to a non-Indian on a state right of way through the Navajo Nation. Williams v. Bd. of Cnty. Comm'rs of San Juan Cnty., 1998-NMCA-090, ¶¶ 2, 26, 125 N.M. 445, 963 P.2d 522. Although *Williams* **[***10]** is arguably dispositive, it did not address any of the enumerated definitions raised by Officer Gutierrez on appeal. We therefore proceed to consider those arguments.

defines "public employee" to include law enforcement officers. *Section 41-4-3(F)(2)*. In relevant part, *Section 41-4-3(D)* more precisely defines a "law enforcement officer" as

> a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes[.]

Our courts have construed this definition strictly. *See, e.g., Silva v. State, 1987-NMSC-107, ¶ 17, 106 N.M. 472, 745 P.2d 380* (holding that the secretary of corrections is not a "law enforcement **[***9]** officer" under the TCA); *Coyazo v. State, 1995-NMCA-056, ¶¶ 14-19, 120 N.M. 47, 897 P.2d 234* (concluding that district attorneys and staff were not "law enforcement officers"); *Dunn v. State ex rel. Taxation & Revenue Dep't, 1993-NMCA-059, ¶ 11, 116 N.M. 1, 859 P.2d 469* (holding that the director of the New Mexico **[**660]** Motor Vehicle Department, who has statutory authority to make arrests, was not a law enforcement officer because the "vast majority of [his] time and effort are involved in administrative matters" (internal quotation marks omitted)).

[*12] Here, Officer Gutierrez agrees that he does not meet the definition of "law enforcement officer" under *Section 41-4-3(D)*. We nevertheless address this provision of the TCA because our analysis settles the present dispute with regard to the County's duty to defend and/or indemnify Officer Gutierrez. We start with the facts.

[*13] Officer Gutierrez was on duty as a full-time Pueblo tribal law enforcement officer, acting in his capacity as a commissioned Deputy Sheriff for the County, when he made the traffic stop of Loya's vehicle in September 2009. At the time of the stop, Officer Gutierrez was dressed in his tribal police uniform, including wearing his tribal badge, and driving his tribally issued police vehicle. Officer Gutierrez, assisted by two other tribal officers, ultimately arrested Loya for the misdemeanor crime of reckless driving under *Section 66-8-113*. Loya was taken to the tribal police department for processing and then transported to the Santa Fe County jail by another tribal officer.

[*14] As a result of the stop and **[***11]** arrest, Loya brought a complaint under *42 U.S.C. § 1983* against Officer Gutierrez, alleging that Officer Gutierrez "violently attacked [him]" during the incident leading to the arrest and that Officer Gutierrez pinned Loya by his neck to his vehicle and then kicked him, causing Loya to have neck spasms and injuries. The complaint also asserted that Officer Gutierrez was a law enforcement and commissioned officer for the County and that he was "acting under color of state law, in patrolling a state highway and enforcing state criminal statutes."

[*15] The above facts establish that Officer Gutierrez was performing traditional law enforcement duties when he stopped and arrested Loya. Moreover, the claims against Officer Gutierrez—unreasonable seizure and deprivation of liberty, prosecution without probable cause, and excessive force—can only be understood to come within Section 41-4-12's waiver of immunity for "law enforcement officers." *Section 41-4-12* provides:

> The immunity granted pursuant to Subsection A of Section 41-4-4 . . . does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, **[***12]** malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

[*16] Although Officer Gutierrez was exercising his authority as a commissioned County Sheriff's Deputy when he stopped and arrested Loya, the district court found—and Officer Gutierrez does not dispute—that he does not come within the TCA's definition of a "law enforcement officer" as that term is defined in *Section 41-4-3(D)*. The district court found that Officer Gutierrez was neither a full-time nor part-time salaried officer employed by the County. The court further found that Officer Gutierrez was hired, trained, supervised, and subject to discipline by the Pueblo. In addition, Officer Gutierrez does not challenge the district court's finding that the Pueblo is a sovereign Indian tribe that is not a "governmental entity" as defined by the TCA. The district court therefore concluded that Officer Gutierrez was not a "law enforcement officer" within the plain language **[***13]** of the definition in the TCA. Accordingly, the TCA's employee defense and indemnification provisions were not available to him on this basis. Based on the undisputed facts, we affirm the district court's ruling in this regard.

Officer Gutierrez Is Not a "Public Employee" Under Section 41-4-3F(3)

[*17] As we have discussed above, Officer Gutierrez freely admits that he does not meet Section 41-4-3(D)'s definition of "law enforcement officer," yet he seeks the benefit of a defense and/or indemnification by contending that he instead fits within another **[**661]** definition of a public employee under the TCA. In particular, he argues that *Section 41-4-3(F)(3)* is applicable to any person that has "been authorized to exercise and who [does] exercise state law enforcement powers" regardless of whether he receives compensation. We disagree.

[*18] *Section 41-4-3(F)(3)* includes as "public employees" those persons "acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation[.]" In construing a statute, we seek to achieve the intent of the Legislature. *Grine v. Peabody Natural Res., 2006-NMSC-031, ¶ 17, 140 N.M. 30, 139 P.3d 190*. "The first guiding principle **[***14]** in statutory construction dictates that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *United Rentals Nw., Inc. v. Yearout Mech. Inc., 2010-NMSC-030, ¶ 9, 148 N.M. 426, 237 P.3d 728* (alteration, internal quotation marks, and citation omitted). We do not read a statute in such a way that "would lead to injustice, absurdity, or contradiction." *Otero v. State, 1987-NMCA-054, ¶ 11, 105 N.M. 731, 737 P.2d 90*.

[*19] Accepting Officer Gutierrez's interpretation of *Section 41-4-3(F)(3)* would require us to expand the definition of "public employee" to include law enforcement officers acting within the scope of their police duties but who are not salaried employees of a governmental entity subject to the TCA. *See § 41-4-3(D)*. In essence, Officer Gutierrez is asking this Court to create two

classes of law enforcement officers within the TCA's definitional section of "public employee"—one that is salaried and works for a governmental entity and one that is not. We decline to do so for several reasons. [***15] First, such an interpretation would go beyond the plain language of Section 41-4-3(F)(3). That section makes no mention of providing an alternate or different definition of "public employee" to include those persons exercising state law enforcement powers but who are not salaried employees of a "governmental entity." *See id.* Second, reading the statute to say that a police officer who fails to meet the definition of a "law enforcement officer" under Section 41-4-3(D) can then allege that his same conduct falls within another definition in order to trigger the duty to defend and indemnify is an illogical distinction that makes no sense. *See* Ramirez v. IBP Prepared Foods, 2001-NMCA-036, ¶ 16, 130 N.M. 559, 28 P.3d 1100 (stating that "[i]n interpreting a statute, we look to the statute as a whole [and] . . . attempt to achieve internal consistency" (citation omitted)), *superseded by statute on other grounds as stated in* Baca v. Los Lunas Cmty. Programs, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070. In other words, Officer Gutierrez cannot claim that he was acting in his capacity as a law enforcement officer yet disclaim that he must fit within the TCA's definition for conduct involving [***16] a law enforcement officer. Finally, if the New Mexico Legislature had intended to protect commissioned tribal officers discharging their duties under state law, it could readily have demonstrated such an intent by including language to that effect. *See* Starko, Inc. v. Presbyterian Health Plan, Inc., 2012-NMCA-053, ¶ 49, 276 P.3d 252 (noting that if the Legislature wanted to condition the applicability of a payment scheme on the dispensing of the lesser expensive, therapeutic equivalent drug, it would have included those terms within the statute), *cert. granted*, 2012-NMCERT-003, 293 P.3d 184. Indeed, our Legislature recently amended the TCA to include "certified part-time salaried police officer[s] employed by a governmental entity" within the definition of "law enforcement officer." Section 41-4-3(D). Thus, the Legislature could have—but did not—include non-salaried commissioned officers working on behalf or in the service of a governmental entity subject to the TCA.

[*20] Officer Gutierrez relies on several cases and statutes as support for his contention that he fits within the definition of Section 41-4-3(F)(3). However, none of these cases or statutes have any bearing on the issue on [***17] appeal. For example, he cites to Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239, for the proposition that he, like the volunteer chaplain in that case, is an [**662] uncompensated person working "on behalf of or in service of a governmental entity." However, the issue in *Celaya* was not whether the police department's volunteer chaplain came within the definition of "law enforcement officer" under Section 41-4-3(F)(3). Instead, that case dealt with whether the chaplain, who had been given a vehicle by the Bernalillo County Sheriff's Department to drive to and from official functions, could be acting within the scope of his duties if he was driving to or from an official function when he ran over a teenager's foot in a Wal-Mart parking lot. Celaya, 2004- NMSC-005, ¶¶ 1-3. Furthermore, in Celaya, the tort for which immunity was waived by the TCA came under the exception of negligent operation of a motor vehicle. *See* § 41-4-5. In contrast, here, the only section of the TCA that waives immunity for the claims asserted against Officer Gutierrez is the law enforcement provision of Section 41-4-12, and he identifies no other exception. Consequently, *Celaya* has no bearing on this case.

[*21] Officer [***18] Gutierrez also cites to 28 U.S.C. § 2680(h) (2006) of the Federal Tort Claims Act (FTCA) to support his argument that he is a "public employee." We fail to see the

relevance of the FTCA here when the statutory language defining a "public employee" under the various provisions of the TCA is clear and unambiguous. Further, the many federal cases cited by Officer Gutierrez are also not pertinent. The crux of those cases is not whether a tribal officer enforcing state law pursuant to a commission is a "law enforcement officer" entitled to a defense and/or indemnification under the TCA, but whether he may become a "state actor" for purposes of *42 U.S.C. § 1983*. *See, e.g., Romero v. Peterson*, No. CIV-89-128-JC, 1993 WL 375746, at *1-3 (10th Cir. Sept. 27, 1993); *Romero v. Peterson, 930 F.2d 1502, 1503-04 (10th Cir. 1991)*; *Hebert v. United States, 438 F.3d 483, 486-87 (5th Cir. 2006)*; *Ouart v. Fleming, No. CIV-08-1040-D, 2010 U.S. Dist. LEXIS 30051, 2010 WL 1257827, at *3 (W.D. Okla. Mar. 26, 2010)*.

[*22] There is no dispute that once commissioned as a sheriff's deputy, Officer Gutierrez was authorized to discharge all the law enforcement powers of a Santa Fe County sheriff, including with respect to the Motor Vehicle Code. **[***19]** We conclude however, that in this case, such a commission did not make Officer Gutierrez a "public employee" of the County but merely conferred upon him jurisdiction to act lawfully when enforcing state and local laws. Accordingly, the County has no duty to defend Officer Gutierrez in this lawsuit or indemnify him for tortious acts committed under color of his commission. We affirm the district court's decision.

CONCLUSION

[*23] We affirm the decision of the district court.

[*24] IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

CYNTHIA A. FRY, Judge

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Segura v. Colombe

United States District Court for the District of New Mexico

September 24, 2012, Decided; September 24, 2012, Filed

Civ. No. 11-0926 MV/WDS

Opinion by: MARTHA VÁZQUEZ

Opinion

[*1142] MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants Board of County Commissioners of Santa Fe County and Greg Solano's ("County Defendants") Motion for Summary Judgment (Qualified Immunity) [Doc. 18]. The Court, having considered the motion, briefs, and relevant law, and being otherwise fully informed, finds that the County Defendants' Motion is well taken in part and will be GRANTED in part.

BACKGROUND

The facts supported by the evidence, viewed in the light most favorable to Plaintiff Michael Segura ("Plaintiff") as the party opposing the summary judgment, are as follows. *See Cavanaugh v. Woods Cross City, 625 F.3d 661, 662 (10th Cir. 2010)*. **[**2]** At approximately 11:00 p.m. on July 10, 2009, Defendant Paul Colombe ("Defendant Colombe"), dressed in his full Pueblo of Tesuque Tribal Police Department uniform, driving a fully-marked Tesuque Pueblo Tribal Police vehicle, and displaying a tribal badge of office, conducted a traffic stop of an automobile driving within Tesuque Pueblo based upon the driver's failure to come to a complete stop at a stop sign. Defendant Colombe was assisted by Tribal Police Officer Waylon Brown, who also was dressed in his full tribal police uniform and likewise was displaying his tribal badge of office. Defendant Colombe made several arrests arising out of the traffic stop, including **[*1143]** an arrest of Plaintiff, a non-Native American, back-seat passenger of the stopped vehicle, for Parties to a Crime, *N.M. Stat. Ann. § 66-8-120*, and Concealing Identity, *N.M. Stat. Ann. § 30-22-3*, both of which are crimes pursuant to New Mexico (and not Tesuque tribal) law. Plaintiff was booked at the Santa Fe County Adult Detention Facility. Thereafter, Defendant Colombe filed a criminal complaint against Plaintiff in the Santa Fe County Magistrate Court on July 11, 2009, for both offenses. Plaintiff subsequently was prosecuted **[**3]** in the State of New Mexico First Judicial District Court for the crime of Concealing Identity.

On August 13, 2008, Defendant Colombe was duly appointed and commissioned as a Deputy Sheriff in the County of Santa Fe. As a commissioned Santa Fe County Deputy Sheriff, Defendant Colombe was sworn to support the Constitution of the United States, the Constitution and laws of the State of New Mexico, and the laws of the County of Santa Fe, and to faithfully and impartially discharge the duties of the Santa Fe County Sheriff's Department to the best of his ability. Defendant Colombe's appointment and commission as a Santa Fe County Deputy Sheriff was in effect at the time he arrested Plaintiff.

From January 2004 through April 2010, Defendant Colombe was employed as a full-time police officer by the Pueblo of Tesuque Tribal Police Department. During this same time, Defendant Colombe's salary and employment benefits were paid by the Pueblo of Tesuque Tribal Police Department and no part of his salary or benefits was paid by the Santa Fe County Sheriff's Department or the County of Santa Fe. Also during this time, (1) the Santa Fe County Sheriff's Department had no right to promote, demote, discipline **[**4]** and/or fire Defendant Colombe, (2) Defendant Colombe was not subject to the Sheriff's Department's rules, regulations, policies, or procedures, (3) the Santa Fe County Sheriff's Department did not supervise or oversee Defendant Colombe, assign work to him, or control the maimer or means of his performance as a law enforcement officer, and (4) the Santa Fe County Sheriff's Department did not provide, pay for, or facilitate any training of Defendant Colombe. The Santa Fe County Sheriff's Department, however, did possess the right to revoke at any time Plaintiff's appointment and commission as a Santa Fe County Deputy Sheriff.

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Jones v. Kodak Med. Assistance Plan, 169 F.3d 1287, 1290 (10th Cir. 1999)*. Under Rule 56(c), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. **[**5]** Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id. at 248*.

Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993)* (citations omitted). The moving party need not negate the nonmovant's claim, but rather must only show "that there is an absence of evidence to support the nonmoving party's case." *Celotex v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the moving party meets its initial **[*1144]** burden, the nonmoving party must show that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l Inc. v. First Affiliated Sees., Inc., 912 F.2d 1238, 1241 (10th Cir. 1991)* (citation omitted). The nonmoving party cannot rely upon conclusory allegations or contentions of counsel to defeat summary judgment, *Pueblo v. Neighborhood Health Ctrs., Inc., 847 F.2d 642, 649 (10th Cir. 1988)*, but rather must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, **[**6]** and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324* (quoting Fed. R. Civ. P. 56(e)). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *See Anderson, 477 U.S. at 248*.

Upon a motion for summary judgment, the Court "must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence." *Kaus v. Standard Ins. Co., 985 F. Supp. 1277, 1281 (D. Kan. 1997), aff'd, 162 F.3d 1173 (10th Cir. 1998)*. If there is no genuine issue of material fact in dispute, then a

court must next determine whether the movant is entitled to judgment in its favor as a matter of law. *See, e.g.*, *Jenkins v. Wood, 81 F.3d 988, 990 (10th Cir. 1996)*; *Celotex, 477 U.S. at 322*.

DISCUSSION

I. Plaintiff's Claims Under *42 U.S.C. Section 1983*

The County Defendants move for summary judgment on the basis of qualified immunity with respect to Plaintiff's claims pursuant to *42 U.S.C. Section 1983*. When a defendant asserts qualified immunity at summary judgment, the burden shifts to **[**7]** the plaintiff to show that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established. *See Morris v. Noe, 672 F.3d 1185, 1191 (10th Cir. 2012)* (internal quotations and citation omitted). In his response to the County Defendants' Motion for Summary Judgment on the *Section 1983* claims, Plaintiff concedes that he cannot establish that the County Defendants violated a clearly established constitutional right, and he therefore withdraws his *Section 1983* claims against the County Defendants. Based on Plaintiff's withdrawal, the County Defendants' Motion for Summary Judgment on the *Section 1983* claims is denied as moot.

II. Plaintiff's Claims Under the New Mexico Tort Claims Act

The County Defendants also move for summary judgment on Plaintiff's respondeat superior claims under the New Mexico Tort Claims Act ("NMTCA" or "Act"). The NMTCA prohibits a plaintiff from suing a governmental entity of New Mexico or its employees or agents unless the plaintiff's cause of action fits within one of the exceptions granted for governmental entities and public employees. *See N.M. Stat. Ann. §§ 41-4-4*. Plaintiff is seeking to impose NMTCA supervisory liability **[**8]** on the County Defendants under a theory of respondeat superior to require the County Defendants to answer for the alleged torts of Defendant Colombe, a Tesuque tribal police officer who was appointed and commissioned as a Deputy Sheriff by the Santa Fe County Sheriff's Department. In *Silva v. State*, the New Mexico Supreme Court confirmed that the doctrine of respondeat superior extends NMTCA liability to public entities that have supervisory control over tortious actors. *See 106 N.M. 472, 745 P.2d 380, 385 (N.M. 1987), limited on other grounds by Archibeque v. Moya, 116 N.M. 616, 866 P.2d 344 (N.M. 1993)*. The *Silva* **[*1145]** court explained that to prevail on a respondeat superior claim against a particular supervisory entity, a plaintiff must establish (1) a negligent "public employee," (2) who meets one of the NMTCA's waiver exceptions under *Sections 41-4-5 to 41-4-12* of the Act, and (3) a defendant "governmental entity" that has immediate supervisory responsibilities over the employee. *See id.; see also Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996 NMSC 21, 121 N.M. 646, 916 P.2d 1313, 1318 (N.M. 1996)*.

The parties do not dispute that the County Defendants constitute "governmental entities" within the meaning of the NMTCA, [1] **[**9]** and that the County Defendants could be subject to respondeat superior liability based upon the alleged torts of their public employees. The parties likewise do not dispute that the Tesuque Tribal Police Department is not a governmental entity within the meaning of the Act. *See N.M. Stat. Ann. §§ 41-4-3(B), (C) & (H)*. What the parties do

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[1] The NMTCA defines "governmental entity" as "the state or any local public body," including "all political subdivisions of the state and their agencies, instrumentalities and institutions" and the "state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions." *N.M. Stat. Ann. §§ 41-4-3(B)*, **[**10]** *(C)*, & *(H)*.

dispute, however, is whether Defendant Colombe meets the first *Silva* requirement of being a "public employee" of the County Defendants within the meaning of the NMTCA, whether Defendant Colombe meets the second *Silva* requirement of falling under one of the NMTCA's waiver exceptions in *Sections 41-4-5 to 41-4-12* of the NMTCA, and whether the County Defendants meet the third *Silva* requirement of having immediate supervisory responsibilities over Defendant Colombe. The Court will address each of these questions in turn.

A. "Public Employee" Within the Meaning of the NMTCA

With respect to the first *Silva* requirement, the County Defendants argue that Plaintiff's NMTCA claims against them must fail because Defendant Colombe was not a "public employee" within the meaning of the NMTCA and that his acts therefore could not be attributable to the County Defendants. *See Silva, 745 P.2d at 385.* The NMTCA defines "public employee" as an "officer, employee or servant of a governmental entity . . . including[, among other things,] law enforcement officers[and] persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." *N.M. Stat. Ann. §§ 41-4-3(F)(2)* & *(3)*.

The Act defines "law enforcement officer" as "a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principle duties under law are to hold in custody any person accused of a criminal offense, [or] to maintain public order or to make arrests for crimes." *Id. § 41-4-3(D)*. There is no dispute that Defendant Colombe's regular duties meet the Act's definition of "law enforcement officer." **[**11]** The problem arises, however, with respect to two of the other criteria in the definition. Specifically, the Act requires Defendant Colombe to be a *salaried* public employee of a *governmental entity. Id.* (emphasis added). This is problematic for Plaintiff on the one hand because, although the undisputed facts indicate that Defendant Colombe was a "salaried" employee in that he was employed full-time as a police officer by the Pueblo of Tesuque Tribal Police Department, the Tribal Police Department does not meet **[*1146]** the second criteria of being a "governmental entity" within the meaning of the NMTCA. *See id. §§ 41-4-3(B)*, *(C)* & *(H)*. It is likewise problematic on the other hand because, while the County Defendants meet the second criteria of being a "governmental entity," the undisputed facts show that the County Defendants paid no part of Defendant Colombe's salary or benefits rendering it impossible for Defendant Colombe to meet the first criteria of being a "salaried public employee" of the Santa Fe County Sheriff's Department. Accordingly, on the facts construed in the light most favorable to Plaintiff, Plaintiff cannot establish that Defendant Colombe was a "law enforcement officer" within **[**12]** the meaning of the Act.

Plaintiff's argument that Defendant Colombe was a "public employee" by virtue of his appointment and commission as a Santa Fe County Deputy Sheriff, even if he was not a "law enforcement officer" within the meaning of the NMTCA, likewise fails to satisfy the first *Silva* requirement. Admittedly, the Act does not limit the definition of "public employee" to include only law enforcement officers. "Public employee" also includes an "officer, employee or servant . . . acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation," provided such person is not an independent contractor. *Id. § 41-4-3(F)(3)*; *see also Celaya v. Hall, 2004 NMSC 5, 135 N.M. 115, 85 P.3d 239, 242 (N.M. 2004)* (affirming district court's decision on summary judgment that a chaplain who volunteered for the Bernalillo County Sheriff's Department, and who also held a full-time, compensated position with an entity unrelated to the Sheriff's Department, was a "public employee" within the meaning of

New Mexico Statutes Annotated Section 41-4-3(F)(3)). The question becomes, then, whether Defendant Colombe was a public employee of the County Defendants by virtue of his **[**13]** commission as a Santa Fe County Deputy Sheriff, and if so, whether Defendant Colombe was an independent contractor excluded from Act's definition of public employee.

With respect to the first inquiry, Plaintiff correctly argues that absent the commission from the Santa Fe County Sheriff's Department, Defendant Colombe lacked the jurisdiction to charge and prosecute a non-Indian such as Plaintiff for state criminal violations occurring on Indian land. *See, e.g., United States v. Green, 140 Fed. Appx. 798, 2005 WL 1799823, at *2 (10th Cir. 2005)* (citing *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)*). Moreover, the undisputed facts show that Defendant Colombe did in fact arrest Plaintiff for Parties to a Crime, and Concealing Identity, both of which are crimes pursuant to New Mexico (and not Tesuque tribal) law, *see N.M. Stat. Ann. §§ 66-8-120, 30-22-3*, and that he thereafter filed a criminal complaint prosecuting Plaintiff in the Santa Fe County Magistrate Court for both offenses. Defendant Colombe had no authority to undertake these actions as a Tesuque tribal police officer. The Court therefore concludes that Defendant Colombe was acting in his capacity as a Deputy Sheriff for **[**14]** the County of Santa Fe. [2]

[*1147] Plaintiff's claim must nonetheless fail, however, because, with respect to the second inquiry, *see id. § 41-4-3(F)(3)*, the facts viewed in Plaintiff's favor suggest **[**15]** that Defendant Colombe was acting as an independent contractor and therefore is excluded from the Act's definition of "public employee." The New Mexico Supreme Court in *Celaya v. Hall*, looking to well-established agency principles, has explained that the principal's right to control the individual performing the work often distinguishes an employee from an independent contractor. *See 85 P.3d at 242*. The Plaintiff, however, has presented no evidence that the County Defendants had the right to control Defendant Colombe other than the fact that the County could revoke his commission as a Deputy Sheriff at any time. Rather, the undisputed evidence shows that the County Defendants had no right to supervise, oversee, promote, demote, discipline, or fire Defendant Colombe, that Defendant Colombe was not subject to the Sheriff's Department's rules, regulations, policies, or procedures, that the Santa Fe County Sheriff's Department did not assign work to Defendant Colombe or control the manner or means of his performance as a law enforcement officer, and that the Santa Fe County Sheriff's Department did not provide, pay for, or facilitate any training of Defendant Colombe. This evidence, even **[**16]** when viewed in the light most favorable to Plaintiff, is insufficient to raise a factual question as to whether the County Defendants had the right to control Defendant Colombe.

The inquiry, however, does not end with a cursory application of the right-to-control test. The court in *Celaya* cautioned against strict application of this test, and instead instructed courts to

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[2] The New Mexico Court of Appeals' decision in *Williams v. Board of County Comm'rs of San Juan County, 1998 NMCA 90, 125 N.M. 445, 963 P.2d 522, 528 (N.M. Ct. App.), cert. denied, 125 N.M. 654, 964 P.2d 818 (1998)*, does not change this result. In *Williams*, the court determined that a tribal police officer's cross-deputization as a county deputy sheriff *alone* did not transform the tribal police officer into a "public employee" within the meaning of the NMTCA. *See id.* The *Williams* decision is distinguishable, however, because the tribal police officer was not charging and prosecuting a non-Indian with a state crime, but rather was citing a non-Indian for violating tribal law. *See id. at 524*. Here, in contrast, it is not the commission by the Santa Fe County Sheriff's Department alone that renders Defendant Colombe a public employee, but rather the fact that Defendant Colombe was acting pursuant to his authority as a Santa Fe County Deputy Sheriff when he charged and prosecuted Plaintiff for violation of the laws of the State of New Mexico.

take a more nuanced approach that considers a number of factors in determining whether an individual sufficiently is subject to a principal's control or right to control to render that individual an employee rather than an independent contractor. *See id. at 243*. These factors include (1) the type of occupation and whether it is usually performed without supervision; (2) the skill required for the occupation; (3) whether the employer supplies the instrumentalities or tools for the person doing the work; (4) the length of time the person is employed; (5) the method of payment, whether by time or job; (6) whether the work is part of the regular business of the employer; (7) whether the parties intended to create an employment relationship; and (8) whether the principal is engaged in business. *See id.* (citing *Restatement (Second) of Agency §§ 220(2)(a) — (j)* **[**17]** (1958)). "'[N]o particular factor should receive greater weight than any other, except when the facts so indicate, nor should the existence or absence of a particular factor be decisive. Rather, the totality of the circumstances should be considered in determining whether the employer has the right to exercise essential control over the work or workers of a particular contractor.'" *Id.* (quoting *Harger v. Structural Servs., Inc., 1996 NMSC 18, 121 N.M. 657, 916 P.2d 1324, 1334 (N.M. 1996)*). The Court will analyze each factor in turn.

The first factor—the type of occupation and whether it is usually performed without supervision—weighs in favor of finding that the County Defendants did not have control of or the right to control Defendant Colombe and that Defendant Colombe therefore was an independent contractor. The work of a law enforcement officer is **[*1148]** typically performed with supervision and training, and yet the undisputed facts here show that the County Defendants had no right to supervise, discipline, train, assign work to, or control the manner or means of work of Defendant Colombe and that Defendant Colombe was not subject to the Sheriff's Department's rules, regulations, policies, or procedures. *See supra* pp. 9-10. **[**18]** The only power the County Defendants had over Defendant Colombe was the power to appoint and commission Defendant Colombe as a Deputy Sheriff and the power to revoke the appointment and commission. This degree of supervision is not commensurate with the nature of the position of a law enforcement officer and therefore does not weigh in favor of a finding that Defendant Colombe was an employee of the County Defendants. *Compare Celaya, 85 P.3d at 243* (finding volunteer chaplain was a Sheriff's Department employee because the degree of supervision exercised over the chaplain was proportionate to the professional nature of the chaplain's position).

Another factor to consider is whether the principal supplies the instrumentalities or tools for the individual doing the work. Here, it is undisputed that at the time of Plaintiff's arrest Defendant Colombe was wearing a full Pueblo of Tesuque Tribal Police Department uniform, driving a fully-marked Tesuque Pueblo Tribal police vehicle, and displaying a tribal badge of office. There is no evidence in the record that the County Defendants supplied Defendant Colombe with any of the instrumentalities or tools of being a law enforcement officer other **[**19]** than the certificate appointing and commissioning Defendant Colombe as a Santa Fe County Deputy Sheriff. This factor, therefore, weighs in favor of finding that the County Defendants did not have sufficient control over, or a right to control Defendant Colombe, to transform him into an employee of the Sheriff's Department.

Also relevant is whether the parties intended to create an employment relationship. The undisputed evidence reveals that the Santa Fe County Sheriff's Department paid no part of Defendant Colombe's salary or benefits and that Defendant Colombe was employed full-time by the Pueblo of Tesuque Tribal Police Department. Moreover, as previously discussed, the Santa

Fe County Sheriff's Department had no right to supervise, discipline, promote, or train Defendant Colombe. *See supra* pp. 9-10. Accordingly, this factor weighs in favor of finding that Defendant Colombe was an independent contractor of the County Defendants.

Another relevant factor is the length of time the person is employed, with employment over a considerable period of time with regular hours and over a fixed route being indicative of a master-servant, as opposed to a principal-independent contractor, relationship. **[**20]** *See* Restatement (Second) of Agency § 220(2), cmt. h (1958). Here, Defendant Colombe was commissioned as a Santa Fe County Deputy Sheriff on August 13, 2008, and remained commissioned as a Deputy Sheriff through the time of Plaintiff's arrest, approximately eleven months later on July 10, 2009. While eleven months constitutes a significant period of time, there is no evidence in the record that Defendant Colombe had any regular hours or fixed route in his capacity as a commissioned Santa Fe County Deputy Sheriff. Indeed, the only evidence in the record indicates that the Santa Fe County Sheriff's Department had no right to supervise or oversee Defendant Colombe, which includes no right to set or oversee his hours worked or his route patrolled. Defendant Colombe likewise was not subject to the county's rules, regulations, policies, or procedures. *See id.* Accordingly, **[*1149]** this factor, on balance, weighs in favor of a finding that the County Defendants had no right to control Defendant Colombe, thereby rendering Defendant Colombe an independent contractor rather than an employee.

The method of payment is also a relevant factor, with payment by time (*e.g.*, by hour or month) weighing in favor **[**21]** of a master-servant relationship and payment by job weighing in favor of a principal-independent contractor relationship. *See id* Here, the undisputed evidence shows that no part of Defendant Colombe's salary or benefits was paid by the Santa Fe County Sheriff's Department, and that Defendant Colombe's entire salary was paid by the Pueblo of Tesuque Tribal Police Department. This factor therefore also weighs in favor of a finding that Defendant Colombe was an independent contractor of the County Defendants.

The skill required for the occupation is another factor to consider, with work that does not require the services of one highly educated or skilled being more indicative of a master-servant relationship. Because the work of a law enforcement officer is skilled work that requires training, this factor weighs in favor of a finding that Defendant Colombe was an independent contractor of the Santa Fe County Sheriff's Department.

Although the final two factors weigh in favor of a master-servant relationship—*i.e.*, Defendant Colombe's work was part of the regular business of the Santa Fe County Sheriff's Department and the Sheriff's Department is engaged in the business of law enforcement—the **[**22]** Court nonetheless concludes, applying the factors articulated by the Celaya court under the totality of the circumstances, that at the time of Plaintiff's arrest and prosecution Defendant Colombe was acting as an independent contractor of the Santa Fe County Sheriff's Department. Considered in context, and based on the evidence viewed in the light most favorable to Plaintiff, the Santa Fe County Sheriff's Department did not exercise sufficient control over Defendant Colombe's activities to render the relationship one of an employer and an employee. Rather, the evidence indicates that Defendant Colombe was acting as an independent contractor at the time of Plaintiff's arrest and prosecution. Because an independent contractor is excluded from the definition of "public employee," Plaintiff has failed to satisfy the first *Silva* requirement by

showing that Defendant Colombe was a negligent public employee within the meaning of the Act. The County Defendants therefore are entitled to summary judgment in their favor.

B. NMTCA's Waiver Exceptions

The County Defendants are also entitled to summary judgment in their favor on a second, independent ground. Specifically, *Silva* requires a plaintiff **[**23]** to not only identify a negligent public employee but also to establish that the public employee meets one of the NMTCA's waiver exceptions under Sections 41-4-5 to 41-4-12. *See* Silva v. State, 106 N.M. 472, 745 P.2d 380, 385 (N.M. 1987). Plaintiff has failed to establish facts showing that Defendant Colombe falls within such an exception. The applicable NMTCA exception provides that the immunity granted does not apply to liability for certain enumerated claims, including the claims of battery, false imprisonment, false arrest, malicious prosecution, and abuse of process "when caused by *law enforcement officers* while acting within the scope of their duties." N.M. Stat. Ann. § 41-4-12 (emphasis added). This Court already has concluded, on the facts viewed in the light most favorable to Plaintiff, that Defendant Colombe does not meet the definition of "law enforcement officer" set forth in the Act. *See supra* p. 7. The waiver of immunity for law **[*1150]** enforcement officers, therefore, does not apply. Accordingly, the County Defendants are entitled to summary judgment in their favor on this ground as well.

C. Governmental Entity with Immediate Supervisory Responsibilities

Even assuming, arguendo, that Plaintiff **[**24]** had raised a factual dispute with respect to the first two *Silva* requirements, the County Defendants nonetheless would be entitled to summary judgment in their favor because Plaintiff has failed to point to facts showing that the County Defendants had immediate supervisory responsibilities over Defendant Colombe, which is the third requirement of *Silva*. *See* 745 P.2d at 385. The Court already has concluded that the County Defendants did not have the control of or the right to control Defendant Colombe necessary to render Defendant Colombe an employee rather than an independent contractor. *See supra* pp. 9-10. The Court likewise concludes that Plaintiff has failed to raise a factual dispute with respect to whether the County Defendants had immediate supervisory responsibilities over Defendant Colombe. In *Silva*, the New Mexico Supreme Court explained that a trial court should employ traditional concepts of respondeat superior for determining whether a governmental entity had immediate supervisory responsibilities over its public employee. *See* 745 P.2d at 385. The inquiry again rests on agency principles. Specifically, a court must determine whether the governmental entity had the legal **[**25]** right to supervise or control the public employee, regardless of whether the entity actually exercised that control, *see id.*, or, even absent a right to control, whether the entity enjoyed a degree of actual, *de facto* control over the employee, *see* California First Bank v. State, 111 N.M. 64, 801 P.2d 646, 651-52 (N.M. 1990). The exercise or right to control need not be under a contract for employment. Indeed, a "master-servant relationship . . . may exist when one person volunteers to perform services for another." *Id.*; *cf.* Celaya v. Hall, 85 P.3d at 244.

As previously discussed, the only control the County Defendants had over Defendant Colombe was the power to appoint or terminate his commission as a Santa Fe County Deputy Sheriff. This minimal control, when considered in light of the overwhelming evidence produced by the County Defendants that they had no right to control Defendant Colombe, *see supra* p. 9-10, is insufficient as a matter of law to constitute a genuine factual dispute as to whether the County Defendants had control or *de facto* control over Defendant Colombe. *See* Silva, 745 P.2d at

385. Accordingly, the Court concludes that the County Defendants did not have immediate supervisory [**26] responsibilities over Defendant Colombe and grants the County Defendants' Motion for Summary Judgment on this ground as well. [3]

Plaintiff's policy argument does not persuade the Court otherwise. In his Response to the County Defendants' Motion for Summary Judgment, Plaintiff opines, "While it is true that the [NMTCA definition [*1151] of "law enforcement officer"] appears to give [the County] Defendants a pass when they employ a deputy who is paid by a tribe, it is certainly against [**27] the intent of the law. If tribal immunity protects the officer or tribe from responsibility and the Tort Claims Act protects the county from responsibility, this creates a category of a fairly large number of police officers in New Mexico who can disregard the rights of citizens with impunity." Plaintiff's argument misses the mark. Contrary to Plaintiff's belief, the intent of the NMTCA is not to hold all governmental actors liable for their torts or the torts of their employees. Rather, the New Mexico legislature enacted the NMTCA in attempt to reach a balance between two competing goals. *See* Lymon v. Aramark Corp., 728 F. Supp. 2d 1222, 1252 (D.N.M. 2010). On the one hand, and in Plaintiff's favor, the legislature recognized the "inherent unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity," *id.* at 1251, and wanted to compensate those injured by the negligence of public employees and to impose duties of reasonable care. *See id.*; N.M. Stat. Ann. § 41-4-2(A). On the other hand, however, and in contravention of Plaintiff's position, the New Mexico legislature also recognized that "while a private party may readily be held liable [**28] for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done." *Id.; see also* Lymon, 728 F. Supp. 2d at 1251. The NMTCA reached a balance between these two competing interests by recognizing and generally granting sovereign immunity to governmental actors, but by also providing for exceptions to the doctrine of sovereign immunity for some torts and actors. Accordingly, the NMTCA does not, and the legislature never intended the Act to, provide a remedy for all torts and all actors.

III. Plaintiff's Request for Certification to the New Mexico Supreme Court

Plaintiff requests that if the Court determines that the County Defendants are immune from tort liability pursuant to the NMTCA, that the Court certify the question to the New Mexico Supreme Court. The New Mexico Rules Annotated provide in relevant part that the New Mexico Supreme Court

> may answer by formal written opinion questions of law certified to it by a court of the United States[] . . . if the answer may be determinative of an issue in pending litigation [**29] in the certifying court and the question is one for which answer is not provided by a controlling: (a) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or (b) constitutional provision or statute of this state.

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[3] If the court determines that a governmental entity had the right to control or had *de facto* control over the public employee, the court next should apply the remoteness doctrine to determine if the entity should be freed from liability. *See* Silva, 745 P.2d at 385. Because the Court finds that Plaintiff has failed to point to evidence showing that the County Defendants had any right to control or any *de facto* control over Defendant Colombe, and the Court grants summary judgment in the County Defendants' favor on this ground, the Court need not—and therefore does not—reach the second part of the inquiry whether the remoteness doctrine should free the Board of County Commissioners of Santa Fe County from liability.

N.M. Rules Ann., Rule 12-607(A). The question whether the County Defendants are entitled to sovereign immunity or whether Plaintiff's cause of action against the County Defendants fits within one of the NMTCA's exceptions granted for governmental entities and public employees can be answered both by appellate opinions of the New Mexico Supreme Court and the New Mexico Court of Appeals. The answer also can be found in the plain language of the NMTCA. Accordingly, the Court declines to certify Plaintiff's question to the New Mexico Supreme Court.

CONCLUSION

For the foregoing reasons, IT THEREFORE IS ORDERED that the County Defendants' Motion for Summary Judgment (Qualified Immunity) [Doc. 18] is DENIED in part and GRANTED in part as follows:

> **[*1152]** (1) The motion for summary judgment is denied as moot with respect to Plaintiff's claims under *42 U.S.C. Section 1983*.
>
> (2) The motion for summary judgment is granted with respect to Plaintiff's claims under the **[**30]** New Mexico Tort Claims Act.

DATED this 24th day of September, 2012.

/s/ Martha Vázquez

MARTHA VÁZQUEZ

United States District Court Judge

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Trujillo v. Romero

United States District Court for the District of New Mexico

March 3, 2015, Decided; March 3, 2015, Filed

No. 13-CV-1178 MCA-SCY

Opinion by: M. CHRISTINA ARMIJO

Opinion

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on the County of Santa Fe's (County) *Motion to Dismiss Third-Party Complaint* [Doc. 21] and *Motion [*2] to Certify Question to Supreme Court of New Mexico* [Doc. 27]. Having considered the parties' submissions, the relevant case law, and otherwise being fully advised in the premises, the Court will grant the County's motion to dismiss and deny the County's motion to certify.

I. BACKGROUND

Defendants Robert Romero and Zach Garcia admit and/or allege the following relevant facts. On March 21, 2013, Defendants Romero and Garcia, police officers employed by the Pueblo of Pojoaque, stopped a vehicle driven by Plaintiff Luciano Trujillo, a non-Indian. At the time of the traffic stop, Defendants Romero and Garcia were "duly deputized to serve as Deputy Sheriffs of Santa Fe County, New Mexico" and were "duly issued Santa Fe County Sheriff's Department Commission cards." [Doc. 40 at 27] As a result of the traffic stop, Plaintiff was arrested and charged with violations of Pojoaque tribal law (specifically, driving while under the influence (DWI) and interfering with an officer) in Pueblo of Pojoaque Tribal Court. [Doc. 40 at 27] The Tribal Court charges were rejected, however, because of Plaintiff's non-Indian status. [Doc. 40 at 28]

On or about March 28, 2011, the original Pueblo of Pojoaque criminal [*3] complaint, a new DWI citation signed by Defendant Romero, and other relevant documents and videos were forwarded to the Office of the District Attorney, First Judicial District. [Doc. 40 at 28] "On or about July 12, 2012, the Santa Fe County District Attorney filed the DWI charge [against Plaintiff] and filed additional state law criminal charges of assault on a police officer, resisting or obstructing an officer charged under *NMSA §§ 30-22-21(A)(1)* and *(2)* and *30-22-1*, all of which charges were originally referenced in Individual Defendant Romero's March 28, 2011 transmittal to the District Attorney's Office." [Doc. 40 at 29] The state charges against Plaintiff were eventually dismissed. [Doc. 25 at 16-17; Doc. 40 at 17-18]

On December 12, 2013, Plaintiff filed a *Complaint for Damages* [Doc. 1], followed by an *Amended Complaint for Damages* against Defendants Romero, Garcia, and the United States of America. [Doc. 25] Plaintiff's *Amended Complaint* alleges that Defendants: (1) violated *42 U.S.C. § 1983* because "the arrest, the force used to effect the arrest and the filing of the criminal charges [against Plaintiff] in state court were undertaken by Defendants Romero and

Garcia under color of state law"; [Doc. 25 at 18] and (2) violated **[*4]** the Federal Tort Claims Act because "at the time Defendants Romero and Garcia detained [Plaintiff] without reasonable suspicion, arrested him without probable cause, otherwise subjected him to an unreasonable seizure, and subjected him to false imprisonment, false arrest and a battery they were acting within the course and scope of their employment and under color of federal law as federal employees pursuant to the authority they had received under the contract(s) between the Pojoaque Pueblo and the United States Bureau of the Interior, an agency of Defendant United States of America." [Doc. 25 at 20]

Defendants Romero and Garcia filed an *Amended Third-Party Complaint* against the County of Santa Fe (the County) seeking a declaratory judgment that the County "is required to defend, indemnify and represent" Defendants Romero and Garcia under the New Mexico Tort Claims Act, *NMSA 1978, § 41-1-1, et. seq.*,"to the extent that it is alleged (as to indemnity) or the Court finds (as to liability) that any of their actions at issue in this case were undertaken in their capacities as Santa Fe County Sheriff's Deputies." [Doc. 40 at 32] The County has moved to dismiss the *Amended Third-Party Complaint* pursuant to *Fed. R. Civ. P. 12(b)(6)* **[*5]** , alleging that "Defendants are not 'public employees' within the definitions of the New Mexico Tort Claims Act, and the County therefore has not waived its sovereign immunity related to defense and indemnification."[1] [Doc. 21 at 1]

On March 10, 2014, the County also filed the present *Motion to Certify Question to Supreme Court of New Mexico*. [Doc. 27] The County seeks to certify the following question to the New Mexico Supreme Court:

> Does the New Mexico Tort Claims Act require a governmental entity to provide a defense and/or indemnification to a tribal police officer who is employed by a sovereign Indian Nation and on duty as a tribal police officer, when he or she acts under color of state law against a non-Indian **[*6]** person who is within the exterior boundaries of the Indian Nation, pursuant to the officer's commission as a Deputy Sheriff duly issued by the governmental entity, and allegedly commits torts and/or violations of *42 U.S.C. § 1983*?

[Doc. 27 at 1] Plaintiff opposes the County's motion for certification, alleging that the foregoing question does not pose a novel or unsettled area of state law in light of the New Mexico Court of Appeals' recent decision in *Loya v. Gutierrez, 2014-NMCA-028, 319 P.3d 656 (2013)*, *cert. granted, 322 P.3d 1063 (N.M. 2014)*.

On January 21, 2015, the United States of America was substituted as a party for Defendants Romero and Garcia with respect to Plaintiff's Federal Tort Claims Act claim. [Doc. 105] However, the United States was "not substituted for Defendants Robert Romero and Zach Garcia for any alleged deprivation of civil rights under *42 U.S.C. § 1983*." [Doc. 105 at 4] On February 11, 2015, the parties filed a *Rule 41(a)(1)(A)(i) Notice of Dismissal of the Federal Tort*

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[1] The County initially moved to dismiss the original complaint, but the parties have stipulated and agreed that "the County's pending Motion to Dismiss Third-Party Complaint (Doc. 21), filed on March 3, 2014, and the Response in Opposition to the Motion to Dismiss Third Party Complaint, filed by the Defendants on May 16, 2014 (Doc. 54), shall apply in their entirety to the Amended Third-Party Complaint (Doc. 40, pp. 26-32, ¶¶ 1-32), as will the County's future Reply." [Doc. 60]

Claim and Defendant United States of America [Doc. 110]. Therefore, only the *§ 1983* claims against Defendants Romero and Garcia remain pending.

II. STANDARDS

A. Motion to Certify

Pursuant to New Mexico Rule of Appellate Procedure 12-607(A), the New Mexico Supreme Court has the power to:

> answer by formal written opinion questions **[*7]** certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and the question is one for which answer is not provided by a controlling:
>
> (a) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or
>
> (b) constitutional provision or statute of this state.

§ 39-7-4(1); see also *NMSA 1978, § 39-7-4* ("The supreme court of this state may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision or statute of this state.").

"Certification 'allows a federal court faced with a novel state-law question to put the question directly to the State's highest court,' and has the advantages of 'reducing the delay, cutting the costs, and increasing the assurance of gaining an authoritative response' from the state court." *Kansas Judicial Review v. Stout, 519 F.3d 1107, 1119 (10th Cir. 2008)* (quoting Arizonans for *Official English v. Arizona, 520 U.S. 43, 76, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)*). However, "[c]ertification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." Id. (quoting *Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988)*). Indeed, the Supreme Court has instructed that:

> In the absence **[*8]** of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

Meredith v. City of Winter Haven, 320 U.S. 228, 234, 64 S. Ct. 7, 88 L. Ed. 9 (1943). Thus, "only questions of state law that are both unsettled and dispositive" should be certified. *Kansas Judicial Review, 519 F.3d at 1119* (internal quotation marks and citation omitted). "The decision to certify 'rests in the sound discretion of the federal court . . . .'" *Id. at 1120* (quoting *Lehman Bros v. Schein, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)*).

B. Motion to Dismiss

A court will dismiss a complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. For decades, *Rule 12(b)(6)* motions were governed by a test taken from *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*: a complaint was subject to dismissal pursuant to *Rule 12(b)(6)* only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011)* (quoting *Conley, 355 U.S. at 45-46*) (internal quotation marks omitted). In *Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Court retired *Conley*'s test, replacing it with a new standard: "to withstand a motion to dismiss, a complaint must have enough allegations of fact, taken as true, **[*9]** 'to state a claim to relief that is plausible on its face.'" *Collins, 656 F.3d at 1214* (quoting *Twombly, 550 U.S. at 570*)). In applying this standard, a court accepts as true all "plausible, non-conclusory, and non-speculative" facts alleged in the plaintiff's complaint. *Shrader v. Biddinger, 633 F.3d 1235, 1239 (10th Cir. 2001)* (internal quotation marks and citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Moreover, "'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim" that "raise a right to relief above the speculative level.'" *Collins, 656 F.3d at 1214* (quoting *Twombly, 550 U.S. at 555*). In short, in ruling on a 12(b)(6) motion, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Collins, 656 F.3d at 1214*.

III. DISCUSSION

A. Motion to Certify

To determine whether the defense or indemnification of cross-commissioned tribal police officers poses a novel or unsettled area of state law, the Court first turns to the relevant provisions of the New Mexico Tort Claims Act (the Act). *NMSA 1978, § 41-4-4(A)* generally grants immunity to "any public **[*10]** employee while acting within the scope of duty" and requires the "governmental entity" to defend "any public employee when liability is sought for":

> (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
>
> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

NMSA 1978, § 41-4-4(B). The term "governmental entity" means "the state or any local public body," which includes "all political subdivisions of the state and their agencies, instrumentalities, and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978." *NMSA 1978, § 41-4-3(B), (C)*. The term "public employee" is defined as follows:

"public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10), (14) and (17) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act, the Small Business Investment Act or the Mortgage Finance Authority **[*11]** Act or a licensed health care provider, who has no medical liability insurance, providing voluntary services as defined in Paragraph (16) of this subsection and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or department of health, but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act;

(6) members of state or local selection panels established pursuant to the Juvenile Community Corrections Act;

(7) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(8) members of the board of directors of the New Mexico medical insurance pool;

(9) individuals who are members of medical review boards, committees or panels established by the educational retirement board or the retirement board of the public employees retirement **[*12]** association;

(10) licensed medical, psychological or dental arts practitioners providing services to the children, youth and families department pursuant to contract;

(11) members of the board of directors of the New Mexico educational assistance foundation;

(12) members of the board of directors of the New Mexico student loan guarantee corporation;

(13) members of the New Mexico mortgage finance authority;

(14) volunteers, employees and board members of court-appointed special advocate programs;

(15) members of the board of directors of the small business investment corporation;

(16) health care providers licensed in New Mexico who render voluntary health care services without compensation in accordance with rules promulgated by the secretary of health. The

rules shall include requirements for the types of locations at which the services are rendered, the allowed scope of practice and measures to ensure quality of care;

(17) an individual while participating in the state's adaptive driving program and only while using a special-use state vehicle for evaluation and training purposes in that program; and

(18) the staff and members of the board of directors of the New Mexico health insurance [*13] exchange established pursuant to the New Mexico Health Insurance Exchange Act;

NMSA 1978, § 41-4-3(F).

The term "law enforcement officers" is defined as follows:

A full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

NMSA 1978, § 41-4-3(D). However, the immunity granted by the Act does not apply to liability for:

personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

NMSA 1978, § 41-4-12.

It is undisputed that Defendants Romero and Garcia are not "law enforcement officers" as defined by the Act because they are not salaried officers employed [*14] by the County. Nonetheless, Defendants Romero and Garcia argue that they are "public employees" pursuant to *§ 41-4-3(F)(3)*, which applies to "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."*§ 41-4-3(F)(3)*. [Doc. 54 at 6-9] In Loya v. Gutierrez, the New Mexico Court of Appeals considered whether a police officer employed by the Pueblo of Pojoaque, who was exercising his authority as a commissioned sheriff's deputy of the County of Santa Fe, was a "public employee" entitled to defense and indemnification by the County under the Act. In that case, as in the present case, the officer was "performing traditional law enforcement duties" at the time the alleged *§ 1983* violations occurred, but nonetheless, the officer did "not meet *Section 41-4-3(D)*'s definition of a 'law enforcement officer.'" *319 P.3d at 660*. Also in that case, as in the present case, the officer argued that he was a "public employee" pursuant to *§ 41-4-3(F)(3)*, because he was "acting on behalf or in service of a governmental entity in any official capacity, whether with or without

compensation."*§ 41-4-3(F)(3)*. The New Mexico Court of Appeals rejected the officer's argument because:

> Accepting Officer Gutierrez's interpretation of *Section 41-4-3(F)(3)* would **[*15]** require us to expand the definition of "public employee" to include law enforcement officers acting within the scope of their police duties but who are not salaried employees of a governmental entity subject to the TCA. See *§ 41-4-3(D)*. In essence, Officer Gutierrez is asking this Court to create two classes of law enforcement officers within the TCA's definitional section of "public employee"—one that is salaried and works for a governmental entity and one that is not. We decline to do so for several reasons. First, such an interpretation would go beyond the plain language of *Section 41-4-3(F)(3)*. That section makes no mention of providing an alternate or different definition of "public employee" to include those persons exercising state law enforcement powers but who are not salaried employees of a governmental entity." See id. Second, reading the statute to say that a police officer who fails to meet the definition of a "law enforcement officer" under *Section 41-4-3(D)* can then allege that his same conduct falls within another definition in order to trigger the duty to defend and indemnify is an illogical distinction that makes no sense. See *Ramirez v. IBP Prepared Foods, 2001-NMCA-036, ¶ 16, 130 N.M. 559, 28 P.3d 1100* (stating that '[i]n interpreting a statute, we look to the statue as a whole [and] . . . **[*16]** attempt to achieve internal consistency' (citation omitted)), superseded by statute on other grounds as stated in *Baca v. Los Lunas Cmty. Programs, 2011-NMCA-008, 149 N.M. 198, 246 P.3d 1070*. In other words, Officer Gutierrez cannot claim that he was acting in his capacity as a law enforcement officer yet disclaim that he must fit within the TCA's definition for conduct involving a law enforcement officer. Finally, if the New Mexico Legislature had intended to protect commissioned tribal officers discharging their duties under state law, it could readily have demonstrated such an intent by including language to that effect. See *Starko, Inc. v. Presbyterian Health Plan, Inc., 2012-NMCA-053, ¶ 49, 276 P.3d 252* (noting that if the Legislature wanted to condition the applicability of a payment scheme on the dispensing of the lesser expensive, therapeutic equivalent drug, it would have included those terms within the statute), cert. granted, *2012-NMCERT-003, 293 P.3d 184*. Indeed, our Legislature recently amended the TCA to include "certified part-time salaried police officer[s] employed by a governmental entity" within the definition of "law enforcement officer." *Section 41-4-3(D)*. Thus, the Legislature could have—but did not—include non-salaried commissioned officers working on behalf or in the service of a governmental entity subject to the TCA.

Loya, 319 P.3d at 661. The New Mexico Supreme Court granted **[*17]** certiorari to review the decision of the Court of Appeals. *Loya v. Gutierrez, 322 P.3d 1063 (N.M. 2014)*. The case is fully briefed and was submitted to the Court on August 27, 2014.

In light of the Court of Appeals' opinion in *Loya*, the Court concludes that the question of law that the County seeks to certify to the New Mexico Supreme Court is neither novel nor unsettled. A district court should "not trouble our sister state courts every time an arguably unsettled question of state law comes across [its] desk[]." *Pino v. United States, 507 F.3d 1233, 1236 (10th Cir. 2007)*; see *Armijo, 843 F.2d at 407* ("Certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law."). If the district court can "see a reasonably clear and principled course, [it should] seek to follow it [itself]." Id. Because the

question of law that the County seeks to certify can be answered by reference to an appellate opinion of the New Mexico Court of Appeals, the County's *Motion to Certify Question to Supreme Court of New Mexico* [Doc. 27] will be denied. See *Segura v. Colombe, 895 F. Supp. 2d 1141, 1151, Doc. 46 (D. N.M. 2012)* (declining to certify the question of whether a cross-commissioned tribal police officer is a "public employee" entitled to defense and indemnification under the New Mexico Tort Claims [*18] Act, because the question "can be answered both by appellate opinions of the New Mexico Supreme Court and the New Mexico Court of Appeals. The answer can be found in the plain language of the NMTCA."); see also NMRA 12-607(A) (permitting certification only when the "question is one for which answer is not provided by a controlling . . . appellate opinion of the New Mexico Supreme Court *or the New Mexico Court of Appeals"* (emphasis added)).

B. Motion to Dismiss

The County has moved to dismiss the *Amended Third-Party Complaint* on the basis of sovereign immunity because, pursuant to the Court of Appeals' holding in Loya, Defendants Romero and Garcia are not "public employees" as defined by the Act. [Doc. 21] In response, Defendants Romero and Garcia contend that Loya was wrongly decided because the definitional sections of *§ 41-4-3(F)* are separate and distinct and the failure to satisfy one of the statutory definitions does not preclude an individual from satisfying another. [Doc. 54] Defendants Romero and Garcia argue that "it makes sense from a public policy perspective" to construe the Act in such a manner with respect to law enforcement officers:

> because the risk that persons exercising law enforcement [*19] authority who are full-time (or 'certified' part-time) salaried law enforcement officers will commit intentional torts is lower as compared to persons exercising such authority without the same degree of training or experience or certification. Likewise, the lines here drawn by the legislature—in distinguishing between intentional torts and negligence torts—likely rested on the expectation that on average the likelihood of severe (and costly) injuries that would result from intentional torts would tend to be greater than for the categories of negligence torts for which the TCA waives immunity. *§§ 41-4-5 to 41-4-11*. These differences explain why the statute protects all persons who meet the "public employee" definition of *§ 41-4-3(F)* from personal liability per *§ 41-4-4* for torts or *§ 1983* violations they commit within the scope of their duty, but why the County is not liable to third parties (per *§ 41-4-4(A)* and *§ 41-4-12*) for intentional torts committed by "public employees" unless they also meet the special "law enforcement officer" definition at *§ 41-4-3(D)*.

[Doc. 54 at 10]

To resolve the present motion to dismiss, the Court "must ascertain and apply [New Mexico] law with the objective that the result obtained in the federal court should be the result that [*20] would be reached in [a New Mexico] court." *Wood v. Eli Lilly & Co., 38 F.3d 510, 512 (10th Cir. 1994)*. "Absent a definitive ruling from a state's highest court, we must predict the course that body would take if confronted with the issue." *Rancho Lobo, Ltd. v. Devargas, 303 F.3d 1195, 1202 n.2 (10th Cir. 2002)* (internal quotation marks and citation omitted). "[A] decision from the New Mexico Court of Appeals, an intermediate court in that state . . . . cannot be considered a

controlling decision from New Mexico's highest court, the New Mexico Supreme Court." Id. "Rather, [w]here an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that it is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." Id. (internal quotation marks and citations omitted).

The New Mexico Supreme Court has not yet ruled on the issue of whether a tribal law enforcement officer operating under a county cross-commissioning agreement is a "public employee" under the Act and, therefore, entitled to defense and indemnity by the county. However, as explained in detail above, the Court of Appeals held in Loya that a cross-commissioning agreement does not make **[*21]** a tribal police officer "a 'public employee of the County" and, therefore, the county "has no duty to defend [the officer] . . . or indemnify him for tortious acts committed under color of his commission." *Loya, 319 P.3d at 662*. Prior to Loya, in *Williams v. Board of County Commissioners of San Juan County, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522 (N.M. App. 1998)*, the Court of Appeals "held that the TCA's definition of 'public employee' under *Section 41-4-3(F)* and 'governmental entity' under *Section 41-4-3(B)* did not include a cross-deputized Navajo police officer who was sued after issuing a Navajo speeding ticket to a non-Indian on a state right of way through the Navajo Nation." *Loya, 319 P.3d at 660 n.1*. In Williams, the Court affirmed the dismissal of the plaintiff's tort claims under the Act because the Navajo police officer's "cross-deputization as a San Juan County sheriff did not, in itself, make him a public employee." *Williams, 963 P.2d at 528*.

In Segura, the United States District Court for the District of New Mexico also considered whether a cross-deputized tribal police officer qualifies as a "public employee" under the Act. In that case, the defendants, a police officer employed by the Tesuque Pueblo and cross-deputized by Santa Fe County and the Board of County Commissioners of Santa Fe County, were sued for alleged violations of the New Mexico Tort Claims Act arising out of a traffic stop and **[*22]** arrest of the plaintiff, a non-Native American, for various violations of state law. *Segura, 895 F. Supp. 2d 1141, 1142, Doc. 46*. The plaintiff sought "to impose NMTCA supervisory liability on County Defendants under a theory of respondeat superior to require the County Defendants to answer for the alleged torts" of the cross-deputized police officer. *895 F. Supp. 2d 1141, 1144*. The Court held that the defendant officer was not a "law enforcement officer" as defined by the Act because he was not a salaried public employee of a governmental entity.[2] *895 F. Supp. 2d 1141, 1145*. The Court next considered whether the defendant officer was "acting on behalf of or in service of a governmental entity in any official capacity, with or without compensation" pursuant to *§ 41-4-3(F)(3)*.

The Court found that, because the defendant officer had arrested the non-Indian plaintiff for state criminal violations occurring on Indian land, he "was acting in his capacity as a Deputy

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[2] The Court noted that "although the undisputed facts indicate that Defendant Colombe was a 'salaried' employee in that he was employed full-time as a police officer by the Pueblo of Tesuque Tribal Police Department, the Tribal Police Department does not meet the second criteria of being a 'governmental entity' within the meaning of the NMTCA." *Segura, 895 F. Supp. 2d 1141, 1145, Doc. 46*. Furthermore, "while the County Defendants meet the second criteria of being a 'governmental entity,' the undisputed facts **[*23]** show that the County Defendants paid no part of Defendant Colombe's salary or benefits rendering it impossible for Defendant Colombe to meet the first criteria of being a 'salaried public employee' of the Santa Fe County Sheriff's Department." Id.

Sheriff for the County of Santa Fe."[3] *895 F. Supp. 2d 1141, 1146-47*. Nonetheless, the Court concluded that the defendant officer "was acting as an independent contractor and therefore is excluded from the Act's definition of 'public employee.'" *895 F. Supp. 2d 1141, 1147*. In arriving at this conclusion, the Court noted that the right-to-control test and the factors enumerated in *Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239, 243 (N.M. 2004)* indicate that "the Santa Fe County Sheriff's Department did not exercise sufficient control over Defendant Colombe's activities to render the relationship one of an employer and an employee." *895 F. Supp. 2d 1141, 1149*; see *Celaya, 85 P.3d at 243* (holding that, in addition to the right-to-control test, the court should also consider the following factors in determining whether an employer-employee relationship exists: "1) the type of occupation and whether it is usually performed **[*24]** without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business."). Because the defendant officer was not a "public employee" as defined by the Act, the Court rendered summary judgment in favor of the County.

The case law **[*25]** described above supports the Court of Appeals' decision in *Loya* that a cross-deputized tribal officer is not a "public employee" as defined by the Act. Nonetheless, Defendants Romero and Garcia contend that Loya was wrongly decided because the definitional sections of *Section 41-4-3(F)* are not mutually exclusive and public policy supports construing the Act to include a cross-deputized tribal officer who fails to meet the statutory definition of a "law enforcement officer." [Doc. 54 at 10] They contend that "from a policy perspective" it makes sense to distinguish between salaried law enforcement officers employed by a governmental entity and other individuals exercising traditional law enforcement functions, because the risk that the former officers "will commit intentional torts is lower as compared to persons exercising such authority without the same degree of training or experience." [Doc. 54 at 10] Defendants fail to cite any authority in support of the proposition that salaried law enforcement officers employed by a governmental entity are at a lower risk for committing intentional torts. Even assuming, for the sake of argument, that such officers are at a lower risk for committing intentional **[*26]** torts, the Court fails to see why the Act would specifically exclude such intentional torts from coverage under *§ 41-4-12*, but not exclude such torts from coverage when they are committed by other officers executing traditional law enforcement functions, especially when these other officers are at a higher risk for committing intentional torts. Defendants Romero and Garcia also argue that the Act's distinction between "intentional torts and negligence torts . . . likely rested on the expectation that on average the likelihood of severe (and costly) injuries that would result from intentional torts would tend to be greater than

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[3] The Court found *Williams, 963 P.2d at 524*, to be distinguishable because in that case:

> the tribal officer was not charging and prosecuting a non-Indian with a state crime, but rather was citing a non-Indian for violating tribal law. See *id. at 524*. Here, in contrast, it is not the commission by the Santa Fe County Sheriff's Department alone that renders Defendant Colombe a public employee, but rather the fact that Defendant Colombe was acting pursuant to his authority as a Santa Fe County Deputy Sheriff when he charged and prosecuted Plaintiff for violation of the laws of the State of New Mexico.

Segura, 895 F. Supp. 2d 1141, 1146, Doc. 46 n.2.

for the categories of negligence torts for which the TCA waives immunity." [Doc. 54 at 10] However, the Act only distinguishes between the intentional torts enumerated in § 41-4-12 and negligence torts for individuals who meet the statutory definition of a "law enforcement officer." See § 41-4-12. Under Defendants Romero's and Garcia's proposed construction of the Act, the government would be required to defend and indemnify officers executing traditional law enforcement functions, but who fail to meet the statutory definition of a "law enforcement officer," even when such officers commit [*27] the intentional torts enumerated in § 41-4-12. Given that these individuals are supposedly at a higher risk for committing intentional torts, it seems that the likelihood of "severe (and costly) injuries" would be far greater for this category of officers. Therefore, the Court agrees with the Loya Court that "reading the statute to say that a police officer who fails to meet the definition of a 'law enforcement officer' under Section 41-4-3(D) can then allege that his same conduct falls within another definition in order to trigger the duty to defend and indemnify is an illogical distinction that makes no sense." Loya, 319 P.3d at 661.

Defendants Romero and Garcia also rely on Dunn v. State ex rel. Taxation & Revenue Dep't, Motor Vehicle Div., 1993-NMCA-059, 116 N.M. 1, 859 P.2d 469 (N.M. App. 1993), to support their construction of the Act. In Dunn, the plaintiff brought a § 1983 claim and New Mexico Tort Claim Act claim against the State of New Mexico and Frank A. Mulholland, the former director of the Motor Vehicle Division of the Taxation and Revenue Department. Mulholland argued that he was immune from suit under the Act, in relevant part, because "as the Director of the Motor Vehicle Division, he was not a law enforcement officer within the contemplation of Section 41-4-12." Dunn, 859 P.2d at 472. The Court of Appeals noted that under the Motor Vehicle Code, Mulholland had the power to [*28] act as a "peace officer[] for the purpose of enforcing the provisions of the Motor Vehicle Code [and] to make arrests upon view and without warrant for any violation . . . of the . . . Code." Id. (quoting NMSA 1978, § 66-2-12(A)(1)-(2) (Repl. Pamp. 1989)). However, Mulholland submitted an affidavit averring that "his principle duties 'and the vast majority of my time and effort are involved in administrative matters,' not in acting as a law enforcement officer." Id. Because Mulholland's principle duties did not involve "holding 'in custody [persons] accused of a criminal offense, [or] . . . maintain[ing] public order or . . . [making] arrests for crimes,'" consistent with § 41-4-3(D), the Court held that he was "not a law enforcement officer within the contemplation of Section 41-4-12." Id. Therefore, Mulholland was immune from liability under the Act. Id. at 476.

Defendants Romero and Garcia contend that "[t]he Dunn case makes clear that they, like Director Mulholland, are nonetheless 'public employees' entitled to the protections of the TCA," even though they do not satisfy the statutory definition of a law enforcement officer. [Doc. 54 at 12] However, Dunn is distinguishable from Loya and the present case. Dunn did not consider whether "law enforcement officers [*29] acting within the scope of their police duties but who are not salaried employees of a governmental entity subject to the TCA," Loya, 319 P.3d at 661, nonetheless fall within a statutory definition of a "public employee." Furthermore, Dunn did not consider the scope of the catchall provision in Section 41-4-3(F)(3), since the Director of the Motor Vehicle Department is appointed by the Governor and, therefore, is an "elected or appointed official[]" under Section 41-4-3(F)(1). See NMSA 1978, § 9-11-5(A) (providing that the secretary of the Taxation and Revenue Department "shall be appointed by the Governor"); NMSA 1978, § 66-1-4.4(F) (providing that the term "director" in the Motor Vehicle Code means

"secretary"); NMSA 1978, § 66-1-4.16(F) (providing that the term "secretary" in the Motor Vehicle Code means "the secretary of taxation and revenue"). Accordingly, Defendants Romero's and Garcia's reliance upon Dunn is misplaced.

Defendants Romero and Garcia also rely on Scull v. State of New Mexico, 236 F.3d 588 (10th Cir. 2000) in support of their construction of the Act. In Scull, the plaintiff sued the County of Bernalillo, the City of Albuquerque, Tom Udall, the Attorney General of New Mexico, Anthony Tupler, an Assistant Attorney General of New Mexico, Robert Schwartz, the District Attorney for Bernalillo County, and Michael Sisneros, the Director of the Bernalillo County **[*30]** Detention Center for unlawful detention in violation of the Act. Id. at 591. The Tenth Circuit Court of Appeals noted that the immunity granted by the Act "does not apply to false imprisonment when caused by law enforcement officers while acting within the scope of their duties." Id. at 598 (citing § 41-4-12). Because "immunity principles [did] not resolve [the] issue," id. at 598-99, the Court proceeded to address the merits of the district court's grant of summary judgment in favor of the defendants.

In Scull, it appears to have been undisputed that the defendants were "law enforcement officers" as defined by the Act. See § 41-4-3(D). In contrast, in the present case, as in Loya, it is undisputed that the defendant cross-deputized tribal officers were *not* "law enforcement officers" as defined by the Act, even though they performed traditional law enforcement functions, and the dispositive issue is whether these officers nonetheless fall within an alternative definition of a "public employee" under § 41-4-3(F). Therefore, Scull does not assist the Court in construing the scope of the Act.

Lastly, Defendants rely on Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239, to support their proposed construction of the Act. In Celaya, the defendant was an ordained minister and volunteer chaplain **[*31]** with the Bernalillo County Sheriff's Department. Id. at 117. The New Mexico Supreme Court observed that § 41-4-3(F)(3) expressly "includes volunteers in the TCA, presumably in recognition of the important contribution volunteers can provide through government service." Id. at 118. The Court noted that:

> In so designating uncompensated persons working on behalf of the government, the legislature took action to protect both the volunteer and the public. The law protects the volunteer by providing immunity for an act not included within the TCA and by affording the volunteer indemnification and a defense when immunity has been waived. See § 41-4-4. Either way, the TCA treats the volunteer the same as any other employee, thereby encouraging volunteer participation in government. The TCA also protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty commit certain torts and injure innocent members of the public.

Id. Although § 41-4-3(F)(3) applies to volunteers, it does not apply to independent contractors and the question before the Court was whether the defendant chaplain was an independent contractor or an employee of the governmental entity. Id. at 118-19. Applying the right-to-control **[*32]** test and the factors enumerated in the Restatement (Second) of Agency § 220(2)(a-j), the Supreme Court concluded that the defendant chaplain was an employee of the Bernalillo County Sheriff's Department, rather than an independent contractor. Id.

In Celaya, the defendant chaplain did not execute traditional law enforcement functions and, therefore, the Court did not address the issue of whether an officer who executes traditional law enforcement functions, but fails to meet the definition of a "law enforcement officer" under *§ 41-4-3(D)*, nonetheless may be considered a public employee under *§ 41-4-3(F)(3)*. Therefore, the Court concludes that *Celaya* does not support Defendants Romero's and Garcia's proposed construction of the Act.

Defendants Romero and Garcia have failed to adduce any persuasive evidence that the New Mexico Supreme Court will not follow the reasoning of the Court of Appeals in Loya. See *United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F.3d 951, 957 (10th Cir. 2011)* (noting that where "there is no controlling decision by the highest court of a state, a decision by an intermediate court should be followed by the Federal court, absent convincing evidence that the highest court would decide otherwise"). Accordingly, the Court concludes, pursuant to *Loya*, that Defendants Romero and Garcia are not "public employees" under **[*33]** the Act. Therefore, the County's motion to dismiss the *Amended Third-Party Complaint* will be granted.[4]

IV. CONCLUSION

IT IS THEREFORE ORDERED that the County's *Motion to Certify Question to Supreme Court of New Mexico* [Doc. 27] is **DENIED**;

IT IS FURTHER ORDERED that the County's *Motion to Dismiss Third-Party Complaint* [Doc. 21] is **GRANTED**.

SO ORDERED this 3rd day of March, 2015, in Albuquerque, New Mexico.

/s/ M. Christina Armijo

M. CHRISTINA ARMIJO

Chief United States District Judge

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[4] In light of this conclusion, the Court does not address whether Defendants Romero and Garcia are excluded from the scope of the Act because they are "independent contractors."

Loya v. Gutierrez

Supreme Court of New Mexico

May 11, 2015, Filed

NO. 34,447

Opinion by: RICHARD C. BOSSON

Opinion

[1157] BOSSON, Justice.**

[*P1] Given New Mexico's highways that traverse both state and tribal lands, it is not uncommon that a tribal police officer patrolling those highways may be commissioned as a deputy county sheriff to arrest non-Indians and prosecute them in state court when they commit state traffic offenses on tribal land. In light of those recurring facts, we determine a county's legal obligation when a non-Indian, arrested by a tribal officer and prosecuted in state court for state traffic offenses, sues the arresting tribal officer for federal civil rights violations. More particularly, **[***2]** we decide when the county has an obligation under the New Mexico Tort Claims Act, *NMSA 1978, §§ 41-4-1 to -29* (1976, as amended through 2009) (NMTCA), to provide that tribal police officer with a legal defense in the federal civil rights action. The district court as well as our Court of Appeals found no such legal duty, in part because it concluded that the tribal officer was not a state public employee as defined in the NMTCA. We hold to the contrary, finding clear evidence in the text and purpose of the NMTCA requiring the county to defend the tribal officer, duly commissioned to act as a deputy county sheriff, under these circumstances endemic to the New Mexico experience.

BACKGROUND

[*P2] On September 5, 2009, Officer Glen Gutierrez, on duty as a full-time salaried police officer of the Pueblo of Pojoaque and also commissioned as a Santa Fe County deputy sheriff, was patrolling a portion of U.S. Highway 84/285 located within the exterior boundary of the Pojoaque Pueblo. He was driving his tribally-marked and issued police vehicle and was dressed in his full tribal uniform displaying his tribal badge. He was also carrying a deputy's commission card issued to him by the Santa Fe County sheriff.

[*P3] Officer Gutierrez observed **[***3]** Jose Luis Loya making a dangerous lane change and engaged his emergency equipment to signal Loya to pull over. Once stopped, Officer Gutierrez asked Loya to step out of his vehicle and informed Loya that he was under arrest for reckless driving in violation of *NMSA 1978, Section 66-8-113* (1987), a state law. Officer Gutierrez placed Loya in the back of his patrol vehicle and transported Loya to the Pojoaque Tribal Police Department for processing. Loya, a non-Indian, was not subject to prosecution for violation of tribal law, and therefore, he was transported from the Pueblo to the Santa Fe County Adult Detention Center where he was incarcerated. Ultimately, Officer Gutierrez prosecuted Loya for reckless driving in Santa Fe County Magistrate Court.

[*P4] Loya felt aggrieved by what happened to him that night. Based on those events, Loya filed a civil complaint against Officer Gutierrez in the First Judicial District Court to recover damages for deprivation of his civil rights under 42 U.S.C. Section 1983 (1996) (Section 1983), claiming false arrest, malicious prosecution, and use of excessive force. Section 1983 creates a civil action for damages under federal law against any person acting under color of state law who violates the Constitution and laws of the [***4] United States. *See* 42 U.S.C. § 1983. "Native American tribes and those acting under *tribal law* do not act under color of state law within the meaning of *[Section] 1983*," but Native-American actors may be subject to a *Section 1983* claim if their actions are taken pursuant to state authority. Williams v. Bd. of Cnty. Comm'rs, 1998-NMCA-090, ¶ 20, 125 N.M. 445, 963 P.2d 522 (emphasis added). "If an individual is possessed of state authority and purports to act under that authority, his action is state action." Id. ¶ 21 (internal quotation marks and citation omitted).

[*P5] The State of New Mexico has exclusive criminal jurisdiction over non-Indians for actions committed within the exterior boundaries of a tribe or pueblo pursuant to the Indian Pueblo Land Act Amendments of 2005. *See* Pub. L. No. 109-133, 119 Stat. 2573 (2005). A tribal police officer may have jurisdictional authority to enforce tribal civil [**1158] traffic ordinances against non-Indians and may eject or exclude a non-Indian engaging in criminal activity or may detain and transport the offender to proper state authorities. *See Pueblo of Pojoaque Civil Traffic Code, Tribal Council Resolution No. 1992-95* (August 20, 1992). *See also* Duro v. Reina, 495 U.S. 676, 696-97, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990). A tribal officer may not arrest, charge, jail, or prosecute non-Indian offenders for violation of state law without some additional state authority. *Id.*

[*P6] According to the [***5] affidavit of Pueblo of Pojoaque Police Chief John Garcia, the limited jurisdiction of tribal police officers historically created a gap in effective law enforcement on state highways located within the exterior boundaries of a tribe or pueblo. The county sheriff did not have adequate staff to combat criminal activity by non-Indians on state highways traversing tribal lands. Likewise, the tribal officers lacked authority to prosecute non-Indian offenders. To overcome this limitation and encourage jurisdictions to work together, the Santa Fe County sheriff issued commissions to Pojoaque Pueblo police officers to act as county sheriff's deputies.

[*P7] In the course of that practice, on June 23, 2008, Santa Fe County Sheriff Greg Solano issued a commission to Officer Gutierrez appointing him as a Santa Fe County deputy sheriff for purposes of enforcing state traffic laws and criminal statutes against non-Indian offenders for offenses committed within the exterior boundaries of Pojoaque Pueblo. To qualify for the appointment, Sheriff Solano required Officer Gutierrez to provide documentation showing successful completion of state and/or federal law enforcement training and certification, a written [***6] copy of his background investigation, and his written application. Sheriff Solano also required Officer Gutierrez to take the oath mandated by the New Mexico Constitution to "support the Constitution of the United States, the Constitution and laws of the State of New Mexico, the laws of the County of Santa Fe and faithfully and impartially discharge the duties of said office to the best of [his] ability." *See* N.M. Const. art. XX, § 1 ("Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws

of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.").

[*P8] As stated above, absent additional authority tribal police officers have no legal authority to charge non-Indian offenders for a violation of state law even if the violation is committed on tribal land. *See Duro, 495 U.S. at 696-697*. It is the commission as a county deputy sheriff that gives tribal police the authority to make such arrests while acting under state law. In this case, the very reason Officer Gutierrez, a *tribal* police officer, is subject to a *Section 1983* **[***7]** claim for actions taken under color of *state* law, is because he was acting under his state authority as a deputy sheriff, not tribal authority, when he charged, detained, and prosecuted Loya under state law. *See Williams, 1998-NMCA-090, ¶¶ 20-21*.

[*P9] Upon being sued, Officer Gutierrez tendered two requests to Santa Fe County to provide him with a legal defense and indemnification, if necessary, in accord with the defense and indemnification provisions of the NMTCA, *§ 41-4-4(B), (D)*. The County claimed it did not have any duty to provide a legal defense and indemnification, asserting that Officer Gutierrez was not a state "public employee" as defined by the NMTCA. *See § 41-4-3(F)*. Following the denial of his request, Officer Gutierrez filed a third-party complaint in the Loya litigation against the County seeking a declaratory judgment that the NMTCA required the County to defend and indemnify him with respect to Loya's *Section 1983* claims against him. The County answered and asserted a counterclaim for declaratory judgment in its favor.

[*P10] Both parties then filed motions for summary judgment, each basing its claim on an interpretation of the County's duties under the NMTCA. The district court ruled for the County, finding that Officer Gutierrez was not entitled to a defense under the NMTCA. The Court of Appeals affirmed. *Loya v. Gutierrez, 2014-NMCA-028, ¶ 23, 319 P.3d 656*. **[**1159]** We granted certiorari to resolve a significant issue of law that potentially affects law enforcement wherever **[***8]** state and tribal lands border each other throughout New Mexico. *Loya v. Gutierrez, 322 P.3d 1063, 2014-NMCERT-002*.

DISCUSSION

The New Mexico Tort Claims Act

[*P11] The issue before us is whether the County is obligated to defend and potentially indemnify Officer Gutierrez when he was sued for actions taken to charge, arrest, and prosecute a non-Indian offender in state court for violating state law on Indian land. The parties agree that the NMTCA guides this determination. The defense and indemnification provisions of the NMTCA, *§ 41-4-4(B), (D)*, set forth the obligation of governmental entities to protect public employees when they are sued for actions taken in the scope of their duties. Specifically, *Subsection (B)* states:

> [A] governmental entity shall provide a defense, including costs and attorney['s] fees, for *any public employee* when liability is sought for:
>
> (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of [***9] his duty.

Section 41-4-4(B) (emphasis added). Likewise, if a settlement or judgment is entered against a public employee acting within the scope of his or her duties, the governmental entity is required to pay the judgment or settlement. Section 41-4-4(D). These provisions are intended to protect "public employee[s]" from individual liability when they are acting within the scope of their duties, thus operating as a kind of statutory insurance policy. Risk Mgmt. Div. v. McBrayer, 2000-NMCA-104, ¶ 6, 129 N.M. 778, 14 P.3d 43. Accordingly, we focus first on whether Officer Gutierrez was acting as a "public employee" within the meaning of the NMTCA when he arrested Loya on a state highway traversing tribal lands.

Whether Officer Gutierrez Is a Public Employee Under the NMTCA

[*P12] Section 41-4-3(F) of the NMTCA defines "'public employee'" as "an officer, employee or servant of a governmental entity, excluding independent contractors" except for specifically defined individuals not relevant here. "'[G]overnmental entity' means the state or any local public body." Section 41-4-3(B). "'[S]tate' . . . means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions." Section 41-4-3(H). "'[L]ocal public body' means all political subdivisions of the state and their agencies, instrumentalities and institutions." Section 41-4-3(C). Based on these definitions the County is [***10] a "governmental entity," and the Pueblo of Pojoaque is not a "governmental entity" under the NMTCA.

[*P13] The question then is whether Officer Gutierrez was acting as a "public employee" for the County when he arrested Loya. The "public employee" definition in turn identifies eighteen categories of persons who are deemed to be "public employees," two of which pertain to this case. Section 41-4-3(F). Section 41-4-3(F)(2) identifies "law enforcement officers" as "public employees." Section 41-4-3(F)(3) identifies "public employees" as those "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."

Whether a Tribal Police Officer Can Also Be a Public Employee Under the NMTCA Under Certain Circumstances

[*P14] The County makes a number of arguments as to why Officer Gutierrez cannot be a public employee under the NMTCA.[1] We consider them in the order of their presentation.

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[1] Following oral argument, the County submitted supplemental authority to support its position that a tribal officer cannot be a public employee under the NMTCA. *See* Trujillo v. Romero, No. 13-CV-1178 MCA-SCY, Doc. 112, 2015 U.S. Dist. LEXIS 62282 (D.N.M. Mar. 3, 2015) (declining to certify question of whether the NMTCA requires a governmental entity [***11] to provide a defense and/or indemnification to a tribal officer commissioned as a deputy sheriff when, acting under color of state law, he allegedly commits torts and/or violations of Section 1983, because the question can be answered by an appellate opinion of the New Mexico Court of Appeals). In reaching the conclusion that the tribal officers in that case were not public employees under the NMTCA, the federal district court expressly relied on the Court of Appeals' decision in this case. *See generally* Loya, 2014-NMCA-028, 319 P.3d 656. For the reasons set forth in this opinion, we reverse the Court of Appeals and instead hold that, when

[*P15] [1160]** The County first argues that Officer Gutierrez is not a "public employee" based on the opinion from the Court of Appeals in *Williams, 1998-NMCA-090, ¶ 26*. *Williams* involved a Navajo tribal officer who was "cross-deputized" as a San Juan County sheriff's deputy, commissioned as a Bureau of Indian Affairs special deputy police officer, and certified by the New Mexico state police. *Id. ¶ 2*. The officer in that case issued a tribal speeding ticket, under Navajo law, to a non-Indian driving **[***12]** within the exterior boundaries of the Navajo Nation. *Id. ¶¶ 2, 3*. The person receiving the tribal speeding ticket (the plaintiff) sued the tribal officer under the NMTCA for alleged tortious behavior. *Id. ¶¶ 5, 26*. The plaintiff argued that the tribal officer, though making the arrest under tribal law, was subject nonetheless to the NMTCA because his "cross-deputization" to act under state law as a deputy sheriff made him a "public employee" under the NMTCA. *Id. ¶ 26*.The Court of Appeals affirmed dismissal of the tort claims, holding that the mere issuance of a deputy commission-without more-does not automatically transform a tribal officer into a "public employee" under the NMTCA. *Id.* The Court in *Williams* noted that the tribal officer issued a tribal traffic ticket, not a state traffic ticket, to the plaintiff and was therefore acting under Navajo law when he was sued. *Id. ¶ 3*. Importantly, the Court of Appeals left open the possibility that a tribal officer could be a "public employee" under the NMTCA if there were more evidence than just the issuance of a state commission to the tribal officer. *See Williams, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522*

[*P16] This is just such a case. Unlike *Williams*, Officer Gutierrez was enforcing *state **[***13]*** law, not tribal law, when he arrested Loya and charged him in state court for violating state law, thereby acting as a state officer and not a tribal officer. If Officer Gutierrez had issued a tribal ticket to Loya under Pueblo authority, he would have been acting on behalf of the Pueblo and the result would be the same as in *Williams*. The additional fact that Officer Gutierrez was acting on behalf of the County, not the Pueblo, creates an important distinction between the two cases, and thus provides the additional evidence missing from *Williams*. We conclude that the Court of Appeals' analysis in *Williams*is consistent with our determination here that Officer Gutierrez is not excluded from the NMTCA definition of "public employee" on the mere basis that he is also employed as a tribal officer. We next address whether Officer Gutierrez falls within one of the two identified categories of "public employee" under the NMTCA.

[*P17] As set forth previously, one definition of a public employee under the NMTCA is a "law enforcement officer." *Section 41-4-3(D)* defines "law enforcement officer" as:

> [A] full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed **[***14]** by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes.

Officer Gutierrez was not a "full-time salaried public employee" or even a "part-time salaried police officer" of the County or any other "governmental entity" recognized by the NMTCA. He was compensated by the Pueblo of Pojoaque and not by the County.

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enforcing state law, a tribal officer commissioned as a county sheriff's deputy is a public employee. Therefore, *Trujillo* is not persuasive.

[*P18] This does not end the inquiry, however. In addition to the "law enforcement officer" category, the NMTCA defines a public employee as a "person[] acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." *Section 41-4-3(F)(3)*. The statute does not supply a definition for this **[**1161]** category, so we look first to the text. *Key v. Chrysler Motors Corp., 1996-NMSC-038, ¶ 13, 121 N.M. 764, 918 P.2d 350* ("In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background.").

Whether Officer Gutierrez Is a "Person Acting On Behalf Of Government Or In Service Of a Governmental Entity In Any Official Capacity, Whether With Or Without Compensation"

[*P19] To meet this category of "public employee," Officer **[***15]** Gutierrez had to be acting on behalf of the County with or without compensation. *Section 41-4-3(F)(3)*. Officer Gutierrez must also have been acting in any official capacity. *Id.* At first glance it would appear that Officer Gutierrez satisfies both requirements. At the time of the Loya arrest, Officer Gutierrez was acting in an official capacity as a duly-sworn sheriff's deputy; he could not have legally arrested Loya, a non-Indian, any other way. When Officer Gutierrez made the arrest, he was acting on behalf of the County, not the Pueblo, which continued through Officer Gutierrez's prosecution of Loya in state magistrate court for the state traffic offense. In order to be certain, however, we must first understand the nature of Officer Gutierrez's commission to act as a deputy sheriff. A brief history of these commissions helps inform this understanding.

History Of Law Enforcement Commissions

[*P20] We start with the authority of a sheriff to commission a deputy. A sheriff's ability to commission deputies is rooted in ancient English common law under which a sheriff has inherent authority to vest his undersheriff with authority to perform every ministerial act the principal sheriff may perform. *State ex rel. Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294, 298 (Ohio Ct. App. 1947)* (per curium). **[***16]**

> [The deputy] acts for the sheriff in his name and stead. . . . In the absence of any statutory restriction, the sheriff has full power to appoint . . . an undersheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the office, such as the return and service of process and the like. All acts of the undersheriff or of the deputies are done in the name of the sheriff, who is responsible for them.

Id. In modern jurisprudence, the common-law office of deputy sheriff remains much the same and is the presumed rule unless a change is effected by the Constitution or state statute. *Id.*

[*P21] In New Mexico, the power of a county sheriff to commission someone as a deputy to "preserve the public peace and to prevent and quell public disturbances," *N.M. Att'y Gen. Op. 57-83, 1957 N.M. AG LEXIS 84 (1957)*, was codified as early as 1856 by the Legislative Assembly of the Territory of New Mexico. That statute states:

> Section 1. That the sheriffs in all the counties of this Territory shall have power to appoint deputies . . . .

> Sec. 2. Each deputy . . . shall take an oath to discharge faithfully the duties of his office, and the sheriffs shall be respons[i]ble for the acts of [***17] their deputies as such.
>
> Sec. 3. The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals, with the same effect as though they were executed by the respective sheriffs.

1855-56 N.M. Laws, ch. 2, §§ 1-3. Under that statute, the sheriff in every territorial county had the power to appoint deputies as long as they took an oath to "discharge faithfully the duties of his office" prior to entering upon the duties thereof. *Id.*§ 2. In line with common-law principles, the statute mandated that "the sheriffs shall be respons[i]ble for the acts of their deputies." *Id.* In 1905, the Legislature added eligibility requirements for deputy sheriffs. NMSA 1915, § 1257 (1905). The same oath was later added to the New Mexico Constitution. *See N.M. Const. art. XX, § 1.*

[*P22] [**1162] In 1891, the Legislative Assembly enacted an additional statute to require all appointed special deputy sheriffs, marshals, police officers, or other peace officers in New Mexico to be citizens of the Territory of New Mexico. *1891 N.M. Laws, ch. 60, § 1*. The statute was amended in 2006 to require that all deputy sheriffs be United States citizens. *See NMSA 1978, § 4-41-10* (2006). The 1891 statute also required a written appointment [***18] from the person authorized by law to appoint special deputy sheriffs before the appointed person could "assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff, special constable, marshal or police[officer] or other peace officer." *1891 N.M. Laws, ch. 60, § 1*.

Extension Of Commissions To Tribal Officers

[*P23] During the 1950s, the New Mexico Attorney General issued several legal opinions advising that full-time police officers employed by New Mexico tribes and pueblos could be commissioned as special deputies as long as they met statutory qualifications under NMSA 1953, Section 15-40-10 (1905); NMSA 1953, Section 15-40-12 (1901); and NMSA 1953, Section 39-1-9 (1891). *N.M. Att'y Gen. Op. 55-6305, 1955 N.M. AG LEXIS 238 (1955)*; *N.M. Att'y Gen. Op. 57-83, 1957 N.M. AG LEXIS 84*. The Attorney General characterized these specially commissioned tribal officers as "unpaid [county sheriff's] deput[ies]." *N.M. Att'y Gen. Op. 66-91, 1966 N.M. AG LEXIS 90 (1966)*. Today, county sheriffs maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances, including the authority to appoint tribal police officers who satisfy statutory qualifications. *See NMSA 1978, § 4-41-5* (1975) ("Deputy sheriffs; appointment and term; merit [***19] system"); *NMSA 1978, § 4-41-8* (1905) ("Deputy sheriff; qualifications; character; revocation of commission"); *and NMSA 1978, § 4-41-9* (1855-56) ("Deputy sheriffs; powers and duties"). **Commissioning Tribal Officers By Contractual Agreement And Not Just By Appointment**

[*P24] In addition to the authority of the county sheriff to appoint tribal police officers to act as special deputies, the Legislature authorized additional law enforcement agencies during the 1970s to issue commissions through formal agreements with tribal entities. The Mutual Aid Act, *NMSA 1978, §§ 29-8-1 to -3* (1971), authorizes "[a]ny state, county or municipal agency having

and maintaining peace officers [to] enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act, with respect to law enforcement." Section 29-8-3. Other "public agenc[ies]" include "an Indian tribal council, Indian pueblo council and the state or any county or municipality thereof." Section 29-8-2. To be valid, a mutual aid agreement must be in writing and approved by both the "public agency"—in this case the Pueblo of Pojoaque—and the governor of New Mexico. *See* State v. Branham, 2004-NMCA-131, ¶ 14, 136 N.M. 579, 102 P.3d 646; *see also* § 29-8-3.

[*P25] The other type of statutory agreement, referred to as a "cross-commission agreement," is authorized under NMSA 1978, Section 29-1-11 (2005). This provision authorizes the chief of the **[***20]** New Mexico state police to issue commissions as New Mexico peace officers to members of tribal police departments as long as statutory procedures are followed and the requirements and responsibilities of each entity are set forth in a formal written agreement. Section 29-1-11(B). Originally, the statute only authorized cross-commission agreements between the New Mexico state police and members of the Navajo police department. NMSA 1953, § 39-1-12 (1972). In 1979, the Legislature amended the statute to authorize state police to enter into agreements with members of any New Mexico tribe or pueblo. NMSA 1978, § 29-1-11(B) (1979). As indicated, this statute only pertains to agreements with the state police.

[*P26] The 1979 amendment also added several conditions to be included in a crosscommission agreement, including a training requirement for all commission applicants, proof that the tribe or pueblo entering into the agreement has adequate public liability and property damage insurance for vehicles **[**1163]** operated by the peace officers and police professional liability insurance, and a requirement that the chief of the New Mexico state police and the tribe or pueblo meet at least quarterly to discuss the status of the agreement. *Id.* ¶ C. Importantly, in 2005 **[***21]** the Legislature added a subsection to the statute cautioning that these procedures in the cross-commission statute are separate from, and do not "impair[] or nullif[y]" the traditional "authority of county sheriffs to appoint . . . duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico . . . as deputy sheriffs authorized to enforce New Mexico criminal and traffic law." Section 29-1-11(G).

[*P27] Thus, the Mutual Aid Act and the statute authorizing cross-commission agreements are not, and never have been, the exclusive source of authority for commissioning a tribal police officer to act under state law as a deputy sheriff. Sheriffs retain that traditional authority, going back to the common law and early territorial days, to appoint deputies, including tribal police officers, to assist the sheriff in the enforcement of New Mexico criminal and traffic law. These appointments may occur, pursuant to the sheriff's historic authority under Section 4-41-5, without a formal agreement between governmental entities and, more to the point, without any assurance that the tribe will indemnify the county in the event of litigation.

[*P28] Accordingly, **[***22]** Santa Fe County Sheriff Solano had the authority under state law to commission Officer Gutierrez, notwithstanding the lack of any formal agreement between the County and the Pueblo of Pojoaque. At the time of the Loya arrest, Officer Gutierrez was duly acting as an unpaid sheriff's deputy, a volunteer, no different from any volunteer deputy commissioned over the past century.

The Effect Of the Sheriff's Unanswered Letter To the Pueblo

[*P29] The County argues, however, that in this particular instance Sheriff Solano issued the commission subject to the provisions set forth in the January 24, 2005, letter from Sheriff Solano to Pueblo of Pojoaque Tribal Police Chief John Garcia. According to the County, that letter memorialized the scope of authority conferred upon Officer Gutierrez, provided rules for commissioned deputies to follow when acting on behalf of the County, and delineated financial responsibilities between the County and the Pueblo. In particular the letter stated that the Pueblo of Pojoaque shall be liable if a commissioned officer "is sued for actions taken while effecting an arrest or pursuing a suspect." The County argues that the letter created an agreement between the County **[***23]** and the Pueblo of Pojoaque and that Officer Gutierrez is commissioned pursuant to the conditions set forth in that agreement, including the Pueblo's assumption of liability.

[*P30] We find the County's position unpersuasive. The record is devoid of any evidence that Pojoaque Police Chief Garcia, the Pueblo Governor, or the Pueblo Council ever acknowledged the existence of that letter, much less agreed to its terms. Officer Gutierrez claimed that he was unaware of the letter at the time he took the oath of office as a commissioned deputy sheriff. The district court below issued no contrary findings. Nothing in the record indicates any efforts by Sheriff Solano to follow through with these purported (and unilateral) conditions. There is no indication of any discussions verifying that the Pueblo had accepted liability for its officers. Accordingly, we need not decide the letter's legal efficacy without any evidence of its acceptance. And we certainly could not decide the letter's legal efficacy without hearing from the Pueblo. *See* *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)* ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal quotation marks and citations omitted)); *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379 (8th Cir. 1985)* ("[N]othing **[***24]** short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation.").

[*P31] As discussed earlier, the Legislature has provided for agreements between Native-American tribes and the State, but this **[**1164]** letter does not fall within anything the Legislature has authorized. Without a written, executed agreement, it does not comply with the terms of the Mutual Aid Act. The letter does not create a valid cross-commission agreement under *Section 29-1-11* because those agreements are limited to commissions issued by the New Mexico state police. In fact, the statute clearly states that the authority of county sheriffs to appoint duly commissioned deputies is not limited, impaired or nullified by the provisions of *Section 29-1-11*. *See* *Section 29-1-11(G)*. The statute allows for the appointment of commissioned deputies (including tribal officers), but makes no reference to the kind of agreement envisioned here, including assumption of liability. *Id.*

[*P32] Accepting that Officer Gutierrez was commissioned as a volunteer sheriff's deputy and not pursuant to any formal agreement executed under New Mexico statute, we return to our initial, "working" determination that Officer Gutierrez seemed to be acting as a "public employee" under **[***25]** the NMTCA when he arrested and prosecuted Loya. *See* *§ 41-4-3(F)*. As an unpaid deputy, Officer Gutierrez was acting in an "official capacity" and "on behalf or in service of" the County sheriff and Santa Fe County. *See* *§ 41-4-3(F)(3)*. Satisfaction of these two

requirements necessarily makes Officer Gutierrez a "public employee" under the NMTCA; he was a "person[] acting on behalf or in service of a governmental entity [the County] in any official capacity, whether with or without compensation." *Id.* As a "public employee" under that section of the NMTCA, Officer Gutierrez was entitled to its benefits including a legal defense and indemnification.

[*P33] As an aside, it is of no import that the County did not compensate Officer Gutierrez for his service. The language in *Section 41-4-3(F)(3)* "with or without compensation" is an "express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the [NM]TCA." *Celaya v. Hall, 2004-NMSC-005, ¶ 9, 135 N.M. 115, 85 P.3d 239*. There is clear legislative intent to protect both paid employees and volunteers from personal liability for actions taken on behalf of their "governmental entity" employer with or without any agreement pertaining to indemnification and legal defense. We see no reason why Officer **[***26]** Gutierrez, an unpaid sheriff's deputy, should be treated any differently simply because the Legislature also intended to provide protection from personal liability for full-time "law enforcement officers" as defined under the NMTCA. The NMTCA treats volunteers the same as any other employee and "protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty" are hauled into court. *Celaya, 2004-NMSC-005, ¶ 9, 135 N.M. 115, 85 P.3d 239*

As a Tribal Police Officer, Officer Gutierrez Is Not Limited To the "Law Enforcement Officer" Subcategory Of "Public Employee"

[*P34] . The County further argues that even if a tribal police officer may technically fit within the definition of a "public employee" as a person "acting on behalf . . . of . . . government[] . . . in any official capacity," the operative category in this inquiry is nonetheless limited to "law enforcement officer." *See § 41-4-3(D), (F)*. According to the County, because Officer Gutierrez was purporting to act specifically as a law enforcement officer and not generally as a public employee when he arrested and charged Loya, then he can only qualify under the NMTCA as a "law enforcement officer." As previously acknowledged, of course, Officer **[***27]** Gutierrez is not a "law enforcement officer" as defined under the NMTCA because he is not a "full-time salaried public employee" of the County. What the County is really trying to do, therefore, is to exclude Officer Gutierrez and other unpaid sheriff's deputies from the protections provided by the NMTCA because the County does not pay them a salary for their service. We first look at the policy implications of such as position.

[*P35] Presumably, allowing the County sheriff to commission tribal police officers as deputies has enhanced the law enforcement presence and effectiveness within the County, resulting in improved public safety at little cost to the County. *See Affidavit of **[**1165]** Chief John Garcia Pueblo of Pojoaque Tribal Police Department* in *Loya v. Gutierrez*, First Judicial District Court No. D-101-CV-2010-3854, dated November 10, 2011. The County seeks to keep that benefit while denying any responsibility for the risks arising from its creation—namely actions taken by volunteer deputies who are sued while acting on the County's behalf. The County's position would leave those unpaid deputies exposed to personal liability, left to pay the costs of their own defense, while simultaneously **[***28]** leaving members of the public like Loya without any realistic chance of financial recourse. To put the matter delicately, such a result would seem to

be at odds with sound public policy. The Legislature may opt for such a course, but we would need an unambiguous expression of legislative intent, far from what we have at present.

[*P36] The County argues that the more specific public employee definition—law enforcement officer—should prevail over more general provisions touching on the same subject. The County's argument proceeds as follows: Officer Gutierrez was acting in a law enforcement officer capacity when he stopped and arrested Loya, the term "law enforcement officer" is a more specific subcategory of "public employee" than "persons acting on behalf of," so "law enforcement officer" should be the operative category.

[*P37] The proposition that specific prevails over general stems from a case where the notice requirements stated within a statute conflicted with the notice requirements set forth in a rule. *Prod. Credit Ass'n v. Williamson, 1988-NMSC-041, 107 N.M. 212, 755 P.2d 56*. This Court held that the statute addressed the specific type of proceeding at issue in the case and was therefore controlling over the rule which addressed general notice requirements, hence **[***29]** creating the specific over general rule of statutory interpretation. *Id. ¶ 5*.

[*P38] Here, we are not dealing with different parts of a statute or a conflict between a statute and a rule; we are looking at one definition. The definition of "public employee" includes 18 different categories. *See § 41-4-3(F)*. "Law enforcement officer" might be more focused than "persons acting on behalf or in service of a governmental entity in any official capacity," but that does not make it more specific for purposes of statutory construction. The Legislature purposely listed multiple categories, and we must assume it did so for good reason. We cannot allow the County to limit the categories available to Officer Gutierrez without ignoring the clear intent of the Legislature. As a result, we decline to adopt the County's position that Officer Gutierrez must meet the "law enforcement officer" definition in order to be recognized as a "public employee."

The Duty To Provide a Defense In a *Section 1983* Action Is Not Subject To the State's Assertion Of Sovereign Immunity

[*P39] The County next argues that even if Officer Gutierrez is a "public employee" under the NMTCA, there is no duty to provide a legal defense here because both the County **[***30]** and Officer Gutierrez are immune from liability. Under the NMTCA, the State's general policy is that "governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act." *Section 41-4-2(A)*. The County interprets this policy statement to mean that it has a duty to defend its employees only when it is or could be liable for a tort for which sovereign immunity has been waived under the NMTCA.

[*P40] The NMTCA asserts sovereign immunity from liability for any tort except as waived by *Sections 41-4-5 to -12*. *See § 41-4-4(A)*. Here, the County argues it is immune from suit because none of the stated waiver exceptions apply. Specifically, Officer Gutierrez cannot be sued under *Section 41-4-12*,[2] the only waiver exception otherwise applicable to this situation,

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[2] *Section 41-4-12*, liability for law enforcement officers, waives immunity for liability from:

> personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, **[***31]** false arrest, malicious prosecution, abuse of process, . . . or deprivation of any rights privileges or immunities secured by

because, as stated **[**1166]** earlier in this opinion, Officer Gutierrez is not a full time salaried "law enforcement officer" for the County. If there can be no NMTCA liability, then the County has no duty to defend. With respect, the County misperceives the law in several respects.

[*P41] The terms "waiver" and "sovereign immunity" do not appear anywhere in the text of *Section 41-4-4(B)*, the provision that sets forth the County's duty to provide a legal defense. In order to accept the County's argument that the defense obligation is dependent upon a statutory waiver of sovereign immunity, we would have to read words into *Section 41-4-4(B)*, limiting the County's defense obligation to actions brought under one of the torts for which sovereign immunity has been waived. But *Section 41-4-4(B)* does not say that; it imposes no such limitation. The statute reads, "a governmental entity [the County] shall provide a defense . . . when liability is sought for" (1) "any tort" or (2) "any violation of . . . any rights, privileges or immunities secured by the constitution and laws of the United States [civil rights claims] . . . ." *Id.* Textually then, *Section 41-4-4(B)* requires a defense equally for (1) claims that *are* torts for which sovereign immunity has been waived, and (2) **[***32]** claims that are *not* torts (civil rights claims) for which sovereign immunity has not been waived under the NMTCA.

[*P42] In addition to being at odds with the statute's text, the County's position would seem to contradict settled insurance law and the expectations that normally arise with respect to an insurer's duty to defend. It is the norm that an insurer, though denying coverage and liability, must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations. *See Miller v. Triad Adoption & Counseling Servs., Inc., 2003-NMCA-055, ¶ 9, 133 N.M. 544, 65 P.3d 1099* ("If the allegations of the complaint or the alleged facts tend to show that an occurrence comes within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured."); *see also Lujan v. Gonzales, 1972-NMCA-098, ¶ 22, 84 N.M. 229, 501 P.2d 673* (an insurer's "good faith belief that there was no coverage . . . is not a defense to the breach of the duty to defend").

[*P43] Here, contrastingly, the County, while denying any liability to Loya for Officer Gutierrez's actions, wants to be relieved of any duty to defend Officer Gutierrez even before it obtains a ruling in its favor. The County, unlike a normal insurer, would leave Officer Gutierrez, in the position of an insured, to fight **[***33]** off liability on his own at his own expense. This would appear to fly in the face of *Section 41-4-4(B)* which equates the duties of the County with the duties of an insurer. *See § 41-4-4(B)* ("Unless an insurance carrier provides a defense, a governmental entity shall provide a defense . . . for any public employee when liability is sought for" (1) a tort or (2) civil rights violations under federal or state law.)

[*P44] Focusing on the specific rights and obligations set forth in the *NMTCA, Section 41-4-4(A)* asserts sovereign immunity from liability except as waived; however, the assertion is only for immunity from tort liability, not civil rights liability. *See § 41-4-2(B)* ("Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and . . . standard of care."); *§ 41-4-4(A)* ("A governmental entity and any public employee . . . are granted immunity from liability for any tort except as waived by . . . *Sections 41-4-5 through 41-4-12*.").

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the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

[*P45] The NMTCA does not grant immunity from liability for federal civil rights actions, nor could it do so under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."). *See also* *Howlett v. Rose*, 496 U.S. 356, 375-76, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) (noting that state laws that attempt **[***34]** to provide for immunities "over and above those already provided in *§ 1983*" are preempted); *Martinez v. California*, 444 U.S. 277, 284, n. 8, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) (noting that "[c]onduct by persons acting under color of state law which is wrongful under *42 U.S.C. § 1983* . . . cannot be immunized by state law" because a "construction of the **[**1167]** federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced" (internal quotation marks and citations omitted)). Government officials can be sued in their individual capacities for damages under *Section 1983*, *Hafer v. Melo*, 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); and in their official capacity for injunctive relief, *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012).

[*P46] It follows, therefore, that the listed waivers, including *Section 41-4-12*, are only relevant when liability is sought for the torts listed therein.[3] But here, the suit Loya brought against Officer Gutierrez alleges violations of federally protected constitutional rights under *Section 1983*, and does not allege tort liability. *Loya*, 2014-NMCA-028, ¶ 8. Accordingly, the waiver exceptions under *Section 41-4-4(A)* would seem to have no bearing on the County's obligation to provide a defense when liability is sought against its employee for violation of federal constitutional rights.

[*P47] The same is true for the County's duty to indemnify Officer Gutierrez in the event of a judgment against him. The County must pay that judgment under the clear language of the NMTCA. *See* *§ 41-4-4(D)* ("A governmental entity shall pay any settlement or any final judgment entered against a public employee for" (1) any tort or (2) violation of federal constitutional rights.). An award of punitive damages, which are not even authorized under the *NMTCA, Section 41-4-19(D)*, must also be paid by the governmental entity/insurer under the NMTCA if sustained "under the substantive law of a jurisdiction other than New Mexico, including . . . the United States of America." *Section 41-4-4(C)*. Here again, **[***36]** there appears to be no statutory link between the County's obligation to defend and indemnify a public employee and the separate question of whether the County can be held liable for one of the torts enumerated in the NMTCA for which sovereign immunity has been waived.

[*P48] History supports our conclusion. The NMTCA, as originally enacted, only required a governmental entity to provide a defense when liability was alleged for torts committed by the employee. *See* 1976 N.M. Laws, ch. 58, § 3(C). Under the original statute, it is possible that the obligation of the governmental entity to provide a defense was dependent upon express waiver of liability because the statute only required the entity to provide a defense for tort actions. If the

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[3] *Section 41-4-12* is essentially **[***35]** a restatement of the provisions of the former Peace Officers Liability Act (POLA). *See* Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. Rev. 249, 264 (1976). POLA was enacted in 1973 "to provide a permissive method whereby the state or a local public body may elect to protect peace officers from personal liability arising out of certain acts committed during the performance of their activities . . . and to compensate the individuals wrongfully harmed by these actions." 1973 N.M. Laws, ch. 194, § 2. POLA was repealed upon the enactment of the NMTCA. *See* Kovnat, *supra*, 255-64.

statute today read as it did in 1976, it might have been necessary for Officer Gutierrez to fit within one of the waiver exceptions in order to be provided with a defense. *See id.* ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, whether or not alleged to have been committed maliciously, fraudulently or without justifiable cause, the governmental entity shall provide a defense.")

[*P49] **[***37]** In 1977, however, the Legislature amended the statute and added a subsection to the defense provision to require a governmental entity to provide a defense when liability is sought for any violation of constitutional rights as well as for commission of the specific torts for which liability was waived in the Act. *See* 1977 N.M. Laws, ch. 386, § 3(C) ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, or for a violation of property rights or any rights, privileges or immunities secured by the constitution . . . the governmental entity shall provide a defense and pay any settlement or judgment."). Thus, the amendment expanded the duty to defend.

[*P50] **[**1168]** It is clear from the added subsection, therefore, that there exists a clear right to defense against civil rights claims with no reference to assertion of waiver of immunity from those claims. *See § 41-4-4(A)*. If the Legislature intended to condition the duty to provide a defense upon a finding that immunity is waived, it would not have amended the original statute to require an entity to provide a defense against civil rights violations without also asserting immunity for those same violations.

[*P51] All of this makes **[***38]** sound policy sense. If a police officer or other public employee can be sued under federal law for violation of federally-secured constitutional rights while acting within the scope of his or her duty, sound public policy supports a county not abandoning its officer, but coming to the officer's assistance with a legal defense and indemnification if necessary. Therefore, showing waiver of tort liability is not required before a governmental entity is obligated to provide its employee with a defense in a *Section 1983* action where there are no tort claims asserted.

Officer Gutierrez Was Not Acting As an Independent Contractor

[*P52] Because we determine that Officer Gutierrez otherwise meets the "public employee" definition, we now address the County's final argument that he is excluded as an independent contractor. *See § 41-4-3(F)* ("'[P]ublic employee' means an officer, employee or servant of a governmental entity, excluding independent contractors."). The district court determined that Officer Gutierrez failed to meet the definition of "public employee," so it did not reach this issue. The County argues that even if Officer Gutierrez is otherwise a "public employee" for purposes of the NMTCA, he was nonetheless acting as **[***39]** an "independent contractor" when he arrested, charged, and prosecuted Loya.

[*P53] We start by questioning, without deciding, whether a sheriff's deputy could ever "act" as an "independent contractor." The common law rule, undisturbed by New Mexico statute, has long established that a deputy acts on behalf of his sheriff. We are unaware of any situation in which a sheriff has lawfully commissioned an individual to serve as a deputy without also controlling, or reserving control over, the manner and means by which that deputy exercises the authority conferred upon him by the sheriff. A functional law enforcement system requires accountability and uniformity among the officers. If a sheriff no longer had the duty to oversee

the actions of sworn deputies, chaos or at least a lack of critical accountability would ensue. Rightfully so, the public would question such a rogue system of law enforcement. We have grave doubts whether our Legislature would tolerate such a system.

[*P54] That said, the County offers *Segura v. Colombe* to support its position that a sheriff's deputy can act as an independent contractor. *895 F. Supp. 2d 1141 (D.N.M. 2012)*. In that case, the federal district court determined that the County did not exercise sufficient **[***40]** control over the deputy's activities to render the relationship one of employer and employee and thus found that the officer was acting as an independent contractor. *Id. at 1148-49*.

[*P55] In reaching its determination, the *Segura* court applied the test announced by this Court in *Celaya, 2004-NMSC-005, ¶ 15, 135 N.M. 115, 85 P.3d 239*.*Segura, 895 F. Supp. 2d at 1149*. In *Celaya*, this Court held that a strict application of the right-to-control test may lead to inconsistencies when analyzing whether an individual is an independent contractor for purposes of the NMTCA. We instead adopted the multi-factor analysis in *Restatement (Second) of Agency, § 220(2)(a)-(j)* (1958), which includes:

> 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business.

[1169]** *Celaya, 2004-NMSC-005, ¶ 15, 135 N.M. 115, 85 P.3d 239*The facts in *Celaya* involved a volunteer chaplain for the sheriff's department who was in an accident while driving a department vehicle. In that case, **[***41]** the right-to-control analysis alone could not resolve the issue of whether a volunteer chaplain was an independent contractor under the NMTCA. Thus, it was necessary to go beyond right to control to determine the relationship between the chaplain and the sheriff's department.

[*P56] No such further inquiry is necessary here. In the case of a sworn sheriff's deputy engaged in enforcing state law on behalf of the county, there is a clear right to control—indeed an obligation to control—the actions of a deputy. When that right to control is so fundamentally a part of the relationship, we find it unnecessary to analyze the relationship under the additional factors announced in *Celaya*.

[*P57] We note from our reading of *Segura* that, unlike the present case, the parties there presented very little evidentiary support for the proposition that the deputy was not an independent contractor. Beyond that difference, however, we find the federal court's reasoning unpersuasive for the reasons stated as a matter of sound legal policy.

CONCLUSION

[*P58] We hold that the County must provide Officer Gutierrez with a legal defense, including costs and attorney's fees in conformity with the NMTCA. We therefore reverse the entry **[***42]**

of summary judgment in favor of the County and remand to the district court for further proceedings consistent with this ruling.

[*P59] IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:

PETRA JIMENEZ MAES, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

ABIGAIL P. ARAGÓN, Judge

Sitting by Designation

End of Document

NOTES

NOTES

The Future of Cross-commissioning

Carl Rogers

November 5, 2015

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HOLDINGS AND IMPLICATIONS RE *LOYA V. GUTIERREZ*, 350 P.3d 1155 (NM 2015) AND RELATED REMEDY ISSUES

PREPARED BY C. BRYANT ROGERS, ESQ.
OCTOBER 29, 2015
FOR
ILS CLE – NOVEMBER 5, 2015
THE FUTURE OF CROSS-COMMISSIONING: WHAT EVERY TRIBAL, STATE AND COUNTY LAWYER SHOULD CONSIDER POST *LOYA V. GUTIERREZ*

THE HOLDINGS IN *LOYA*

In *Loya* the New Mexico Supreme court held that a tribal police officer who holds a deputy sheriff's commission is entitled to the protection of the New Mexico Tort Claims Act (NMTCA), § 41-4-1 *et seq.*, when sued on a federal civil rights act claim for actions he took in enforcing state law against a non-Indian in his capacity as a deputy sheriff. The key passages from the *Loya* opinion which set out the Court's ultimate ruling and address the arguments the Court accepted, are set out below. I have not included passages which address the various arguments which the Court rejected:

> The issue before us is whether the County is obligated to defend and potentially indemnify Officer Gutierrez when he was sued for actions taken to charge, arrest, and prosecute a non-Indian offender in state court for violating state law on Indian land. The parties agree that the NMTCA guides the determination. The defense and indemnification provisions of the NMTCA, § 41-4-4(B), (D), set forth the obligation of governmental entities to protect public employees when they are sued for actions taken in the scope of their duties. ... if a settlement or judgment is entered against a public employee acting within the scope of his or her duties, the governmental entity is required to pay the judgment or settlement. Section 41-4-4(D). (P. 1159).
>
> * * * *.

Section 41-4-3(F) of the NMTCA defines "'public employee'" as an officer, employee or servant of a governmental entity, excluding independent contractors' except for specifically defined individuals not relevant here." (P. 1159).

* * * *

The question then is whether Officer Gutierrez was acting as a "public employee" for the County when he arrested Loya. The "public employee" definition in turn identifies eighteen categories of persons who are deemed to be "public employee," two of which pertain to this case. Section 41-4-3(F). Section 41-4-3(F)(2) identifies "law enforcement officers" as "public employees." Section 41-4-3(F)(3) identifies "public employees" as those persons acting on behalf or in service of a governmental entity in any official capacity whether with or without compensation." (P. 1159).

* * * *

... As an unpaid deputy, Officer Gutierrez was acting in an "official capacity" and "on behalf or in service of the County sheriff and Santa Fe County. *See* § 41-4-3(F)(3). Satisfaction of these two requirements necessarily makes Officer Gutierrez a "public employee" under the NMTCA. He was a "person[] acting on behalf or in service of a governmental entity [the County] in any official capacity, whether with or without compensation." *Id.* As a "public employee" under that section of the NMTCA, Officer Gutierrez was entitled to its benefits, including a legal defense and indemnification. (P. 1164).

* * * *

Presumably, allowing the County sheriff to commission tribal police officers as deputies has enhanced the law enforcement presence and effectiveness within the County, resulting in improved public safety at little cost to the County. ... The County seeks to keep that benefit while denying any responsibility for the risks arising from its creation—namely actions taken by volunteer deputies who are sued while acting on the County's behalf. The County's position would leave those unpaid deputies exposed to personal liability, left to pay the costs of their own defense, while simultaneously leaving members of the public like Loya without any realistic chance of financial recourse. To put the matter delicately, such a result would seem to be at odds with sound public policy. The Legislature may opt for such a course, but we would need an unambiguous expression of legislative intent, far from what we have at present. (P. 1165).

* * * *

Because we determine that Officer Gutierrez otherwise meets the "public employee" definition, we now address the County's final argument that he is excluded as an independent contractor. *See* § 41-4-3(F). ...

* * * *

We start by questioning, without deciding, whether a sheriff's deputy could ever "act" as an "independent contractor." The common law rule, undisturbed by New Mexico statute, has long established that a deputy acts on behalf of his sheriff. We are unaware of any situation in which a sheriff has lawfully commissioned an individual to serve as a deputy without also controlling, or reserving control over, the manner and means by which that deputy exercises the authority conferred upon him by the sheriff. A functional law enforcement system requires accountability and uniformity among the officers. If a sheriff no longer had the duty to oversee the actions of sworn deputies, chaos or at least a lack of critical accountability would ensue. Rightfully so, the public would question such a rogue system of law enforcement. We have grave doubts whether our Legislature would tolerate such a system. (P. 1168).

* * * *

... in the case of a sworn sheriff's deputy engaged in enforcing state law on behalf of the county, there is a clear right to control—indeed an obligation to control—the actions of a deputy. When that right to control is so fundamentally a part of the relationship, we find it unnecessary to analyze the relationship under the additional factor announced in *Celaya*. (P. 1169).

* * * *

We hold that the County must provide Officer Gutierrez with a legal defense, including costs and attorney's fees in conformity with the NMTCA. ... (P. 1169). (Emphases added).

SOME RESULTS OF *LOYA* COULD BE ALTERED BY GOVERNEMNTAL ENTITY AGREEMENT, BUT NO "GOVERNMENTAL ENTITY" CAN CONTRACT AWAY A TRIBAL OFFICER'S STATUTORY RIGHT TO NMTCA COVERAGE

In *Loya* the tribal police officer held a deputy sheriff's commission issued by the Santa Fe County Sheriff per the sheriff's statutory authority under NMSA 1978 § 41-4-5.

One result of *Loya* is that the County's insurance carrier rather than the Pueblo's insurance carrier was required to cover the cost for the officer's

defense and indemnification for any judgment or settlement. The case settled after the *Loya* decision was issued.

This aspect of *Loya* can be altered by a formal agreement between a Pueblo or tribe and a city, county or the State Department of Public Safety (DPS).

Specifically, if a written agreement requiring the tribal officer's tribal or Pueblo employer to provide liability insurance coverage for the officer is duly executed pursuant to the Joint Powers Agreement Act, NMSA 1978 § 11-1-1 *et seq.*, or the Mutual Aid Act, NMSA 1978 § 29-8-1 *et seq.* or (for the State Police) NMSA 1978 § 29-1-11. Nothing in the NMTCA or the *Loya* case prohibits that transfer of responsibility for providing such insurance coverage.

Indeed, § 29-1-11(C)(1) requires that the tribal or Pueblo employee of a tribal police officer to whom a state police commission is issued provide such insurance.

However, in our opinion, nothing in the NMTCA, the *Loya* case or any of the above-referenced statutes authorizes or permits a city, county, county sheriff or the state DPS (or any public employer ("governmental entity") under the NMTCA) to contract away the right of tribal officers who hold a deputy sheriff or state police commission or city police commission to NMTCA coverage as a public employee under § 41-4-3(F)(3). NMTCA coverage protection provides many other protections to such officers independent of which insurance carrier must bear the cost of defense and indemnification—and which entity has to bear the cost of that insurance coverage, e.g., the shortened statute of limitations on tort claims (§ 41-4-15), the limits on the kind of tort claims on which there can be a recovery per § 41-4-4A, the bar to punitive damages on tort claims (§ 41-4-4C), etc.

The Court in *Loya* did make reference to the Mutual Aid Act, NMSA 1978 § 29-8-1 *et seq.*, at pages 1163-1164. However, that reference merely pointed out that the Mutual Aid Act was a different statutory mechanism by which cross-deputization arrangements could be put in place involving the counties and tribal police officers, and to confirm the tribal officer's argument in *Loya* that a letter written by the sheriff attempting to transfer insurance coverage obligations from the county to the Pueblo did not evidence a valid Mutual Aid Act Agreement between the county and the Pueblo on this issue. Nothing in *Loya* suggests that had the insurance coverage obligation been transferred from the county to the Pueblo pursuant to a formal Mutual Aid Act agreement that the answer regarding a tribal officer's status as a public employee per § 41-4-3(F)(3) would have come

out differently if that officer had been duly commissioned as a sheriff's deputy pursuant to such an agreement.

DOES THE *LOYA* RULING REQUIRE ANY CHANGE IN THE EXISTING DPS COMMISSION AGREEEMENT FOR TRIBAL POLICE OFFICERS?

Section 29-1-11 authorizes DPS to issue state police commissions to tribal officers where proof of insurance coverage per § 29-1-11C(1) is submitted and the other requirements of that statute are met.

As noted above, there is no doubt that DPS has the right per § 29-1-11 to insist that a tribe's or Pueblo's insurance carrier bear the burden of providing a defense and indemnification of their officers on claims filed against them based on their actions or inactions in enforcing state law per a state police commission. It is clear that the tribe's or Pueblo's insurance carrier (rather than DPS's carrier) will bear that burden as the relevant insurance carrier per NMSA 1978 § 41-4-4B of the NMTCA.

However, nothing in § 29-1-11 requires or supports the conclusion that tribal officers holding DPS commissions are not "employees" otherwise entitled to the protections of the NMTCA based on the interpretation of § 41-4-3F(3) of that Act as confirmed in *Loya.*

Under *Loya,* Tribal Officers holding DPS Commissions (and derivatively their employer Pueblos or Tribes and their insurance carriers) are still entitled to all the other benefits and protections of the NMTCA.

Under *Loya,* the only difference in the handling of tort or § 1983 claims filed against Tribal Police Officers holding DPS Commissions sued for actions or inactions they have taken in enforcement of state law, as compared to such suits filed against regular DPS officers, is that the DPS is entitled to turn to the Pueblo's insurance carrier rather than DPS' insurance carrier to pay for the defense and indemnity obligations the NMTCA otherwise imposes on DPS.

Accordingly, in the case of Tribal Officers commissioned as DPS Officers under § 29-1-11 agreement, the defense of those officers for litigation covered by the NMTCA should otherwise be handled in the same way as cases against regular DPS Officers where DPS' carrier would have been involved, but instead tendering those insurance coverage obligations to the Pueblo's insurance carrier.

The *Loya* decision thus does require that some provisions of the existing form of DPS Commission Agreement used per § 29-1-11 be revised. *See,*

Section 6 of the existing form of the standard DPS Commission Agreement which requires that tribal parties to these Agreements "hold harmless and indemnify" DPS from "any claim ... which may arise out of the actions of a police officer commission pursuant to this Agreement;" and, *see,* Section 7 of that Agreement which provides that:

> The Pueblo, its agents and employees, including peace officers commissioned pursuant to this Agreement, are not employees of the State of New Mexico. No insurance coverage, retirement benefits or any other benefits afforded to employees of the State of New Mexico shall be provided by the State of New Mexico, the New Mexico Department of Public Safety, or the New Mexico State Police to the Pueblo, its agents and employees, including peace officers commissioned pursuant to this Agreement. It is understood and agreed by the parties to this Agreement that the State of New Mexico, the Department of Public Safety and the New Mexico State Police, their agents, employees and insurers, have no authority nor any right whatsoever to control in any manner the day-to-day discharge of the duties of the persons commissioned pursuant to this Agreement, but rather these persons are acting in the capacity of an independent contractor as an employee or agent of the Pueblo and that they are not an employee or agent of any kind of the State of New Mexico, the New Mexico Department of Public Safety, or the New Mexico State Police. It is further understood and agreed that the State of New Mexico, the New Mexico Department of Public Safety, and the New Mexico State Police, their agents, employees and insurers do not by this Agreement assume any responsibility or liability for the actions of those persons provided commissions pursuant to this Agreement. (Emphasis added).

The *Loya* decision makes clear that Tribal Police Officers holding DPS Commissions can no more be "independent contractors," than can tribal police officers commissioned as county sheriff deputies; and, that such tribal police officers holding DPS commissions are just as entitled to NMTCA coverage as "public employees" under § 41-4-3(F)(3) as are tribal officers holding deputy sheriff commissions. Thus, some revisions to the existing DPS Commission Agreement are clearly warranted.

The Court in *Loya* did make reference to § 29-1-11 at pages 1162-1164. However, that reference merely pointed out that that statute was a different way by which cross-deputization arrangements could be put in place for issuance of state police commissions to tribal police officers. The Court also

referenced § 29-1-11(G) which confirms that nothing in § 29-1-11 in any way "limits, impairs or nullifies the authority of county sheriffs to appoint" federal, state or tribal police officers as county deputies pursuant to §41-4-5.

Nothing in *Loya* suggests that (1) had the case involved a tribal officer holding a state police commission instead of a deputy sheriff's commission and (2) the fact that in that circumstance the insurance coverage obligation would have been placed on the Pueblo pursuant to § 29-1-11C(1), that the answer regarding the tribal officer's status as a public employee per § 41-4-3(F)(3) would have come out differently.

What I am saying above is my legal opinion on these issues. DPS does not agree. *See,* the redacted DPS letters included in the materials.

DPS, however, has not given any sensible rationale for distinguishing the status of tribal police officers holding deputy sheriff's commissions from those holding DPS commissions in re their entitlement to NMTCA coverage.

Section 29-1-11 does not say anything that would take such officers outside the protection of the NMTCA. § 29-1-11 does not authorize or require a tribe or Pueblo to indemnify DPS for claims arising from the acts of their officers sued for enforcing state law per a DPS commission, beyond providing the required insurance coverage.

Section 29-1-11(E) does provide that "This subsection shall not be construed to impose liability upon or to require indemnification by the state for any act performed by federal law enforcement officer pursuant to this subsection" (emphasis added); but, that statutory provision does not apply to tribal police officers. Oddly, that statute does not require that federal officers receiving such commissions provide proof of insurance coverage. And, such officers will often have no such coverage. Further, nothing in § 29-1-11 requires the federal government to indemnify DPS if such federal officers are sued on tort or § 1983 claims while enforcing state law as commissioned state police officers.

SOME OTHER IMPLICATIONS AND IMPACTS OF *LOYA* AND RELATED ISSUES

1. Where multiple New Mexico "public agencies" enter into a Joint Powers Act agreement per § 11-1-1 *et seq.* involving cross deputization arrangements (and where each of those signatories is also a "governmental entity" under the NMTCA), § 11-1-6 makes clear that the agency which actually employs (pays) the officer will retain responsibility for all "privileges,

immunities, pension, relief, disability, workmen's compensation and other benefits" which would apply to those officers in exercise of their authority as regular employees of their regular employer. Their regular employer remains liable for providing those benefits rather than the borrowing jurisdiction. In our opinion, this would include responsibility of the regular employer to provide NMTCA coverage. An example of where this would apply is the Joint Powers Agreement re cross deputizations executed by a number of counties brokered by the New Mexico Association of Counties.

2. Section 11-1-6 will not relieve the county or DPS of NMTCA coverage of obligations re tribal police officers holding sheriff's deputy or DPS commissions, even per an executed Joint Powers Agreement, because the tribal or Pueblo employer of those officers (while those tribal entities are "public agencies" under § 11-1-1, are not "governmental entities" under the NMTCA.

Hence, while the Pueblo or tribal employee would retain responsibility for salaries and workmen's compensation and pension and other tribal benefits ordinarily provided to those officers, the Pueblo or tribal employers do not (and cannot) provide NMTCA coverage. Hence, under *Loya,* the county or state DPS would still have to provide such coverage. Again, NMTCA coverage for such officers is a statutory right which cannot be contracted away even under a Joint Powers Agreement.

3. *Loya* involved only § 1983 claims. If intentional tort claims had been pled, there would have been no liability for the county or the tribal officer for these torts listed in § 41-4-12 since tribal officers are not full time or part-time paid "law enforcement officers" under § 41-4-3(D) of the NMTCA.

A companion case referenced in *Loya* fn. 1 was *Trujillo v. Romero,* No. 13-CV-1178 MCA-SCY Doc. 112 (D.N.M. Mar. 3, 2015). That case involved both § 1983 and tort claims against tribal police officers sued for actions they took as Santa Fe County deputies in enforcing state law against a non-Indian; and, in the alternative, *Bivens* claims and Federal Tort Claims Act claims. As noted above, the "governmental entity" who commissions tribal officers entitled to coverage under the NMTCA per *Loya* cannot be held liable for the intentional torts listed at § 41-4-12 of the Act because they do not meet the "law enforcement officer" definition of § 41-4-3(D) of the Act.

Hence, there is no waiver of New Mexico's sovereign immunity as to such torts. Nonetheless, the exclusive remedy bar of § 41-4-17 applies to protect the tribal officer (and the "governmental entity") from such claims.

This does not apply to § 1983 claims, because the counties do not have sovereign immunity as against such claims. *Loya, supra* at 1166-1167.

4. As argued in *Loya, t*his is directly analogous to the way the Federal Tort Claims Act handles such claims, and explains why there is a "law enforcement officer" definition at § 41-4-3(D). *See,* definitions of "employee of the government" at 28 U.S.C. § 2571 and "law enforcement officer of the United States" at 28 U.S.C. § 2871 and the limited waiver of federal immunity for intentional torts only when committed by "investigative or law enforcement officer of the United States" per 28 U.S.C. § 2680(h). *See, United States v. Smith,* 499 U.S. 160 (1991) (FTCA is exclusive remedy on tort claims against federal employees even if FTCA permits no remedy); *Etsitty-Thompson v. U.S.,* 2013 WL 4052821 (tribal police officers operating under Pub. L. 93-638 law enforcement contracts with the Bureau of Indian Affairs have the status of federal employees protected by the FTCA); *accord, Scott v. Allender,* 379 F.Supp.2d 1206 (2005); *Dry v. United States,* 235 F.3d 1249 (10th Cir. 2000) (tribal police officers operating under Pub. L. 93-638 law enforcement contracts are not law enforcement officers of the United States under the FTCA, hence there is no waiver of federal immunity as to intentional tort claims filed against them).

5. The United States has a duty to defend tribal police officers operating Pub. L. 93-638 law enforcement contracts with the Bureau of Indian Affairs for tort claims filed against them based on their enforcement of tribal or federal law for actions taken during the scope of their employment. *Etsitty-Thompson, supra; Scott, supra; Rodger Red Elk, et al. v. United States,* 62 F.3d 1102 (8th Cir. 1995) (operating under Pub. L. 93-638 sued for sexual assault of a prisoner was covered by FTCA)..

However, tribal police officers are not subject to suit on *Bivens* (federal constitutional) claims unless they also hold Special Law Enforcement Commissions (SLEC) issued by the BIA per 25 U.S.C. § 2804(a) and 25 C.F.R. 12.21(a). *Romero v. Peterson,* 930 F.2d 1502 (10th Cir. 1991); *Romero v. Peterson,* 5 F.3d 547 (Table) (affirming dismissal after remand and second appeal); *Henderson v. United States*, 2012 WL 4498871 (D.N.M.) (allegation that defendants were tribal members working under BIA P.L. 93-638 contract did not establish that they were federal officials, employees or agents to support *Bivens* claim); *see, Snyder v. Navajo Nation,* 371 F.3d 658, 662-663 (9th Cir. 2004) (even though Indian contractors and their employees are given FTCA coverage by § 314 of Pub. L. 101-512 "Congress ... did not intent Section 314 to provide a remedy against the United States in civil actions unrelated to the FCTA.").Those federal commissions also make those officers "law enforcement officers of

the United States" for purposes of 28 U.S.C. § 2680(h). *See, Dry v. United States, supra; Red Elk, supra.*

6. Federal officers who are sued for tort claims have coverage under the FTCA when they are carrying out federal law enforcement functions within the scope of their duties. 28 U.S.C. § 267 *et seq.*

Federal officers (including tribal police officers who hold SLECs) who are sued for constitutional violations on a *Bivens* theory do not receive any kind of defense or indemnity coverage on such claims from the federal government.* *Carlson v. Green,* 446 U.S. 14 (1980) (FTCA coverage is not applicable to *Bivens* claims against federal official or officer).

Federal officers who receive and use deputy sheriff's or state police commissions are subject to suit under § 1983 and for negligent tort claims for which government immunity has been waived by the NMTCA, for actions they take in enforcing state law. The federal government also does not provide those federal officers any kind of defense or indemnity coverage on such claims.*

The federal government does suggest that their officers who hold such state or county cross-commissions buy private insurance coverage to protect them from *Bivens,* § 1983 claims.*

Federal officers who hold deputy sheriff commissions are eligible for the same NMTCA coverage as to tort and § 1983 claims as are tribal police officers under *Loya.* This is less clear as to federal officers who hold DPS commissions because of the last sentence in § 29-1-11(E), quoted above.

* **NOTE:** All of these ***s** points have been verbally confirmed to me by the U.S. Attorney's Office, the U.S. Department of Justice in D.C. and the Interior Department.

NOTE: The legal opinions and positions set out in this presentation reflect the views of the author. They do not necessarily represent the views or the positions of any of our tribal or Pueblo clients on those same issues.

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can obtain relief: the retailer and the manufacturer, and the former may seek indemnification from the latter for any loss suffered. Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331 (Ct. App. 1987).

Peculiar risk of harm. — When an employer hires an independent contractor to do work that the law recognizes as likely to create a peculiar risk of harm, the employer is jointly and severally liable for harm resulting if reasonable precautions are not taken against the risk. The liability is direct, not vicarious, and what the independent contractor knew or should have known is not at issue. This imposition of joint and several liability on the employer of an independent contractor falls within the public policy exception of Subsection (C)(4) to the general abolition of joint and several liability set forth in this section. Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102 (1992).

Law reviews. — For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

For article, "The Impact of Non-Mutual Collateral Estoppel on Tort Litigation Involving Several Liability," see 18 N.M.L. Rev. 559 (1988).

For note, "Contract law: New Mexico interprets the insurance clause in the oil and gas anti-indemnity statute: *Amoco Production Co. v. Action Well Service, Inc.*," 20 N.M.L. Rev. 179 (1990).

For note, "Tort Law — New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: Saiz v. Belen School District," see 23 N.M.L. Rev. 399 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 74 Am. Jur. 2d Torts §§ 61 to 64.

Comparative negligence: judgment allocating fault in action against less than all potential defendants as precluding subsequent action against parties not sued in original action, 4 A.L.R.5th 753.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury, 9 A.L.R.5th 746.

86 C.J.S. Torts § 34 et seq.

41-3A-2. Definition.

As used in this act, "person" means any individual or entity of any kind whatsoever.

History: Laws 1987, ch. 141, § 2.

Applicability clauses. — Laws 1987, ch. 141, § 5 makes this section applicable to all civil actions initially filed on and after July 1, 1987.

Meaning of "this act". — The term "this act" as used in this section means Laws 1987, ch. 141, which appears as 41-3-2, 41-3A-1, 41-3A-2 and 52-1-10.1 NMSA 1978.

Law reviews. — For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M.L. Rev. 483 (1988).

ARTICLE 4
Tort Claims

Sec.

41-4-1. Short title.

Sections 41-4-1 through 41-4-27 NMSA 1978 may be cited as the "Tort Claims Act".

Tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events, 68 A.L.R.5th 663.

Tort liability of public schools and institutions of higher learning for injury to student walking to or from school, 72 A.L.R.5th 469.

41-4-3. Definitions.

As used in the Tort Claims Act:

A. "board" means the risk management advisory board;

B. "governmental entity" means the state or any local public body as defined in Subsections C and H of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978;

D. "law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor;

E. "maintenance" does not include:

(1) conduct involved in the issuance of a permit, driver's license or other official authorization to use the roads or highways of the state in a particular manner; or

(2) an activity or event relating to a public building or public housing project that was not foreseeable;

F. "public employee" means an officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10), (14) and (17) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act, the Small Business Investment Act or the Mortgage Finance Authority Act or a licensed health care provider, who has no medical liability insurance, providing voluntary services as defined in Paragraph (16) of this subsection and including:

(1) elected or appointed officials;

(2) law enforcement officers;

(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

(4) licensed foster parents providing care for children in the custody of the human services department, corrections department or department of health, but not including foster parents certified by a licensed child placement agency;

(5) members of state or local selection panels established pursuant to the Adult Community Corrections Act;

(6) members of state or local selection panels established pursuant to the Juvenile Community Corrections Act;

(7) licensed medical, psychological or dental arts practitioners providing services to the corrections department pursuant to contract;

(8) members of the board of directors of the New Mexico medical insurance pool;

(9) individuals who are members of medical review boards, committees or panels established by the educational retirement board or the retirement board of the public employees retirement association;

(10) licensed medical, psychological or dental arts practitioners providing services to the children, youth and families department pursuant to contract;

(11) members of the board of directors of the New Mexico educational assistance foundation;

(12) members of the board of directors of the New Mexico student loan guarantee corporation;

(13) members of the New Mexico mortgage finance authority;

(14) volunteers, employees and board members of court-appointed special advocate programs;

(15) members of the board of directors of the small business investment corporation;

(16) health care providers licensed in New Mexico who render voluntary health care services without compensation in accordance with rules promulgated by the secretary of health. The rules shall include requirements for the types of locations at which the services are rendered, the allowed scope of practice and measures to ensure quality of care;

(17) an individual while participating in the state's adaptive driving program and only while using a special-use state vehicle for evaluation and training purposes in that program; and

stein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

County detention center officers. — The director and the captain and assistant director of a county detention center are subject to suit as law enforcement officers under the Tort Claims Act. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

Tribal police officer was not a "public employee". — Where an on-duty, full-time pueblo tribal law enforcement officer, acting in the officer's capacity as a commissioned deputy sheriff for the county stopped plaintiff's vehicle on a state-maintained road within the exterior boundaries of the pueblo and arrested plaintiff for reckless driving; the officer was dressed in a full tribal police uniform, displaying a tribal badge of office, and driving a tribal police vehicle; in addition to acting under tribal law, the officer was on duty as a duly commissioned deputy sheriff, which gave the officer authority to arrest, charge, and jail non-Indians for violations of New Mexico state laws; the officer took plaintiff to the tribal police department for processing and later transported plaintiff to the county jail; the officer was not a salaried officer employed by the county; the pueblo was a sovereign Indian tribe; plaintiff sued the officer for violation of plaintiff's constitutional rights, the officer was not a "law enforcement officer" or a "public employee" of a "governmental entity" as defined in Section 40-4-3 NMSA 1978 and the county did not have a duty under Section 40-4-4 NMSA 1978 to defend or indemnify the officer for tortious acts committed while exercising the officer's authority as a commissioned deputy sheriff. Loya v. Gutierrez, 2014-NMCA-028, cert. denied, 2014-NMCERT-____.

Navajo police officer not "public employee". — Fact that Navajo Nation police officer was cross-deputized as a county sheriff did not make the officer a "public employee" of a New Mexico governmental body. Williams v. Bd. of Cnty. Comm'rs, 1998-NMCA-090, 125 N.M. 445, 963 P.2d 522, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998).

Medical investigator. — The office of the medical investigator and a physician employed as a medical investigator by that office are not law enforcement officers. Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Crime laboratory. — A crime laboratory technician and his employer, the state police crime laboratory, whose duties are to examine and evaluate physical evidence that may relate to a possible offense, are not law enforcement officers. Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Municipal police officers are law enforcement officers. — The officers in this case are municipal police officers subject to Section 3-13-2 NMSA 1978, and their principal duties entail making arrests for crimes and maintaining public order; accordingly, they are law enforcement officers for purposes of the Tort Claims Act. Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 1313.

Officers of county detention home. — Whether officers of a county detention home were acting within the scope of their duties in making an employment recommendation about a former employee was a question of fact. Davis v. Bd. of Cnty. Comm'rs, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

Scope of duties.

Deputy sheriff who was involved in accident while driving her assigned department vehicle home was acting within the scope of her duties, because she was required to be available for calls at all times. Medina v. Fuller, 1999-NMCA-011, 126 N.M. 460, 971 P.2d 851.

IV. PRIVATE PERSONS, CORPORATIONS AND ENTITIES.

Independent corrections contractor employees. — An employee of an independent corrections contractor is not a "public employee" immune from tort liability under this article. Giron v. Corrs. Corp. of Am., 14 F. Supp. 2d 1245 (D.N.M. 1998).

Volunteers. — It is an express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the Tort Claims Act. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Tort Claims Act explicitly contemplates that volunteers acting on behalf of the government may become public employees, thereby entitled to the protections of the Tort Claims Act and subject to the reliability of the same. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Sheriff's department chaplain. — Whether a defendant who volunteered as a chaplain for a county sheriff's department was a public employee or an independent contractor was a question of fact, upon which the "right to control" test would bear. Celaya v. Hall, 2003-NMCA-086, 134 N.M. 19, 71 P.3d 1281, aff'd in part and rev'd in part, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Where, at the time of the incident, defendant had been an official sheriff's department volunteer chaplain for eight years, and as part of his official duties, defendant was summoned to crime and accident scenes by the department on an as-needed basis where he provided counseling and support services to civilians, acting primarily at the department's request, therefore, defendant was an employee of the department because, considered in context, the department exercised sufficient control over defendant's activities in a manner consistent with the status of employee. Celaya v. Hall, 2004-NMSC-005, 135 N.M. 115, 85 P.3d 239.

Law reviews.

For note, "An Employer's Duty to Third Parties When Giving Employment Recommendations - *Davis v. Board of County Commissioners of Dona Ana County*," see 30 N.M.L. Rev. 307 (2000).

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 NMSA 1978] and by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 NMSA 1978].

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorney fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort that was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

I. A jointly operated public school, community center or athletic facility that is used or maintained pursuant to a joint powers agreement shall be deemed to be used or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978.

J. For purposes of this section, a "jointly operated public school, community center or athletic facility" includes a school, school yard, school ground, school building, gymnasium, athletic field, building, community center or sports complex that is owned or leased by a governmental entity and operated or used jointly or in conjunction with another governmental entity for operations, events or programs that include sports or athletic events or activities, child-care or youth programs, after-school or before-school activities or summer or vacation programs at the facility.

K. A fire station that is used for community activities pursuant to a joint powers agreement between the fire department or volunteer fire department and another governmental entity shall be deemed to be operated or maintained by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978. As used in this subsection, "community activities" means operations, events or programs that include sports or athletic events or activities, child care or youth programs, after-school or before-school activities, summer or vacation programs, health or education programs and activities or community events.

History: 1953 Comp., § 5-14-4, enacted by Laws 1976, ch. 58, § 4; 1977, ch. 386, § 3; 1978, ch. 166, § 1; 1981, ch. 267, § 1; 1982, ch. 8, § 1; 1989, ch. 369, § 1; 1996, ch. 68, § 1; 1999, ch. 268, § 1; 2000 (2nd S.S.), ch. 17, § 6; 2001, ch. 211, § 1.

The 2001 amendment, effective June 15, 2001, added Subsection K.

The 2000 amendment, effective July 3, 2000, inserted "the New Mexico Religious Freedom Restoration Act and by" following "waived by" in Subsection A and deleted "but not limited to" following "including" in Subsection C.

The 1999 amendment, effective June 18, 1999, inserted the language beginning "but the waiver of immunity" in the last sentence of Subsection A.

41-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

History: 1953 Comp., § 5-14-12, enacted by Laws 1976, ch. 58, § 12; 1977, ch. 386, § 9.

Immunity not waived for mere negligence. — There is no waiver of immunity under this section for mere negligence of law enforcement officers that does not result in one of the enumerated acts. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

Strict construction. — Since the Tort Claims Act is in derogation of a plaintiff's common-law rights to sue governmental employees for negligence, the act is to be strictly construed insofar as it modifies the common law. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Right to sue and recover under this act is limited to the rights, procedures, limitations and conditions prescribed in the act. Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

Immunity not waived for deprivation of "happiness". — Vague references to "safety" or "happiness" in N.M. Const., art. II, § 4 are not sufficient to state a claim under this section. Waiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

Immunity waived under 41-4-5 NMSA 1978. — Section 41-4-5 NMSA 1978, which waives immunity for negligent operation or maintenance of a motor vehicle, watercraft, or aircraft, applies to all public employees, including law enforcement officers. This section, which applies only to law enforcement officers, waives immunity only for the acts enumerated in this provision, such as assault and battery. Wilson v. Grant County, 117 N.M. 105, 869 P.2d 293 (Ct. App. 1994).

Relationship requirement. — A minor daughter of the alleged victim satisfied the close relationship requirement but plaintiffs who asserted that they maintained an intimate relationship with a victim as the equivalent of their "step-dad" or "common law" husband in their "family unit" did not satisfy the close relationship requirement needed to state a claim for bystander recovery. Sollars v. City of Albuquerque, 794 F. Supp. 360 (D.N.M. 1992).

Claim for violating right to familial association. — The plaintiffs, parents of a decedent allegedly killed by the gross negligence and reckless conduct of the defendants, had a claim for violation of constitutional right to familial association. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

Duty of law enforcement officer. — A law enforcement officer has the duty in any activity actually undertaken to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done. Cross v. City of Clovis, 107 N.M. 251, 755 P.2d 589 (1988).

Although a law enforcement officer or agency may be held liable under this section for negligently causing infliction of one of the predicate torts, simple negligence in the performance of a law enforcement officer's duty does not amount to commission of one of the torts listed in the section. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

Summary judgment in favor of state police was affirmed in the case of an automobile passenger's action for injuries sustained in a traffic accident following a rock concert, in the absence of any allegations giving rise to a duty on the part of the state police to exercise ordinary care for the passenger's safety. Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).

As a matter of law, the plaintiffs, children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and, therefore, the defendant officers owed no duty to them. Lucero v. Salazar, 117 N.M. 802, 877 P.2d 1106 (Ct. App. 1994).

Scope of duty. — An employee's action, although unauthorized, is considered to be in the scope of employment if the action (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area, and (4) is actuated, at least in part, by a purpose to serve the employer. Accordingly, since the police officer conducted an arrest too far removed from the place he was authorized to perform his duties, and the arrest occurred during a time that he was expressly told to take off, the officer did not act within scope of his duties. Narney v. Daniels, 115 N.M. 41, 846 P.2d 347 (Ct. App. 1992).

Liability will not attach until all elements of negligence have been proved, including duty, breach of duty and proximate cause. Schear v. Board of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984).

Class of persons to be protected by duty to investigate. — In creating the duty to investigate, the legislature did not limit the traditional tort concept of foreseeability that would otherwise define the intended beneficiaries of the statute; all persons who are foreseeably at risk within the general population are within the class of persons to be protected by the duty to investigate. Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995).

When any person of the public, regardless of geographic location, is foreseeably at risk of injury by a party reported to be in violation of the criminal law, officers undertaking the investigation of the crime owe that person a duty to exercise the care ordinarily exercised by prudent and qualified officers. Torres v. State, 119 N.M. 609, 894 P.2d 386 (1995).

Foreseeability of criminal act. — Since it is not unlikely that a murderer would flee the city in which the crime was committed and, given modern-day transportation, that this person would flee across state lines, and since the police knew or should have known that it is possible that a person who kills randomly with no motive would kill again, the harm

limitations begins to run. Once plaintiff suffers loss or injury, the statute begins to run. Bolden v. Village of Corrales, 111 N.M. 721, 809 P.2d 635 (Ct. App. 1990).

Once loss occurs, limitation period begins. — Until an occurrence resulting in loss takes place, the statute of limitations cannot begin to run. Aragon & McCoy v. Albuquerque Nat'l Bank, 99 N.M. 420, 659 P.2d 306 (1983).

Time for giving notice in medical malpractice action is calculated from the time the injury manifests itself in a physically objective manner and is ascertainable. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

If governmental entity creates condition that causes injury, notice is still required of a claim for damages. Section 41-4-16 NMSA 1978, the notice provision, operates in conjunction with this section on the issue of a timely claim. Tafoya v. Doe, 100 N.M. 328, 670 P.2d 582 (Ct. App. 1983).

No relation back. — The amended complaint sought damages against the state, the department of corrections and its employees under the Tort Claims Act, and because the original complaint was a nullity, there was no relation back. DeVargas v. State ex rel. New Mexico Dep't of Cors., 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981).

Relation back of amendments. — An action for malpractice and wrongful death brought under the Tort Claims Act by the natural parents of a deceased child within the limitation period was not barred because the parents failed to secure court appointment as personal representatives within the two-year limitation period of this section, due to the operation of Rules 15(c) (relation back of amendments) and 17(a) (real party in interest), N.M.R.C.P., (now see Paragraph C of Rule 1-015 and Paragraph A of Rule 1-017). Chavez v. Regents of Univ. of N.M., 103 N.M. 606, 711 P.2d 883 (1985).

Minority exception under Subsection A applies only to living minors. Regents of Univ. of N.M. v. Armijo, 103 N.M. 174, 704 P.2d 428 (1985).

General savings provision inapplicable. — The general savings provision of 37-1-14 NMSA 1978, which protects from limitations a new suit filed within six months after dismissal of a prior suit, does not apply to an action under this article. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds, Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

No equitable tolling while federal jurisdiction asserted. — Principles of equitable tolling did not apply to an action under this article during the time the claim was being asserted on the basis of pendent jurisdiction in a federal court. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds, Bracken v. Yates Petroleum Corp., 107 N.M. 463, 760 P.2d 155 (1988).

When last day of limitation period falls on Saturday. — Rule 1-006(A), which provides that if the last day of a statutory time period falls on a Saturday, Sunday, or legal holiday, the period runs until the next day that is not a Saturday, Sunday or legal holiday, supersedes 12-2-2(G) NMSA 1978, which only extends the time period to the following Monday if the last day falls on a Sunday. Therefore, a claim under the Torts Claim Act was not barred by the two-year statute of limitations of this section when the last day of the two-year period fell on a Saturday and the plaintiff filed a claim on the following Monday. Dutton v. McKinley County Bd. of Comm'rs, 113 N.M. 51, 822 P.2d 1134 (Ct. App. 1991).

Law reviews. — For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For note, "Federal Civil Rights Act — The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What statute of limitations governs actions based on strict liability in tort, 91 A.L.R.3d 455.

Liability of hotel or motel operator for injury or death resulting to guest from defects in furniture in room or suite, 91 A.L.R.3d 483.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

41-4-16. Notice of claims.

A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the Tort Claims Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased person or any person claiming benefits of the proceeds of a wrongful death action, or the consular officer of a foreign country of which the deceased was a citizen, within six months after the date of the occurrence of the injury which resulted in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

History: 1953 Comp., § 5-14-14.1, enacted by Laws 1977, ch. 386, § 12.

Constitutional right to access courts not violated. — The 90-day notice provision of the Tort Claims Act does not violate the constitutional right of access to the courts. The legislative purposes requiring timely and reasonable notice to a governmental entity of potential claims are rationally related to legitimate governmental interests such as: (1) to allow investigation of a matter while the evidence is fresh; (2) to allow questioning of witnesses; (3) to protect against stimulated or aggravated claims; or (4) to allow consideration of whether a claim should be paid or not. Powell v. New Mexico State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App. 1994).

Due process. — The notice requirement is not unreasonably short, thus not constituting a denial of due process. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

The period of giving notice does not deny an incapacitated victim due process of law. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Application of the notice provision of Subsection A to any minor, whatever the circumstances, would not, in every circumstance, violate due process. Erwin v. City of Santa Fe, 115 N.M. 596, 855 P.2d 1060 (Ct. App. 1993).

Section inapplicable to claims against public employees. — The language of the written notice section does not include, and therefore does not apply to, claims against public employees. Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980).

The written notice requirement of Subsection A does not apply to public employees, such as a mayor or a police chief. Frappier v. Mergler, 107 N.M. 61, 752 P.2d 253 (Ct. App. 1988).

Purpose of the notice requirement is four-fold: (1) to enable the person or entity to whom notice must be given, or its insurance company, to investigate the matter while the facts are accessible; (2) to question witnesses; (3) to protect against simulated or aggravated claims; and (4) to consider whether to pay the claim or to refuse it. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982).

Contents of notice. — Subsection B does not require that the notice of a claim under this article indicate that a lawsuit will in fact be filed against the state, but, rather, it contemplates that the state must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it. Smith v. State ex rel. New Mexico Dep't of Parks & Recreation, 106 N.M. 368, 743 P.2d 124 (Ct. App. 1987).

The notice required is not simply actual notice of the occurrence of an accident or injury but rather actual notice that there exists a likelihood that litigation may ensue. Dutton v. McKinley County Bd. of Comm'rs, 113 N.M. 51, 822 P.2d 1134 (Ct. App. 1991).

Although the plaintiff claimed that the department had actual notice of this claim because of: (1) the information contained in a police report, (2) information derived from the conversation between a maintenance foreman and the police officer investigating the accident, and (3) the department's special knowledge concerning the hazards of blunt-edged guardrails, there was no evidence that the department had notice that this particular accident was likely to result in litigation against the department, or that the plaintiff considered the accident to be the department's fault. The above factors did not satisfy the requirement of actual notice. Powell v. New Mexico State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App. 1994).

To whom notice necessary. — In an action against the state park and recreation department, for its alleged negligence resulting in a boating accident and ensuing deaths, notice given to both the superintendent of the state park where the drownings occurred and to the boating supervisor at the park, satisfied the notice requirements specified in this section. Notice did not have to be given to the head of the department or its risk management division. Smith v. State ex rel. New Mexico Dep't of Parks & Recreation, 106 N.M. 368, 743 P.2d 124 (Ct. App. 1987).

The "actual notice" required by Subsection B is not simply actual notice of the occurrence of an accident or injury but rather, actual notice that there exists a "likelihood" that litigation may ensue. Frappier v. Mergler, 107 N.M. 61, 752 P.2d 253 (Ct. App. 1988).

Lack of notice relieving state from liability. — State was not responsible, under the Tort Claims Act, for paying a federal court judgment against a penitentiary guard when neither the state nor any of its agencies had notice of either the claim or of the federal court suit. Otero v. State, 105 N.M. 731, 737 P.2d 90 (Ct. App. 1987).

Notice begins to run when injury manifests itself. — Where the language of this section's notice provisions and the statute of limitations, 41-4-15 NMSA 1978, is similar, the rule that the statute of limitations period begins to run from the time an injury manifests itself in a physically objective manner and is ascertainable is an applicable precedent to the question of when, under the Tort Claims Act, notice begins to run. Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981).

Notice defense may not be stricken as insufficient. — The notice defense accorded by this section is a defense under which a defendant may be entitled to relief against a plaintiff's claim and, thus, is not to be stricken as insufficient as a matter of law. Emery v. University of N.M. Medical Center, 96 N.M. 144, 628 P.2d 1140 (Ct. App. 1981).

Notice requirements of Subsections A and B may not be applied to bar infant's claim. One

41-4-17. Exclusiveness of remedy.

A. The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim. No rights of a governmental entity to contribution, indemnity or subrogation shall be impaired by this section, except a governmental entity or any insurer of a governmental entity shall have no right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death, property damage or violation of rights, privileges or immunities secured by the constitution and laws of the United States or laws of New Mexico resulting in the settlement or final judgment. Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction or quo warranto.

B. The settlement or judgment in an action under the Tort Claims Act shall constitute a complete bar to any action by the claimant, by reason of the same occurrence against a governmental entity or the public employee whose negligence gave rise to the claim.

C. No action brought pursuant to the provisions of the Tort Claims Act shall name as a party any insurance company insuring any risk for which immunity has been waived by that act.

History: 1953 Comp., § 5-14-15, enacted by Laws 1976, ch. 58, § 15; 1977, ch. 386, § 13; 1982, ch. 8, § 2.

Application of 1977 amendment. — Where an act giving rise to a claim under the Tort Claims Act occurred prior to the effective date of the 1977 amendment which added "settlement" to Subsection B, but the injury and settlement occurred after the effective date, the settlement is governed by the amended subsection. Sugarman v. City of Las Cruces, 95 N.M. 706, 625 P.2d 1223 (Ct. App. 1980).

When settlement does not bar suit. — A suit authorized by the Tort Claims Act and brought against the potentially liable governmental entity is not barred by a settlement with one who has no statutory liability to the claimant, nor by a settlement reached with anyone outside the framework of a Tort Claims Act suit. Sugarman v. City of Las Cruces, 95 N.M. 706, 625 P.2d 1223 (Ct. App. 1980).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Simultaneous pursual of § 1983 action not barred. — The New Mexico Tort Claims Act does not prohibit a plaintiff from bringing an action for damages under that act against a governmental entity or public employee where the plaintiff also pursues, by reason of the same occurrence or chain of events, an action against the same entity or employee pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Double recovery prohibited. — In those cases where tort damages will constitute a portion of the damages for a deprivation of a constitutional right, general principles against double recovery will prevail. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

City entitled to "exclusive remedy" provisions. — The operation of a natural gas system, even though beyond the statutory limitations imposed by 3-25-3A(2) NMSA 1978, does not deprive a city of the exclusive right, remedy and obligation provision of the Tort Claims Act. Cole v. City of Las Cruces, 99 N.M. 302, 657 P.2d 629 (1983).

Joinder. — Prior to the enactment of Subsection C, there was nothing in the Tort Claims Act which indicated the legislature's intention to disallow a plaintiff bringing an action under the act from joining an insurance company as a party defendant. By drawing a logical inference from the legislature's subsequent enactment of Subsection C, it appears that the legislature realized that without this subsection a plaintiff could join the insurance company and therefore this prompted the 1977 amendment which specifically negated the idea of joinder. England v. New Mexico State Hwy. Comm'n, 91 N.M. 406, 575 P.2d 96 (1978).

In any action which falls within the purview of the Tort Claims Act where the injury occurred between July 1, 1976, and February of 1977, when the 1977 amendments became immediately effective, joinder of an insurance company as a party defendant is allowed. England v. New Mexico State Hwy. Comm'n, 91 N.M. 406, 575 P.2d 96 (1978). (This section was amended by Laws 1977, which contained an emergency clause, Laws 1977, ch. 386, § 23, and was approved April 8, 1977.).

Wrongful decision to perform autopsy. — In an action for damages on the basis of an alleged wrongful decision to perform an autopsy, even if 24-12-4 NMSA 1978, which provides for consent for post-mortem examinations, created a private cause of action, it did not override the state medical investigator's grant of immunity under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985).

Governmental entity not entitled to reimbursement from employee. — A school district

was not entitled to reimbursement from an employee of federal funds it lost due to the employee's negligence in failing to comply with federal regulations. Daddow v. Carlsbad Mun. Sch. Dist., 120 N.M. 97, 898 P.2d 1235 (1995).

Mandamus proceedings not prohibited. — The Tort Claims Act does not interfere with the traditional right to bring a mandamus action against a government official for failure to perform a required duty. Board of County Comm'rs v. Risk Mgt. Div., 120 N.M. 178, 899 P.2d 1132 (1995).

Law reviews. — For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

41-4-18. Jurisdiction; appeals; venue.

A. Exclusive original jurisdiction for any claim under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be in the district courts of New Mexico. Appeals may be taken as provided by law.

B. Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act, shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county. Venue for all other claims pursuant to the Tort Claims Act, shall be in the county in which the principal offices of the governing body of the local public body are located.

History: 1953 Comp., § 5-14-16, enacted by Laws 1976, ch. 58, § 16.

Section is unconstitutional to extent that it acts to limit pendent jurisdiction of a federal district court over tort claims against counties, municipalities, and their officers. Wojciechowski v. Harriman, 607 F. Supp. 631 (D.N.M. 1985).

Constitutional deprivation may be remedied in a jurisdiction other than New Mexico. Wells v. County of Valencia, 98 N.M. 3, 644 P.2d 517 (1982).

Federal jurisdiction barred. — Inmate could not pursue claim against the New Mexico Department of Corrections and its employees acting within the scope of their employment in the federal district court, but rather was relegated to the state district court to seek relief consistent with the limited waiver of immunity under this section. Bishop v. Doe 1, 902 F.2d 809 (10th Cir.), cert. denied, 498 U.S. 873, 111 S. Ct. 198, 112 L. Ed. 2d 159 (1990).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Venue in actions against state educational institutions. — The venue provision of this section does not delimit choice of forum for tort actions brought against state educational institutions, which actions are governed by the venue provision set forth in 38-3-1G NMSA 1978. Clothier v. Lopez, 103 N.M. 593, 711 P.2d 870 (1985).

Federal jurisdiction barred. — A student at the New Mexico school of mines (now New Mexico institute of mining and technology), was barred from bringing an action in the United States district court for the district of New Mexico, seeking damages for personal injuries alleged to have resulted from the negligence of the school's board of regents in the operation of the school, because the action was, in effect, against the state of New Mexico, and the U.S. Const., amend. XI, barred federal jurisdiction. Korgich v. Regents of N.M. Sch. of Mines, 582 F.2d 549 (10th Cir. 1978).

Law reviews. — For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 649 to 654.

41-4-19. Maximum liability.

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) the sum of one hundred thousand dollars ($100,000) for damage to or destruction of property arising out of a single occurrence; and

(2) the sum of three hundred thousand dollars ($300,000) for all past and future medical and medically-related expenses arising out of a single occurrence; and

(3) the sum of four hundred thousand dollars ($400,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage and medical and medically-related expenses as permitted under the Tort Claims Act; or

(4) the sum of seven hundred fifty thousand dollars ($750,000) for all claims other than medical or medically-related expenses arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

History: 1953 Comp., § 5-14-3, enacted by Laws 1976, ch. 58, § 3; 1977, ch. 386, § 2; 1983, ch. 123, § 2; 1983, ch. 242, § 1; 1985, ch. 76, § 1; 1988, ch. 31, § 1; 1991, ch. 205, § 3.

The 1991 amendment, effective July 1, 1992, in Subsection A, added Paragraph (2), redesignated former Paragraphs (2) and (3) as Paragraphs (3) and (4), substituted "four hundred thousand dollars ($400,000)" for "three hundred thousand dollars ($300,000)" and inserted "and medical and medically-related expenses" in Paragraph (3), and substituted "seven hundred fifty thousand dollars ($750,000)" for "five hundred thousand dollars ($500,000)" and inserted "other than medical or medically-related expenses" in Paragraph (4).

Cap on damages. — A tort victim's interest in full recovery of damages calls for a form of scrutiny somewhere between minimum rationality and strict scrutiny. Therefore, intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of this section. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

In considering the constitutionality of the cap on damages in Subsection A(2), the trial court was mistaken in limiting the facts applicable solely to the defendant city; the city had the burden of demonstrating that enforcement of the cap was substantially related to an important state interest, and the trial court should have considered evidence on the relationship of the cap to public treasuries as an indivisible and statewide whole, both at the time the cap was enacted and at the time the causes of action accrued; *Trujillo v. City of Albuquerque*, 110 N.M. 621, 798 P.2d 571 (1990) is withdrawn. Trujillo v. City of Albuquerque, 119 N.M. 602, 893 P.2d 1006 (1995).

Recovery of costs. — The legislature, in 39-3-30 NMSA 1978, gives express authority, without exception, to the recovery of costs against any losing party, including the state. Kirby v. New Mexico State Hwy. Dep't, 97 N.M. 692, 643 P.2d 256 (Ct. App. 1982).

Postjudgment interest. — Plaintiff in wrongful death action was not entitled to postjudgment interest on a prior judgment obtained against the New Mexico State Highway Department. Fought v. State, 107 N.M. 715, 764 P.2d 142 (Ct. App. 1988), overruled in part on other grounds, Folz v. State, 115 N.M. 639, 857 P.2d 39 (Ct. App. 1993).

An award of postjudgment interest on judgments against a governmental entity is not permitted under this article. Yardman v. San Juan Downs, Inc., N.M. , 906 P.2d 742 (Ct. App. 1995).

"Single occurrence" construed. — In a negligence action against a city for injuries sustained in a collision with a city-owned crane, there was but a single occurrence when successive negligent acts or omissions of the governmental entity combined concurrently to create a singular risk of collision and to proximately cause injury triggered by a discrete event. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

In a wrongful death and personal injury action brought against the state highway department and others for deaths and injuries from a runaway truck, all injuries proximately caused by a governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a "single occurrence" when triggered by the discrete event of one runaway truck. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

In an action against a county race track by a jockey who was injured when the horse veered, causing the jockey to fall and strike a post and track rail, the county's failure to replace the rail with a safer system and negligent placement of an exit gap on the rail were not separate occurrences; the plaintiff's injuries, which were alleged to have been caused by successive negligent acts or omissions that combined concurrently to create a risk of harm, constituted a single occurrence. Yardman v. San Juan Downs, Inc., N.M. , 906 P.2d 742 (Ct. App. 1995).

Jury consideration of aggravating circumstances not punitive damages. — In a wrongful death action in which the state was a defendant, an instruction allowing the jury to consider mitigating or aggravating circumstances in setting compensatory damages did not violate the prohibition on punitive damages contained in Subsection B. Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 680 to 696.

Recovery of exemplary or punitive damages from municipal corporations, 1 A.L.R.4th 448.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action against governmental unit, 43 A.L.R.4th 19.

41-4-20. Coverage of risks; insurance.

A. It shall be the duty of governmental entities to cover every risk for which immunity has been waived under the provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or any liability imposed under Section 41-4-4 NMSA 1978 as follows:

(1) local public bodies shall cover every such risk or liability as follows:

(a) for a risk for which immunity has been waived pursuant to Sections 41-4-9, 41-4-10 and 41-4-12 NMSA 1978, the local public body shall cover the risk, and for any commercially uninsurable risk for which public liability fund coverage is made available, the local public body may insure the risk in accordance with the provisions of Section 41-4-25 NMSA 1978;

(b) for excess liability for damages arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, the local public body shall provide coverage in accordance with the provisions of Subsection B of Section 41-4-27 [41-4-28] NMSA 1978, if coverage is available; and

(c) for a risk or liability not covered pursuant to Subparagraphs (a) and (b) of this paragraph, the local public body shall purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law; and

(2) for state agencies, the risk management division shall insure or otherwise cover every such risk or liability in accordance with the provisions of Section 41-4-23 NMSA 1978. Coverage shall include but is not limited to coverage for all such liability arising under and subject to the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America.

B. The department of finance and administration shall not approve the budget of any governmental entity that has not budgeted an adequate amount of money to insure or otherwise cover pursuant to this section or Section 3-62-2 NMSA 1978 every risk of the governmental entity for which immunity has been waived under the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978. The public school finance division of the department of finance and administration shall not approve the budget of any school district which has failed to budget sufficient revenues to insure or otherwise cover pursuant to this section every risk for which immunity has been waived pursuant to the provisions of the Tort Claims Act or liability imposed under Section 41-4-4 NMSA 1978.

C. No liability insurance may be purchased by any governmental entity other than as authorized by the Tort Claims Act.

History: Laws 1976, ch. 58, § 18; 1953 Comp., § 5-14-18; Laws 1977, ch. 247, § 52; 1977, ch. 386, § 15; 1978, ch. 166, § 3; 1979, ch. 287, § 4; 1979, ch. 392, § 2; 1981, ch. 268, § 1.

Bracketed material. — The bracketed material in Subsection A(1)(b) was inserted by the compiler to correct an apparently incorrect reference. It was not enacted by the legislature and is not a part of the law.

Existence of insurance as waiver of immunity. — Without specific authorization by the legislature, the existence of insurance covering a governmental agency does not constitute a waiver of immunity from suit. Chavez v. Mountainair School Bd., 80 N.M. 450, 457 P.2d 382 (Ct. App. 1969).

Where insufficiency of insurance not raised. — No question of immunity from suit existed where no claim was made that the insurance was insufficient to cover the amount of the verdict. Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Two-year statute of limitations applicable to negligence suit involving public utility's employee. — Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of 37-1-24 NMSA 1978, which refers to the time for bringing suits in negligence against any city, town or village, or any officers thereof, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Law reviews. — For survey, "Torts: Sovereign and Governmental Immunity in New Mexico," see 6 N.M.L. Rev. 249 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 A.L.R.2d 1437.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tortfeasor, 91 A.L.R.3d 844.

41-4-21. Application of act.

The provisions of the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall not affect the provisions of any personnel act, any rules or regulations issued thereunder or any other provision of law governing the employer-employee relationship.

History: 1953 Comp., § 5-14-19, enacted by Laws 1976, ch. 58, § 19; 1977, ch. 386, § 16.

Purpose of section. — This section was designed to preserve employment relations between the state, or a subdivision thereof, and its employees. It may not be read to expand Subsection A of 41-4-4 NMSA 1978 and to provide a waiver of immunity to allow an educational malpractice action against a public school board. Rubio ex rel. Rubio v. Carlsbad Mun. School Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Asserting immunity for first time in supreme court permissible. — The right to assert sovereign immunity may be raised for the first time in the supreme court. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

CHAPTER 11

Intergovernmental Agreements and Authorities

Art.

ARTICLE 1

Joint Powers Agreements

Sec.

11-1-1. Short title.

This act [11-1-1 to 11-1-7 NMSA 1978] may be cited as the "Joint Powers Agreements Act."

History: 1953 Comp., § 4-22-1, enacted by Laws 1961, ch. 135, § 1.

Cross references. — For the Planning District Act, *see* 4-58-1 NMSA 1978 et seq.

ANNOTATIONS

Legislative intent. — The intent of the legislature in the Joint Powers Agreements Act was to allow a joint and coordinated effort to be undertaken by separate governmental units. 1969 Op. Att'y Gen. No. 69-127.

11-1-2. Definitions.

As used in the Joint Powers Agreements Act:

A. "public agency" means the federal government or a federal department, agency or instrumentality; this state, another state or a state department, agency or instrumentality; an Indian nation, tribe or pueblo; a subdivision of an Indian nation, tribe or pueblo that has authority pursuant to the law of that Indian nation, tribe or pueblo to enter into joint powers agreements directly with the state;

Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Generally. — Formerly, this was the only statutory section which gave the state board of finance specific control (now held by the secretary of finance and administration) over a corporation which was authorized to operate a gas public utility system, and which was jointly owned and jointly controlled by three cities. Other than those financial matters which might possibly come before the board of finance, the major item concerning the corporation which was subject to the control of the state board of finance was the joint powers agreement creating such corporation. 1966 Op. Att'y Gen. No. 66-7.

Constitutionality. — The appointment, under authority of the Joint Powers Agreements Act, of a district judge to be chairman of a joint commission for consolidation of two municipalities does not contravene the constitution. There is no incompatibility, inconsistency or subordination, and no interference. The fact that some day an action of the commission might be before a court was not enough to make the positions incompatible. 1968 Op. Att'y Gen. No. 68-67.

Agreements with federal government. — The Joint Powers Agreements Act authorizes agreements with the federal government of the type contemplated under 40 U.S.C. § 484. 1964 Op. Att'y Gen. No. 64-138.

Agreements relating to surplus property. — The state department of finance and administration by broad general statutory provision has the authority to enter into contractual agreements with the federal government, subject to approval of such agreements by the state board of finance (now by the secretary of finance and administration), for acquisition, administration and disposition of surplus property. 1964 Op. Att'y Gen. No. 64-138. (*See now* surplus property powers of the general services department, 15-4-2 NMSA 1978.)

11-1-4. Terms and conditions of joint agreements.

A. Every agreement executed by one or more public agencies shall clearly specify the purpose of the agreement or for any power which is to be exercised. The agreement shall provide for the method by which the purpose will be accomplished and the manner in which any power will be exercised under such agreement.

B. The parties to the agreement may provide therein that:

(1) contributions from the funds of the public agencies may be made for the purpose set forth in the agreement; or

(2) payments of public funds may be made to defray cost of such agreement; or

(3) advances of public funds of the public agencies be made for the purpose set forth in the agreement and that such advances be repaid as provided in such agreement.

C. The agreement may provide that funds be paid to and disbursed by the agency agreed upon by the public agencies under the terms of the agreement.

D. The agreement shall provide for strict accountability of all receipts and disbursements.

E. The agreement may be continued for a definite term or until rescinded or terminated, and may provide for the method by which it may be rescinded or terminated by any party.

F. The agreement shall provide for the disposition, division or distribution of any property acquired as the result of the joint exercise of powers, and shall further provide that after the completion of the agreement's purpose any surplus money on hand shall be returned in proportion to the contributions made.

G. If the purpose set forth in [the] agreement is the acquisition, construction or operation of a revenue-producing facility, the agreement may provide:

(1) for the repayment or return to the parties of all or any part of any contributions, payments or advancements made by the parties pursuant to such agreement; and

(2) for payment to the parties of any sum derived from the revenues of such facilities.

H. Payments, repayments or returns to a public agency shall be made at the time and in the manner specified in the agreement.

History: 1953 Comp., § 4-22-4, enacted by Laws 1961, ch. 135, § 4.

Bracketed material. — The bracketed material in Subsection G was inserted by the compiler and it is not a part of the law.

11-1-5. Powers of administering agency under agreement.

A. The agency provided by the agreement to administer or execute the agreement may be one of the parties to the agreement or a commission or board constituted pursuant to the agreement.

B. The administering agency under any such agreement shall be considered under the provisions of this Joint Powers Agreements Act as an entity separate from the parties to such agreement.

C. The agency shall possess the common power specified in the agreement and may exercise it in the manner or according to the method provided in the agreement, subject to any of the restrictions imposed upon the manner of exercising such power of one of the contracting public agencies or such

restrictions of any public agency participating which may be designated or incorporated in the agreement.

History: 1953 Comp., § 4-22-5, enacted by Laws 1961, ch. 135, § 5.

ANNOTATIONS

Scope of powers. — A development district created pursuant to the Joint Powers Agreements Act may only exercise powers common to the contracting parties. 1969 Op. Att'y Gen. No. 69-127.

11-1-6. Privileges and immunities, exemptions, benefits.

All of the privileges and immunities from liability, exemptions from laws, ordinances and rules, all pension, relief, disability, workmen's compensation and other benefits which apply to the activity of officers, agents or employees of any such public agency when performing their respective functions within the territorial limits of their respective public agencies, shall apply to them to the same extent while engaged in the performance of any of their functions and duties extraterritorially under the provisions of the Joint Powers Agreements Act.

History: 1953 Comp., § 4-22-6, enacted by Laws 1961, ch. 135, § 6.

ANNOTATIONS

Scope of section. — This section goes no further than to provide that an official of a participating member of the joint project does not lose his privileges, immunities or benefits during the time that he is serving under the joint project. Thus participation by an official previously covered by the Public Employees Retirement Act [10-11-1 NMSA 1978] does not remove him from continued participation in the retirement system, but it does nothing whatever to confer or transfer participation to other officials who are not so covered by the system. 1970 Op. Att'y Gen. No. 70-58.

11-1-7. Power to issue revenue bonds.

In addition to other powers, any agency, commission or board provided for by a joint powers agreement pursuant to this Joint Powers Agreements Act may issue revenue bonds to pay the cost and expenses of acquiring or constructing any structures, facilities or equipment necessary to effectuate the purposes of the agreement; provided, however, such authority shall be subject to the provisions of the Joint Powers Agreements Act and the constitutional provisions of this state.

History: 1953 Comp., § 4-22-7, enacted by Laws 1961, ch. 135, § 7.

ARTICLE 2

Commission on Intergovernmental Cooperation

Sec.
11-2-1. Commission on intergovernmental cooperation.
11-2-2. Duties of commission.
11-2-3. Appointment of delegations and committees.
11-2-4. Council of state governments; joint governmental agency.

11-2-1. Commission on intergovernmental cooperation.

There is created the "commission on intergovernmental cooperation." The members and officers of the legislative council are ex-officio members and officers of the commission, and the director of the legislative council service is ex-officio executive secretary of the commission.

History: 1953 Comp., § 4-6-4, enacted by Laws 1963, ch. 90, § 1.

Cross references. — For legislative council service, *see* 2-3-2 NMSA 1978.

Repeals and reenactments. — Laws 1963, ch. 90, § 1, repealed 4-6-4, 1953 Comp., and enacted the above section.

11-2-2. [Duties of commission.]

It shall be the function of this commission:

(b) violation of a federal or state law, a local ordinance relating to aggravated assault or theft or a law involving moral turpitude; or

(4) knowingly made a false statement on his application.

B. The board shall develop, adopt and promulgate administrative procedures for suspension or revocation of a telecommunicator's certification that include:

(1) notice and opportunity for the affected telecommunicator to be heard; and

(2) procedures for review of the board's decision.

History: Laws 2003, ch. 320, § 11.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Section 29-7A-3 was repealed by Laws 2003, Ch. 320, § 12, effective July 1, 2003. For present comparable provisions *see* 29-7C-3 NMSA 1978.

Effective dates. — Laws 2003, ch. 320, § 13 made Laws 2003, ch. 320, § 11 effective on July 1, 2003.

ARTICLE 8
Mutual Aid

Sec.
29-8-1. Short title.
29-8-2. Public agency defined.
29-8-3. Mutual aid agreements.

29-8-1. Short title.

This act [29-8-1 to 29-8-3 NMSA 1978] may be cited as the "Mutual Aid Act".

History: 1953 Comp., § 39-7-1, enacted by Laws 1971, ch. 153, § 1.

29-8-2. [Public agency defined.]

As used in the Mutual Aid Act, "public agency" includes the federal government or any department or agency thereof, an Indian tribal council, Indian pueblo council and the state or any county or municipality thereof.

History: 1953 Comp., § 39-7-2, enacted by Laws 1971, ch. 153, § 2.

29-8-3. Mutual aid agreements.

Any state, county or municipal agency having and maintaining peace officers may enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act, with respect to law enforcement, provided any such agreement shall be approved by the agency involved and the governor.

History: 1953 Comp., § 39-7-3, enacted by Laws 1971, ch. 153, § 3.

ANNOTATIONS

Applicability to gaming compacts with Indian tribes. — The Mutual Aid Act does not in any way pertain to gaming compacts and thus provides no statutory basis for the governor to enter into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian gaming laws. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

By adding the limiting language that mutual aid agreements must be approved by both the agency involved and the governor of the state of New Mexico, the legislature contemplated a written agreement. State v. Branham, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

Inconsistency between written agreements. — It is inconsistent for the legislature to require a written agreement for the issuance of a cross commission under Section 29-1-11 NMSA 1978 between state law enforcement and Indian tribal police officers and not require a written agreement for mutual aid agreements under this section. State v. Branham, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

Where state police officer initially stopped defendant for speeding on Mescalero reservation, because the officer did not have authority to enforce Mescalero tribal traffic ordinances, defendant's motion to suppress evidence was properly granted. State v. Branham, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

Deputization of city or county officials by state agency. — The environmental improvement division (EID) (now Air Quality Bureau of Environment Department) may seek assistance from city and county law enforcement agencies to enforce asbestos disposal regulations pursuant to the Mutual Aid Act, Sections 29-8-1 to 29-8-3 NMSA 1978, but it cannot deputize city or county law enforcement officials to act as EID agents to enforce the division's asbestos disposal regulations. 1987 Op. Att'y Gen. No. 87-48.

ARTICLE 9

Organized Crime

29-9-1. Short title.

Sections 29-9-1 through 29-9-17 NMSA 1978 may be cited as the "Organized Crime Act".

History: 1953 Comp., § 39-9-1, enacted by Laws 1973, ch. 225, § 1; 1977, ch. 215, § 1.

Compiler's notes. — Laws 1981, ch. 234, § 2 repealed Laws 1977, ch. 215, § 9, which had provided that the act shall terminate on July 1, 1981.

ANNOTATIONS

Statute not amenable to vagueness claim. — The Organized Crime Act [Sections 29-9-1 through 29-9-17 NMSA 1978] is not the type of statute that is amenable to a claim of unconstitutional vagueness because the vagueness doctrine is applied when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of a proscribed activity, whereas the Organized Crime Act is not a penal statute; the only sanction that can come from the act is a contempt citation for failure to abide by a court order. In re Governor's Organized Crime Prevention Comm'n, 91 N.M. 516, 577 P.2d 414 (1978).

Word "racketeering" does not need to appear in title to Laws 1977, ch. 215, which amends the Organized Crime Act; nor does the title violate N.M. Const., art. IV, § 16, although the 1977 amendment for the first time authorizes the commission to investigate racketeering, since racketeering is reasonably germane to the subject matter of organized crime. In re Governor's Organized Crime Prevention Comm'n, 91 N.M. 516, 577 P.2d 414 (1978).

29-9-2. Definitions.

As used in the Organized Crime Act:

A. "organized crime" means the supplying for profit of illegal goods and services, including, but not limited to, gambling, loan sharking, narcotics and other forms of vice and corruption, by members of a structured and disciplined organization;

B. "public officer" means any elected or appointed officer of the state or any of its political subdivisions, serving with or without remuneration for his services; and

C. "commission" means the governor's organized crime prevention commission.

History: 1953 Comp., § 39-9-2, enacted by Laws 1973, ch. 225, § 2.

29-9-3. Commission created; membership.

A. There is created the "governor's organized crime prevention commission". The commission shall consist of seven members appointed by the governor with the advice and the consent of the senate. No more than four members shall belong to the same political party and at least one member shall be a member of the New Mexico bar.

B. Persons appointed to the commission shall:

(1) be of unquestioned integrity and of high standing and influence within the state by virtue of their demonstrated capacity for leadership;

(2) be selected from the various parts of the state in such manner as to provide broad geographical representation on the commission; and

making the request. 1959-60 Op. Att'y Gen. No. 60-239.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 70 Am. Jur. 2d Sheriffs, Police, and Constables §§ 1 to 5, 8, 10, 13.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Validity, construction and application of regulation regarding outside employment of government employees or officers, 94 A.L.R.3d 1230.

Validity, construction, and application of regulations regarding outside employment of governmental employees of officers, 62 A.L.R.5th 671.

63 C.J.S. Municipal Corporations § 478 et seq.; 80 C.J.S. Sheriffs and Constables §§ 3, 22, 37.

29-1-10. [Law enforcement agencies, state and local; participation in federal programs.]

All state and local law enforcement agencies are hereby authorized to participate in the Federal Law Enforcement Assistance Act of 1965 (Public Law 98-197 [89-197]).

History: 1953 Comp., § 39-1-11, enacted by Laws 1966, ch. 24, § 1.

Compiler's notes. — The federal Law Enforcement Assistance Act of 1965 was codified as a note following 18 USCS § 3001 prior to its repeal by Public Law 90-351 on June 19, 1968.

Bracketed material. — The bracketed material was inserted by the compiler to correct an error and is not part of the law.

29-1-10.1. Federal funds; receipt and expenditure for law enforcement activities.

Any law enforcement agency of the state of New Mexico may receive and spend for law enforcement activities, in addition to amounts appropriated to it, transfers from the United States department of justice or the United States department of the treasury pursuant to the Controlled Substances Act, 21 U.S.C. § 881(e) (1970), and the Tariff Act of 1930, 19 U.S.C. § 1616(a) (1930), both as amended before or after the effective date of this section.

History: Laws 1986, ch. 87, § 1.

Compiler's notes. — The Tariff Act of 1930, 19 USC 1616, referred to in this section, was repealed in 1986. For present comparable provisions, *see* 19 USC § 1616a.

29-1-11. Authorization of tribal and pueblo police officers and certain federal officers to act as New Mexico peace officers; authority and procedure for commissioned peace officers.

A. All persons who are duly commissioned officers of the police or sheriff's department of any New Mexico Indian nation, tribe or pueblo or who are law enforcement officers employed by the bureau of Indian affairs and are assigned in New Mexico are, when commissioned under Subsection B of this section, recognized and authorized to act as New Mexico peace officers. These officers have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including the power to make arrests for violation of state laws.

B. The chief of the New Mexico state police is granted authority to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian nation, tribe or pueblo or a law enforcement officer employed by the bureau of Indian affairs to implement the provisions of this section. The procedures to be followed in the issuance and revocation of commissions and the respective rights and responsibilities of the departments shall be set forth in a written agreement to be executed between the chief of the New Mexico state police and the Indian nation, tribe or pueblo or the appropriate federal official.

C. The agreement referred to in Subsection B of this section shall contain the following conditions:

(1) the Indian nation, tribe or pueblo, but not the bureau of Indian affairs, shall submit proof of adequate public liability and property damage insurance for vehicles operated by the peace officers and police professional liability insurance from a company licensed to sell insurance in the state;

(2) each applicant for a commission shall successfully complete four hundred hours of basic police training that is approved by the director of the New Mexico law enforcement academy;

(3) the chief of the New Mexico state police shall have the authority to suspend any commission granted pursuant to Subsection B of this section for reasons solely within the chief's discretion;

(4) if any provision of the agreement is violated by the Indian nation, tribe or pueblo or any of its agents, the chief of the New Mexico state police shall suspend the agreement on five days' notice, which suspension shall last until the chief is satisfied that the violation has been corrected and will not recur;

(5) the goldenrod-colored officer's second copy of any citation issued pursuant to a commission authorized by this section shall be submitted within five days to the chief of the New Mexico state police;

(6) any citation issued pursuant to a commission authorized by this section shall be to a magistrate court of New Mexico; except that any citations issued to Indians within the exterior boundaries of an Indian reservation shall be cited into tribal court;

(7) the agreement or any commission issued pursuant to it shall not confer any authority on a tribal court or other tribal authority that the court or authority would not otherwise have;

(8) the authority conferred by any agreement entered into pursuant to the provisions of this section shall be coextensive with the exterior boundaries of the reservation; except that an officer commissioned under this section may proceed in hot pursuit of an offender beyond the exterior boundaries of the reservation, and the authority conferred in any written agreement between the chief of the New Mexico state police and the Navajo Nation may extend beyond the exterior boundaries of the Navajo reservation to and including the area enclosed by the following description:

Beginning at a point where the southern boundary line of the Navajo Nation reservation intersects the western right-of-way line of US 491, and running thence; southerly along the western right-of-way line of US 491 to the northerly city limits of Gallup; thence, easterly along the northerly city limits of Gallup to the northern side of the right of way of I-40; thence, in an easterly direction along the northerly side of the right of way of I-40 to the northerly limits of the village of Prewitt; thence, in a straight line between the northerly boundary of the village of Prewitt to the southerly boundary of Ambrosia Lake; thence in a straight line between the southerly boundary of Ambrosia Lake to the southerly boundary of Hospah; thence, east along a straight line from the southerly boundary of Hospah to the southern boundary of Torreon; thence along the easterly side of the right of way of state road 197 to the westerly city limits of Cuba; thence, north along the westerly side of the right of way of state road 44 to the southerly boundary of the Jicarilla Apache Nation reservation; thence, westerly along the southerly boundary of the Jicarilla Apache Nation reservation to the southwest corner of that reservation; thence, northerly along the westerly boundary of the Jicarilla Apache Indian reservation to a point where the westerly boundary of the reservation intersects the southerly side of the right of way of state road 44; thence, northerly along the southerly side of the right of way of state road 44 to its intersection with the northerly side of the right of way of Navajo road 3003; thence, along the northerly side of the right of way of Navajo road 3003 to a point where the northerly side of the right of way of Navajo road 3003 intersects the westerly side of the right-of-way line of state road 371; thence, northerly along the west side of the right of way of state road 371 to the southerly side of the right of way of Navajo road 36; thence, westerly along the southerly side of the right of way of Navajo road 36 to the eastern border of the Navajo Nation reservation; thence, along the eastern and southerly borders of the Navajo Nation reservation to the point of beginning.

The municipalities of Cuba and Gallup and the villages of Thoreau and Prewitt are excluded from the grant of authority that may be conferred in any written agreement entered into pursuant to provisions of this section; provided, however, any written agreement may include under such grant of authority the communities of Ambrosia Lake, Hospah, Torreon, Lybrook, Nageezi, Counselors and Blanco Trading Post and those communities commonly known as the Wingate community; the Navajo Nation Blue Water ranch area of the Thoreau community; the Prewitt community, exclusive of the village of Prewitt; the Haystack community; the Desidero community; the Sand Springs community; the Rincon Marquis community; the Charley Jesus Arviso and the Castillo community; and state road 264 beginning at the point where it intersects US 491 and ending where state road 264 intersects the Arizona-New Mexico state line; and

(9) the chief of the New Mexico state police or the chief's designee and the Indian nation, tribe or pueblo or the appropriate federal official shall be required to meet at least quarterly or more frequently at the call of the chief of the New Mexico state police to discuss the status of the agreement and invite other law enforcement or other officials to attend as necessary.

D. Nothing in this section impairs or affects the existing status and sovereignty of an Indian nation, tribe or pueblo as established under the laws of the United States.

E. All persons who are duly commissioned federal law enforcement officers employed by the federal bureau of investigation; drug enforcement administration; bureau of alcohol, tobacco and firearms; United States secret service; United States customs service; immigration and naturalization service;

United States marshals service; postal inspection service; United States probation department; and United States pretrial services agency; and other appropriate federal officers whose primary duty is law enforcement related, who are assigned in New Mexico and who are required to be designated by the county sheriff on a case-by-case basis in the county in which they are working, are recognized and authorized to act as New Mexico peace officers and have all the powers of New Mexico peace officers to enforce state laws in New Mexico, including the power to make arrests for violation of state laws. The department of public safety shall maintain a registry that lists the name and affiliated federal agency of every federal law enforcement officer recognized and authorized to act as a New Mexico peace officer pursuant to the provisions of this subsection. This subsection shall not be construed to impose liability upon or to require indemnification by the state for any act performed by a federal law enforcement officer pursuant to this subsection.

F. The provisions of Subsection E of this section regarding designation of federal law enforcement officers by a county sheriff do not apply to federal law enforcement officers who are duly commissioned officers of a police or sheriff's department for an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs.

G. Nothing in this section limits, impairs or nullifies the authority of county sheriffs to appoint pursuant to Chapter 4, Article 41 NMSA 1978 duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs as deputy sheriffs authorized to enforce New Mexico criminal and traffic law.

History: 1953 Comp., § 39-1-12, enacted by Laws 1972, ch. 8, § 1; 1979, ch. 39, § 1; 1981, ch. 120, § 1; 1983, ch. 275, § 1; 1988, ch. 14, § 3; 1993, ch. 179, § 1; 1995, ch. 186, § 1; 1997, ch. 260, § 1; 2002, ch. 92, § 1; 2005, ch. 290, § 1.

The 2005 amendment, effective June 17, 2005, added Subsection G to provide that nothing in this section limits, impairs or nullifies the authority of county sheriffs to appoint duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico or who are federal law enforcement officers employed by the bureau of Indian affairs as deputy sheriffs authorized to enforce New Mexico criminal and traffic law.

The 2002 amendment, effective May 15, 2002, deleted "payment" following "authority" in the section heading; and deleted Paragraph C(10), which provided for payment from the law enforcement protection fund to tribes or pueblos for each commissioned peace officer in the tribe or pueblo.

The 1997 amendment, effective July 1, 1997, in Subsection E, in the first sentence, inserted "United States probation department; United States pretrial services agency;", deleted "as designated by the chief of the New Mexico state police upon a recommendation by a county sheriff" preceding "who are assigned", and inserted "and who are required to be designated by the county sheriff on a case-by-case basis in the county in which they are working", added the second sentence; and added Subsection F.

The 1995 amendment, effective June 16, 1995, substituted "pursuant to provisions of" for "under" near the end of Paragraph (8) in Subsection C, and in Subsection E deleted "and" preceding "postal" and substituted "whose primary duty is law enforcement related, as designated by the chief of the New Mexico state police upon a recommendation by a county sheriff" for "as designated by the chief of the New Mexico state police".

The 1993 amendment, effective June 18, 1993, inserted "payment" and substituted "commissioned peace officers" for "commissioning" in the section heading; added Paragraph (10) of Subsection C; and made minor stylistic changes in Paragraphs (2), (4), (8), and (9) of Subsection C and in Subsection E.

ANNOTATIONS

Off-reservations crimes. — State officers have the authority to enter Indian country to investigate off-reservation crimes committed in their presence by Indians, so long as the investigation does not infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure. A traffic stop which included the administration of field sobriety tests, did not circumvent or contravene the Navajo Nation Code and, therefore, did not infringe on the sovereignty of the Navajo Nation. State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869, aff'g 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146.

Authority of non-cross-commissioned officer. — A state police officer, who is not cross-commissioned with the bureau of Indian affairs or the tribe, may pursue an Indian onto the reservation, across jurisdictional lines, for a minor traffic offense committed outside the reservation and after determining that the officer lacks jurisdiction, the officer may continue to detain the Indian and collect evidence for use against him. State v. Harrison, 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146, aff'd, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869.

Inconsistency between written agreements. — It is inconsistent for the legislature to require a written agreement for the issuance of a cross commission under this section between state law enforcement and Indian tribal police officers and not require a written agreement for mutual aid agreements under Section 29-8-3 NMSA 1978. State v. Branham, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

Authority of cross-commissioned officer. — Traffic stop and detention and arrest are not illegal where Navajo tribal officer acted as a New Mexico peace officer with authority to enforce the Motor Vehicle Code on non-Indian land in the city of Gallup. State v. Martinez, 2005-NMCA-052, 137 N.M. 432, 112 P.3d 293, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Because Navajo tribal officer claims to have been deputized by the McKinley County sheriff, Subsection C(8) of Section 29-1-11 NMSA 1978 does not defeat his claimed authority to act as a cross-commissioned county deputy. State v. Martinez, 2005-NMCA-052,

137 N.M. 432, 112 P.3d 293, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

Authority of non-cross-commissioned officers. — A non-cross-commissioned federal police officer has the lawful authority not only to stop a motor vehicle within an Indian reservation, but also to issue the driver a federal traffic citation based on state law. Ryder v. State, 98 N.M. 316, 648 P.2d 774 (1982).

A non-cross-commissioned bureau of Indian affairs officer is empowered to stop a vehicle within the borders of an Indian reservation for a traffic law offense and, upon determining that the offender is a non-Indian, to request him to wait until a cross-commissioned BIA officer arrives. State v. Ryder, 98 N.M. 453, 649 P.2d 756 (Ct. App.), aff'd, 98 N.M. 316, 648 P.2d 774 (1982).

Authority of tribal police officer over non-Indian. — A tribal police officer has the authority to stop and issue a tribal citation, and arrest a non-Indian, so long as the Indian authorities promptly deliver up the non-Indian offender, rather than try and punish him themselves. State v. Ryder, 98 N.M. 453, 649 P.2d 756 (Ct. App.), aff'd, 98 N.M. 316, 648 P.2d 774 (1982).

Where state police officer initially stopped defendant for speeding on Mescalero reservation, because the officer did not have authority to enforce Mescalero tribal traffic ordinances, defendant's motion to suppress evidence was properly granted. State v. Branham, 2004-NMCA-131, 136 N.M. 579, 102 P.3d 646.

Citations issued to non-Indians. — Traffic citations lawfully issued by a commissioned bureau of Indian affairs officer to a non-Indian cannot legally be referred to a tribal court, but should be referred to state magistrate court. 1992 Op. Att'y Gen. No. 92-07.

Law reviews. — For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

29-1-12. Authorization to maintain and retake custody of Arizona prisoners.

An officer or employee of the Arizona department of corrections who has in his custody, pursuant to Arizona law, a ward, offender or prisoner of the state of Arizona whom he is transporting from a facility in Arizona to another point in Arizona via New Mexico or to a point in New Mexico for fire fighting or conservation work shall maintain custody of such ward, offender or prisoner in New Mexico. Such officer or employee may, in the event of escape of such ward, offender or prisoner in New Mexico, retake such ward, offender or prisoner in the same manner as if such officer or employee were a New Mexico police officer and such ward, offender or prisoner had been committed to his custody under New Mexico law.

History: 1953 Comp., § 39-1-13, enacted by Laws 1975, ch. 281, § 1.

29-1-13. Unclaimed property; inventory.

A peace officer shall immediately inventory and record any personal property that comes into his possession and is taken under authority of law or is left in his possession or in the possession of the state, county or municipality. As used in Sections 29-1-13 through 29-1-15 NMSA 1978, "peace officer" means any full-time employee of a police or sheriff's department that is part of or administered by the state or any political subdivision of the state and which employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the state.

History: Laws 1983, ch. 50, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Uniform Disposition of Unclaimed Property Act, 98 A.L.R.2d 304.

29-1-14. Unclaimed property; authority to sell; notice of sale; deadly weapons, controlled substances and other contraband excepted.

A. Any personal property having a fair market value greater than fifty dollars ($50.00) that has been unclaimed by the true owner, is no longer necessary for use in obtaining a conviction, is not needed for any other public purpose and has been in the possession of a state, county or municipal law enforcement agency for more than ninety days shall be sold at public sale.

B. Prior to the sale of seized personal property, the law enforcement agency shall make a reasonable attempt to notify the original owner of the seized personal property and shall publish a notice of the sale of unclaimed personal property once each week for two successive weeks. The notice shall contain:

(1) a brief description of the personal property to be sold;

Loya v. Gutierrez
Supreme Court of New Mexico. May 11, 2015 350 P.3d 1155 2015-NMSC-017 (Approx. 17 pages)

350 P.3d 1155
Supreme Court of New Mexico.

Jose Luis **LOYA**, Plaintiff,

v.

Glen **GUTIERREZ**, Commissioned Officer of Santa Fe County,
Defendant/Third–Party Plaintiff/Appellant–Petitioner,

v.

County of Santa Fe, Third–Party Defendant/Appellee–Respondent.

No. 34,447. May 11, 2015.

Synopsis

Background: Arrestee brought § 1983 action against tribal police officer, who was commissioned as deputy county sheriff and who prosecuted arrestee in state court for state traffic offense committed on tribal land, alleging false arrest, malicious prosecution, and use of excessive force. Officer brought third-party action against county, seeking declaratory judgment that county was required to defend and indemnify officer. The District Court, Santa Fe County, Barbara J. Vigil, D.J., granted summary judgment for county. Officer appealed. The Court of Appeals, 319 P.3d 656, affirmed. Officer petitioned for certiorari.

Holdings: After grant of certiorari, the Supreme Court, Bosson, J., held that:
1 mere fact that officer was employed as a tribal police officer did not per se exclude officer from the New Mexico Tort Claims Act (NMTCA) definition of "public employee" for whom a governmental entity could be required to provide a defense from certain actions;
2 officer was a person acting on behalf of government or in service of governmental entity in official capacity when he made arrest at issue, as would support finding that officer was a "public employee" who was entitled to defense and indemnification by county;
3 showing waiver of tort liability by a governmental entity is not required before the entity is obligated by NMTCA to provide its employee with a defense in a § 1983 action against the employee, when there are no tort claims asserted; and
4 officer was not acting as independent contractor when he made arrest at issue, as could trigger exclusion from NMTCA definition of public employees entitled to defense and indemnification.

Reversed and remanded.

West Headnotes (10)

1 **Civil Rights** Private Persons or Corporations, in General
Native American tribes and those acting under tribal law do not act under color of state law within the meaning of § 1983, but Native American actors may be subject to a § 1983 claim if their actions are taken pursuant to state authority. 42 U.S.C.A. § 1983.

Cases that cite this headnote

2 **Civil Rights** State or territorial action, or individual or private action, in general
If an individual is possessed of state authority and purports to act under that authority, his action is state action, as could support a § 1983 claim. 42 U.S.C.A. § 1983

Cases that cite this headnote

3 **Indians** Non-Indian Defendant
A tribal police officer may have jurisdictional authority to enforce tribal civil traffic ordinances against non-Indians and may eject or exclude a non-Indian engaging in criminal activity or may detain and transport the offender to proper state authorities

Cases that cite this headnote

4 **Indians** Non-Indian Defendant
A tribal officer may not arrest, charge, jail, or prosecute non-Indian offenders for violation of state law without some additional state authority.

Cases that cite this headnote

5 **Officers and Public Employees** Compensation and Fees
Mere fact that police officer was employed as a tribal police officer did not per se exclude officer from the New Mexico Tort Claims Act (NMTCA) definition of "public employee" for whom a governmental entity could be required to provide a defense from certain actions. West's NMSA §§ 41–4–3, 41–4–4.

Cases that cite this headnote

6 **Sheriffs and Constables** Disbursements and Incidental Expenses
Tribal police officer who had been commissioned as deputy county sheriff was a person acting on behalf of government or in service of governmental entity in official capacity when he arrested non-Indian motorist for state traffic offense committed on tribal land, as would support finding that officer was a "public employee" who was entitled to defense and indemnification by county, pursuant to the New Mexico Tort Claims Act (NMTCA), from motorist's § 1983 claim against officer arising out of arrest, where county sheriff had authority under state law to commission officer as deputy county sheriff, and officer was acting as unpaid sheriff's deputy at time of arrest. 42 U.S.C.A. § 1983; West's NMSA §§ 41–4–3, 41–4–4.

Cases that cite this headnote

7 **Indians** Tribal officers and officials
County sheriff's letter to tribe regarding commission of tribal police officer to arrest non-Indian motorists and prosecute state traffic offenses did not create any valid agreement between county and tribe as to terms of officer's commission, including purported term in which tribe would accept liability for officer's actions while effecting an arrest or pursuing a suspect, where there was no evidence that tribal police chief, governor, or council ever acknowledged the existence of letter, much less agreed to its terms, and there was no indication of any discussions verifying that tribe had accepted terms set out in letter.

Cases that cite this headnote

8 **Sheriffs and Constables** Disbursements and Incidental Expenses
Fact that tribal police officer who had been commissioned as deputy county sheriff did not meet definition of law enforcement officer, as a subcategory of definition of public employee under the New Mexico Tort Claims Act (NMTCA), under provision requiring governmental entity to defend and indemnify public employees in certain situations, did not preclude officer from meeting one of the other subcategory definitions of public employee, despite argument that more specific definition for law enforcement officer should prevail over more general provisions touching on same subject; Legislature had purposely listed multiple categories, and court would assume it did so for a reason. West's NMSA §§ 41–4–3, 41–4–4.

Cases that cite this headnote

9 **Officers and Public Employees** Compensation and Fees
Showing waiver of tort liability by a governmental entity is not required before the entity is obligated by the New Mexico Tort Claims Act (NMTCA) to provide its employee with a defense in a § 1983 action against the employee, when there are no tort claims asserted. 42 U.S.C.A. § 1983; West's NMSA § 41–4–4.

Cases that cite this headnote

10 **Sheriffs and Constables** Disbursements and Incidental Expenses

Tribal police officer who had been commissioned as deputy county sheriff was not acting as independent contractor when he arrested non-Indian for state traffic offense on tribal land, and thus officer was not excluded as independent contractor from requirement of New Mexico Tort Claims Act (NMTCA) that county provide defense and indemnification from arrestee's § 1983 claim against officer; county sheriff had a clear right, or indeed an obligation, to control the actions of a deputy. 42 U.S.C.A. § 1983; West's NMSA § 41–4–3(F).

Cases that cite this headnote

Attorneys and Law Firms

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OPINION

BOSSON, Justice.

{1} Given New Mexico's highways that traverse both state and tribal lands, it is not uncommon that a tribal police officer patrolling those highways may be commissioned as a deputy county sheriff to arrest non-Indians and prosecute them in state court when they commit state traffic offenses on tribal land. In light of those recurring facts, we determine a county's legal obligation when a non-Indian, arrested by a tribal officer and prosecuted in state court for state traffic offenses, sues the arresting tribal officer for federal civil rights violations. More particularly, we decide when the county has an obligation under the New Mexico Tort Claims Act, NMSA 1978, §§ 41–4–1 to –29 (1976, as amended through 2009) (NMTCA), to provide that tribal police officer with a legal defense in the federal civil rights action. The district court as well as our Court of Appeals found no such legal duty, in part because it concluded that the tribal officer was not a state public employee as defined in the NMTCA. We hold to the contrary, finding clear evidence in the text and purpose of the NMTCA requiring the county to defend the tribal officer, duly commissioned to act as a deputy county sheriff, under these circumstances endemic to the New Mexico experience.

BACKGROUND

{2} On September 5, 2009, Officer Glen **Gutierrez**, on duty as a full-time salaried police officer of the Pueblo of Pojoaque and also commissioned as a Santa Fe County deputy sheriff, was patrolling a portion of U.S. Highway 84/285 located within the exterior boundary of the Pojoaque Pueblo. He was driving his tribally-marked and issued police vehicle and was dressed in his full tribal uniform displaying his tribal badge. He was also carrying a deputy's commission card issued to him by the Santa Fe County sheriff.

{3} Officer **Gutierrez** observed Jose Luis **Loya** making a dangerous lane change and engaged his emergency equipment to signal **Loya** to pull over. Once stopped, Officer **Gutierrez** asked **Loya** to step out of his vehicle and informed **Loya** that he was under arrest for reckless driving in violation of NMSA 1978, Section 66–8–113 (1987), a state law. Officer **Gutierrez** placed **Loya** in the back of his patrol vehicle and transported **Loya** to the Pojoaque Tribal Police Department for processing. **Loya**, a non-Indian, was not subject to prosecution for violation of tribal law, and therefore, he was transported from the Pueblo to the Santa Fe County Adult Detention Center where he was incarcerated. Ultimately, Officer **Gutierrez** prosecuted **Loya** for reckless driving in Santa Fe County Magistrate Court.

1 2 {4} **Loya** felt aggrieved by what happened to him that night. Based on those events, **Loya** filed a civil complaint against Officer **Gutierrez** in the First Judicial District Court to recover damages for deprivation of his civil rights under 42 U.S.C. Section 1983 (1996) (Section 1983), claiming false arrest, malicious prosecution, and use of excessive force. Section 1983 creates a civil action for damages under federal law against any person acting under color of state law who violates the Constitution and laws of the United States. *See* 42 U.S.C. § 1983. "Native American tribes and those acting under *tribal law* do not act under color of state law within the meaning of [Section] 1983," but Native–American actors may be subject to a Section 1983 claim if their actions are taken pursuant to state authority *Williams v. Bd. of Cnty. Comm'rs.* 1998–NMCA–090, ¶ 20, 125 N.M. 445, 963 P.2d 522

(emphasis added). "If an individual is possessed of state authority and purports to act under that authority, his action is state action." *Id.* ¶ 21 (internal quotation marks and citation omitted).

3 4 {5} The State of New Mexico has exclusive criminal jurisdiction over non-Indians for actions committed within the exterior boundaries of a tribe or pueblo pursuant to the Indian Pueblo Land Act Amendments of 2005. *See* Pub.L. No. 109–133, 119 Stat. 2573 (2005). A tribal police officer may have jurisdictional authority to enforce tribal civil ***1158*** traffic ordinances against non-Indians and may eject or exclude a non-Indian engaging in criminal activity or may detain and transport the offender to proper state authorities. *See Pueblo of Pojoaque Civil Traffic Code, Tribal Council Resolution No. 1992–95* (August 20, 1992). *See also Duro v. Reina*, 495 U.S. 676, 696–97, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990). A tribal officer may not arrest, charge, jail, or prosecute non-Indian offenders for violation of state law without some additional state authority. *Id.*

{6} According to the affidavit of Pueblo of Pojoaque Police Chief John Garcia, the limited jurisdiction of tribal police officers historically created a gap in effective law enforcement on state highways located within the exterior boundaries of a tribe or pueblo. The county sheriff did not have adequate staff to combat criminal activity by non-Indians on state highways traversing tribal lands. Likewise, the tribal officers lacked authority to prosecute non-Indian offenders. To overcome this limitation and encourage jurisdictions to work together, the Santa Fe County sheriff issued commissions to Pojoaque Pueblo police officers to act as county sheriff's deputies.

{7} In the course of that practice, on June 23, 2008, Santa Fe County Sheriff Greg Solano issued a commission to Officer **Gutierrez** appointing him as a Santa Fe County deputy sheriff for purposes of enforcing state traffic laws and criminal statutes against non-Indian offenders for offenses committed within the exterior boundaries of Pojoaque Pueblo. To qualify for the appointment, Sheriff Solano required Officer **Gutierrez** to provide documentation showing successful completion of state and/or federal law enforcement training and certification, a written copy of his background investigation, and his written application. Sheriff Solano also required Officer **Gutierrez** to take the oath mandated by the New Mexico Constitution to "support the Constitution of the United States, the Constitution and laws of the State of New Mexico, the laws of the County of Santa Fe and faithfully and impartially discharge the duties of said office to the best of [his] ability." *See* N.M. Const. art. XX, § 1 ("Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.").

{8} As stated above, absent additional authority tribal police officers have no legal authority to charge non-Indian offenders for a violation of state law even if the violation is committed on tribal land. *See Duro*, 495 U.S. at 696–97, 110 S.Ct. 2053. It is the commission as a county deputy sheriff that gives tribal police the authority to make such arrests while acting under state law. In this case, the very reason Officer **Gutierrez**, a *tribal* police officer, is subject to a Section 1983 claim for actions taken under color of *state* law, is because he was acting under his state authority as a deputy sheriff, not tribal authority, when he charged, detained, and prosecuted **Loya** under state law. *See Williams*, 1998–NMCA–090, ¶¶ 20–21, 125 N.M. 445, 963 P.2d 522.

{9} Upon being sued, Officer **Gutierrez** tendered two requests to Santa Fe County to provide him with a legal defense and indemnification, if necessary, in accord with the defense and indemnification provisions of the NMTCA, § 41–4–4(B), (D). The County claimed it did not have any duty to provide a legal defense and indemnification, asserting that Officer **Gutierrez** was not a state "public employee" as defined by the NMTCA. *See* § 41–4–3(F). Following the denial of his request, Officer **Gutierrez** filed a third-party complaint in the **Loya** litigation against the County seeking a declaratory judgment that the NMTCA required the County to defend and indemnify him with respect to **Loya's** Section 1983 claims against him. The County answered and asserted a counterclaim for declaratory judgment in its favor.

{10} Both parties then filed motions for summary judgment, each basing its claim on an interpretation of the County's duties under the NMTCA. The district court ruled for the County, finding that Officer **Gutierrez** was not entitled to a defense under the NMTCA. The Court of Appeals affirmed. ***1159*** ***Loya v. Gutierrez***, 2014–NMCA–028, ¶ 23, 319 P.3d 656. We granted certiorari to resolve a significant issue of law that potentially affects law enforcement wherever state and tribal lands border each other throughout New Mexico. ***Loya v. Gutierrez***, 2014–NMCERT–002, 322 P.3d 1063.

DISCUSSION

The New Mexico Tort Claims Act

{11} The issue before us is whether the County is obligated to defend and potentially indemnify Officer **Gutierrez** when he was sued for actions taken to charge, arrest, and prosecute a non-Indian offender in state court for violating state law on Indian land. The parties agree that the NMTCA guides this determination. The defense and indemnification provisions of the NMTCA, § 41–4–4(B), (D), set forth the obligation of governmental entities to protect public employees when they are sued for actions taken in the scope of their duties. Specifically, Subsection (B) states:

> [A] governmental entity shall provide a defense, including costs and attorney ['s] fees, for *any public employee* when liability is sought for:
>
> (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
>
> (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

Section 41–4–4(B) (emphasis added). Likewise, if a settlement or judgment is entered against a public employee acting within the scope of his or her duties, the governmental entity is required to pay the judgment or settlement. Section 41–4–4(D). These provisions are intended to protect "public employee[s]" from individual liability when they are acting within the scope of their duties, thus operating as a kind of statutory insurance policy. *Risk Mgmt. Div. v. McBrayer*, 2000–NMCA–104, ¶ 6, 129 N.M. 778, 14 P.3d 43. Accordingly, we focus first on whether Officer **Gutierrez** was acting as a "public employee" within the meaning of the NMTCA when he arrested **Loya** on a state highway traversing tribal lands.

Whether Officer Gutierrez Is a Public Employee Under the NMTCA

{12} Section 41–4–3(F) of the NMTCA defines " 'public employee' " as "an officer, employee or servant of a governmental entity, excluding independent contractors" except for specifically defined individuals not relevant here. " '[G]overnmental entity' means the state or any local public body." Section 41–4–3(B). " '[S]tate' ... means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions." Section 41–4–3(H). " '[L]ocal public body' means all political subdivisions of the state and their agencies, instrumentalities and institutions." Section 41–4–3(C). Based on these definitions the County is a "governmental entity," and the Pueblo of Pojoaque is not a "governmental entity" under the NMTCA.

{13} The question then is whether Officer **Gutierrez** was acting as a "public employee" for the County when he arrested **Loya**. The "public employee" definition in turn identifies eighteen categories of persons who are deemed to be "public employees," two of which pertain to this case. Section 41–4–3(F). Section 41–4–3(F)(2) identifies "law enforcement officers" as "public employees." Section 41–4–3(F)(3) identifies "public employees" as those "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation."

Whether a Tribal Police Officer Can Also Be a Public Employee Under the NMTCA Under Certain Circumstances

5 {14} The County makes a number of arguments as to why Officer **Gutierrez** cannot be a public employee under the NMTCA. [1] We consider them in the order of their presentation.

***1160** {15} The County first argues that Officer **Gutierrez** is not a "public employee" based on the opinion from the Court of Appeals in *Williams*, 1998–NMCA–090, ¶ 26, 125 N.M. 445, 963 P.2d 522. *Williams* involved a Navajo tribal officer who was "cross-deputized" as a San Juan County sheriff's deputy, commissioned as a Bureau of Indian Affairs special deputy police officer, and certified by the New Mexico state police. *Id.* ¶ 2. The officer in that case issued a tribal speeding ticket, under Navajo law, to a non-Indian driving within the exterior boundaries of the Navajo Nation. *Id.* ¶¶ 2, 3. The person receiving the tribal speeding ticket (the plaintiff) sued the tribal officer under the NMTCA for alleged tortious behavior. *Id.* ¶¶ 5, 26. The plaintiff argued that the tribal officer, though making the arrest under tribal law, was subject nonetheless to the NMTCA because his "cross-deputization" to act under state law as a deputy sheriff made him a "public employee" under the NMTCA. *Id.* ¶ 26.The Court of Appeals affirmed dismissal of the tort claims, holding that the mere issuance of a deputy commission—without more—does not automatically transform a tribal officer into a "public

employee" under the NMTCA. *Id.* The Court in *Williams* noted that the tribal officer issued a tribal traffic ticket, not a state traffic ticket, to the plaintiff and was therefore acting under Navajo law when he was sued. *Id.* ¶ 3. Importantly, the Court of Appeals left open the possibility that a tribal officer could be a "public employee" under the NMTCA if there were more evidence than just the issuance of a state commission to the tribal officer. *See Williams,* 1998–NMCA–090, 125 N.M. 445, 963 P.2d 522.

{16} This is just such a case. Unlike *Williams,* Officer **Gutierrez** was enforcing *state* law, not tribal law, when he arrested **Loya** and charged him in state court for violating state law, thereby acting as a state officer and not a tribal officer. If Officer **Gutierrez** had issued a tribal ticket to **Loya** under Pueblo authority, he would have been acting on behalf of the Pueblo and the result would be the same as in *Williams.* The additional fact that Officer **Gutierrez** was acting on behalf of the County, not the Pueblo, creates an important distinction between the two cases, and thus provides the additional evidence missing from *Williams.* We conclude that the Court of Appeals' analysis in *Williams* is consistent with our determination here that Officer **Gutierrez** is not excluded from the NMTCA definition of "public employee" on the mere basis that he is also employed as a tribal officer. We next address whether Officer **Gutierrez** falls within one of the two identified categories of "public employee" under the NMTCA.

{17} As set forth previously, one definition of a public employee under the NMTCA is a "law enforcement officer." Section 41–4–3(D) defines "law enforcement officer" as:

> [A] full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes.

Officer **Gutierrez** was not a "full-time salaried public employee" or even a "part-time salaried police officer" of the County or any other "governmental entity" recognized by the NMTCA. He was compensated by the Pueblo of Pojoaque and not by the County.

{18} This does not end the inquiry, however. In addition to the "law enforcement officer" category, the NMTCA defines a public employee as a "person [ ] acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation." Section 41–4–3(F)(3). The statute does not supply a definition for this ***1161** category, so we look first to the text. *Key v. Chrysler Motors Corp.,* 1996–NMSC–038, ¶ 13, 121 N.M. 764, 918 P.2d 350 ("In interpreting statutes, we seek to give effect to the Legislature's intent, and in determining intent we look to the language used and consider the statute's history and background.").

Whether Officer Gutierrez Is a "Person Acting On Behalf Of Government Or In Service Of a Governmental Entity In Any Official Capacity, Whether With Or Without Compensation"

6 {19} To meet this category of "public employee," Officer **Gutierrez** had to be acting on behalf of the County with or without compensation. Section 41–4–3(F)(3). Officer **Gutierrez** must also have been acting in any official capacity. *Id.* At first glance it would appear that Officer **Gutierrez** satisfies both requirements. At the time of the **Loya** arrest, Officer **Gutierrez** was acting in an official capacity as a duly-sworn sheriff's deputy; he could not have legally arrested **Loya**, a non-Indian, any other way. When Officer **Gutierrez** made the arrest, he was acting on behalf of the County, not the Pueblo, which continued through Officer **Gutierrez's** prosecution of **Loya** in state magistrate court for the state traffic offense. In order to be certain, however, we must first understand the nature of Officer **Gutierrez's** commission to act as a deputy sheriff. A brief history of these commissions helps inform this understanding.

History Of Law Enforcement Commissions

{20} We start with the authority of a sheriff to commission a deputy. A sheriff's ability to commission deputies is rooted in ancient English common law under which a sheriff has inherent authority to vest his undersheriff with authority to perform every ministerial act the principal sheriff may perform. *State ex rel. Geyer v. Griffin,* 80 Ohio App. 447, 76 N.E.2d 294, 298 (1947) (per curium).

> [The deputy] acts for the sheriff in his name and stead ... In the absence of any statutory restriction, the sheriff has full power to appoint ... an undersheriff, and as many general or special deputies as the public service may require, who may discharge all the ordinary ministerial duties of the

> office, such as the return and service of process and the like. All acts of the undersheriff or of the deputies are done in the name of the sheriff, who is responsible for them.

Id. In modern jurisprudence, the common-law office of deputy sheriff remains much the same and is the presumed rule unless a change is effected by the Constitution or state statute. *Id.*

{21} In New Mexico, the power of a county sheriff to commission someone as a deputy to "preserve the public peace and to prevent and quell public disturbances," N.M. Att'y Gen. Op. 57–83 (1957), was codified as early as 1856 by the Legislative Assembly of the Territory of New Mexico. That statute states:

> Section 1. That the sheriffs in all the counties of this Territory shall have power to appoint deputies....
>
> Sec. 2. Each deputy ... shall take an oath to discharge faithfully the duties of his office, and the sheriffs shall be respons[i]ble for the acts of their deputies as such.
>
> Sec. 3. The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their principals, with the same effect as though they were executed by the respective sheriffs.

1855–56 N.M. Laws, ch. 2, §§ 1–3. Under that statute, the sheriff in every territorial county had the power to appoint deputies as long as they took an oath to "discharge faithfully the duties of his office" prior to entering upon the duties thereof. *Id.* § 2. In line with common-law principles, the statute mandated that "the sheriffs shall be respons[i]ble for the acts of their deputies." *Id.* In 1905, the Legislature added eligibility requirements for deputy sheriffs. NMSA 1915, § 1257 (1905). The same oath was later added to the New Mexico Constitution. *See* N.M. Const. art. XX, § 1.

***1162** {22} In 1891, the Legislative Assembly enacted an additional statute to require all appointed special deputy sheriffs, marshals, police officers, or other peace officers in New Mexico to be citizens of the Territory of New Mexico. 1891 N.M. Laws, ch. 60, § 1. The statute was amended in 2006 to require that all deputy sheriffs be United States citizens. *See* NMSA 1978, § 4–41–10 (2006). The 1891 statute also required a written appointment from the person authorized by law to appoint special deputy sheriffs before the appointed person could "assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff, special constable, marshal or police [officer] or other peace officer." 1891 N.M. Laws, ch. 60, § 1.

Extension Of Commissions To Tribal Officers

{23} During the 1950s, the New Mexico Attorney General issued several legal opinions advising that full-time police officers employed by New Mexico tribes and pueblos could be commissioned as special deputies as long as they met statutory qualifications under NMSA 1953, Section 15–40–10 (1905); NMSA 1953, Section 15–40–12 (1901); and NMSA 1953, Section 39–1–9 (1891). N.M. Att'y Gen. Op. 55–6305 (1955); N.M. Att'y Gen. Op. 57–83. The Attorney General characterized these specially commissioned tribal officers as "unpaid [county sheriff's] deput[ies]." N.M. Att'y Gen. Op. 66–91 (1966). Today, county sheriffs maintain that authority under New Mexico law to appoint special sheriff's deputies to preserve the public peace and to prevent and quell public disturbances, including the authority to appoint tribal police officers who satisfy statutory qualifications. *See* NMSA 1978, § 4–41–5 (1975) ("Deputy sheriffs; appointment and term; merit system"); NMSA 1978, § 4–41–8 (1905) ("Deputy sheriff; qualifications; character; revocation of commission"); *and* NMSA 1978, § 4–41–9 (1855–56) ("Deputy sheriffs; powers and duties").

Commissioning Tribal Officers By Contractual Agreement And Not Just By Appointment

{24} In addition to the authority of the county sheriff to appoint tribal police officers to act as special deputies, the Legislature authorized additional law enforcement agencies during the 1970s to issue commissions through formal agreements with tribal entities. The Mutual Aid Act, NMSA 1978, §§ 29–8–1 to –3 (1971), authorizes "[a]ny state, county or municipal agency having and maintaining peace officers [to] enter into mutual aid agreements with any public agency as defined in the Mutual Aid Act, with respect to law enforcement." Section 29–8–3. Other "public agenc[ies]" include "an Indian tribal council, Indian pueblo council and the state or any county or municipality thereof." Section 29–8–2. To be valid, a mutual aid agreement must be in writing and approved by both the "public agency"—in this case the

Pueblo of Pojoaque—and the governor of New Mexico. *See State v. Branham*, 2004–NMCA –131, ¶ 14, 136 N.M. 579, 102 P.3d 646; *see also* § 29–8–3.

{25} The other type of statutory agreement, referred to as a "cross-commission agreement," is authorized under NMSA 1978, Section 29–1–11 (2005). This provision authorizes the chief of the New Mexico state police to issue commissions as New Mexico peace officers to members of tribal police departments as long as statutory procedures are followed and the requirements and responsibilities of each entity are set forth in a formal written agreement. Section 29–1–11(B). Originally, the statute only authorized cross-commission agreements between the New Mexico state police and members of the Navajo police department. NMSA 1953, § 39–1–12 (1972). In 1979, the Legislature amended the statute to authorize state police to enter into agreements with members of any New Mexico tribe or pueblo. NMSA 1978, § 29–1–11(B) (1979). As indicated, this statute only pertains to agreements with the state police.

{26} The 1979 amendment also added several conditions to be included in a cross-commission agreement, including a training requirement for all commission applicants, proof that the tribe or pueblo entering into the agreement has adequate public liability and property damage insurance for vehicles ***1163** operated by the peace officers and police professional liability insurance, and a requirement that the chief of the New Mexico state police and the tribe or pueblo meet at least quarterly to discuss the status of the agreement. *Id.* ¶ C. Importantly, in 2005 the Legislature added a subsection to the statute cautioning that these procedures in the cross-commission statute are separate from, and do not "impair[ ] or nullif[y]" the traditional "authority of county sheriffs to appoint ... duly commissioned state or federally certified officers who are employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico ... as deputy sheriffs authorized to enforce New Mexico criminal and traffic law." Section 29–1–11(G).

{27} Thus, the Mutual Aid Act and the statute authorizing cross-commission agreements are not, and never have been, the exclusive source of authority for commissioning a tribal police officer to act under state law as a deputy sheriff. Sheriffs retain that traditional authority, going back to the common law and early territorial days, to appoint deputies, including tribal police officers, to assist the sheriff in the enforcement of New Mexico criminal and traffic law. These appointments may occur, pursuant to the sheriff's historic authority under Section 4 –41–5, without a formal agreement between governmental entities and, more to the point, without any assurance that the tribe will indemnify the county in the event of litigation.

{28} Accordingly, Santa Fe County Sheriff Solano had the authority under state law to commission Officer **Gutierrez**, notwithstanding the lack of any formal agreement between the County and the Pueblo of Pojoaque. At the time of the **Loya** arrest, Officer **Gutierrez** was duly acting as an unpaid sheriff's deputy, a volunteer, no different from any volunteer deputy commissioned over the past century.

The Effect Of the Sheriff's Unanswered Letter To the Pueblo

7 {29} The County argues, however, that in this particular instance Sheriff Solano issued the commission subject to the provisions set forth in the January 24, 2005, letter from Sheriff Solano to Pueblo of Pojoaque Tribal Police Chief John Garcia. According to the County, that letter memorialized the scope of authority conferred upon Officer **Gutierrez**, provided rules for commissioned deputies to follow when acting on behalf of the County, and delineated financial responsibilities between the County and the Pueblo. In particular the letter stated that the Pueblo of Pojoaque shall be liable if a commissioned officer "is sued for actions taken while effecting an arrest or pursuing a suspect." The County argues that the letter created an agreement between the County and the Pueblo of Pojoaque and that Officer **Gutierrez** is commissioned pursuant to the conditions set forth in that agreement, including the Pueblo's assumption of liability.

{30} We find the County's position unpersuasive. The record is devoid of any evidence that Pojoaque Police Chief Garcia, the Pueblo Governor, or the Pueblo Council ever acknowledged the existence of that letter, much less agreed to its terms. Officer **Gutierrez** claimed that he was unaware of the letter at the time he took the oath of office as a commissioned deputy sheriff. The district court below issued no contrary findings. Nothing in the record indicates any efforts by Sheriff Solano to follow through with these purported (and unilateral) conditions. There is no indication of any discussions verifying that the Pueblo had accepted liability for its officers. Accordingly, we need not decide the letter's legal efficacy without any evidence of its acceptance. And we certainly could not decide the letter's legal efficacy without hearing from the Pueblo. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("It is settled that a waiver of sovereign immunity

cannot be implied but must be unequivocally expressed." (internal quotation marks and citations omitted)). *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir.1985) ("[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation.").

{31} As discussed earlier, the Legislature has provided for agreements between Native American tribes and the State, but this *1164 letter does not fall within anything the Legislature has authorized. Without a written, executed agreement, it does not comply with the terms of the Mutual Aid Act. The letter does not create a valid cross-commission agreement under Section 29–1–11 because those agreements are limited to commissions issued by the New Mexico state police. In fact, the statute clearly states that the authority of county sheriffs to appoint duly commissioned deputies is not limited, impaired or nullified by the provisions of Section 29–1–11. *See* Section 29–1–11(G). The statute allows for the appointment of commissioned deputies (including tribal officers), but makes no reference to the kind of agreement envisioned here, including assumption of liability. *Id.*

{32} Accepting that Officer **Gutierrez** was commissioned as a volunteer sheriff's deputy and not pursuant to any formal agreement executed under New Mexico statute, we return to our initial, "working" determination that Officer **Gutierrez** seemed to be acting as a "public employee" under the NMTCA when he arrested and prosecuted **Loya**. *See* § 41–4–3(F). As an unpaid deputy, Officer **Gutierrez** was acting in an "official capacity" and "on behalf or in service of" the County sheriff and Santa Fe County. *See* § 41–4–3(F)(3). Satisfaction of these two requirements necessarily makes Officer **Gutierrez** a "public employee" under the NMTCA; he was a "person[ ] acting on behalf or in service of a governmental entity [the County] in any official capacity, whether with or without compensation." *Id.* As a "public employee" under that section of the NMTCA, Officer **Gutierrez** was entitled to its benefits, including a legal defense and indemnification.

{33} As an aside, it is of no import that the County did not compensate Officer **Gutierrez** for his service. The language in Section 41–4–3(F)(3) "with or without compensation" is an "express declaration of legislative intent in including volunteers acting on behalf of a governmental entity within the purview of the [NM]TCA." *Celaya v. Hall*, 2004–NMSC–005, ¶ 9, 135 N.M. 115, 85 P.3d 239. There is clear legislative intent to protect both paid employees and volunteers from personal liability for actions taken on behalf of their "governmental entity" employer with or without any agreement pertaining to indemnification and legal defense. We see no reason why Officer **Gutierrez**, an unpaid sheriff's deputy, should be treated any differently simply because the Legislature also intended to provide protection from personal liability for full-time "law enforcement officers" as defined under the NMTCA. The NMTCA treats volunteers the same as any other employee and "protects the public by ensuring that government will be financially accountable when volunteers working within their scope of duty" are hauled into court. *Celaya*, 2004–NMSC–005, ¶ 9, 135 N.M. 115, 85 P.3d 239.

As a Tribal Police Officer, Officer Gutierrez Is Not Limited To the "Law Enforcement Officer" Subcategory Of "Public Employee"

{34} The County further argues that even if a tribal police officer may technically fit within the definition of a "public employee" as a person "acting on behalf ... of ... government [ ] ... in any official capacity," the operative category in this inquiry is nonetheless limited to "law enforcement officer." *See* § 41–4–3(D), (F). According to the County, because Officer **Gutierrez** was purporting to act specifically as a law enforcement officer and not generally as a public employee when he arrested and charged **Loya**, then he can only qualify under the NMTCA as a "law enforcement officer." As previously acknowledged, of course, Officer **Gutierrez** is not a "law enforcement officer" as defined under the NMTCA because he is not a "full-time salaried public employee" of the County. What the County is really trying to do, therefore, is to exclude Officer **Gutierrez** and other unpaid sheriff's deputies from the protections provided by the NMTCA because the County does not pay them a salary for their service. We first look at the policy implications of such as position.

{35} Presumably allowing the County sheriff to commission tribal police officers as deputies has enhanced the law enforcement presence and effectiveness within the County, resulting in improved public safety at little cost to the County. *See Affidavit of *1165 Chief John Garcia Pueblo of Pojoaque Tribal Police Department* in ***Loya*** *v.* ***Gutierrez***, First Judicial District Court No. D–101–CV–2010–3854, dated November 10, 2011. The County seeks to keep that benefit while denying any responsibility for the risks arising from its creation—namely actions taken by volunteer deputies who are sued while acting on the County's behalf. The County's position would leave those unpaid deputies exposed to personal liability, left to pay

the costs of their own defense, while simultaneously leaving members of the public like **Loya** without any realistic chance of financial recourse. To put the matter delicately, such a result would seem to be at odds with sound public policy. The Legislature may opt for such a course, but we would need an unambiguous expression of legislative intent, far from what we have at present.

{36} The County argues that the more specific public employee definition—law enforcement officer—should prevail over more general provisions touching on the same subject. The County's argument proceeds as follows: Officer **Gutierrez** was acting in a law enforcement officer capacity when he stopped and arrested **Loya**, the term "law enforcement officer" is a more specific subcategory of "public employee" than "persons acting on behalf of," so "law enforcement officer" should be the operative category.

{37} The proposition that specific prevails over general stems from a case where the notice requirements stated within a statute conflicted with the notice requirements set forth in a rule. *Prod. Credit Ass'n v. Williamson*, 1988–NMSC–041, 107 N.M. 212, 755 P.2d 56. This Court held that the statute addressed the specific type of proceeding at issue in the case and was therefore controlling over the rule which addressed general notice requirements, hence creating the specific over general rule of statutory interpretation. *Id.* ¶ 5.

{38} Here, we are not dealing with different parts of a statute or a conflict between a statute and a rule; we are looking at one definition. The definition of "public employee" includes different categories. *See* § 41–4–3(F). "Law enforcement officer" might be more focused than "persons acting on behalf or in service of a governmental entity in any official capacity," but that does not make it more specific for purposes of statutory construction. The Legislature purposely listed multiple categories, and we must assume it did so for good reason. We cannot allow the County to limit the categories available to Officer **Gutierrez** without ignoring the clear intent of the Legislature. As a result, we decline to adopt the County's position that Officer **Gutierrez** must meet the "law enforcement officer" definition in order to be recognized as a "public employee."

The Duty To Provide a Defense In a Section 1983 Action Is Not Subject To the State's Assertion Of Sovereign Immunity

9 {39} The County next argues that even if Officer **Gutierrez** is a "public employee" under the NMTCA, there is no duty to provide a legal defense here because both the County and Officer **Gutierrez** are immune from liability. Under the NMTCA, the State's general policy is that "governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act." Section 41–4–2(A). The County interprets this policy statement to mean that it has a duty to defend its employees only when it is or could be liable for a tort for which sovereign immunity has been waived under the NMTCA.

{40} The NMTCA asserts sovereign immunity from liability for any tort except as waived by Sections 41–4–5 to –12. See § 41–4–4(A). Here, the County argues it is immune from suit because none of the stated waiver exceptions apply. Specifically, Officer **Gutierrez** cannot be sued under Section 41–4–12,[2] the only waiver exception otherwise applicable to this situation, because, as stated ***1166** earlier in this opinion, Officer **Gutierrez** is not a full time salaried "law enforcement officer" for the County. If there can be no NMTCA liability, then the County has no duty to defend. With respect, the County misperceives the law in several respects.

{41} The terms "waiver" and "sovereign immunity" do not appear anywhere in the text of Section 41–4–4(B), the provision that sets forth the County's duty to provide a legal defense. In order to accept the County's argument that the defense obligation is dependent upon a statutory waiver of sovereign immunity, we would have to read words into Section 41–4–4 (B), limiting the County's defense obligation to actions brought under one of the torts for which sovereign immunity has been waived. But Section 41–4–4(B) does not say that; it imposes no such limitation. The statute reads, "a governmental entity [the County] shall provide a defense ... when liability is sought for" (1) "any tort" or (2) "any violation of ... any rights, privileges or immunities secured by the constitution and laws of the United States [civil rights claims]...." *Id.* Textually then, Section 41–4–4(B) requires a defense equally for (1) claims that *are* torts for which sovereign immunity has been waived, and (2) claims that are *not* torts (civil rights claims) for which sovereign immunity has not been waived under the NMTCA.

{42} In addition to being at odds with the statute's text, the County's position would seem to contradict settled insurance law and the expectations that normally arise with respect to an insurer's duty to defend. It is the norm that an insurer, though denying coverage and liability,

must nonetheless defend its insured unless and until it receives a judicial ruling in its favor relieving it of any further obligations. *See Miller v. Triad Adoption & Counseling Servs., Inc.*, 2003–NMCA–055, ¶ 9, 133 N.M. 544, 65 P.3d 1099 ("If the allegations of the complaint or the alleged facts tend to show that an occurrence comes within the coverage of the policy, the insurer has a duty to defend regardless of the ultimate liability of the insured."); *see also Lujan v. Gonzales*, 1972NMCA–098, ¶ 22, 84 N.M. 229, 501 P.2d 673 (an insurer's "good faith belief that there was no coverage ... is not a defense to the breach of the duty to defend").

{43} Here, contrastingly, the County, while denying any liability to **Loya** for Officer **Gutierrez's** actions, wants to be relieved of any duty to defend Officer **Gutierrez** even before it obtains a ruling in its favor. The County, unlike a normal insurer, would leave Officer **Gutierrez**, in the position of an insured, to fight off liability on his own at his own expense. This would appear to fly in the face of Section 41–4–4(B) which equates the duties of the County with the duties of an insurer. *See* § 41–4–4(B) ("Unless an insurance carrier provides a defense, a governmental entity shall provide a defense ... for any public employee when liability is sought for" (1) a tort or (2) civil rights violations under federal or state law.)

{44} Focusing on the specific rights and obligations set forth in the NMTCA, Section 41–4–4 (A) asserts sovereign immunity from liability except as waived; however, the assertion is only for immunity from tort liability, not civil rights liability. *See* § 41–4–2(B) ("Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and ... standard of care "); § 41–4–4(A) ("A governmental entity and any public employee ... are granted immunity from liability for any tort except as waived by ... Sections 41–4–5 through 41–4–12.").

{45} The NMTCA does not grant immunity from liability for federal civil rights actions, nor could it do so under the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."). *See also Howlett v. Rose*, 496 U.S. 356, 375–76, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (noting that state laws that attempt to provide for immunities "over and above those already provided in § 1983" are preempted); *Martinez v. California*, 444 U.S. 277, 284, n. 8, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) (noting that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 ... cannot be immunized by state law" because a "construction of the **1167* federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced" (internal quotation marks and citations omitted)). Government officials can be sued in their individual capacities for damages under Section 1983, *Hafer v. Melo*, 502 U.S. 21, 30–31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); and in their official capacity for injunctive relief, *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C.Cir.2012).

{46} It follows, therefore, that the listed waivers, including Section 41–4–12, are only relevant when liability is sought for the torts listed therein.[3] But here, the suit **Loya** brought against Officer **Gutierrez** alleges violations of federally protected constitutional rights under Section 1983, and does not allege tort liability. ***Loya***, 2014–NMCA–028, ¶ 8, 319 P.3d 656. Accordingly, the waiver exceptions under Section 41–4–4(A) would seem to have no bearing on the County's obligation to provide a defense when liability is sought against its employee for violation of federal constitutional rights.

{47} The same is true for the County's duty to indemnify Officer **Gutierrez** in the event of a judgment against him. The County must pay that judgment under the clear language of the NMTCA. *See* § 41–4–4(D) ("A governmental entity shall pay any settlement or any final judgment entered against a public employee for" (1) any tort or (2) violation of federal constitutional rights.). An award of punitive damages, which are not even authorized under the NMTCA, Section 41–4–19(D), must also be paid by the governmental entity/insurer under the NMTCA if sustained "under the substantive law of a jurisdiction other than New Mexico, including ... the United States of America." Section 41–4–4(C). Here again, there appears to be no statutory link between the County's obligation to defend and indemnify a public employee and the separate question of whether the County can be held liable for one of the torts enumerated in the NMTCA for which sovereign immunity has been waived.

{48} History supports our conclusion. The NMTCA, as originally enacted, only required a governmental entity to provide a defense when liability was alleged for torts committed by the employee. *See* 1976 N.M. Laws, ch. 58, § 3(C). Under the original statute, it is possible that the obligation of the governmental entity to provide a defense was dependent upon

express waiver of liability because the statute only required the entity to provide a defense for tort actions. If the statute today read as it did in 1976, it might have been necessary for Officer **Gutierrez** to fit within one of the waiver exceptions in order to be provided with a defense. *See id.* ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, whether or not alleged to have been committed maliciously, fraudulently or without justifiable cause, the governmental entity shall provide a defense.")

{49} In 1977, however, the Legislature amended the statute and added a subsection to the defense provision to require a governmental entity to provide a defense when liability is sought for any violation of constitutional rights as well as for commission of the specific torts for which liability was waived in the Act. *See* 1977 N.M. Laws, ch. 386, § 3(C) ("When liability is alleged against any public employee for any torts alleged to have been committed within the scope of his duty, or for a violation of property rights or any rights, privileges or immunities secured by the constitution ... the governmental entity shall provide a defense and pay any settlement or judgment."). Thus, the amendment expanded the duty to defend.

***1168** {50} It is clear from the added subsection, therefore, that there exists a clear right to defense against civil rights claims with no reference to assertion of waiver of immunity from those claims. *See* § 41–4–4(A). If the Legislature intended to condition the duty to provide a defense upon a finding that immunity is waived, it would not have amended the original statute to require an entity to provide a defense against civil rights violations without also asserting immunity for those same violations.

{51} All of this makes sound policy sense. If a police officer or other public employee can be sued under federal law for violation of federally-secured constitutional rights while acting within the scope of his or her duty, sound public policy supports a county not abandoning its officer, but coming to the officer's assistance with a legal defense and indemnification if necessary. Therefore, showing waiver of tort liability is not required before a governmental entity is obligated to provide its employee with a defense in a Section 1983 action where there are no tort claims asserted.

Officer Gutierrez Was Not Acting As an Independent Contractor

10 {52} Because we determine that Officer **Gutierrez** otherwise meets the "public employee" definition, we now address the County's final argument that he is excluded as an independent contractor. *See* § 41–4–3(F) (" '[P]ublic employee' means an officer, employee or servant of a governmental entity, excluding independent contractors."). The district court determined that Officer **Gutierrez** failed to meet the definition of "public employee," so it did not reach this issue. The County argues that even if Officer **Gutierrez** is otherwise a "public employee" for purposes of the NMTCA, he was nonetheless acting as an "independent contractor" when he arrested, charged, and prosecuted **Loya**.

{53} We start by questioning, without deciding, whether a sheriff's deputy could ever "act" as an "independent contractor." The common law rule, undisturbed by New Mexico statute, has long established that a deputy acts on behalf of his sheriff. We are unaware of any situation in which a sheriff has lawfully commissioned an individual to serve as a deputy without also controlling, or reserving control over, the manner and means by which that deputy exercises the authority conferred upon him by the sheriff. A functional law enforcement system requires accountability and uniformity among the officers. If a sheriff no longer had the duty to oversee the actions of sworn deputies, chaos or at least a lack of critical accountability would ensue. Rightfully so, the public would question such a rogue system of law enforcement. We have grave doubts whether our Legislature would tolerate such a system.

{54} That said, the County offers *Segura v. Colombe* to support its position that a sheriff's deputy can act as an independent contractor. 895 F.Supp.2d 1141 (D.N.M.2012). In that case, the federal district court determined that the County did not exercise sufficient control over the deputy's activities to render the relationship one of employer and employee and thus found that the officer was acting as an independent contractor. *Id.* at 1148–49.

{55} In reaching its determination, the *Segura* court applied the test announced by this Court in *Celaya*, 2004–NMSC–005, ¶ 15, 135 N.M. 115, 85 P.3d 239. *Segura*, 895 F.Supp.2d at 1149. In *Celaya*, this Court held that a strict application of the right-to-control test may lead to inconsistencies when analyzing whether an individual is an independent contractor for purposes of the NMTCA. We instead adopted the multi-factor analysis in 2 Restatement (Second) of Agency § 220(2)(a)-(j) (1958), which includes:

> 1) the type of occupation and whether it is usually performed without supervision; 2) the skill required for the occupation; 3) whether the employer supplies the instrumentalities or tools for the person doing the work; 4) the length of time the person is employed; 5) the method of payment, whether by time or job; 6) whether the work is part of the regular business of the employer; 7) whether the parties intended to create an employment relationship; and 8) whether the principal is engaged in business.

*1169 *Celaya*, 2004–NMSC–005, ¶ 15, 135 N.M. 115, 85 P.3d 239. The facts in *Celaya* involved a volunteer chaplain for the sheriff's department who was in an accident while driving a department vehicle. In that case, the right-to-control analysis alone could not resolve the issue of whether a volunteer chaplain was an independent contractor under the NMTCA. Thus, it was necessary to go beyond right to control to determine the relationship between the chaplain and the sheriff's department.

{56} No such further inquiry is necessary here. In the case of a sworn sheriff's deputy engaged in enforcing state law on behalf of the county, there is a clear right to control—indeed an obligation to control—the actions of a deputy. When that right to control is so fundamentally a part of the relationship, we find it unnecessary to analyze the relationship under the additional factors announced in *Celaya*.

{57} We note from our reading of *Segura* that, unlike the present case, the parties there presented very little evidentiary support for the proposition that the deputy was not an independent contractor. Beyond that difference, however, we find the federal court's reasoning unpersuasive for the reasons stated as a matter of sound legal policy.

CONCLUSION

{58} We hold that the County must provide Officer **Gutierrez** with a legal defense, including costs and attorney's fees in conformity with the NMTCA. We therefore reverse the entry of summary judgment in favor of the County and remand to the district court for further proceedings consistent with this ruling.

{¶ 59} **IT IS SO ORDERED.**

WE CONCUR: PETRA JIMENEZ MAES, EDWARD L. CHÁVEZ, CHARLES W. DANIELS, Justices, and ABIGAIL P. ARAGÓN, Judge Sitting by Designation.

All Citations

350 P.3d 1155, 2015 -NMSC- 017

Footnotes

1 Following oral argument, the County submitted supplemental authority to support its position that a tribal officer cannot be a public employee under the NMTCA. *See Trujillo v. Romero*, No. 13–CV–1178 MCA–SCY, Doc. 112 (D.N.M. Mar. 3, 2015) (declining to certify question of whether the NMTCA requires a governmental entity to provide a defense and/or indemnification to a tribal officer commissioned as a deputy sheriff when, acting under color of state law, he allegedly commits torts and/or violations of Section 1983, because the question can be answered by an appellate opinion of the New Mexico Court of Appeals). In reaching the conclusion that the tribal officers in that case were not public employees under the NMTCA, the federal district court expressly relied on the Court of Appeals' decision in this case. *See generally* ***Loya***, 2014–NMCA–028, 319 P.3d 656. For the reasons set forth in this opinion, we reverse the Court of Appeals and instead hold that, when enforcing state law, a tribal officer commissioned as a county sheriff's deputy is a public employee. Therefore, *Trujillo* is not persuasive.

2 Section 41–4–12, liability for law enforcement officers, waives immunity for liability from:

> personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, ... or deprivation of any rights privileges or immunities secured by the constitution and laws of the United States or

New Mexico when caused by law enforcement officers while acting within the scope of their duties.

3 Section 41–4–12 is essentially a restatement of the provisions of the former Peace Officers Liability Act (POLA). *See* Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L.Rev. 249, 264 (1976). POLA was enacted in 1973 "to provide a permissive method whereby the state or a local public body may elect to protect peace officers from personal liability arising out of certain acts committed during the performance of their activities ... and to compensate the individuals wrongfully harmed by these actions." 1973 N.M. Laws, ch. 194, § 2. POLA was repealed upon the enactment of the NMTCA. *See* Kovnat, *supra*, 255–64.

End of Document

AGREEMENT BETWEEN

NEW MEXICO STATE POLICE

AND

WHEREAS, the Legislature of the State of New Mexico has granted authority to the Chief of the New Mexico State Police to issue commissions as New Mexico peace officers to members of the police or sheriff's department of any New Mexico Indian tribe, or pueblo or a law enforcement officer employed by the Bureau of Indian Affairs, NMSA 1978, § 29-1-11; and

WHEREAS, the New Mexico State Police and the _____ (hereinafter "Pueblo") desire to effectuate such legislative authorization according to the terms and conditions contained in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual promises and conditions hereinafter set forth, the Chief of the New Mexico State Police and the duly authorized official or officials of the Pueblo agree as follows:

SECTION 1. COMMISSIONS.

A. "Commission," as referenced in this Agreement, shall refer to a commission to act as a New Mexico peace officer issued by the Chief of the New Mexico State Police. Upon receiving a request from the Pueblo, the Chief of the New Mexico State Police shall supply to the Pueblo applications for commissions to act as New Mexico peace officers pursuant to this Agreement. These applications shall be completed and returned to the Chief of the New Mexico State Police who shall grant or deny each application within a reasonable period of time.

B. An application for a commission will not be granted by the Chief of the New Mexico State Police in the absence of compliance with the following requirements:

1. The applicant has complied with the prerequisites for permanent appointment as a police officer as set forth in NMSA 1978, §29-7-6(A) 1-9, or analogous statutory sections which are hereafter enacted by the New Mexico Legislature. Said prerequisites include:
    a. the applicant is a citizen of the United States and has reached the age of majority;
    b. the applicant holds a high school diploma or the equivalent;
    c. the applicant holds a valid New Mexico driver's license;
    d. the applicant is found, after examination by a licensed physician, to be free of any physical condition which might adversely affect his or her performance as a police officer; and is found, after examination by a certified psychologist, to be free of any emotional condition which might adversely affect his or her performance as a police officer;

e. the applicant has not been convicted of, pled guilty to, or entered a plea of nolo contendere to any felony charge;

f. the applicant has met such other requirements as may be prescribed by the New Mexico Law Enforcement Academy Board.

2. The Pueblo submits proof of adequate public liability and property damage insurance for vehicles operated by peace officers, and police professional liability insurance covering each of its peace officers commissioned pursuant to this Agreement from a company licensed to sell insurance in the State of New Mexico. Such insurance policies, amendments thereto or applicable certificate of insurance shall contain a provision requiring the insurance company or appropriate agent thereof to give immediate notice to the Chief of the New Mexico State Police of any cancellation or termination of the policy or policies. Such policies shall be exhibited to the Chief of the New Mexico State Police upon his or her request, are subject to his or her approval, and shall be in the amount and shall contain such terms and conditions as may be required by the Chief of the New Mexico State Police. The Pueblo shall provide the Chief of the New Mexico State Police with a copy of its Certificate of Insurance each year on the policy renewal date.

3. The applicant for a commission has successfully completed four hundred hours of basic police training which has been approved by the Director of the Training Division, New Mexico Department of Public Safety.

C. After the applicant has complied with the prerequisites of Paragraph B Section 1, above, the Chief of the New Mexico State Police will issue a commission hereunder unless he or she determines, in his or her discretion, that grounds exist for denying the applicant a commission.

D. The commission granted to any peace officer shall automatically terminate when the peace officer is no longer a Pueblo employee and the peace officer shall return his or her evidence of commission to the Chief of the New Mexico State Police. In addition, the Chief of the New Mexico State Police may, at any time suspend any commission for reasons within his or her sole discretion. Within ten (10) days of receipt of verbal or written notice of suspension from the Chief of the New Mexico State Police, the Pueblo shall cause the commission to be returned to the Chief of the New Mexico State Police unless otherwise directed by the Chief of the New Mexico State Police. Suspension will ordinarily be for reasons related to the fitness of the officer or other reasons justifying the conclusion that continuance of the commission would not be in the interest of this Agreement. The reasons for suspension include but are not limited to the following:

1. termination of the peace officer, voluntarily or involuntarily, from the Pueblo's law enforcement unit or agency;

2. transfer or reassignment of the peace officer out of the area which is coextensive with the exterior boundaries of the Pueblo's reservation;

3. conviction of the peace officer of a felony or other crime involving moral turpitude; or

4. if, upon examination by a licensed physician or certified psychologist, the peace officer is found not to be free of any physical, emotional, or mental condition which might adversely affect his or her performance as a peace officer.

E. The Pueblo shall inform the Chief of the New Mexico State Police of the existence of any grounds, including those set forth under Section 1, paragraph D of this Agreement, for suspending a commission.

F. The Chief of the New Mexico State Police shall provide written notice to the Pueblo if a commission is denied or suspended as provided in this Agreement with the reason stated therein. The decision of the Chief of the New Mexico State Police to deny or suspend a commission, whether temporarily, indefinitely or permanently, shall be final.

G. This Agreement, or any commission issued pursuant to it, shall not confer any authority on a Tribal court or other Tribal authority which that court or authority would not otherwise have.

SECTION 2. TERRITORIAL LIMITATION

The authority conferred by this Agreement shall be coextensive with the external boundaries of the Pueblo's reservation. An exception to the provisions herein contained concerning territorial limitation is that a peace officer commissioned under this Agreement may proceed in hot pursuit of an offender beyond the exterior boundaries of the reservation as allowed by law.

SECTION 3. SCOPE OF POWERS GRANTED

A. Peace officers commissioned pursuant to this Agreement shall have the power:

1. to enforce the New Mexico Motor Vehicle Code and arrest for violations as necessary;
2. to enforce the New Mexico Criminal Code and other criminal offenses as provided in the New Mexico Statutes Annotated and arrest for violations as necessary; and
3. to enforce the New Mexico Children's Code and take children into custody as therein provided.

B. Peace officers commissioned pursuant to this Agreement shall comply with the applicable statutory provisions concerning enforcement of the New Mexico Motor Vehicle Code, the New Mexico Criminal Code, the New Mexico Children's Code, and the New Mexico state and federal constitutions.

SECTION 4. UNIFORM TRAFFIC CITATIONS

A. Peace officers commissioned pursuant to this Agreement, when acting pursuant to said commission, shall use the New Mexico Uniform Traffic Citation when issuing traffic citations for violations of the New Mexico Motor Vehicle Code.

B. The Pueblo's law enforcement unit or agency agrees to reimburse the New Mexico State Police for the cost of New Mexico Uniform Traffic Citation forms provided to the Pueblo's law enforcement unit or agency.

~~B~~C. The Pueblo's law enforcement unit or agency shall issue, keep a record of, and require a receipt for, each serially numbered New Mexico Uniform Traffic Citation issued to individual peace officers commissioned pursuant to this Agreement.

D. A second copy of any New Mexico Uniform Traffic Citation issued pursuant to a commission authorized by this Agreement must be submitted within five (5) days to the Chief of the New Mexico State Police, or his or her authorized agent.

~~C~~E. Any New Mexico Uniform Traffic Citation issued pursuant to a commission authorized by this Agreement shall be to a Magistrate Court of the State of New Mexico.

F~~D~~. Any citations issued to Indians for violating tribal criminal laws, and any citations issued to any person for engaging in activities prohibited by tribal civil laws, shall be made pursuant to the Pueblo's authority to issue such citations, shall be processed in accordance with the applicable federal and tribal law, and are expressly not issued—nor shall they be deemed issued—pursuant to the terms and conditions of this Agreement.

G~~E~~. Payment of New Mexico Motor Vehicle Code penalty assessments, unless contested in accordance with the Magistrate Court rules for the Magistrate Court of the State of New Mexico, must be made by mail to the New Mexico Motor Vehicle Division in Santa Fe within thirty (30) days from the date of the offense.

H~~F~~. Additional requirements concerning the New Mexico Uniform Traffic Citations, including specific distribution and control procedures, as designated in the Uniform Traffic Citation Manual, may be issued to the Pueblo by the Chief of the New Mexico State Police.

SECTION 5. CUSTODY OF PERSONS

A. No person shall be detained by a peace officer commissioned pursuant to this Agreement for a period in excess of two (2) hours without oral notification to an officer of the New Mexico State Police.

B. Any person arrested by a peace officer commissioned pursuant to this Agreement shall, without unnecessary delay, be taken to a New Mexico Magistrate having jurisdiction, a State Police officer, or a County Sheriff for further proceedings in accordance with law.

C. Any person arrested by a peace officer commissioned pursuant to this Agreement shall be immediately informed of his or her United States Constitutional Rights by the peace officer as specified on a written form to be supplied by the Chief of the New Mexico State Police and that person shall be afforded any other rights conferred by law.

SECTION 6. INDEMNIFICATION

The Pueblo agrees to hold harmless and promptly indemnify and reimburse the State of New Mexico, the New Mexico Department of Public Safety, and the New Mexico State Police, their agents, employees, and insurers from any claim, judgment or liability of any nature which may arise out of the actions of a peace officer commissioned pursuant to this Agreement.

SECTION 7. STATUS OF NEW MEXICO PEACE OFFICER

The Pueblo, its agents and employees, including peace officers commissioned pursuant to this Agreement, are not employees of the State of New Mexico. No insurance coverage, retirement benefits, or any other benefits afforded to employees of the State of New Mexico shall be provided by the State of New Mexico, the New Mexico Department of Public Safety, or the New Mexico State Police to the Pueblo, its agents and employees, including peace officers commissioned pursuant to this Agreement. It is understood and agreed by the parties to this Agreement that the State of New Mexico, the Department of Public Safety and the New Mexico State Police, their agents, employees and insurer, have no authority nor any right whatsoever to control in any manner the day-to-day discharge of the duties of the persons commissioned pursuant to this Agreement; but rather these persons are acting in the capacity of an independent contractor as an employee of the Pueblo and that they are not an employee or agent of any kind of the State of New Mexico, the New Mexico Department of Public Safety, or the New Mexico State Police. It is further understood and agreed that the State of New Mexico, the New Mexico Department of Public Safety, and the New Mexico State Police, their agents, employees and insurers do not by this Agreement assume any responsibility or liability for the actions of those persons provided commissions pursuant to this Agreement.

SECTION 8. STATUS OF PUEBLO

Nothing in this Agreement impairs or affects the existing status and sovereignty of the Pueblo or members thereof as established under the laws of the United States. Further, nothing in this Agreement shall be deemed to impair or affect the actions of officers commissioned under this Agreement when acting under tribal law pursuant to their commissions as tribal police officers.

SECTION 9. QUARTERLY MEETINGS

The Chief of the New Mexico State Police, or his or her designee, and the Pueblo shall meet at least quarterly or more frequently at the call of the Chief of the New Mexico State Police to discuss the status of the Agreement and the Chief of the New Mexico State Police may invite other law enforcement or other officials to attend as necessary.

SECTION 10. SUSPENSION OR TERMINATION OF AGREEMENT

A. If any provision of this Agreement is violated by the Pueblo or any of its agents, the Chief of the New Mexico State Police may suspend the Agreement on five (5) days' written notice setting for the reasons for the suspension, which suspension shall last until the Chief of the

New Mexico State Police is satisfied within his or her sole discretion that the violation has been corrected and will not reoccur. Reinstatement of this Agreement may be made contingent upon satisfaction of such conditions as the Chief of the New Mexico State Police may specify.

B. Either a duly authorized official of the Pueblo or the Chief of the New Mexico State Police may terminate this Agreement at any time by giving written notice to the other of such termination which shall be effective thirty (30) days after the date of receipt of said notice.

SECTION 11. AMENDMENTS TO AND ENFORCEMENT OF THE AGREEMENT

A. This Agreement shall not be altered, changed or amended except by an instrument in writing executed by the Chief of the New Mexico State Police and the duly authorized official or officials of the Pueblo.

B. This Agreement and any amendment hereto shall be governed by the laws of the State of New Mexico.

SECTION 12. EFFECTIVE DATE.

The effective date of this Agreement shall be the date the Chief of the New Mexico State Police executes this Agreement.

NEW MEXICO STATE POLICE

_____
Pete N. Kassetas, Deputy Secretary/Chief
Date:_____, 2015

_____
Date:_____, 2015

_____
Date:_____, 2015

Approved as to form and legal sufficiency

_____
Amy L. Orlando, General Counsel
New Mexico Department of Public Safety

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SERVICES AND SUPPORT

OFFICE OF THE SECRETARY
505/ 827-3370

OFFICE OF THE CHIEF
NEW MEXICO STATE POLICE
505/ 827-9219

OFFICE OF THE DEPUTY SECRETARY
505/ 827-9102

MOTOR TRANSPORTATION POLICE
505/ 476-2457

ADMINISTRATIVE SERVICES
505/ 827-3332

INFORMATION TECHNOLOGY
505/ 827-3413

SPECIAL INVESTIGATIONS
505/ 841-8053

TECHNICAL SUPPORT
505/ 827-3352

TRAINING AND RECRUITING
505/ 827-9252

August 4, 2015

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

Re: New Mexico Section 29-1-11 Agreements

Dear

In light of the recent New Mexico Supreme Court decision, *Loya v. Gutierrez*, we are in the process of reviewing the agreements that the New Mexico State Police have with tribal and pueblo police departments pursuant to NMSA 1978, Section 29-1-11. Based on our review of the file we have for , it appears that i there was discussion regarding desire to enter into a 29-1-11 agreement, however no agreement was ultimately executed.

If would like to enter into such an agreement at this time, please contact Amy Orlando, DPS General Counsel, at the address above and we will discuss this matter with you. Further, if you are aware of the existence of an agreement entered into between and the New Mexico State Police pursuant to NMSA 1978, Section 29-1-11, please provide that agreement to Ms. Orlando within thirty (30) days from your receipt of this letter, along with current proof of insurance and a list of all commissioned tribal peace officers.

As a matter of caution, any agreement that may have been previously entered into with or cross commissions previously issued by the New Mexico State Police to officers that are not sent to Ms. Orlando will be deemed revoked effective thirty (30) days of your receipt of this letter. Please contact me directly with any specific questions.

Thank you for your understanding and your attention to this letter.

Sincerely,

Pete N. Kassetas
Deputy Secretary/Chief

cc: Amy L. Orlando, General Counsel

NEW MEXICO DEPARTMENT OF PUBLIC SAFETY

POST OFFICE BOX 1628 • SANTA FE, NEW MEXICO 87504-1628

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September , 2015

DELIVERED VIA CERTIFIED MAIL

C. Bryant Rogers, Esq.
Attorney for
P.O. Box 1447
Santa Fe, NM 87504

Re: Section 29-1-11 Commissions

Dear Mr. Rogers,

We are in receipt of your correspondence dated September 2, 2015. Under the agreement entered into in March 2001, and pursuant to NMSA 1978, § 29-1-11, the would remain liable and responsible for liability incurred by its peace officers, even when acting under the commission issued pursuant to Section 29-1-11.

The New Mexico Supreme Court opinion, *Loya v. Gutierrez*, 350 P.3d 1155, does not apply to agreements and commissions issued pursuant to NMSA 1978, § 29-1-11. See *Loya v. Gutierrez*, ¶25, ¶26, discussing and stating "[t]he other type of statutory agreement, referred to as a "cross-commission agreement," is authorized under NMSA 1978, Section 29–1–11 (2005)."

[Prior periods]

Further, the agreements entered into and commission cards issued in are not impacted by the *Loya v., Gutierrez* case. See *Loya v. Gutierrez*, stating "[t]his provision authorizes the chief of the New Mexico state police to issue commissions as New Mexico peace officers to members of tribal police departments as long as … the requirements and responsibilities of each entity are set forth in a formal written agreement. Section 29–1–11(B)."

The insurance policy that you sent in your most recent correspondence reflects a policy period of April 1, 2014 through April 1, 2015. If your client would still like commissions issued for the listed officers, please provide an updated insurance policy, and please have the applications that are included in this correspondence completed and returned.

Sincerely,

Aaron A. Rodriguez
Assistant General Counsel

cc: Pete N. Kassetas, Chief, NMSP

Enclosure

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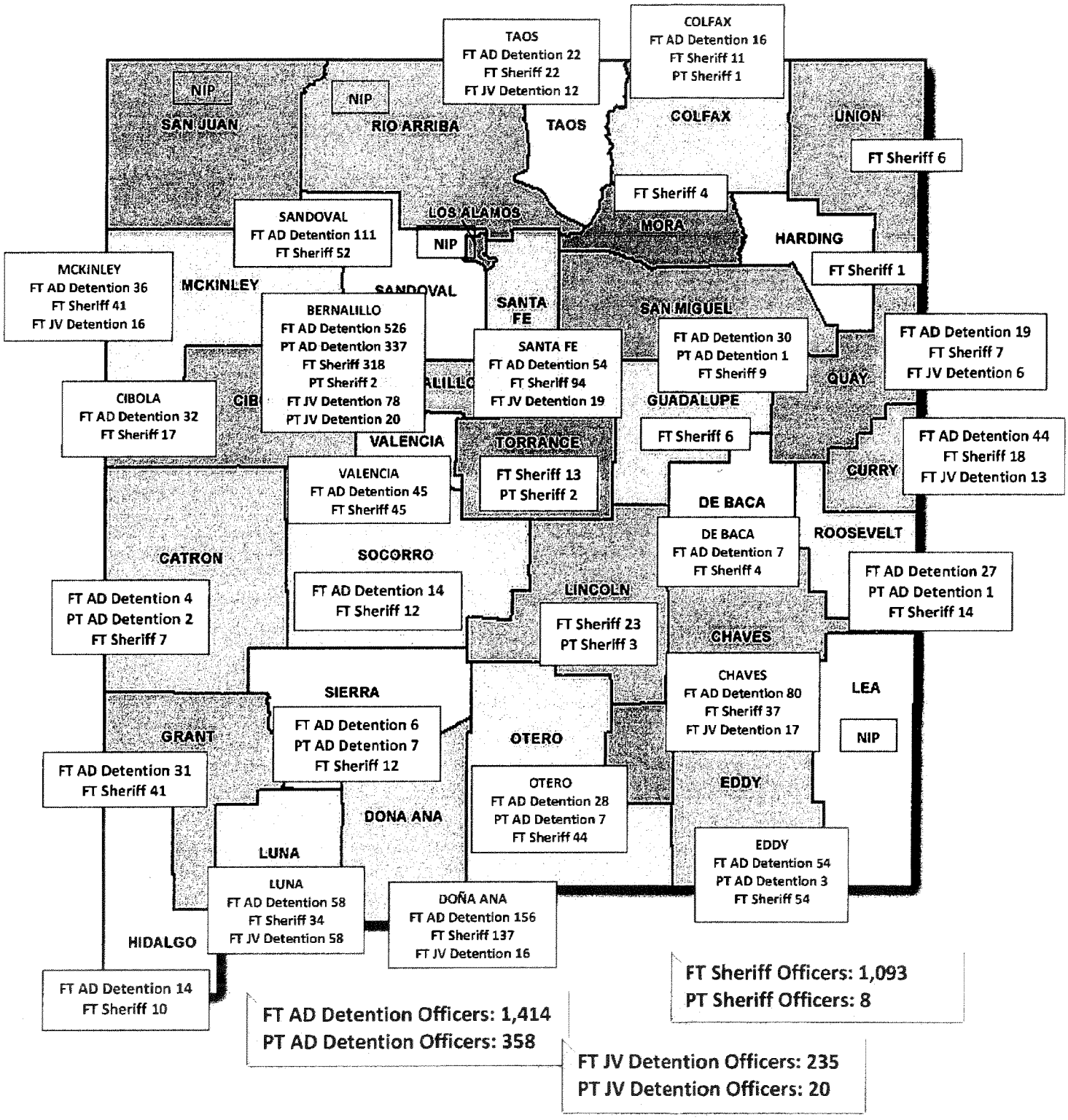
The Future of Cross-commissioning

Andrew Johnson

November 5, 2015

County	Municipal	Other Sheriffs	Tribal	Federal	Other	Totals	Comments
Bernalillo	1,880	120	68	16	3	**2,087**	
Catron	0	3	0	0	2	**5**	Other, Livestock Board
Chaves	24	0	0	7	0	**31**	
Cibola	-	0	0	2	0	**2**	Reduced from 11, CC to Homeland Security Agents
Colfax	10	0	0	0	0	**10**	
Curry	1	0	0	0	0	**1**	
De Baca	0	0	0	0	0	**0**	
Doña Ana	122	100	0	0	0	**222**	
Eddy	56	0	0	3	0	**59**	
Grant	0	253	0	0	0	**253**	
Guadalupe	0	0	0	0	0	**0**	
Harding						**0**	Left Msg w/ Sheriff
Hidalgo	10	237	0	0	20	**267**	Other Motor Transport Police and New Mexico State Police, Not sure why they need cc as their jurisdiction is statewide
Lea	-	0	0	0	0	**0**	**NOT A MEMBER OF POOL**
Lincoln	30	0	4	1	0	**35**	Tribal, 4, BIA Agengts, Drug Task Force, Federal, 1 Customs Border Patrol Officer, Drug Task Force
Los Alamos						**0**	**NOT A MEMBER OF POOL**
Luna	0	279	0	0	0	**279**	
McKinley						**0**	Left Msg w/ Undersheriff Paul Lucero
Mora						**0**	Left Msg w/ Sheriff
Otero						**0**	Left Msg w/ Undersheriff Daron Syling
Quay	0	0	0	0	0	**0**	
Rio Arriba	-	0	0	0	0	**0**	**NOT A MEMBER OF POOL**
Roosevelt	34	18	0	0	0	**52**	
San Juan	203	0	0	9	0	**212**	**NOT A MEMBER OF POOL**
San Miguel	5	0	0	0	0	**5**	
Sandoval	189	5	95	14	0	**303**	
Santa Fe	190	8	17	10	0	**225**	
Sierra	0	0	0	0	0	**0**	
Socorro						**0**	Left Msg w/ Sheriff
Taos	0	0	0	3	0	**3**	
Torrance	19	1	0	0	0	**20**	
Union	0	3	0	0	0	**3**	
Valencia	107	39	21	2	0	**169**	
Totals	**2,880**	**1,066**	**205**	**67**	**25**	**4,243**	

NM Adult, Juvenile Detention & Sheriff FT & PT Officers Employed Data



FT Sheriff Officers: 1,093
PT Sheriff Officers: 8

FT AD Detention Officers: 1,414
PT AD Detention Officers: 358

FT JV Detention Officers: 235
PT JV Detention Officers: 20

New Mexico Association of Counties

Data as of: August 1, 2015
NIP: Not in Pool:
Lea, Los Alamos, Rio Arriba and San Juan

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The Future of Cross-commissioning

Levon Henry

November 5, 2015

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