IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) THE ESTATE OF JAMES DYLAN GONZALEZ, by and through Personal Representative Dolly Gonzales, and (2) DOLLY GONZALES, individually, Plaintiffs, vs. (3) CALVIN BROWN, individually and in his official capacity; (4) THE CITY OF PAWNEE, OKLAHOMA; (5) HERB ADSON, Chief of Police for the City of Pawnee, individually and in his official capacity; (6) LARRY MILLER, individually and in his official capacity; (7) MIKE WATERS, Sheriff of Pawnee County, in his official capacity; (8) PAT LEADING FOX, individually and in his official capacity; and (9) DAVID KANUHO, Chief/Director of Police of the Pawnee Nation Police Department, individually and in his official capacity, Defendants.	) Case No. 12-CV-495-JED-PJC

DEFENDANT DAVID KANUHO'S REPLY TO PLAINTIFFS RESPONSE TO DAVID KANUHO'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT AND BRIEF IN SUPPORT

Defendant David Kanuho, individually and in his official capacity by and through counsel, Alyssa D. Campbell of Legal Advocates for Indian Country,

LLP, files this Reply to Plaintiff's Response to David Kanuho's Motion to Dismiss Plaintiff's Second Amended (Doc. 76). In Support of this Reply, Defendant Kanuho states the following:

STANDARD OF REVIEW

In considering a 12(b)(6) motion, the truth of a plaintiff's well-pled factual allegations must be viewed in the light most favorable to the plaintiff. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir. 2005). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)(abrogating *Conley v. Gibson*, 355 U.S. 41(1957)). Further, a plaintiff's "[f]actual allegations must be enough to raise a right to reief above the speculative level." Twombly, 127 S.Ct. at 1965. It is the plaintiff's duty to furnish factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief. *Id*. at 1966.

A "[p]laintiff's obligation to provide the 'grounds' of their entitlement to relief requires more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing Twombly 127 S.Ct. at 1964-1965).

The rule in *Twombly* has been applied by the Tenth Circuit. See *Ton Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1236 (10th Cir. 2007) (noting that *Twombly* "articluated a new 'plausibility' standard under which a complaint must include 'enough facts to state a claim to relief that is plausible on its face.").

PROPOSITION I:

Defendant Kanuho has no "Official Capacity" or individual capacity

Counsel for the Plaintiffs clearly does not understand the nature of Cross Deputation Agreements. This boiler plate form is one that has been developed by Federal Agencies and States to be a uniform document to delegate authorities and commission officers. Plaintiffs assume that since the City of Pawnee, County of Pawnee and the Pawnee Nation have cross-commissioned officers under the Deputation Agreement, Pawnee Nation officers must then also be BIA officers and therefore federal employees. That assumption is a misreading of the Depuation Agreement (Doc. 25) and is completely unsupported by the facts. Plaintiffs rather than actually address the issue of Kanuho's official and individual capacity, assert that the Deputation Agreement is unconstitutional and therefore an unlawful delegation of authority. However, the authority for the Deputation Agreement arises from the Indian Law Enforcement Reform Act, 25 U.S.C. §2801 et seq. The City and County were entitled to enter into an Agreement as they saw fit with the Pawnee Nation and if the BIA does not require a waiver of

sovereign immunity from the Tribe, why would it be any less acceptable of a provision for the City and County of Pawnee.

Plaintiffs attempt to further their federal officer argument by attached as an exhibit the BIA's Internal Law Enfocement Services Policies which applies to BIA officers and officers with special law enforcement commissions that were granted by the BIA to individual officers. Neither Defendant Kanuho nor Defendant Leading Fox were BIA officers or SLEC commissioned officers for the BIA duriing the acts that Plaintiff's allege gave rise to the above numbered cause of action. The exhibit has no application to the commission of Defendant Leading Fox nor to the case at issue.

In regards to his official capacity, Plaintiffs assert that he is similar to the Defendants Waters and Adson because of his supervisory capacity. However, the standard to determine liability is "**a municipality cannot be liable under § 1983 for acts of a municipal official in his official capacity "unless that official possesses final policymaking authority to establish municipal policy with respect to acts in question**." Defendant Kanuho did not possess final policymaking authority with respect to the acts in question. Plaintiffs allege that Kanuho submitted to the jurisdiction of the State of Oklahoma because 1) the Deputation Agreement is filed with the Secretary of State and 2) because a tribal officer drove onto City of Pawnee property, however Federal and State law mandated the filing of the

Agreement by their agencies not the Tribal entity. Further, an officer who was not on duty at the time of the incident and who did not instruct his officer to assist does not submit himself to the jurisdiction of the State of Oklahoma when Leading Fox had every authority to assist another agency that he was commissioned with. Again, Defendants Kanuho and Leading Fox are not federal officers nor did they have federal law enforcement vehicles and Plaintiff has not presented any evidence of such facts.

The State of Oklahoma conferred authority when it enacted the Oklahoma Interlocal Cooperation Act, 74 O.S. §1001 et seq. The Cross Deputation Agreement does not purport to leave a citizen without recourse. Plaintiff wants to assert that if they cannot join whomever they choose then they are being denied recourse but that is simply not the case.

PROPOSITION II:

Plaintiffs' Claims Against Defendant Kanuho are Barred by the Applicable Statutes of Limitations.

Plaintiffs assert claims against Defendant Kanuho under 42 U.S.C. § 1983 for alleged violations of the Decedent's civil rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. (See Doc. 25, Count I, p. 12, ¶45 - p. 13, ¶51; Count II, p. 14, ¶53 - p. 15, ¶59; Count III, p. 16, ¶61 – p. 17 62.) However, Plaintiffs' claims against Defendant Kanuho are barred by the applicable statute of limitations.

Congress did not provide a statute of limitations period in §1983 actions; therefore, the courts have adopted the most analogous limitations period provided by state law. *Hardin v. Straub*, 490 U.S. 536, 538, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir. 1984). The statute of limitations for civil rights actions is the same as for personal injury actions under state law. *See Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594. In *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd* 471 U.S. 261 (1985), the Tenth Circuit concluded as a matter of law that all such §1983 claims should be considered personal injury claims. The appropriate statute of limitations for civil rights claims in Oklahoma is, therefore, Oklahoma's two year limitation. *See Watson v. Unipress,* 733 F.2d 1386 (10th Cir. 1984); Title 12 O.S. § 95(3).

"Generally, a statute of limitations begins to run when a cause of action accrues, and a cause of action accrues at the time when a litigant first could have maintained his action to a successful conclusion." *Sherwood Forest No. 2 Corp. v. City of Norman*, 632 P.2d 368, 370 (Okla. 1980). *See also Cowart v. Piper Aircraft Corp.*, 665 P.2d 315, 318 (Okla. 1983) ("As a general rule, the accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued, and the statute of limitations begins to run.").

Though the two-year limitations period governing Plaintiffs' §1983 claims is a creature of state law, *see* *Abbitt v. Franklin*, 731 F.2d 661, 663 (10th Cir.1 984) (*en banc*), federal law governs the question of accrual of federal causes of action, and thus, dictates when the statute of limitations begins to run for purposes of §1983. *See* *Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir.1995); *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993). "A civil rights action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Baker*, 991 F.2d at 632; *see* *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir.) (*quoting* *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir.1991)), *cert. denied*, 513 U.S. 832, 115 S.Ct. 107, 130 L.Ed.2d 55 (1994). Since the injury in a §1983 case is the violation of a constitutional right, *see* *Garcia v. Wilson*, 731 F.2d 640, 650 (10th Cir.1984), *aff'd* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), such claims accrue "when the plaintiff knows or should know that his or her constitutional rights have been violated." *Lawshe v. Simpson*, 16 F.3d 1475, 1478 (7th Cir.1994). This requires the court "to identify the constitutional violation and locate it in time." *Id.*

Here, the face of Plaintiffs' Second Amended Complaint shows that Plaintiffs' claims against Defendant Kanuho accrued on May 1, 2010. (Doc. 25, p. 4, ¶17 - p. 7, ¶30). However, Plaintiffs did not assert their claims against Defendant Kanuho until the filing of the Second Amended Complaint on March 22, 2013 – well

outside of the two-year statute of limitations. Accordingly, Plaintiffs' claims against Defendant Kanuho are time-barred and should be dismissed with prejudice. Plaintiffs allege that the statute of limitations should not toll or bar the joinder of Defendant Kanuho because Plaintiffs did not obtain the OSBI report until after the expiration of the Statute of Limitations and further that without that report, Plaintiffs were in a mistaken position regarding the facts. However, Plaintiffs are required to avail themselves to accessible information. Plaintiff's had two years from the date the cause of action arose to acquire reports and information. The Plaintiffs filed this action on the last date before the Statute of Limitations tolled without having done acceptable discovery. After this case was filed, the parties entered into a Scheduling Order (Doc. 13) on November 28, 2012, which set a discovery deadline of February 28, 2013. Plaintiffs assert that they did not acquire the OSBI report until after that deadline. Additionally, the Scheduling Order (Doc. 13) set a date for dispositive motions by March 14, 2013. On March 11, 2013, the Plaintiffs sought to strike the dispositive motion deadline and add additional parties which was granted by the Court on March 13, 2013. Plaintiffs had three months in which is conduct discovery under the scheduling order and had ten months in which to conduct discovery from the date of filing the original Petition.

In their Unopposed Motion for Leave to File Second Amended Complaint and for Joinder of Parties, Plaintiffs refer to Fed.R.Civ.P. 15 and suggest that their amendment will relate back to their original pleading. (Doc. 23, p.3). Rule 15 simply does not allow an amendment adding additional legal claims against additional party defendants to relate back to the date of filing of the original complaint. Rather, the Rule states in relevant part:

> (c) Relation Back of Amendments.
>
> (1) *When an Amendment Relates Back.* An amendment relates back to the date of the original pleading when:
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> ****
>
> (C) **the amendment changes the party or the naming of the party against whom a claim is asserted**, if Rule 1 5(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> (I) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a **mistake concerning the proper party's identity**.
>
> (Emphasis added).

However, adding additional legal claims against additional party defendants is not a change of party or the naming of a party, nor is it a "mistake concerning the proper party's identity" as contemplated by Rule 15(c). *See Garrett*

v. Fleming, 362 F.3d 692, 696 (10th Cir. 2004) ("[A] plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the identity of the proper party' within the meaning of [Rule 15]..."). "As a general rule, an amendment pursuant to Rule 15, Federal Rules of Civil Procedure, relates back only to the matters relating to the original parties of the complaint, or to correct a misnomer or a misdescription of defendant, and not to add or substitute a new party defendant." *Graves v. Gen. Ins. Corp.*, 412 F.2d 583, 585 (10th Cir. 1969).

Furthermore, Plaintiffs have produced no evidence (or even asserted any allegations) demonstrating that Defendant Kanuho received any notice of this action within the time period for the service of summons and complaint as required by Rule 15(c)(1)(C)(I). Rather, in their Unopposed Motion for Leave to File Second Amended Complaint and for Joinder of Parties, Plaintiffs assert that the Defendants "had notice of the events giving rise to this suit..." (Doc. 23, p. 3, ¶7). However, it is notice of the suit, not knowledge of the underlying events, which Rule 15(c)(1)(C)(I) requires. Defendant Kanuho would clearly be prejudiced in defending claims of which he had no notice and which were first asserted against him three years after the incident which gave raise to the filing of Plaintiff's original complaint. Thus, Plaintiffs' unreasonable delay in seeking to add Defendant Kanuho to this suit clearly works prejudice against Defendant Kanuho in defending this case on the merits.

Moreover, Plaintiffs are not entitled to equitable tolling. Accordingly, Plaintiffs' claims against Defendant Kanuho are time-barred and should be dismissed with prejudice. Plaintiffs are required to perform due diligence in obtaining facts and evidence and to only attempt to collect that information after the Statute of Limitations has tolled does not allow them to allege mistake when they did not take the proper actions to investigate their own claims.

PROPOSITION III:

Plaintiffs' Claims Against Defendant Kanuho are Barred by Sovereign Immunity

Plaintiffs assert that by separate motion they will request the Response to Proposition III be held in abeyance until such time as the *Motion for Expedited Determination and Declarations Pursuant to Fed. R. Civ. P. 57* (Doc. 65) and the *Notice of Constitutional Question* (Doc. 66) have been adjudicated. Pursuant to the Order of this Court (Doc. 71), this Court denied the Plaintiff's Motion (Doc. 69) to strike obligation to file full responses to the dismissal motions of defendants Kanuho and Leading Fox. Further, the Court struck the parties response (Doc. 67 and Doc. 68). Lastly, Plaintiffs were ordered to file complete written responses to the motions of defendants Kanuho and Leading Fox (Doc. 54 and 55) by August 12, 2013. Plaintiffs wholly failed to obey the Order of the

Court. Therefore, Defendant would assert that Proposition III be deemed admitted by the Court.

Plaintiffs exhibit 75-1 has absolutely no application in this matter. Document 75-1 is the BIA's Internal Law Enfocement Services Policies which applies to BIA officers and officers with special law enforcement commissions that were granted by the BIA to individual officers. Neither Defendant Kanuho nor Defendant Leading Fox were BIA officers or SLEC commissioned officers for the BIA duriing the acts that Plaintiff's allege gave rise to the above numbered cause of action.

WHEREFORE, premises considered, the Defendant David Kanuho in his individual and official capacity, respectfully requests the Court to dismiss Plaintiffs' claims against him as set forth in the Second Amended Complaint (Doc. 25) with prejudice to the refiling thereof pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and pursuant to Rule 12(6) and because Plaintiffs' claims were barred by sovereign immunity and that Defendant Kanuho's Motion to Dismiss Plaintiffs' Second Amended Complaint (Document 54) be sustained.

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CERTIFICATE OF SERVICE

This is to certify that on the date of filing, a true and correct copy of the above and foregoing *Defendant Kanuho's Motion to Dismiss Plaintiffs' Second Amended Complaint and Brief in Support* was electronically transmitted to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the Following ECF registrants:

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