UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Brian Noel Hester,

Plaintiff,

v.

Redwood County, Lon Walling, Individually and in his official capacity as Chair of the Redwood County Board of Commissioners, Steven Collins, Individually and in his official capacity as Redwood County Attorney, The State of Minnesota, Mona Dohman, Individually and in her official capacity as Commissioner of the Minnesota Department of Public Safety, The Lower Sioux Indian Community of Minnesota, Gabe Prescott, Individually and in his capacity as President of The Lower Sioux Indian Community of Minnesota, and Jonathan Meece, Individually and in his capacity as a police officer for The Lower Sioux Indian Community of Minnesota,

Defendants.

Court File No. 11-cv-1690 ADM/JJK

MEMORANDUM IN SUPPORT OF MOTION OF THE LOWER SIOUX INDIAN COMMUNITY, GABE PRESCOTT, AND JONATHAN MEECE FOR DISMISSAL AND SUMMARY JUDGMENT

I. INTRODUCTION

The Lower Sioux Indian Community, Gabriel Prescott and Jonathan Meece

(the Lower Sioux Defendants), appearing specially and contesting the jurisdiction of

this Court, have moved for dismissal under Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) or, in the alternative, for summary judgment under Rule 56. The Lower Sioux Defendants contend that the Plaintiff's Complaint fails to state a claim under 42 U.S.C. §1983, that his claims are barred by the applicable statute of limitations, sovereign, qualified and official immunity and the Public Duty Doctrine and are, moreover, pendant state law claims over which the Court should decline to exercise jurisdiction where the Plaintiff has not a pled viable federal claim.

II. STATEMENT OF FACTS

A. Facts about the Lower Sioux Community.

The Community is a federally recognized Indian tribe[1] with reserved sovereign rights that predate the existence of the American Constitution.[2] The Community's powers of self-government extend throughout its territory,[3] and across its people.[4]

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[1] Its name appears on the List of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, published by the Secretary of the United States Department of the Interior. 74 Fed. Reg. 40218, 40221 (Aug. 11, 2009).

[2] *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[3] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 558 (1975).

[4] *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171-72 (1973).

The Community is organized under a Constitution and Bylaws (the "Constitution")[5] adopted pursuant to the Indian Reorganization Act of 1934[6] and is governed by an elected Community Council, which is authorized to exercise powers delegated to it by the Community membership through the Community Constitution. Those powers include the authority to "establish ordinances providing for the maintenance of law and order upon the Reservation and for the establishment of courts to enforce such ordinances in its Tribal Court."[7]

The Community has adopted ordinances protecting the health, safety and welfare of its members in a multitude of areas, including Motor Vehicles.[8] Community ordinances are enforceable in the Community's Tribal Court. In early 1995, the Community established the Lower Sioux Indian Community Police Department (LSPD), and delegated to the Department the authority and responsibility to, *inter alia*, enforce Community laws, patrol Community lands, apprehend violators, respond to calls for assistance, maintain law & order, provide inter-jurisdictional law enforcement services, and manage the law enforcement

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[5] *See*, e.g., http://www.lowersioux.com/pdffiles Lower%20Sioux%20Indian%20Community %20Constitution.pdf (last visited Mar. 26, 2012).

[6] 25 U.S.C. § 461 *et seq.* (2011).

[7] L.S. CONST., Art. V, Sec. 1(j). The Constitution in attached to the Affidavit of Joseph F. Halloran (the Halloran Affidavit) as Exhibit 1.

[8] The Lower Sioux Indian Community Motor Vehicle Code is attached to the Halloran Affidavit as Exhibit 2. The Code was adopted to "protect the safety and welfare of persons within the Reservation and to ensure the maintenance of law and order on the Reservation by regulating motor vehicle traffic and safety standards" Chapter 1, § 1.1.

affairs of the Community.[9] LSPD Officers must be licensed by the Minnesota Peace Officers Standards and Training Board (MNPOST).[10]

On July 9, 1998, pursuant to Minn. Stat. §626.91, the Community entered into a Mutual Aid and Assistance Agreement with Redwood County "to define and regulate the provision of law enforcement services and to provide for a mutual aid and cooperation between the Community and the County (the MAA). The Community acquired liability insurance meeting the limits required by §626.91, subd.2 (a)(2) and provided a certificate to MNPOST. The Community also adopted Council Resolution No. 98-59, providing that: the LSPD will comply with the Minnesota Data Practices Act with respect to the its state law enforcement activities;[11] the Community's President was authorized to execute the MAA;[12] and providing a limited waiver of the Community's sovereign immunity from suit. For claims arising out of tribal law enforcement activities, the waiver is to actions brought in Tribal Court only. For claims arising under state law enforcement activities by Community officers acting within the scope of the authority conferred upon them pursuant to Minnesota Statutes, Section 626.91,[13] the waiver is to actions brought in Tribal, state and federal court.

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[9] Lower Sioux Indian Community Resolution No. 95-50 (5/25/95).
[10] Id.
[11] Id at 3, § 2.
[12] Id at 3, § 3.
[13] Resolution No. 98-59 at 2, § 1.a.

B. The Facts Regarding Dispute.

On the night of December 16, 2008, Lower Sioux member Brian Hester ("Hester" or "the Plaintiff") was driving on County Road #2 on the Lower Sioux Reservation. He was drunk, and driving after his drivers' license had been cancelled as inimical to public safety. He ended up in the ditch and Officer Jonathan Meece ("Meece")—a member of the LSPD on routine patrol that night—arrived on the scene after receiving a call regarding a vehicle in distress.[14] Hester was standing next to the driver's door of the vehicle.[15] While providing assistance at the scene, Meece detected that Hester was intoxicated.[16] Hester acknowledged to Meece that he had been drinking that night and voluntarily submitted to a Preliminary Breath Test, which revealed a blood alcohol concentration of .13.[17]

Due to the extremely cold weather at the time (-15F), Meece, with Hester's consent, drove Hester to the Redwood County Law Enforcement Center for further field sobriety testing.[18] There, Meece administered, and Hester failed, the Horizontal Gaze Nystagmus test, the one-leg-stand and the heel-to-toe-walk-and-turn test. Based on those test results, Hester was placed under arrest and read the

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[14] Amended Complaint, paragraphs 22-23.
[15] *State v. Hester*, File No. CR-08-829, Findings of Fact, Conclusions of Law and Order (Ap. 8, 2009)(The Omnibus Hearing Order"), attached to the Halloran Affidavit as Exhibit 4.
[16] Id.
[17] Omnibus Hearing Order at 2.
[18] Id. at 3. By this time, LSPD Officer Neil Deblieck had arrived at the scene and remained behind to attend to the vehicle and insure there was no threat posed by the scene to others on the Highway that night. Id.

Implied Consent Advisory (ICA).[19] Hester stated that he understood his rights and did not wish to speak to a lawyer, but then refused further chemical testing (having been offered both a urine and blood test) and refused to sign the Notice of Intent to Forfeit Vehicle.[20]

Meece issued Hester Tribal Citation #000393 for driving without a valid license in violation of § 3.1 of the Lower Sioux Traffic Code[21] and Hester was held over at the Redwood County Jail on suspicion of DUI and Test Refusal.[22] The following day, December 17, 2008, Hester was charged by the Redwood County Attorney with First Degree Criminal Test Refusal and First Degree (Felony) Driving-While-Impaired.[23]

An Omnibus Hearing was held in Hester's criminal case on January 12 and March 2, 2009, and on April 8, 2009 the Court entered the Omnibus Hearing Order, which concluded that:

(1) the officers had reasonable articulable suspicion to request the PBT;

(2) Meece had probable cause to believe Hester had been operating a vehicle in violation of Minnesota Statute 169A.20; and

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[19] Id at 2.
[20] Id.; *State v. Hester*, File No. CR-08-829, Amended Complaint (Dec. 17, 2008) ("the Criminal Complaint") at 2, attached to the Halloran Affidavit as Exhibit 5.
[21] Criminal Complaint, citing Lower Sioux Police Department Report No. 08080987 at 2.
[22] Omnibus Hearing Order at 3.
[23] Criminal Complaint.

(3) there existed probable cause for the State charges.[24]

The Driving-While-Impaired count was dismissed before trial.[25] On June 2, 2009, Hester was convicted by a Redwood County jury of test refusal, and on June 15, 2012, Hester moved for a new trial and for the judgment to be vacated, alleging that Meece was not authorized to administer the PBT or the implied consent advisory (ICA).[26] On June 22, 2009, Hester filed a memorandum in support of his Post Trial Motion, further arguing that Meece lacked authority to administer the ICA or any chemical testing under §169A.03 because the Community's police liability insurance coverage had fallen below the minimum required by Minn. Stat. § 626.91, subd. 2(a)(2).[27] Hester's Motion asserted that his test refusal on the night of his arrest was based on that fact.[28] The Court

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[24] Omnibus Hearing Order 2-3, and Memorandum supporting Omnibus Hearing Order at 10-13.

[25] *State v. Hester*, File No. CR-08-829, Dismissal of Count I (June 2, 2009).

[26] *State v. Hester*, File No. CR-08-829, Motion for New Trial or to Vacate Judgment (June 15, 2009)(the Post Trial Motion) at 2, attached to the Halloran Affidavit as Exhibit 6.

[27] *State v. Hester*, File No. CR-08-829, Defendant's Post Trial Motion Memo (June 22, 2009) at 4-6, attached to the Halloran Affidavit as Exhibit 7. On January 1, 2008, the single occurrence coverage amount established in Minnesota Statutes, § 466.04 increased from $1,000,000.00 to $1,200,000.00. At the time of the Hester's drunk-driving arrest, the Community's single occurrence coverage under its police liability policy was $3,000,000.00 per single occurrence, $600,000.00 short of the amount required by Section 626.91, subd. 2(a)(2).

[28] Post Trial Motion at 4.

considered and denied Hester's Motion;[29] twice.[30]

The Minnesota Court of Appeals affirmed the conviction, concluding that the Community's insurance coverage constituted substantial compliance with the Act such that the deviation did not divest Meece of the status of a "peace officer" authorized to administer the ICA and chemical testing under Minn. Stat. 169A.03.[31]

On April 27, 2011, the Minnesota Supreme Court reversed the conviction, concluding that Meece was not authorized to administer the ICA or to offer further chemical testing because the Community was obligated to observe strict compliance with the requirements of the Act in order for its officers to qualify as "peace officers" within the meaning of the Section 169A.03, subd 18.

III. PROCEDURAL HISTORY

Hester filed the instant suit on June 27, 2011 against, among others, the Lower Sioux Defendants. The Plaintiff alleges violations of 42 U.S.C. § 1983, as well as various state common law intentional torts, including assault and battery,

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[29] *State v. Hester*, File No. CR-08-829, Order Denying Motion to Vacate and for a New Trial (July 17, 2008) (the Post Trial Order), attached to the Halloran Affidavit as Exhibit 8

[30] *State v. Hester*, File No. CR-08-829, Order (August 5, 2009), attached to the Halloran Affidavit as Exhibit 9.

[31] *State v. Hester*, No. A09-1784 at 3 (Minn.App. August 3, 2010)(internal citations omitted).

false imprisonment and kidnapping against all of the Lower Sioux Defendants,[32] assault and battery against Meece,[33] and negligence against the Lower Sioux Community.[34] The Plaintiff also alleges a claim for fraudulent concealment[35] and seeks certification of a class.[36] The Community was served process on July 6, 2011.

On August 2, 2011, the State of Minnesota and Mona Dohman moved for dismissal alleging 11th amendment immunity from suit.[37] On September 2, 2011, Hester filed a Motion to Amend the Complaint to add additional parties and claims.[38] With respect to the Community, Hester sought to add Jean Stacy, the former President of the Community in her individual and official capacities and to add a State constitutional claim. The Motion was opposed by the State Defendants as futile.[39] Neither the County Defendant nor the Lower Sioux Defendants opposed the motion. Magistrate Keyes filed a Report and Recommendation on January 24, 2012 recommending that (1) Plaintiffs Motion to Amend be granted to the extent it dismissed the State Defendants; and (2) the State Defendants be

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[32] Complaint, Counts 1, 3 & 4.
[33] Complaint, Count 3.
[34] Complaint Count 5.
[35] Complaint Count 7, paragraphs 56 - 63.
[36] Complaint, paragraphs 70 – 78. This memorandum will defer the issue of Class certification pending the Court's ruling on this Motion.
[37] Dkt. 8.
[38] Dkt. 12.
[39] Dkt. 16.

dismissed from the case.[40] Hester objected to the Report and Recommendation, and on March 13, 2012, this Court adopted it and allowed Hester "leave to amend his original Complaint to assert additional claims against Patrick Rohland and Jean Stacy."[41] To date, no amended complaint has been filed.[42]

IV. STANDARD OF REVIEW

Rule 12 provides that a grant of judgment on the pleadings is appropriate "where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law."[43] The Court will view all facts plead by the non-moving party as true and grant all reasonable inferences in favor of that party.[44]

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[40] *Hester v. Redwood County, et al*, Civ.No. 11-1690 ADM/JJK, Amended Report and Recommendation (Jan. 24, 2012)(the Amended R&R).
[41] *Hester v. Redwood County, et al*, Civ.No. 11-1690 ADM/JJK, Memorandum Opinion & Order (Mar. 13, 2012)(the District Court Order).
[42] The Community's Motion is based on the original Complaint. If an Amended Complaint is filed, the Community's arguments remain fully apposite. Defenses as to President Prescott apply equally to former President Stacy. Moreover, the Plaintiff's anticipated State constitutional claims are inapplicable to the Lower Sioux Defendants. *See, Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171-72 (1973); *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v, Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)(state law "can have no force' on an Indian reservation without the express consent of Congress).
[43] *Minch Family v. Buffalo-Red River Watershed Dist.*, 628 F. 3d 960, 965 (8th Cir. 2010).
[44] *Id*.

Dismissal under Rule 12(b)(1) is appropriate where a court lacks subject matter jurisdiction over the action pled. The plaintiff bears the burden of demonstrating subject matter jurisdiction, but the Court has an independent obligation to confirm that it has subject matter jurisdiction.[45] In doing so, the Court may consider evidence beyond the pleadings[46] without converting the motion to one for summary judgment.[47]

Dismissal under 12(b)(2) is appropriate where a court lacks personal jurisdiction over one of the parties.[48] The Plaintiff bears the burden of demonstrating a *prima facie* case for the Court's personal jurisdiction over the parties and must do so by pleading sufficient facts "to support a reasonable inference that the defendant can be subjected to jurisdiction within the state."[49] The Plaintiff's *prima facie* showing "must be tested, not by the pleadings alone, but by the affidavits and exhibits.[50]

Dismissal under Rule 12(b)(6) is appropriate where a Plaintiff has failed to present on the face of a complaint "sufficient factual matter, accepted as true, to

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[45] *Arbaugh v. Y.H. Corp.*, 546 U.S. 500, 506 (2006).
[46] *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 470 (8th Cir. 1993).
[47] *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir.1990).
[48] *Newhard, Cook & Co. v. Inspired Life Centers, Inc.*, 895 F.2d 1226, 1228 (8th Cir. 1990).
[49] *KV Pharmaceutical Co. v. J. Uriach & CI*A, SA, 648 F.3d 588, 592-93 (8th Cir. 2011).
[50] *KV Pharmaceutical*, 648 F.3d at 593.

'state a claim for relief.'"[51] A complaint presents a claim with "facial plausibility" where it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[52] More is required to meet the standard required by Rule 12 "than labels and conclusions" or the "formulaic recitation of the elements of a cause of action."[53]

In considering a motion made under 12(b)(6), the Court may consider the complaint, exhibits attached to the complaint, documents that the complaint incorporates by reference,[54] and materials of which the Court may take judicial notice,[55] including Court records.[56] The Court need not accept the plaintiff's legal conclusions drawn from the facts,[57] and should not accept as true unwarranted inferences, unreasonable conclusions or arguments,[58] nor ignore pleaded allegations that undermine the Plaintiff's claims.[59]

If the Court determines that the materials presented in support of a Rule 12 motion are beyond the scope of those permitted to be considered, Rule 12(d) provides that the Court should convert the motion into one for summary judgment

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[51] *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[52] *Id.* at 1949.
[53] *Twombly*, 550 U.S. at 555.
[54] *Rivera v. Centro Medico De Turabo, Inc*., 575 F.3d 10, 15 (1st Cir. 2009).
[55] *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).
[56] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978).
[57] *Philips v. Pitt Co. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).
[58] *Id.*
[59] *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

under Rule 56(a).[60] Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.[61] The moving party must demonstrate that no genuine issue of material fact exists, but that burden may be met by pointing out the absence of evidence to support the non-moving party's case.[62] The facts and the inferences drawn from them must be viewed in a light most favorable to the non-moving party.[63] Once the moving party has carried its burden, the non-moving party must set forth specific facts showing there is a genuine issue for trial.[64]

A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party."[65] "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]."[66] An issue is "genuine" if it is "bona fide"[67] rather

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[60] *Rivera*, 575 F.3d at 15.
[61] Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992).
[62] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
[63] *Anderson*, 477 U.S. 242, 255 (1986).
[64] Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. 574, 574 (1986).
[65] *DuBose v. Kelly*, 187 F.3d 999, 1000-01 (8th Cir. 1999).
[66] *Anderson*, 477 U.S. at 252.
[67] *Associated Press v. United States*, 326 U.S. 1, 6 (1945).

than "pretended,"[68] and "genuiness" must be established by "sufficient evidence supporting the claim that the factual dispute requires a jury or a judge to resolve the parties differing versions of the truth at trial."[69] A factual dispute is "material" if it is "outcome determinative under prevailing law".[70] If the fact is not necessary to a decision on the claim that is the subject of the motion, the fact is not "material."[71]

V. DISCUSSION

A. THE PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER 42 U.S.C. §1983.

Hester asserts two federal constitutional claims pursuant to 42 U.S.C. §1983, as well as various pendent state law claims. As this Court has already stated, a §1983 claim must allege facts that, if proven true, would demonstrate that the defendant violated the Plaintiff's constitutional rights when acting under color of state law.[72] Section 1983 "does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the

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[68] *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 362 (5th Cir. 1945).
[69] *Hahn v. Sargent*, 523 F.2d. 461 (1st Cir. 1975).
[70] *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992); *Anderson*, 477 U.S. at 248 (a fact is "material" if its existence might affect the result of the action).
[71] *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1021-22 (8th Cir. 1997).
[72] District Court Order at 11; Amended R&R at 13, citing *West v. Atkins*, 487 U.S. 42, 48 (1988).

United States."[73] Accordingly, a claimant must identify the particular federal right that allegedly has been violated.[74] Inquiry into a §1983 claim must focus on two essential elements: (1) whether the conduct complained of was committed by a "person" acting under "color of state law"; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[75]

Hester's §1983 claims are not legally cognizable for the following reasons: (1) the Community and its officers acting in their official capacity are not "persons" within the meaning of 42 U.S.C. §1983; (2) 42 U.S.C. §1983 does not apply to actions taken by the Community and its officials under color of Tribal law; (3) Hester cannot establish the violation of a "clearly established constitutional right"; (4) Hester has not demonstrated a cognizable individual or official capacity claim against any of the Lower Sioux Defendants; and (5) the Lower Sioux Defendants are protected by qualified immunity.

For these reasons, the Court should dismiss Hester's §1983 claims for failure to state a claim upon which relief can be granted.

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[73] *Gatlin v. Green*, 362 F.3d 1089, 1093 (8th Cir. 2004).
[74] *Id*.
[75] *DuBose v. Kelly*, 187 F.3d 999, 1002 (8th Cir. 1999).

1. The Lower Sioux Defendants are not "persons" under 42 U.S.C. §1983.

Hester cannot state an actionable claim against the Lower Sioux Indian Community under 42 U.S.C. §1983 because, as a matter of law, the Community is not a "person" amendable to suit under the statute.

The plain and unambiguous text of §1983 permits only a "person" to be a defendant in an action under the statute's auspices. The Supreme Court has made clear that the term "person" as used in §1983 does not encompass sovereign entities.[76] Indeed, Title 1 U.S.C. § 1, incorporates that presumption:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
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> The words "person" and "whoever" include corporations, companies, association, firms, partnerships, societies, and joint stock companies, as well as individuals.

The absence of any provision extending the term to sovereign governments, like Indian tribes, implies that Congress did not intend the term to cover those entities.[77] In *Inyo County v. Paiute-Shoshone Indians*,[78] the Court held that an Indian tribe may not sue under §1983 to vindicate rights held solely

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[76] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 69-70 (1989)(neither a sovereign state nor its officials acting in their official capacities are "persons" under §1983); *Breard v. Greene*, 523 U.S. 371, 378 (1998)(per curiam)(foreign nation is not a "person" under the statute); *Vermont Agency of Natural Resources v. United States*, 529 765, 780 (2000); *cf. Ngiraingas v. Sanchez*, 495 U.S. 182 (1990(a Territory is not a "person" under §1983).

[77] *See United States v. Mine Wo*rkers, 330 U.S. 258, 275 (1947).

[78] 538 U.S. 701, 704, 711-12 (2003).

because of its status as a sovereign entity.[79] Although *Inyo County* concluded that a tribe is not a "person" as a *plaintiff* in a §1983 suit, the same result must necessarily be reached concerning whether a tribe could be a "person" as a defendant in such an action, because Congress is presumed to have intended that a term have the same meaning throughout the statute in which it appears.[80]

This interpretation makes particular sense in the context of Indian Tribes who, because of their unique sovereign status, are not subject to the Fourteenth Amendment.[81] Actions against Indian Tribes for civil rights violations can only be examined under the Indian Civil Rights Act.[82] It would make no sense to included Tribes within the meaning of the term "person" under section 1983 when Tribes are not subject to the constitutional amendment that law is designed to enforce.

For the same reason, Hester has no §1983 claim against any of the individual Lower Sioux Defendants in their official capacities. Sovereign government officials, acting in their official capacities, are not "persons" for purposes of the statute because an action against an official acting in his or her

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[79] Interestingly, the parties in that case, as well as the United States as *amicus curiae*, agreed that Indian tribes, like States, are not "persons" under the statute.
[80] *See*, *e.g.*, *Brown v. Gardner*, 513 U.S. 15, 118 (1994)(noting that this presumption is "most vigorous when a term is repeated within a given sentence").
[81] *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967).
[82] *R.J. Williams Co.*, 719 F.2d at 982.

official capacity is an action against the sovereign.[83] It is uncontroverted that Defendants Prescott and Meece were, at all times relevant to this case, acting in their official capacities. Therefore, neither the Community nor its officials can be the subject of a suit under 42 U.S.C. §1983.

2. 42 U.S.C. §1983 does not apply to the Lower Sioux Defendants' actions taken under color of Tribal law

While an action taken under "color of state law" is a required element of a claim under §1983, an action taken under "color of Tribal law" is beyond the scope of §1983.[84] The purpose of 42 U.S.C. §1983 is to enforce the provisions of the Fourteenth Amendment,[85] which are not applicable to Indian tribes.[86] Actions taken under color of Tribal law are, therefore, beyond the scope of §1983 and can only be examined under the Indian Civil Rights Act.[87] Accordingly, the Court must first discern the source of authority for the Lower Sioux Defendants' actions, and must dismiss under Rule 12(b)(6) those claims that are based on their actions taken under color of Tribal law, rather than under color of State law.

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[83] *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Will*, 491 U.S. at 70-71 (1989).
[84] *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) citing *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983).
[85] *Monroe v. Pape*, 365 U.S. 167, 171 (1961).
[86] *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967).
[87] *R.J. Williams Co.*, 719 F.2d at 982.

In *Bressi v. Ford*,[88] a §1983 claim was filed against four officers of the Tohono O'odham Tribe in their individual capacities alleging a violation of Bressi's constitutional rights when he was stopped at a safety checkpoint established on a highway within the Tohono O'odham Indian Reservation. Those officers, like Meece, were authorized to enforce state criminal law on the Reservation.[89] Bressi, a non-Indian, challenged the tribal officer's authority to stop him, refused to produce his license or other identification and refused to give his name. He was arrested and cited for failure to provide a drivers license and failure to comply with a police officer's lawful order, both under Arizona law.[90]

In evaluating the §1983 claim, the Court first inquired whether the Officers were acting under color of tribal law or state law "because the United States Constitution does not restrict actions by tribal governments," and, so, "Bressi cannot succeed in a claim against the Officers for deprivation of constitutional rights to the extent that the Officers were acting under color of tribal law."[91] The Court concluded that the safety checkpoint constituted action taken under color of tribal law and so, too, was the officers' stop of Bressi to check his identification, sobriety and other safety measures.[92] The Court found that the tribal officers actions crossed the threshold to action "under color of State law" when the officers

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[88] 575 F.3d 891 (9th Cir. 2009).
[89] *Bressi*, 575 F.3d 891, 894.
[90] *Id.*
[91] *Bressi*, 575 F.3d at 895, citing *R.J. Williams* 719 F.2d 979, 982 (9th Cir. 1983).
[92] *Id.* at 897.

acted beyond the scope of their tribal law authority and ventured into an area that was authorized *only* as a matter of state law.[93] At that point, their authority to detain Bressi further and cite him for refusal to produce identification or respond to their direction existed only under state law.[94]

a. Counts 3, 4 and 5 of Plaintiff's Complaint are barred because the actions of Meece were taken under color of Tribal law.

Hester's Complaint appears premised on the misconception that *all* of Meece's actions on the night of December 16, 2008 were taken under color of State law,[95] and in the absence of that authority, Meece's actions resulted in various intentional torts and Constitutional violations giving rise to this §1983 claim. But with the exception of the arrest and administration of the ICA, Meece's actions were authorized by tribal, and not state law, and are, therefore, not covered by §1983.

On December 16, 2008, Meece was patrolling the Lower Sioux Reservation as a Lower Sioux Police Officer, under his tribal commission and authority, and in a Lower Sioux Police patrol vehicle. He responded to a call placed to his LSPD phone regarding a vehicle in distress on a Reservation road, and provided

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[93] Id. ("Once they departed from, or went beyond, the inquiry to establish that Bressi was not an Indian, they were acting under color of state law.")

[94] As the Court notes, "The tribe…is authorized to stop and arrest Indian violators of tribal law traveling on the highway. In the absence of some form of state authorization, however, tribal officers have no inherent power to arrest and book non-Indian violators." 575 F.3d at 896, citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[95] Amended Complaint at paragraphs 16.

assistance at the scene to the driver, Hester, a Lower Sioux-member. At the scene, he determined that the motorist might be intoxicated and, so, pose a threat to the safety of all motorists on the Reservation. Meece transported Hester from the scene on a dangerously cold night and arranged for the vehicle to be towed.

Meece had authority to take *all* of these actions under tribal law and none of them was authorized *only* by state law.[96] Under *Bressi*, Meece's actions are not actionable under §1983 because Hester's Complaint fails to demonstrate that they were taken under color of state law. Accordingly, Counts 3, 4 and 5 of Hester's Complaint, alleging assault and battery, kidnapping and false imprisonment and negligence, should be dismissed for failure to state a claim upon which relief can be granted.

b. Prescott's actions, to the extent there were any, were taken under color of Tribal law.

Hester's claims against President Prescott do not allege *any action*, much less action taken under "color of state law". Generally, Count 5 alleges that the Community and President Prescott were negligent in their duty to maintain police liability insurance consistent with §626.91, subd 2(a)(2).[97] But the Community does not act under color of state law when making *any* governmental decisions, including purchasing insurance. The actions of the Community Council members

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[96] In fact, Hester was cited under Tribal law for driving without a valid license in violation of the Lower Sioux Traffic Code.

[97] Hester also includes Prescott in Count 2, but again fails to allege any conduct.

derive from, and are defined by, Community law, specifically, the Community Constitution[98] and tribal ordinances adopted by the Community Council pursuant to its delegated authority.[99] In fact, President Prescott lacks *any* authority to act in his official capacity "under color of state law".

Because the Community and President Prescott did not act under "color of state law," the Court should dismiss the § 1983 claims against them.

3. Hester has not alleged the violation of a clearly established constitutional right.

Hester's §1983 claim is also not viable because he has not alleged the violation of a" clearly established constitutional right." Hester appears to contend that a technical defect in the Community's liability insurance rendered *all* actions by the Lower Sioux Officers without legal authority and, thus, in violation of the Fourth Amendment. But this Court has already noted that there is no constitutionally-protected right to be arrested by an officer whose employer maintains a particular level of liability insurance:

> . . .A plaintiff must offer "particularized allegations of defendant's violation of a clearly established constitutional right. Although Plaintiff's criminal conviction for test refusal was reversed because the Lower Sioux officers were not adequately insured to be "peace officers" as defined in Minnesota state law for purposes of defining who could administer the chemical test, this does not mean that Plaintiff's constitutional rights were violated. Plaintiff had no clearly established constitutional right that he could assert to be arrested by a police officer who was covered by a minimum level of

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[98] L.S. CONST., Art IV, Sec. 1 and Art. V, Sec. 1 (Exhibit 1).
[99] Id.

> liability insurance and there was no clearly established constitutional right violated in connection with the driver's license revocation for refusal to take the chemical test.[100]

Section 1983 provides a remedy only for the violation of rights conferred by the Constitution or laws of the United States. The violation of a state law insurance requirement does not transform Hester's arrest into a Fourth Amendment violation, because there is no federal right not to be arrested in violation of state law.[101] Case authorities are uniform that the violation of a state statute alone does not create a cognizable claim under §1983, [102] even where that violation implicates the officer's commission,[103] arrest authority[104] or territorial jurisdiction.[105]

Here, the only basis for the invalidation of Hester's arrest (and subsequent conviction) was a failure to fully comply with an insurance requirement under Minnesota law. The *Hester* Court found that noncompliance affected Meece's status as a "peace officer" authorized to administer the ICA under Minnesota

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[100] Amended R&R at 20; District Court Order at 11.
[101] *Knight v. Jacobson*, 300 F.3d 1272, 1275-76 (11th Cir. 2002).
[102] *See, e.g. United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995); *Missouri ex rel Gore v. Wochner*, 620 F.2d 183, 185 (8th Cir.), *cert denied*, 449 U.S. 875 (1980); *U.S. v. Burtton*, 599 F.3d 823, 838 (8th Cir. 2010); *Knight v. Jacobson*, 300 F.3d 1272, 1275-76 (11th Cir. 2002) (Collecting cases); *Pasiewicz v. Lake County Forest Preserve District*, 270 F.3d 520, 526-27 (7th Cir. 2001); *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984).
[103] *U.S. v. Jones*, 185 F.3d 459, 462 (5th Cir. 1999)(failure to file required bonds with clerks of court).
[104] *United States v. Garcia*, 462 U.S. 1127 (1983)(validity of arrest by Game Warden); Whren *v. U.S.*, 517 U.S. 806, 815 (1996).
[105] *Abbot v. Crocker*, 30 F.3d 994, 997-98 (8th Cir. 1994).

Statutes, Section 169A.03, subd. 18. The Court did not conclude that the detention and arrest of Hester was not supported by reasonable probable cause and, therefore, in violation of the Fourth Amendment. The sole basis for invalidating the challenged arrest was a purported violation of a state statutory requirement and that, alone, does not give rise to a cognizable claim under §1983. For this reason, Hester's claim fails as a matter of law.

4. Hester has failed to allege a cognizable basis for either an "individual capacity" or an "official capacity" claim against Prescott or Meece.

Hester's Complaint further fails to establish a cognizable basis for either an "individual capacity" or an "official capacity" claim under §1983. An "individual capacity" claim asserts a violation of a constitutional right by a government official for action taken *outside* of the scope of his or her official duties, but under color of state law.[106] "Individual capacity" claims "generally allege that a government official is individually liable for the deprivation of a federal right..."[107] and [are] only viable if [they] allege personal involvement by a defendant because the doctrine of *respondeat superior* does not apply to actions brought under §

[106] Amended R&R at 14-15; *Hafer v. Melo*, 502 U.S. 21, 25; *see Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).
[107] Id. at 14-15.

1983.[108] A claimant must demonstrate that the defendant either participated in or acquiesced in the deprivation of the constitutional right alleged.[109]

An "official capacity" claim asserts a violation of a constitutional right by an official acting *within* the scope of his or her official duties but engaged in the "enforcement… of a municipal or state policy, practice, or decision of a policymaker that causes the violation of the plaintiff's constitutional rights."[110] Such a claim is viable only when the governmental entity is a 'moving force' behind the alleged constitutional deprivation[111] and, thus, the governmental entity's policy or custom must have played a part in the violation of federal law.[112]

Hester's claims fail to allege a cognizable basis for either an "individual capacity" or "official capacity" claim against the Lower Sioux Defendants.

a. Hester has failed to state an individual capacity claim against Prescott.

With respect to Prescott, the Plaintiff fails to allege *any facts* demonstrating that he took *any action whatsoever* resulting in the deprivation of Hester's clearly-

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[108] *Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir. 1992).
[109] Amended R&R at 16, citing *Iqbal*, 129 S.Ct. at 1949 (stating that "each Government official is only liable for his or her own misconduct").
[110] Amended R&R at 15, citing *Monell v. Dep't of Soc. Servs. of N.Y.,* 436 U.S. 658, 694 (1978).
[111] *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) quoting *Monnell v. New York City Dept. of Soc'l Sev's*, 436 U.S. 658, 694 (1978).
[112] *Kentucky v. Graham*, 473 U.S. 159, 167 91985).

established constitutional right.[113] Absent any of these elements, or in this case all of them, dismissal of President Prescott is appropriate.[114]

b. Hester has failed to State an individual capacity claim against Meece.

The Plaintiff fares no better with respect to his allegations against Meece. While Hester identifies Meece as a police officer of the Community,[115] and alleges that he was acting within the course and scope of his duties at all times material to the Complaint,[116] he, nevertheless, names Meece in his individual capacity.[117] As this Court has already noted, merely adding the phrase "individual capacity" does not make the pleading so:

> Here the Plaintiff's Amended Complaint does not indicate whether he intends to sue [the state officials] in their individual or official capacities. This deficiency cannot be cured by simply allowing Plaintiff to add the words "individual capacity" to the Complaint.[118]

Although not clear from the face of the complaint, it appears that Hester claims the insurance coverage defect rendered Meece not a licensed peace officer for *any* purpose and therefore, stripped him of any official capacity.[119] But the

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[113] Complaint at 3, para 9.
[114] Amended R&R at 16 citing *Thomas v. St. Louis Bd. of Police Comm'rs*, No. 03-1114, 2007 WL 475263, at *5 (E.D. Mo. Feb. 9, 2007).
[115] Complaint at 4, para 12.
[116] *Id.*
[117] *Id.*
[118] Amended R&R at 15, citing *Iqbal*, 129 S.Ct. at 1948 (explaining that a plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution).
[119] Complaint at 7, paragraphs 25-26.

record demonstrates to the contrary: Meece was at all times acting with his official capacity. He was a licensed peace officer and an officer of the LSPD, and the Minnesota Supreme Court's *Hester* Decision does not support a contrary conclusion. The *Hester* Court held only that Meece was not a "peace officer" within the meaning of Section 169A.03, subd. 18 only for the limited purpose of administering the ICA and chemical testing. The Court *did not* find that Meece was acting outside the scope of his official duties; (1) when he responded to the scene of a drunk-driving accident occurring on the Reservation and involving a Community member; or (2) when he acted to protect the safety of the Community and motorists on the Reservation by apprehending a suspected drunk driver and transporting him to the Redwood County Law Enforcement Center; or (3) when he arrested Hester for DUI. And, the *Hester* decision does not conclude that Meece's administration of the ICA was beyond the scope of Meece's official duties. The *Hester* decision provides only that, at the time of those actions, Meece was not a "peace officer" under state law to administer the ICA because of a technical insurance coverage defect and that, as a result, Hester's conviction for *refusing to take a test* pursuant to that advisory and must be overturned. The coverage defect does not demonstrate that Meece was acting beyond the scope of his authority or in excess of his official duties.[120]

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[120] The Omnibus Hearing Order further establishes that Meece acted with reasonable articulable suspicion and probable cause. Omnibus Hearing Order,

For these reasons, Hester has failed to state an individual capacity claim against Meece.

c. Hester has failed to state an official capacity claim against Prescott.

Hester has similarly failed to allege any basis for an official capacity claim against Prescott. For an official capacity claim to succeed against a government official under §1983, a plaintiff must demonstrate that (1) the government had a policy, practice or custom; (2) of violating individuals' federally-protected rights; and (3) that the policy proximately caused the plaintiff's alleged damages.[121] "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, which policy can be attributed to a policymaker."[122]

While the Complaint asserts that the Lower Sioux officials were acting in their official capacities,[123] the Complaint lacks any allegation regarding the "policy, practice, or decision of a policymaker" the enforcement of which by the Lower Sioux Defendants caused "the violation of the plaintiff's constitutional

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Conclusions II & III.
[121] *Mettler v. Whitledge*, 165 F.3d 1197, 1205 (8th Cir. 1999).
[122] *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).
[123] Complaint at 3, paragraph 9.

rights."[124] Similarly, the Complaint fails to allege how the Community's role was "a 'moving force' behind the alleged constitutional deprivation" much less how the Community's "policy or custom" played a part in the violation of federal law and does not address the "single occurrence" exception allowed for even unconstitutional activity.

Hester's Complaint further does not allege *any facts* regarding *any action* of President Prescott, much less the enforcement of a policy, practice or decision that deprived Hester of a constitutionally-protected right. Absent any such allegation, dismissal of the § 1983 claims against Prescott is appropriate.[125]

d. Hester has failed to state an official capacity claim against Meece.

Hester's official capacity claim against Meece is similarly defective. It lacks any allegation that Meece was enforcing a practice, policy or decision that he knew violated Hester's constitutional rights. Without an allegation of an unconstitutional practice, policy or decision, the Complaint does not present a viable "official capacity" §1983 claim against Meece.

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[124] Because Indian Tribes are not restricted by the United States Constitution, it is difficult to see how the Lower Sioux Community could have a policy or practice that contributed to the violation of a constitutional right.

[125] Amended R&R at 16, citing *Thomas v. St. Louis Bd. Of Police Comm'rs,* No. 03-1114, 2007 WL 475263, at *5 (E.D. Mo. Feb. 9, 2007).

5. Hester's claims are barred by qualified immunity.

Even if Hester had pled facially sufficient §1983 claims, the claims are barred by the qualified immunity afforded the Lower Sioux Defendants. Qualified Immunity "shields Government officials from liability insofar as their conduct does not violate clearly established statutory or constitutional rights."[126] Qualified immunity protects officials who "mistakenly, but reasonably, believe their actions are lawful."[127] and it "gives ample room for mistaken judgments" but does not protect "the plainly incompetent or those who knowingly violate the law."[128] Qualified immunity is a question of law that courts seek to resolve "at the earliest possible stage in the litigation"[129] because it is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[130]

a. Hester's claims fail the *Saucier* Test.

The Supreme Court has adopted a two-step qualified immunity analysis.[131] First, a court must determine whether the actions of the public official violated a

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[126] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1945 (2009); *Brown v. City of Golden Valley*, 574 F.3d 491, 495 (8th Cir. 2009).
[127] *Curley v. Klem*, 499 F.3d 199, 206-07 (3rd Cir. 2007).
[128] *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986).
[129] *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)(per curiam).
[130] *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).
[131] *Saucier v. Katz*, 533 U.S. 194 (2001); *Samuelson v. City of New Ulm*, 455 F.3d 871, 875 (8th Cir. 2006).

constitutional right.[132] Second, "[i]f, and only if, the court finds a violation of a constitutional right,"[133] the court asks whether the right that was violated was clearly established, or, in other words, "whether it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted."[134] If reached, this second element is to be viewed from the official's reasonable perspective and in light of the information available to him at the time.[135] The contour of the violated rights "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[136] Finally, in addition to the two-element *Saucier* test, liability under § 1983 requires the demonstration of a causal link to, and direct responsibility for, the deprivation of rights.[137] Qualified immunity only applies to actionable claims arising under color of state law, not those arising under color of tribal law, which are not cognizable under §1983.[138]

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[132] *Maryland v. Garrison*, 480 U.S. 79, 85 (1987).
[133] *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1774, 167 L.Ed.2d 686 (2007).
[134] *Saucier*, 533 U.S. at 202. See also, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 473 (8th Cir. 2010).
[135] *Maryland v. Garrison*, 480 U.S. 79, 85, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987).
[136] *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Littrell v. Franklin*, 388 F.3d 578, 583 (8th Cir. 2004).
[137] *Madewell v. Roberts*, 909 F.3d 1203 (8th Cir. 1990).
[138] See, discussion at17-21above.

Hester's claim fails both elements of the *Saucier* test. First, as previously discussed, Hester has failed to demonstrate the violation of a constitutionality – protected right.[139]

Second, even if such a constitutional right existed, Hester's claim fails the second element of the Saucier test because Meece's lack of *actual authority* to administer the ICA was not "clearly established" when Meece arrested Hester – in fact it was not fully appreciated until the Minnesota Supreme Court issued its *Hester* decision nearly 2 years later. Instead, the facts demonstrate clearly that Meece's actions on December 16, 2008 were supported by arguable and actual probable cause.

Qualified immunity "extends to a police officer who is wrong, so long as he is reasonable" and, so, the governing test is not probable cause in fact but *arguable probable cause*.[140] The fundamental question is "whether the state of the law, as it existed at the time of the arrest, gave the defendants 'fair warning' that the arrest was unconstitutional."[141] And where a wrongful arrest is alleged, officers are shielded by qualified immunity if their mistaken belief in the existence of probable cause "is objectively reasonable."[142]

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[139] See, discussion at 21-23 above.
[140] *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005) (internal quotation marks omitted).
[141] *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478 (8th Cir. 2010).
[142] *Amrine v. Brooks*, 522 F.3d 823, 832 (8th Cir. 2008).

Here, Meece administered the ICA and processed Hester's arrest for DUI and test refusal, just as he had processed countless such matters in the past, and with the full belief that his actions were authorized by law and were conducted consistent with the letter of that law. In fact, no one involved in this case, the Plaintiff included, had any inkling on December 16, 2008 that: 1) the Community lacked the minimum insurance coverage required by the Act; or 2) that this insurance defect would be found to implicate the authority of Meece to administer the ICA. The facts presented to Meece on December 16, 2008, and even an objective view of those facts today, demonstrate that he acted responsibly and with an objectively reasonable belief that his actions were entirely lawful.

Whether Meece's belief in his authority was mistaken, as Hester alleges, is irrelevant. The proper question is whether Meece's belief at the time of the arrest was reasonable, and the facts of this case demonstrate clearly that it was. Accordingly, he is entitled to qualified immunity for his actions.

b. Hester is estopped from re-litigating the probable cause for his arrest.

The probable cause for Hester's arrest has been established by the courts of the State of Minnesota, and that determination precludes Hester from re-litigating that issue here. Collateral estoppel bars a party from re-litigating issues that have

been litigated by the parties and decided by a previous adjudication.[143] Collateral estoppel precludes re-litigation of any issue when: (1) the issue is identical to one in a prior adjudication; (2) there was a final judgment on the merits in the prior proceeding; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.[144]

The record in Hester's criminal proceeding demonstrates that the probable cause for Hester's arrest was raised at the Omnibus hearing and was decided by the Court in the Omnibus Hearing Order, which concluded that:

> (1) the officers had reasonable articulable suspicion to request the PBT;
>
> (2) that Meece had probable cause to believe Hester had been operating a vehicle in violation of Minnesota Statute 169A.20; and
>
> (3) that there existed probable cause for the State charges.[145]

The probable cause question litigated and decided in the criminal proceeding is identical to the probable cause question before this Court and it was determined by a final judgment on the merits; Hester was a party to the prior proceeding; and he had a full and fair opportunity to litigate the issue before the

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[143] *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 326 n 5 (1979); *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982).
[144] *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984).
[145] Omnibus Hearing Order at Conclusions II, III & IV; Memorandum supporting Omnibus Hearing Order at 10-13.

District Court and on appeal. In these circumstances, Hester is collaterally estopped from re-litigating the issue in this subsequent §1983 case.[146]

For all of the foregoing reasons, Hester's §1983 claims must be dismissed for failure to state a claim upon which relief can be granted.

B. THE PLAINTIFF'S CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY.

Based on the allegations in Hester's Complaint, the Community's sovereign immunity defeats the Court's jurisdiction. The fact that a federal statute may apply to tribes "does not mean that Congress abrogated tribal immunity in adopting it."[147] Here, even if the Court determines that §1983 applies to the Lower Sioux Defendants—and the Community submits that it does not—the Community is immune from this action and has not waived that immunity. Hester's claims must, therefore, be dismissed for lack of subject matter and personal jurisdiction and failure to state a claim upon which relief can be granted.

Indian tribes possess immunity from lawsuits equal to that enjoyed by other sovereign entities.[148] An Indian tribe's sovereign immunity is a "necessary

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[146] *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001); *Smith v. Menter*, No. 07-4546, 2008 WL 906178, *8 n 2 (D. Minn. Mar. 31, 2008); *Cota v. Chapa*, 2 Fed. App'x 621, 622 (9th Cir. 2001).
[147] *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000).
[148] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995); *Smith v. Babbitt*, 875 F.Supp. 1353, 1359 (D. Minn. 1995).

corollary to Indian sovereignty and self-governance[149] and is rooted in the fact that tribes are independent political communities with inherent powers of a limited sovereignty which have never been extinguished.[150] Sovereign immunity protects a tribe from all unconsented claims,[151] and that immunity applies not only to tribal governments, but also to tribal governmental officials acting within their representative capacities and within the scope of their authority.[152] Like other sovereigns, an Indian tribe may waive its immunity and consent to suit, but that waiver "'cannot be implied but must be unequivocally expressed.'"[153]

Community Resolution 98-59 provides a waiver of the Community's sovereign immunity in two particular and limited ways: for claims arising out of tribal law enforcement, a waiver of immunity to Tribal Court; for claims arising out of enforcement of state law by officers "*acting within the scope of authority conferred on them pursuant to Section 626.91*," a waiver to tribal, state, and federal courts. The resolution provides specifically as follows:

> Limited Waiver of Sovereign Immunity; Consent to Jurisdiction.
>
> Except as expressly and specifically provided in this Section, the Lower Sioux Community Council reserves it sovereign immunity from suit in tribal, federal and state courts. The Lower Sioux Community Council

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[149] *Three Affiliated Tribes v. Wold Eng'g,* 476. U.S. 877, 890 (1986).
[150] *United States v. Wheeler*, 435 U.S. 313, 322 (1978).
[151] *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 758-60 (1998).
[152] *Smith v. Babbitt*, 875 F. Supp. 1353, 1363 (D. Minn. 1995).
[153] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). *See also Kiowa Tribe*, 523 U.S. at 754; *Rupp*, 45 F.3d at 1244 (8th Cir. 1995).

hereby waives its sovereign immunity from suit and consents to jurisdiction as follows:

(a) Claims Arising Out of Enforcement of State Law. The Lower Sioux Community Council hereby waives its sovereign immunity from suit with respect to any claim or cause of action arising out of the enforcement of the laws of the State of Minnesota by any officer, employee or agent of the Community acting within the scope of the authority conferred upon them pursuant to Minnesota Statutes, § 626.91 and consents to the jurisdiction of the federal, state and tribal courts to the same extent as a municipality of the State at Minnesota pursuant to Minnesota Statutes, § 466;

(b) Claims Arising Out of Enforcement of Tribal Law. By resolution 55- 96, the Lower Sioux Community Council has waived its immunity from suit for any civil action for damages, alleging the commission of a tortuous act by the Community, its businesses, officers, employees and agents on the Lower Sioux Reservation, including claims or causes of action arising out of the enforcement of the laws of the Lower Sioux Community by any officer, employee or agent of the Community acting within the scope of the authority conferred upon them by the Lower Sioux Community Council and consents to the jurisdiction of the Tribal Court of the Lower Sioux Community only. This waiver as applied to causes of action arising out of the enforcement of the laws of the Lower Sioux Community shall be subject to the same conditions and limitations as would apply to municipality of the State of Minnesota pursuant to Minnesota Statutes, § 466.

1. The Community is immune from claims arising out the enforcement of Tribal law.

The Lower Sioux Defendants are immune from those claims in the Complaint that arise from the enforcement of tribal law, because the Community's waiver of immunity for such claims extends only to claims brought before the Tribal Court. With the exception of Hester's arrest and the administration of the

ICA, Meece's actions on the night of December 16, 2008 were authorized by tribal law. His response to the scene, his investigation of the scene, his securing the roadway, towing the Plaintiff's truck and transporting the Plaintiff from the scene all were actions authorized by tribal law. No state law authority was invoked or necessary to permit those actions. Further, the actions of Prescott, if any, were, and only could have been, taken under authority of Tribal law. Therefore, Hester's claims arising from those actions, including assault and battery, kidnapping and false arrest, and negligence[154] must be dismissed.

2. The Community is immune from claims arising out Hester's arrest and the administration of the ICA under State law.

The Lower Sioux Defendants are also immune from Hester's claims relating to his arrest and the administration of the ICA. Community Council Resolution 98-59 provides a limited waiver of claims arising out of the enforcement of State law by Community officers "*acting within the scope of the authority conferred upon them pursuant to Minnesota Statutes, Section 626.91*."[155]

As pled by the Plaintiff, the waiver provided in Resolution 98-59 is not applicable in this case because Hester's Complaint alleges throughout that Meece was *precluded* by virtue of the insurance coverage defect from acting under the authority conferred by Section 626.91, including specifically acting as a "peace officer" authorized to administer the ICA under Section 169A.03. Assuming

[154] Complaint, Counts 3, 4 and 5.
[155] Resolution 98-59, at 2, section 1.a. (emphasis supplied).

arguendo that Meece was not "acting within the scope of the authority conferred upon [him] pursuant to Minnesota Statutes, Section 626.91" while administering the ICA, the waiver contained in Resolution 98-59 is inoperable and the Community's immunity from unconsented suit is intact and bars Hester's claims.

C. THE PLAINTIFF'S INTENTIONAL TORT-BASED §1983 CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Hester's intentional tort-based §1983 claims – Counts 3 & 4 – are barred by the applicable statute of limitations. Section 1983 does not establish an independent statute of limitations. Instead, the limitation period for §1983 claims is defined by the state law period for personal injury torts.[156] The accrual of a limitations period is a question of federal law, and [157] the limitations period typically accrues when a plaintiff knew of the injury which is the basis of the action,[158] and it is met when an action is "commenced."[159] Under Minnesota law, an action is commenced upon service of the complaint.[160]

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[156] *Strandlund v. Hawley*, 532 F.3d 741, 746 (8th Cir. 2008).
[157] *Wallace v. Kato*, 549 U.S. 384, 388 (2007).
[158] *Hall v. Elrod*, 399 F. App'x 136, 137 (8th Cir. Oct. 28, 2010) citing *Eidson v. State of Tenn. Dept. of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007); *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991).
[159] *MW Ag, Inc. v. New Hampshire Ins. Co.*, 107 F.3d 644, 646 (8th Cir.1997).
[160] *Rule 3.01, Minnesota Rules of Civil Procedure; McKenzie v. Lunds, Inc.*, 63 F.Supp.2d 986, 1001-02 (D.Minn.1999).

Counts 3 and 4 of the Complaint – kidnapping, assault & battery and false arrest – have two-year statutes of limitations.[161] These claims are based on the events occurring on December 16, 2008,[162] and so accrued on that date, and expired on December 16, 2010.[163] The Tribal Defendants were served the Summons and Complaint on July 6, 2011, over six months beyond the expiration of the statute of limitations. Accordingly, the Plaintiff's intentional tort-based §1983 claims must be dismissed for failing to state a claim because they are time barred.

Hester attempts to avoid the statute of limitations by pleading fraudulent concealment.[164] Fraud, including fraudulent concealment, must be pled with particularity, including "time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud."[165] In order to toll the applicable statute of limitations based on a claim of fraudulent concealment, Hester must prove that "(1) Defendant's concealed

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[161] Minn. Stat. § 541.07(1).
[162] See, respectively, Complaint at 9, Count 3, paragraph 40 ("Defendant Meece assaulted and battered Hester, by engaging in the unwanted, harmful and illegal contact with Hester…") and Count 4, paragraph 43 ("The act of placing Hester in a squad car and transporting him to Redwood County jail…constitutes kidnapping and false imprisonment…"
[163] Hester clearly understood his claim, had researched and argued it when asserting it in his post-trial motion filed on June 15, 2009, which date is still outside the 2-year statute of limitations.
[164] Complaint, Count 7.
[165] *In Re Milk Products Antritrust Litigation*, 84 F.Supp.2d 1016, 1022 (D.Minn. 1997) quoting *Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C.Cir. 1996).

Plaintiffs' cause of action; (2) Plaintiffs failed to discover the cause of action; and (3) Plaintiffs exercised due diligence in attempting to discover the claim."[166]

Hester claims fraudulent concealment, but he has pled only negligence: that the Lower Sioux Defendants had a "duty" to ensure compliance with Section 626.91 and that it "knew or should have known" the requirements of the statute and that they were not met.[167] A fraud claim, however, requires "time, place and content" requirements and "substantially more detail" than is typically expected to standard pleading under Rule 8. So, on the face of the Complaint alone, Hester has failed to properly plead fraudulent concealment and, so, cannot use that vehicle to resurrect his time-barred claims.

The facts of the case also preclude any claim of fraudulent concealment. From December 16, 2008 through Hester's prosecution and conviction, no one had any idea that the Community's liability coverage was relevant to the matter, or that it might affect Meece's state law enforcement authority. Hester and his legal counsel identified and pursued the insurance coverage issue, and asserted it by Motion on June 15, 2009, immediately following his conviction.[168] They requested and received insurance coverage information from the County Defendants, and argued to the District Court, the Minnesota Court of Appeals and

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[166] *In Re Wholesale Grocery Products Antitrust Litigation*, 722 F.Supp. 1079, 1084 (D.Minn. 2010) citing *Milk Products*.
[167] Complaint para 58.
[168] Post-Trial Motion; Post-Trial Motion Memo.

the Minnesota Supreme Court that the insurance coverage non-compliance divested Meece of the authority to administer the ICA. It is difficult to conclude that the Plaintiff's failure to timely file a complaint based on the very same legal theory he litigated in the state courts is the responsibility of anyone other than the Plaintiff.

D. THE PLAINTIFF'S NEGLIGENCE-BASED §1983 CLAIM IS NOT VIABLE.

Count 5 of the Complaint alleges that Lower Sioux Community was negligent in its duty to ensure that its officers "were properly licensed by the state of Minnesota" and were "in initial and continuing compliance with the requirements of state law."[169] Hester alleges that the Community breached its duty "by failing to ensure that [t]he Lower Sioux police department was properly insured and by failing to enter into the necessary agreements to cloak those police officers with the authority of peace officers under Minnesota law." [170] This claim, if considered by the Court, must be rejected because it misstates fundamental facts and fails to allege a viable negligence claim.[171]

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[169] Complaint Count 5, paragraphs 46-47.
[170] Complaint Count 5, paragraph 47.
[171] The Complaint makes crucial factual misstatement. First, LSPD Officers were on December 16, 2008 and remain today: (1) duly appointed officers of the LSPD possessed full tribal law authority; and (2) state-licensed peace officers. Second, neither the purchase of liability insurance nor the MAA "cloaked the LSPD Officers with "peace officer" status – which they already had.

The elements of a negligence claim are (1) duty; (2) breach; (3) proximate cause; and (4) injury in fact.[172] Hester's negligence claim is not viable because it fails to establish a duty owed to Hester. Whether a legal duty exists is a question of law for the Court.[173] The Public Duty Doctrine provides that a general duty "owed to the entire public rather than a specific class of persons cannot form the basis of a negligence action."[174] In short, in order to recover against a municipality for negligence, a plaintiff "must show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public."[175]

Hester's Complaint, on its face, demonstrates that the Public Duty Doctrine applies to this case. Hester claims that "[t]he Lower Sioux . . . owed a duty to all persons who might be stopped, detained, arrested, or otherwise come into contact with the police officers ... to ensure that those officers were properly licensed by the State of Minnesota, in initial and continuing compliance with the requirements of State law."[176] The Complaint alleges a duty owed to the general public and not specifically owed to Hester and, therefore, the Public Duty Doctrine bars Hester's negligence claim.

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[172] *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).
[173] *State v. Back*, 775 N.W.2d 866, 869 (Minn. 2009).
[174] *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 804 (Minn. 1979).
[175] *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 199 N.W.2d 158, 160 (Minn. 1972).
[176] Complaint at 10, para. 46.

E. THE PLAINTIFF STATE LAW CLAIMS ARE BARRED BY OFFICIAL IMMUNITY

If the Court considers the Plaintiff's pendant state law claims, official immunity bars those claims. The doctrine of official immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion, unless the official is guilty of a willful or malicious wrong.[177] While qualified immunity under §1983 and common law official immunity further the same purpose of preventing the threat of personal liability to public officers in the performance of their duties,[178] in Minnesota, official immunity retains an existence distinct from qualified immunity.[179] It protects the actions of public officers except for those who commit a willful or malicious wrong.[180] Like qualified immunity, official immunity protects "all but the plainly incompetent" and those who "knowingly violate the law."[181] Official immunity involves a two-part inquiry: (1) whether the alleged acts are discretionary or ministerial; and (2) whether the alleged acts, even though of the type covered by official immunity, were malicious or willful and therefore

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[177] *Elwood v. County of Rice*, 423 N.W.2d 671, 677 (Minn. 1988).
[178] *Id. at* 678.
[179] *Id. at* 677 (Minn.1988).
[180] *Id.* at 679.
[181] *Dokman v. County of Hennepin,* 637 N.W.2d 281, 292 (Minn. App. 2001).

stripped of the immunity's protection.[182] Whether an act is discretionary is determined by the court as a matter of law[183].

a. As to Prescott.

As previously noted, Hester does not allege *any* action by President Prescott under state law, whether discretionary *or* ministerial and makes no allegation that any action by Prescott was malicious or willful. At most, the Plaintiff alleges negligence, which is addressed above and does not overcome Prescott's official immunity. Absent any allegation regarding these essential elements, Prescott is officially immune from Hester's state law claims.

b. As to Meece.

As previously noted, Meece's actions on December 16, 2008 were by-the-book and professional and were the very type of discretionary action that the official immunity doctrine is intended to protect. As the Court aptly noted in *Kelly v. City of Minneapolis*:

> [T]he conduct of police officers in responding to a dispatch or making an arrest involves precisely the type of discretionary decisions, often split-second and on meager information, that we intended to protect from judicial second-guessing through the doctrine of official immunity.[184]

Hester has alleged no facts that would lead to a contrary conclusion in this case.

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[182] *Dokman*, 637 N.W.2d at 296.
[183] *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999).
[184] *Kelly*, 598 N.W.2d at 665.

Moreover, there are simply no facts alleged that Meece acted maliciously or willfully when assisting and ultimately arresting Hester. Accordingly, his actions, to the extent that they are found to have occurred under state law, are protected by official immunity.

F. THE COURT SHOULD NOT EXERCISE PENDANT JURISDICTION OVER THE PLAINTIFF'S STATE LAW CLAIMS.

The Lower Sioux Defendants submit that ample grounds exist for the Court to dismiss or grant summary judgment against the state-law claims raised in the Plaintiff's Complaint. If the Court does not dismiss some or all of those claims, but finds that the Plaintiff's federal claims must be dismissed, it should also refuse to exercise jurisdiction over the Plaintiff's state law claims. As the Court has noted:

> But even if any state-law claims could survive other hurdles, plaintiff[] doe[es] not provide any reason to suppose that the court would have original jurisdiction over such claims." *Pyron v. Ludeman*, No. 10-4236 (PJS/JJG), 2011 WL 3290365 at *2 (D.Minn. Jul. 29, 2011). Indeed "[i]t would be pointless to permit plaintiff[] to amend [his] complaint to assert claims over which the Court would have only supplemental jurisdiction when the claims over which the Court has original jurisdiction have already been dismissed." *Id.; see also Jenkins v. Hennepin Cnty.*, No. 06-3625 (RHK/AJB), 2007 WL 2287840, at *8 (D. Minn., Aug. 3, 2007)(stating that "[w]hen a district court dismisses a claim over which it has original jurisdiction, it may decline to exercise supplemental jurisdiction over state law claims that are related to the federal claim" and dismissing state law claim against the state

defendants)(citing 28 U.S.C. 1367(c)(3) and *ACLU v. City of Florissant*, 186 F.3d 1095, 1098-99 (8th Cir. 1999).[185]

The Court should refrain from exercising jurisdiction over the Plaintiff's pendant State law claims.

VI. CONCLUSION

For all of the reasons detailed above, the Lower Sioux Indian Community, Gabriel Prescott and Jonathan Meece respectfully request that the Court dismiss the Plaintiff's Complaint against them in its entirety and with prejudice.

[185] Amended R&R at 30-31.

Respectfully Submitted,

JACOBSON, BUFFALO, MAGNUSON,
ANDERSON & HOGEN, P.C.

s/ Joseph F. Halloran_____
Joseph F. Halloran (MN# 244132)
Mary B. Magnuson (MN #160106)
John E. Jacobson (MN #49396), of Counsel
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: jfh@jacobsonbuffalo.com
mmagnuson@jacobsonbuffalo.com
jej@jacobsonbuffalo.com