Charles R. Zeh, Esq.
Nevada State Bar No. 001739
ZEH SAINT-AUBIN SPOO
575 Forest Street, Suite 200
Reno, NV 89509
Phone: 775.323.5700
Fax: 775.786.8183

Attorneys for defendant Walter Valline

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

Gayleen Boney,

Plaintiff,

v.

Walter Valline,

Defendant.

CV-N-05-683-RJJ (VPC)

REPLY TO OPPOSITION TO MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT

I. Plaintiff's Complaint is Exclusively a *Bivens* Claim of Retaliation for Exercising Her Alleged First Amendment Right of Free Speech Arising Out of a Complaint to the Tribal Council Wherein She Complained About Alleged Tribal Police Misconduct

Plaintiff's opposition to the motion to dismiss or for a more definite statement makes clear that her complaint against the defendant, Walter Valline, a member of the Walker River Paiute Tribe's police force at all times pertinent to the complaint, is as follows:

First, "[t]his is not a wrongful death case" arising out of the death of Manny Boney, the plaintiff's son. Opposition, p. 9;2-3. His death is the subject of a Federal Tort Claims Act action which has been administratively commenced. Opposition, p. 22; 8-9.

Second, the plaintiff pleads a *Bivens* civil rights action. Opposition, p.22;8, Specifically, plaintiff claims her son was shot, she was arrested and the arrest was effectuated through the use of excessive force, because she exercised her First Amendment rights under the United States Constitution to redress grievances by complaining to the Tribal Council about the Walker River police force, generally, and Walter Valline, "in particular." Opposition, p. 22;13-16.

Additionally, the plaintiff admits that Officer Valline was not the person who actually placed the plaintiff in a squad car or personally mishandled her by using excessive force. Opposition, p. 7;1-5. Consequently, as to these two elements of her complaint, the plaintiff claims Officer Valline conspired to have the plaintiff arrested and subjected to excessive force in retaliation for complaining to the Tribal Council. Opposition, p. 7; 3-4.

The Opposition offers no objective facts to show a conspiracy existed. There is just the naked conclusory comment in the Opposition. Opposition, p.7; 1-3. The complaint is devoid of any allegation of a conspiracy.

Finally, the Opposition does not detract in any way from the fact that the incident took place on Tribal land, in response to a call for police assistance made by the plaintiff because she believed that her ex-husband was drunk, and possibly driving. Complaint ¶ 15. The Opposition also does not detract from the fact that Officer Valline arrived at the scene of the incident in response to the call for police assistance. Complaint ¶ 15. Equally significant, the Opposition fails to detract in any way from the fact that when he arrived at the scene of the incident, during the course of the incident, and at all pertinent times, Officer Valline was employed and on duty as a member of the Walker River Paiute Tribal Police Force. Complaint ¶¶ 3, 6. Further, there is nothing in the complaint which suggests that at the time of the incident, peace officers from any other Tribe, police force, government or agency were present at the time of the incident, acting in concert with Officer Valline.

II. Because Tribal Immunity Is Invoked in Defense of the Complaint, This Court's Jurisdiction to Hear This Matter Is Directly Implicated

Immunity from suit, grounded as the immunity of Mr. Valline is in the sovereignty of the Tribe, questions this Court's jurisdiction, which is appropriately considered under Rule 12(b)(1), FRCP, addressing subject matter jurisdiction of the Court. *See*, *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2nd Cir., 2001); *Haven v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir., 2000).

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Although Mr. Valline is the party who has raised the question of immunity based upon the sovereignty of the Walker River Tribe and, therefore, questions the jurisdiction of the Court, once subject matter jurisdiction, as here, has been raised, "...the burden of establishing subject matter jurisdiction rests on [the plaintiff,] the party asserting jurisdiction. *See, Thompson v. Gaskill,* 315 U.S. 442, 446, 62 S.Ct. 673, 856 L.Ed. 951 (1942)." *Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271, 277 (D. Conn. 2002).

Although the matter is before the Court upon a motion to dismiss, where subject matter jurisdiction is an issue, the Court may consider matters outside the face of the pleadings. *Bassett v. Mashantucket Pequot Museum, supra* at 276, 277, citing also, *Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947). *See also, Dry v. U.S.*, 235 F.3d 1249, 1252, 1253 (10th Cir., 2000). It is also true the Court may consider documents and records which are necessarily subsumed by the complaint or the complaint is necessarily based upon them, without converting the motion to dismiss into a motion for summary judgment under Rule 56, FRCP. The same is true of public records, of which the Court may take judicial notice. *See*, *Mack v. South Bay Beer Distributions, Inc.,* 798 F.2d 1279, 1282 (9th Cir. 1986); *Ania v. Allstate Insurance Co.,* 161 F.Supp.2d 424 (E.D. Pa. 2001).

Accompanying Officer Valline's reply is a copy of the Tribe's Constitution, and pertinent sections of its Law and Order Code. As explained and emphasized below, the Tribe's Constitution reveals that the Tribe has not waived sovereignty. The Law and Order Code reveals that the Tribe has assumed criminal jurisdiction over alcohol related offenses, such that it would be within a Tribal Police Officer's authority to be present to make an arrest for drunken driving or public drunkenness or disorderly conduct, the reason the plaintiff called the Tribal Police for assistance in the first place. *See, Law and Order Code* §§ 5-90-010 and 5-90-130, pertinent sections of which are attached hereto, Exhibit "A."

If, however, the Court believes these documents and the plaintiff's affidavits remove the instant motion from consideration as a motion to dismiss, then, the motion is to be considered under Rule 56, FRCP. There, the standard is well known. A motion to dismiss may be granted if there is no genuine dispute over any of the material facts and the moving party is otherwise

entitled to relief as a matter of law. *See*, *Andersen v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505 (1986).

The standard turns upon a genuine dispute. A court need not trouble itself with disputes which are not genuine or involve issues which are immaterial. *See*, *Andersen v. Liberty Lobby, Inc*., *supra* at 248; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Furthermore, the Court need not trouble itself with "...'conclusory allegations, unwarranted inferences, or legal conclusions' in a complaint." *Dry v. U.S., supra* at 1254.

These are the standards, therefore, by which the plaintiff's complaint should be measured. Under either Rule 12, FRCP, or Rule 56, FRCP, dismissal of the complaint is warranted.

III. Sovereignty Bars this Litigation Based Upon Every Theory Offered by the Plaintiff and Based Upon the Face of Her Complaint, the Affidavits Accompanying the Opposition to Dismiss Notwithstanding

The plaintiff's opposition to the motion to dismiss stems from her basic proposition that tribal sovereign immunity is inapplicable to this case. Opposition, p. 13;15. The plaintiff argues that this dispute is not intra-tribal, that sovereignty applies only to intra-tribal disputes, Opposition, p. 14, that Officer Valline is not Native American and, thus, tribal sovereignty does not protect him, and that tribal sovereignty does not reach down to the level of a person in the position of a Tribal police officer, such as Officer Valline. Opposition, p. 15;20.

In the process, the plaintiff also states that Officer Valline, "while ...a law enforcement officer of a federally recognized tribe, ... is not a federal official." Opposition, p. 18;1. The plaintiff also claims here, without any authority, that Officer Valline acted under color of federal law. Opposition, p.18;1. This lack of authority is particularly harmful to the plaintiff's complaint since it is exclusively a *Bivens* cause of action. *See, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971).

Plaintiff also relies heavily upon *Baugus v. Brunson*, 890 F.Supp. 908 (E.D. Cal., 1995), for the proposition that as a non-tribal member and a lowly police officer, he was not a covered employee under the Tribe's sovereignty. Opposition, p. 15; 24-25. *Baugus* is a case either expressly or impliedly overruled, ignored, and/or plainly ancient in the pantheon of tribal immunity cases, as developed below. Finally, the plaintiff states that there are no cases

"...holding that any individual employed by or affiliated with a tribe is absolutely immune from tort liability for acts **in the course of his or her duties**, without regard to the nature of those duties." (Emphasis added). Opposition, p. 19; 13-16.

The plaintiff is mistaken. As a result, based upon the plain reading of the complaint, which the plaintiff has framed as a *Bivens* cause of action based upon the plaintiff's First Amendment rights, the reach of the umbrella of Tribal sovereignty, the failure to allege and prove "Federal action" by Officer Valline, and the inapplicability of the First Amendment to the Walker River Tribe and its Reservation, the complaint is inadequate as a matter of law and requires dismissal. As pled, the complaint is incapable of rehabilitation and must be dismissed. *See, Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir., 2002), *Dry v. U.S., supra* at 1255; *Imperial Granite Co. v. Pala Band of Mission Indians,* 940 F.2d 1269, 1271, 1272 n.3 (9th Cir. 1991) .

A. The Complaint Must Be Dismissed, Because There is No Federal Action to Which a *Bivens* Cause of Action Might Attach

The reason the plaintiff attempted a *Bivens* cause of action is obvious. As established in the motion to dismiss, where a claim is against, as here, a Tribal official, there is no state action for purposes of filing suit in Federal court under 42 U.S.C § 1983. Tribes and their Tribal officials are not state actors under 42 U.S.C. § 1983. *See, R.J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979, 982 (9th Cir. 1983); *Sulcer v. Davis,* 986 F.2d 1429 (10th Cir. 1993) *cert. denied,* 510 U.S. 870 (1983).[1] Thus, given the framework of this complaint, it only survives if the plaintiff has adequately pled a *Bivens* cause of action, since *Bivens* is the only claim left remaining to the plaintiff.

A *Bivens* cause of action lies when a "federal agent acting under color of his authority" violates the United States Constitution. *Bivens v. Six Unknown Named Agents*, *supra* at 389. In the Ninth Circuit, it is well settled also that a *Bivens* cause of action may be brought against

[1]The plaintiff has not quarreled with the proposition that Tribes are not States and public officials are not state actors for purposes of establishing a cause of action under 42 U.S.C. § 1983. The plaintiff offered no resistance to this proposition in the Opposition, and therefore, it stands unchallenged that the complaint, to the extent it is based upon 42 U.S.C. § 1983, must be dismissed.

private parties, *.i.e.*, persons who are not employed by the Federal government. The "...private status of the defendant will not serve to defeat a *Bivens* claim provided that the defendant engaged in federal action." *Schowengerdt v. General Dynamics Corp.,* 823 F.2d 1328, 1337, 1338 (9th Cir., 1986). Thus, where the defendant is not a federal employee the question is, can the plaintiff show whether federal involvement in the conduct of the private party so insinuated itself into the private conduct at issue that it becomes federal action for purpose of a *Bivens* complaint? If a plaintiff is incapable of making a showing of Federal action, the *Bivens* complaint cannot survive muster and must be dismissed. *Dry v. U.S., supra* at 1255.

Here, the plaintiff does not claim that Officer Valline was a federal employee. Opposition p. 18; 1.The complaint alleges that at all times, Officer Valline was an employee of the Walker Lake Paiute Tribe. Complaint ¶ ¶ 3, 6. The question is then, whether federal participation so insinuated itself into the situation, to render Officer Valline's conduct federal action for purposes of assigning *Bivens* liability? If not, the complaint must be dismissed since *Bivens* is the sole, surviving basis the plaintiff has for continuing with this litigation.

As a general proposition, Tribes would be astonished to learn that their employees were considered Federal actors for the purpose of rendering them liable under a *Bivens* cause of action, without an incredible degree of direct Federal intervention and interaction which would put the Tribe and world on notice that the Federal government was essentially in control if that could even suffice. Tribes fiercely strive to protect their independence and sovereignty. *See, Board of Trustees of the Sisseton-Wahpeton Community Colleges v. Wynde,* 18 Ind.L.Rptr. 6033, 6035 (N.Plains Intertribal Ct. App. 1990). *Bivens* claims clearly would amount to an intrusion upon tribal autonomy. Indeed, the attempt to impose a *Bivens* cause of action would turn the relationship between Tribe and the Federal government on it head, completely rearranging the respect for the independent sovereignty of Tribes vis-a-vis the Federal government. The relationship between Tribes and the Federal government is not understood as symbiotic. Rather, they operate on a government-to-government basis.

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A body of case law has emerged which provides guidance from which to conclude whether Federal involvement has insinuated itself to a sufficient degree to transform the conduct at issue into Federal action for purposes of *Bivens.* Thus, for example, the mere presence of Federal dollars to fund the underlying activity is not necessarily sufficient to establish Federal action under *Bivens. Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567 (9th Cir., 1986).

In *Vincent*, the Court went on to advise that in *Rendell-Baker v. Kohn*, 457 U.S. 830, 838, 102 S.Ct. 2764 (1982), the United States Supreme Court relied upon a four point test to determine whether there was state action to show liability of a private party for purposes of the state action requirement of 42 U.S.C. § 1983. The Ninth Circuit drew parallels to those factors for the purpose of determining the presence of Federal action under a *Bivens* claim. The factors included: the presence of Federal funding; the impact of regulation upon the entity whose actions are being challenged, *i.e*., a sufficiently close nexus between the State and the challenged action of the regulated entity; whether the actor performed a "public function," *e.g.,* whether the public function performed would otherwise be within the exclusive prerogative of the State or here, Federal government; and fourth, whether there was a symbiotic relationship between the entity and the State or here, the Federal government, *e.g.,* whether there is the sense of a financial integration between the government and the entity or private actor. *Vincent v. Trend Western, supra* at 568, 569.

While the plaintiff, in this case, alludes to a "638 Federal Contract, "as the vehicle by which Federal funds may be provided the Tribe, the fact that there is language in the contract about the use of the Federal funds does not control and establish the presence of Federal action, either. *Cf. Stevens v. Morrison-Knudsen Saudi Arabia Consortium*, 576 F.Supp. 516, 523 (D.Md. 1983), cited with approval in *Vincent*. *Vincent v.Trend Western, supra* at 569. As the Court explained the construction of a military base for a foreign country under contract with the United States, was not within the exclusive province of the Federal government and therefore, the contractor was not a Federal actor. *Id.* at 569.

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The contract, itself, belies the symbiotic relationship because it affirms the Tribe's independence which *Bivens* would otherwise undercut. The "638" contract attached to the plaintiff's opposition states:

> Sec. 7. Effect on Existing Rights
>
> 1. Nothing in this contract shall be construed as:
>
> (A) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe..... 638 Contract, p. 31. (A copy of the pertinent section of the contract are attached hereto. Exhibit "B.")

The contract also states that the Contractor, (Tribe) not the Federal government, shall be responsible for the "[e]nforcement of all tribal criminal and traffic laws... [as well as] ...[the] implementing of programs to prevent crime and delinquency." In addition, the Tribe, and not the Federal government, shall be responsible for "[p]atrol services on and off roadways and in Indian communities within the boundaries of the Reservation." 638 Contract, pp. 13, 14. Also, the personnel employed in Law Enforcement are employees of the Tribe. Personnel are subject to the Tribe's personnel system and policies. 638 Contract, p. 18. Exhibit "C."

To be sure, the Contract contains minimal performance standards, just as, for example, a construction contract to build a military base. The specifications for such a project would be enormous. Nonetheless, it is clear from the above, while Federal funds are used, the Law Enforcement function is the Tribe's to discharge. The police force is not a Federal entity, agency or police department.

The four factors of *Vincent* were established at bottom, to aid the Court in assessing whether the particular conduct at issue bore such a close relationship to the state [or Federal government] to warrant calling the private party's conduct state action. *Id.* at 568. The thought, however, of a symbiotic relationship existing between Tribes and the Federal government or the States to insinuate Tribal action into Federal action and Federal action strikes one as incomprehensible. The requisite nexus is counter-intuitive because of the Tribe's status as a domestic, dependant nation. *See, Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905 (1991). Consequently, Tribes are and hold

themselves out as Nations unto themselves. *Cf., Ninigret Dev. Corp. v. Naragansett Indian Wetuomuck Hous. Authority*, 207 F.3d 21, 29 (1st Cir., 2000) (Immunity for tribes rests on their status as "...autonomous political entities, retaining their original natural rights with regard to self-governance.").

Their inherent sovereignty includes the right to maintain law and order and to enforce their own criminal laws on the Tribe's reservation. *United States v. Wheeler,* 435 U.S. 313, 322-323, 98 S.Ct. 1079 (1978). In other words, the Tribe's right to maintain law and order is not an attribute of self-governance handed down to it by the Federal government. The right belonged to the Tribes from the beginning and Tribes "...continue to possess all aspects of sovereignty not withdrawn by treaty or statute, or 'by implication as a necessary result of their dependent status.' [Internal citation omitted]." *Dry v. U.S., supra* at 1254. The provision of law and order on a Reservation, therefore, is clearly not the "exclusive province "of the Federal government or State and is an attribute of sovereignty the Tribe has held from inception.

Consequently, there is no symbiotic relationship between the Federal government and the Tribes including Walker River Paiute Tribe with respect to law enforcement. *See, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-58, 118 S.Ct. 1700 (1998) (tribal sovereignty integral to self-governance). Tribes fiercely fight to maintain their own Constitutions, Law and Order Codes, and the right to implement and enforce them. *See, Sisseton-Wahpeton Community Colleges v. Wynde, supra* at 6035. The Tribe and Federal government are not financially integrated. Tribes are not subservient entities which can be taxed. *See, Oklahoma Tax Com'n v. Chickasaw Nation,* 515 U.S. 450 (1995); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, supra* at 509. As a general proposition, then, the four factors of *Vincent*, developed from *Rendal-Baker*, argue expressly against the claim that there is Federal action by reason of the police activity engaged in by the Tribal police.

Turning, then, to the complaint, it contains no allegations peculiar to the incident from which to conclude that a Federal presence had so insinuated itself into the situation to transform it into Federal action to support *Bivens.* There are no allegations, for example, that this case

involved a joint Federal/Tribal SWAT team or other form of joint operation, where the Tribe might have been aiding the Federal government in a Federal sting operation. There is no allegation whatsoever, that any Federal involvement was present other than the prospect of Federal funding for the Tribal police department. There is no claim Federal officials were present to aid Officer Valline, or Officer Valline was present to aid Federal officers when arriving on the scene to respond to the plaintiff's call for help with her ex-husband. There is nothing unique about the incident, therefore, to transfer Officer Valline's presence to Federal action.

Moreover, given the allegations set forth in her complaint and opposition which describe the incident, it is implausible to believe that there could ever exist any facts which the plaintiff might plead which could create the Federal action required to support a *Bivens* claim. The way the complaint and opposition are pled, the plaintiff would be hard pressed to turn around, now, and allege a Federal/Tribal joint operation in response to her call for police assistance. As a matter of law, the *Bivens* cause of action is inadequate and plainly, incapable of being resuscitated. It therefore must be dismissed.

Also, clearly, no State action exists in this case to allow for a 42 U.S.C. § 1983 cause of action. Given, further, the general sense that the boundaries of State action under 42 U.S.C. § 1983 and Federal action under *Bivens* are equivalents, *see, Vincent v. Trend Western, supra* at 567, the fact that the plaintiff failed to challenge the claim there is no State action in this case constitutes an admission that there is no Federal action, either, under *Bivens,* in the complaint. From any vantage point, therefore, Federal action has not insinuated itself into the incident of July 15, 2004. Absent Federal action, no *Bivens* cause of action exists in this complaint. *Dry v. U.S., supra* at 1255. The plaintiff's complaint is incapable of being salvaged and must be dismissed since *Bivens* is also the plaintiff's sole remaining claim. Without *Bivens*, there is no case as pled.

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B. A Claim Grounded Upon the First Amendment to the United States Constitution For A Violation On the Reservation Fails Also Because As A Matter of Law, The Constitution Does Not Apply To The Tribe

In the unlikely event the Court allows the *Bivens* claim to go forward on the grounds a symbiotic relation exists that is sufficient for Federal action to be insinuated into this dispute and transform Officer Valline's conduct, as a Tribal official, into a Federal action, the complaint next founders as a matter of law upon the First Amendment. As indicated the plaintiff claims she was mistreated in retaliation for exercising her First Amendment rights under the United States Constitution. Opposition, pp. 22; 14-20. The case has not been brought under the Indian Civil Rights Act of 1968, 25 USCA §§ 1301-1303. Her ill-fated *Bivens* cause of action is based completely upon the allegation that Officer Valline violated the First Amendment of the United States Constitution when conducting himself as a peace officer of the Walker River Paiute Tribe, on the Reservation. The complaint, as stated, alleges that Officer Valline at all pertinent times was an employee of the Tribe. Complaint ¶¶ 3, 6. The complaint also makes no claim the incident occurred any where outside the external boundaries of the Tribe where it governs.

These facts are also dispositive because it is well settled that Tribes and Tribal officials are not bound by the United States Constitution. *Dry v. U.S., supra* at 1257, citing *Talton v. Mayes*, 163 U.S. 376, 382-85, 16 S.Ct. 986 (1896). The Ninth Circuit is in accord. *Imperial Granite Co. v. Pala Band of Mission Indians, supra* at 1271, 1272 n.3 ("The Constitution's limitation on federal and state action does not restrain Indian Tribes ... The Indian Civil Rights Act does, but Congress provided no private right of action to enforce the Act [in Federal Court] other than *habeas corpus*." [Internal citations omitted]). Indeed, this is the reason that the Indian Civil Rights Act was first enacted. While within the external boundaries of a Tribe's sovereign lands, persons there were unprotected by the United States Constitution. Consequently, it was necessary to adopt the Indian Civil Rights Act to provide a measure of civil rights protection which was otherwise not present. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 57, 98 S.Ct. 1670 (1978).

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Talton ,Santa Clara Pueblo and *Imperial Granite* make clear that the United States Constitution is inapplicable to and upon Tribal lands. Officer Valline, according to the plaintiff, was a Tribal employee at all pertinent times. The incident took place within the external boundaries of the Tribe. First Amendment protections are, therefore, unavailable to the plaintiff and her complaint cannot survive as a matter of law since it is based upon the First and Fourth Amendments to the United States Constitution.

Indeed, the complaint is in reality a backdoor way of trying to circumvent the holding in *Santa Clara Pueblo* which makes clear that lawsuits for violations of the ICRA, the analog to the various sections of the Bill of Rights brought onto the Tribal lands by ICRA such as the First Amendment, may not be brought in Federal court. The Federal court only has jurisdiction to hear *habeas* petitions based upon ICRA. *See, Imperial Granite Co. v. Pala Band of Mission Indians, supra* at 1272 n.3. *See also, Santa Clara Pueblo v. Martinez, supra* at 59-72; *R.J. Williams Co. v. Fort Belknap Housing Authority, supra* at 981. The complaint clearly does not sound in *habeas corpus*. Thus, the Court is without jurisdiction to open the backdoor and hear what is really an IRCA claim for damages, *Santa Clara Pueblo v. Martinez, supra* at 59-72, and the complaint against Officer Valline, individually, must be dismissed on this ground as well. *Dry v. U.S., supra* at 1255.

IV. THE STRENGTH OF TRIBAL SOVEREIGNTY INCLUDES OFFICER VALLINE

A. Tribal Sovereign Immunity Applies to The Walker River Paiute Tribe

It is beyond cavil that Indian Tribes are immune from suit absent express and unequivocal authorization from Congress or the Tribal Government. Indian sovereignty is not a discretionary principle subject to the equities of a given situation. *Santa Clara Pueblo v. Martinez, supra* at 58, 59; *Puyallup Tribe v. Washington Dep't. of Game*, 433 U.S. 165 (1977); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). Significantly, a Tribe remains immune from suit, even though a plaintiff claims that it acted beyond its authority or outside its powers. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1052 (9th Cir. 1985) *rev'd per curiam on other grounds*, 424 U.S. 9, 106 S.Ct. 289 (1985).

The plaintiff does not alleged any particular waiver directed towards her situation. Since a Tribe's sovereignty is subject to the plenary authority of Congress, it is important to note also there is no allegation Congress had deprived the Tribe of its sovereignty within the context of this litigation. *See, Romanella v. Hayward*, 933 F.Supp. 163, 167 (D.Conn. 1996), *aff'd,* 114 F.3d 15 (2d Cir., 1997) ("Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits ...against a tribe."). Since waiver of sovereignty by the Tribe has not been alleged, it is not an issue. Suffice it to state, however, the Tribal Council of the Tribe through its Constitution, is assigned the right to safeguard and promote the peace and safety of the Tribe within its external boundaries and provide for the maintenance of law, order and the administration of justice . Walker River Paiute Constitution, Article I and VI (j) and (q). A copy of the pertinent sections are attached hereto. Exhibit "D."

B. The Tribe's Sovereignty from Suit Extends to Officer Valline in this Case

Concededly, Tribal officials are not always immune from suit. "When [tribal officials]... act beyond their authority, they lose their entitlement to the immunity of the sovereign." *Imperial Granite Co. v. Pala Band of Mission Indians, supra* at 1271, citing *Santa Clara Pueblo v. Martinez, supra* at 59. It is obvious, then, also that Officer Valline's sovereign immunity protection is derivative of the Tribe.

It is equally true that "...when tribal officials act in their official capacity and within the scope of their authority, they are immune." *Id.* at 1271. Once immunity is established, therefore, it is coextensive with that of the tribes. *See also, United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1982) (This [tribal sovereign immunity] also extends to tribal officials when acting in their official capacity and within their scope of authority.) Thus, the same sovereign immunity from suit retained by the Tribe is vested in Tribal officials, therefore, provided they are acting in their official capacities and within the scope of their authority.

If he is a Tribal official, then, Officer Valline falls under the umbrella of the sovereignty which protects the Tribe from suit. That is to say, if he was acting within his authority and in his official capacity at the time of the incident, his immunity from suit is coextensive with the

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Tribes, as the case law in the Ninth Circuit clearly holds. *See, Linneen v. Gila River Indian Community, supra* at 492.

The plaintiff seeks to pick away at this sovereignty in various ways beginning with *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983). The plaintiff tries to deny Officer Valline immunity from suit by asserting that *Kennerly* limits sovereign immunity to intra- tribal disputes amongst members of the Tribe. Officer Valline, as a non-tribal member, could therefore not enjoy sovereignty even if he was a tribal official.

The plaintiff quotes a part of *Kennerly* wherein the Ninth Circuit quoted from or restated the District Court's apparent rationale for finding sovereign immunity protected the Tribal official from suit in that case. According to the Ninth Circuit, the District Court found sovereign immunity in Federal court because the dispute was characterized as intra-tribal. *Kennerly v. United States, supra* at 277-278. The plaintiff then states in her opposition: "That because Gail Boney's claims for relief herein against Walter Valline, a non-member of the Walker River Tribe are not inter-tribal should be self-evident." Opposition, p. 14; 22-24.

The sentence is incomplete. No one, also , could claim this as an "inter-tribal" dispute. Only one Tribe is involved. Since there must be a typographical error or two in the incomplete, one sentence paragraph, the sentence seems to suggest that Officer Valline's "non-member" status is a disqualifying factor for purposes of Tribal sovereign immunity. Perhaps the plaintiff is saying, here, a dispute cannot be intra-tribal for purposes of sovereign immunity if one of the parties is not a member of the Tribe. Short and swift can be made of the latter point since Tribal sovereign immunity follows the Tribe off the Reservation. *See, Kiowa Manufacturing Technologies, Inc.*, *supra* at 753.

For the plaintiff to try and carve the former exception out of Tribal sovereignty based upon this reading of *Kennerly* would constitute a distortion of *Kennerly* beyond recognition. First, as established, the maintenance of peace, safety and law and order are inherently a part of Tribal sovereignty which Walker River has chosen to exercise. *See, Dry v. U.S., supra* at 1253. Since this dispute arose out of a call for help due to possible drunken misconduct, the incident arose out of that which is an original Tribal concern. Second, if sovereign immunity is lost

because the accused Tribal employee is not a Tribal member, every time a Tribe hires a non-member, the Tribe would be at risk because the protective shell of sovereignty would vanish. Moreover, employees working side by side in the same job, may or may not be protected by sovereign immunity when there is a dispute with a Tribal member, depending upon whether the Tribal employee was a member of the Tribe. Under the plaintiff's reading of *Kennerly,* immunity would not be available for the non-member Tribal official.

No such distinction was intended by *Kennerly* as evidenced by the rest of the opinion. The Ninth Circuit concluded that **if** a *Bivens* cause of action lies against a Tribal official, the:

> ...individual tribal officials would be entitled to claim the same **qualified immunity** accorded state and federal officials in section 1983 and *Bivens* causes of action; they are immune insofar as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Kennerly v. United States, supra* at 1259.

This passage clearly does not suggest that the defense of qualified immunity was limited only to Tribal officials who happen to be members of the Tribe. Moreover, in every case cited above, where the term "Tribal official," was used, it was used unqualifiedly. These courts did not apply the term Tribal official, when discussing the entitlement to sovereign immunity, only to those persons who were members of the Tribe, or were Native Americans. Nor did they limit sovereignty to those persons embroiled only in intra-tribal disputes. As indicated, sovereignty extends even to off Reservation. *See, Kiowa v. Manufacturing Technologies, Inc.*, *supra* at 753.

Relying upon *Baugus v. Branson*, *supra,* the plaintiff argues police officers are not the kind of person with sufficient discretion or clout within the Tribal organizational structure to rise to the level of a "Tribal official." According to the plaintiff, immunity for Tribal officials depends upon how high up in the organizational structure of the Tribe, the individual relying upon immunity finds him or herself. The plaintiff claims that according to *Baugus,* Officer Valline could not, as a lowly police officer, call upon immunity from suit as a Tribal official to defend this case. The plaintiff calls *Baugus* persuasive authority. Opposition, p. 16.7-8.

Similarily, the plaintiff also argues that based upon *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct., 580 (1988), Officer Valline could not qualify for immunity as a Tribal official because police officers do not have sufficient discretion to be a Tribal official. Consequently, based upon

Westfall, the plaintiff would argue that the immunity of Tribal officials turns also upon the degree of discretion the official has. If the employee does not have sufficient discretion, then, he or she is not a public official for purposes of immunity under the Tribe's umbrella of sovereign immunity.

Westfall and *Baugus,* are ancient history. *Filer v. Tohono O'odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (Ct. of App. Ariz. 2006) explains. There, the plaintiff brought a personal injury and wrongful death action in the State trial court against the Tohono O'odham Gaming Enterprise and several employees, including the persons who served the liquor. The plaintiff claimed that the Gaming Enterprise employees served excessive quantities of liquor to a customer of the casino. The customer, while in an inebriated state, then drove his car into the plaintiff's vehicle, killing the plaintiff's wife and injuring the plaintiff. He sued for wrongful death, negligence and a statutory dram shop claim of liability against this Tribal enterprise, the individual who held the liquor license, and against the fictitiously named casino employees who served the liquor. *Id.* at 80.

The defendants moved to dismiss on grounds of sovereign immunity. The motion was granted. The plaintiff appealed. The Court of Appeals upheld the dismissal on grounds of lack of jurisdiction as to all defendants, including the casino employees, on sovereign immunity grounds as the casino was a subordinate enterprise of the *Tohono O'odham Nation. Id*. at 80.

On the question of employee immunity, *i.e*., the employees who served the driver of the vehicle that killed the plaintiff's wife and injured the plaintiff, the plaintiff relied upon *Westfall, supra*, to argue that even if the Tribe was immune from suit, the employees were not because Tribal immunity does not extend to Tribal employees unless they acted not only within the scope of their duties but also engaged in discretionary conduct. *Baugus v. Brunson, supra*, was cited for the proposition that discretionary activity was not present. This is precisely the argument offered by the plaintiff to defense the motion to dismiss based upon the immunity from suit that is bestowed upon Officer Valline.

The Court of Appeals disagreed with the plaintiff in *Filer* and disagrees with the plaintiff, here. The Court stated:

> As the Gaming Enterprise points out, however, the Ninth Circuit has not applied the *Westfall* rule to tribal immunity. *See Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002), cert. denied, 536 U.S. 939, [parallel citations omitted] (2002); *Imperial Granite Co. v. Pala Band of Mission Indians* [citation omitted]; *Snow v. Quinault Indian Nation*, 709 F. 2d 1319, 1321 (9th Cir., 1983) cert. denied 467 U.S. 1214 [parallel citations omitted] (1984). Rather, that court has recognized and applied sovereign immunity to tribal employees as long as their alleged misconduct occurred while they were acting in their official capacity and within the scope of their authority. *Linneen*, 276 F. 3d at 492; *Snow*, 709 F. 2d 1321. *Id.* at 85.

The Court then acknowledged *Baugus v. Brunson* and two other cases for the contrary proposition. *Id.* at 85. The Court stated, however, they were in the distinct minority, *ibid*, pointing to the overwhelming majority of cases which hold to the contrary, particularly in the Ninth Circuit.

> See *Linneen*, 276 F.3d 489; *Imperial Granite*, 940 F.2d 1269, *Snow*, 709 F.2d 1319; *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307 (N.D.N.Y., 2003); *Bassett v. Mashantcket Pequot Museum & Research Ctr., Inc*., 221 F.Supp.2d 271, 278 (D. Conn., 2002); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D. Conn., 1996), *aff'd* 114 F.3d 15 (2nd Cir. 1997). *Id.* at 85.

The Court reasoned that since the Ninth Circuit cases on this point were consistent and well reasoned, it would follow them. *Ibid.* Based upon the line of reasoning represented by *Linneen* and the progeny cited by the court in *Filer*, the only question that must be answered to determine if the particular defendant is entitled to the immunity of the Tribe as a Tribal official is "whether the individual defendants [or in this case, defendant] were, "'acting in their official capacity and within the scope of their authority'" as tribal employees when they served the alcohol to Levitski [the driver of the other vehicle.]" *Id.* at 85, 86.

In *Filer*, the Court, therefore, examined whether the bartenders were acting within their official capacity and within their scope of authority, when serving drinks to Levitski, the driver of the other car. The Court states that the plaintiff did not argue otherwise. Indeed, it is self-evident that serving drinks to customers would fall within the authority and official capacity of a bartender. The Court noted there was no evidence to contrary. Consequently, the bartenders, the Court held, fell within the meaning of *Linneen* and were entitled to immunity from suit on the exact same footing as the Tribe, even though they were bartenders and hardly in the upper echelons of the Tribe's or gaming enterprise's hierarchy in the management scale. *Filer*

completely undercuts the plaintiff's claim that Officer Valline is not entitled to immunity because of *Westfall*, that he did not have enough discretion to meet the definition of a Tribal official for immunity purposes, or that he was high enough up in the organization of the Tribe to be considered a Tribal official.

Linneen, however, cited by *Filer* needs no introduction. *Linneen* and its progeny, *e.g.*, *Imperial Granite* and *Snow*, amongst the others cited in *Filer*, stand on their own.

Linneen, as a Ninth Circuit decision from 2002, is controlling and dispenses with the plaintiff's argument that Officer Valline is not a Tribal official, entitled to lay claim to immunity from suit. To the contrary, *Linneen* squarely establishes that the plaintiff's reliance upon *Westfall* and *Baugus* are misplaced. The facts, there, track the circumstances of this case. In *Linneen,* the plaintiffs, Kim and Ross Linneen, filed a complaint in the Federal District Court for monetary damages under 42 U.S.C. § 1983, the United States Constitution, Arizona State law, and the bylaws of the Gila River Indian Community. *Linneen v. Gila River Indian Community, supra* at 491. They claimed that a Gila ranger unlawfully detained them, and threatened them at gunpoint. *Ibid*. More specifically, the facts included that Ralph Andrews, the Gila ranger, arrested the plaintiffs, at gun point, detained them for three hours, during which time Andrews held a gun to their heads, told them their possessions would be impounded, and threatened to kill their dog, amongst other abuses and indignities, which included berating them, and lecturing them about the plight of Native Americans. He charged them with criminal trespass before releasing them. These charges were later dismissed. *Id.* at 491.

The plaintiffs named the Tribe, the Governor of the Tribe, and the ranger, Ralph Andrews. Andrews was sued in his official and individual capacities. *Id.* at 491. The plaintiffs sought $8 million in damages, in addition to costs and attorneys' fees. The complaint was dismissed as to the defendant most pertinent to the instant dispute, Ralph Andrews, the Tribal ranger, in his official capacity for the want of jurisdiction due to sovereign immunity. Andrews was dismissed in his individual capacity on grounds that the plaintiffs failed to exhaust their Tribal Court remedies. *Ibid*.

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The only question at issue on appeal was whether Tribal sovereignty barred suit against these defendants including Andrews in his official capacity. The Court held that as to ranger Andrews, suit must be dismissed because the sovereign immunity of Tribes "'...extends to tribal officials when acting in their official capacity and within the scope of their authority.'" *Id.* at 492. Importantly, the Court further concluded: "Here, the suit arises from defendant Andrews' alleged misconduct during his official duties as a tribal ranger on the Community's land. Congress has not abrogated tribal sovereign immunity for such acts committed on tribal land by a tribal officer." *Id.* at 492.

Within the context of *Westfall*, therefore, despite the fact that Andrews was a ranger and therefore, clearly a Tribal peace officer, the Court considered him a Tribal official for purposes of establishing entitlement to immunity from suit. *Westfall* and *Baugus*, do not control whether Officer Valline is a Tribal official eligible for the protection of sovereign immunity from suit.

C. Officer Valline's Immunity From Suit Is Not Stripped Away By Allegations He Acted Unconstitutionally Towards the Plaintiff.

Concededly, the plaintiff has sued Officer Valline only in his individual capacity. To understand Tribal immunity at that level, however, it is not neceassary to work through the progressions in the hierarchy or tiers of immunity to reach the level of immunity which applies to Officer Valline.

Thus, having made clear in the previous section, as a peace officer, Officer Valine is a Tribal official, and therefore, entitled to immunity of the sovereign from suit, the question becomes, then, whether allegations of unconstitutional behavior, which the plaintiff alleges, strips Officer Valline from the protection of immunity from suit in his official capacity. The answer is, more is required. Allegations that a Tribal official violated State or Federal law are insufficient to state a cause of action against a Tribal official in his official capacity as *Linneen* clearly indicates. Moreover, as stated in *Bassett, supra,* "... a tribal official-even if sued in his "individual capacity"-is only "stripped" of tribal immunity when he acts "manifestly or palpably beyond his authority..." *Bassett,* 204 F.3d at 359 (Quoting *Doe*, 81 F.3d at 1210)." *Bassett v. Mashantucket Pequot, supra* at 280.

Tribal officials, thus, are not stripped of sovereignty, in their official capacity merely because they are performing their jobs poorly or because it is alleged, unlawfully. "Beyond the scope "of authority upon which sovereign immunity protection turns is not defined by the legality of the conduct but upon the jurisdiction to act in the first place. *Id.* at 281 fn.15.

The United States Supreme Court long ago made this clear. In *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, 69 S.Ct. 1457, 1464 (1949) the United States Supreme Court stated:

> There is ...nothing in the law of agency to the contention that an officer's tortuous action is *ispso facto* beyond his delegated powers....It is argued that an officer given the power to make decision is only given the power to make correct decisions...[W]e [reject] the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so....We hold that if the actions of an officer do not conflict with the terms of his valid authority, then, they are actions of the sovereign, whether or not tortuous under general law, if they would be regarded as the actions of a private principal under the normal rules of agency.

The fact, as *Linneen* makes clear, that a Tribal employee, such as a peace officer, does his job poorly, tortuously or even unconstitutionally, does not strip the conduct of official action of the sovereign for purposes of the application of immunity. He or she may be doing his or her job poorly in the manner described, to the point that the conduct is even unlawful. As long, however, as it is nonetheless his or her job that is being done, it remains his or her job, no matter how poorly it is being done, and immunity attaches.

Similarly, in *Bassett, supra,* the Court acknowledged that allegations that a defendant violated a plaintiff's constitutional rights, if proven to be true, would be conduct which cannot be within a Tribal official's official authority. *Id.* at 281.

> Nevertheless, it would be insufficient in the complaint to merely allege that the Tribal official "...violated state and federal law in order to state a claim that ...[the Tribal officials] acted beyond the scope of their authority.... Rather, the Court finds that to state a claim for damages against ...[the defending Tribal officials]..., the plaintiffs would have to allege and prove that ...[the Tribal officials] acted 'without any colorable claim of authority,' apart from whether they acted in violation of federal or state law. [footnote omitted and internal citation omitted.]. *Ibid.*

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The Court then gave a practical demonstration of the meaning of its holding in footnote 15 of the opinion. There, tracking *Larsen,* the Court explained:

> [T]he 'beyond the scope of his authority' exception in the Second Circuit's holding in *Doe* was not based on the illegal or unconstitutional nature of the prosecutor's action, but rather upon the nature of the actions as 'plainly beyond the prosecutor's jurisdiction.' *See, Doe*, 81 F.3d at 1210. (Prosecutor's demand that plaintiff participate in religious ceremony was not a prosecutorial function, but was beyond a prosecutor's jurisdiction). Here the plaintiff merely alleges that [the tribal officials'] actions violated state and federal law, not that such actions were 'manifestly or palpably' outside of ...[their] duties...or performed in the 'clear absence of all jurisdiction.' *Id."*

These cases and pronouncements, therefore, establish the degree to which a complaint must be pled and proved to proceed with a personal liability claim against a Tribal official and to strip him or her of Tribal sovereign immunity. Applying this standard to the plaintiff's complaint, the plaintiff's claims clearly fail to remove Tribal sovereignty from Officer Valline in his official capacity. The complaint obviously claims he acted unconstitutionally. Complaint ¶¶ 16, 17. There is no allegation that Officer Valline acted manifestly and palpably outside the scope of his duties. To the contrary, the complaint describes an attempted arrest in response to a call for a Tribal member to the Tribal Police Department for assistance with a possible inebriated ex-husband. It cannot be gainsaid, Officer Valline, as a peace officer, was present and acting within the duties, jurisdiction, and scope of his responsibilities of a police officer.

The exercise of this official duty and responsibility took an unfortunate turn. The plaintiff labels it unconstitutional. Her complaint alleges an attempt at an arrest she believes turned unconstitutional. Officer Valline was there, nonetheless, as a police officer attempting to perform a function associated with the job of a police officer.

Couched in other terms, the events described in *Linneen*, except for the discharge of the firearm in this situation, *i.e.,* threatening to kill the dog, detaining them for three hours, and holding a gun to the plaintiff's head versus shooting young Boney, are conduct of the same kind and only different in degree. The conduct of Andrews, however, though unlawful, was not outside what the Tribe could lawfully bestow, *i.e.,* making arrests. Thus, since Officer Valline was also there, on the scene to make an arrest, *Linneen* plainly establishes, as does *Bassett, Filer,* and their progeny, that Officer Valline has retained Tribal sovereign immunity from suit in his

official capacity since the plaintiff has not pled, could not plead and obviously has not proved that Officer Valline was acting "'without colorable claim of authority.'" *Bassett v. Mashantucket, supra* at 281.

D. Officer Valline's Immunity From Suit Is a Complete Bar to Individual Liability From Suit, Also, Arising Out of the Plaintiff's Complaint as Pled

Since the preceding section readily shows that Officer Valline has not been striped of Tribal sovereign immunity, what immunity from suit does he possess, individually in the face of a *Bivens* complaint brought against him, individually, based upon the First and possibly the Fourth Amendment to the United States Constitution. *Linneen* clearly barred suit against Officer Valline because the complaint does not allege conduct on his part which is manifestly or palpably beyond his authority. The complaint here describes an attempt to make an arrest that went tragically awry, resulting in a constitutional claim under *Bivens*. Such a claim does not strip Officer Valline of the Tribe's sovereignty from suit. *Bassett v. Massantucket, supra* at 280. *Linneen* only dealt, however, with a suit against ranger Andrews in his official capacity since the individual capacity part of the case had been dismissed on failure to exhaust Tribal remedies grounds.

What, then, about the immunity protecting Officer Valline in his individual capacity? According to *Filer,* since the misconduct of the bartenders, as alleged, was in the manner in which they poured the drinks, the bartenders were protected because they were acting, however poorly, in their capacity as bartenders.

Applying the logic of *Filer* to Officer Valline, sovereign immunity would bar suit against him personally, since police officers make arrests and, therefore, attempting to make an arrest, he was acting within the jurisdiction the Tribe bestowed on him even though, the plaintiff claims, he was acting poorly like the bartenders. *Bassett*, however, states that to proceed with a complaint which aspires to assign individual damages against Officer Valline, the plaintiff here must be able to "allege and prove that...[the tribal official, Officer Valline,] acted 'without any colorable claim of authority,' apart from whether ... [he] acted in violation of federal or state law. [footnote omitted]." *Id.* at 281. The complaint fails when measured by this standard to assign

individual liability to Officer Valline since, again, it describes an arrest that went sadly awry, which the plaintiff then labels unconstitutional in derogation of the First Amendment to the United States Constitution.

The complaint concedes Officer Valline was present at the scene by invitation in his official capacity as a police officer to make arrests in the face of claims that the peace was being disturbed. The plaintiff clearly thought that was the case. The complaint, therefore, is pled in such a way, the plaintiff has placed Officer Valline at the scene of the incident with more than colorable authority.

The label she places on Officer Valline's conduct was one of unconstitutionality. More is required than an allegation that Officer Valline acted unconstitutionally if individual liability is stated as a claim for relief. If Officer Valline is to be stripped of immunity on an individual basis, the allegation must be that he acted "manifestly" and "palpably" beyond his authority. *Ibid*. Having placed Officer Valline at the scene with at least colorable authority, however, Officer Valline's immunity on an individual basis trumps the plaintiff's complaint. The complaint must be rewritten or dismissed.

Couched in other terms, to survive a motion to dismiss, a complaint must allege that the conduct of the Tribal official was beyond the authority which the Tribe could lawfully bestow. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2nd Cir., 2000); *Yakima Indian Nation v. Washington Dep't of Revenue*, 176 F.3d 1241, 1246 (9th Cir., 1999) (immunity unavailable when state officer acts without any authority.) The plaintiff seeks to reign in Officer Valline using the First Amendment and possibly the Fourth Amendment to the United States Constitution. As explained, *supra*, the United States Constitution is inapplicable to Tribes and their Tribal officials. It is not a barrier, then, to conduct on the Reservation and as a result, it is legally impossible for the Tribe or Tribal official to exceed authority when the restraint expressly sought to be imposed is no restraint in the first place. *Cf. Garcia v. Akwesane Housing Authority*, 268 F.3d 76, 88 (2nd Cir., 2001). There, the Court explained that a suit for injunctive relief against a Tribal Housing Authority would not lie if brought under Title VII of the Civil Rights Act because the Act exempts an Indian Tribe from its application.

Since the United States Constitution does not obtain on Tribal land and the plaintiff relies upon the United States Constitution exclusively, to bring her complaint, she has ineffectively in her complaint drawn a line that in no way is a line of demarcation which Officer Valline could exceed while a Tribal police officer on the Reservation. He, therefore, retains the Tribe's sovereign immunity which creates an insuperable barrier from suit in this case on the grounds alleged by the plaintiff.

The option which brings the effect of the First and Fourth Amendments to the Reservation is the Indian Civil Rights Act. However, as *habeas* is the sole remedy in this Federal Court, under ICRA, *see*, *Santa Clara Pueblo v. Martinez, supra* at 62, the complaint must be dismissed for this reason, also, as to Officer Valline.

Having eschewed the Tribal court system, the plaintiff was simply mistaken. She may well have a remedy there, or at least a forum, in addition to the Federal Tort Claim Act action she has administratively initiated since "tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring on a reservation." *Weeks Construction, Inc. v. Oglala Sioux Housing. Authority*, 797 F.2d 668, 673 (8th Cir. 1986).

CONCLUSION

For the reasons stated in the underlying motion and for the reasons set forth herein, the plaintiff's complaint must be dismissed because:

1. There is no Federal action and a *Bivens* complaint cannot be sustained. Since the complaint is based entirely upon *Bivens*, there is no basis upon which to continue.

2. Neither the First nor Fourth Amendment are applicable to the Tribe, its officials and Reservation and, therefore, there is no basis for the complaint as pled, in the first place.

3. In any event, for the reasons sited herein, Officer Valline retains the Tribe's immunity from suit against individual liability.

Dated this 28th day of July, 2006.

Zeh Saint-Aubin Spoo

By: /s/
Charles R. Zeh, Esq. (Original signature located in the law office of Zeh Saint-Aubin Spoo)
Attorney of Record for Walter Valline