

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


RUSSELL ALLEN PASSONS,)	
Plaintiff,)	
)	
vs.)	Case No. 14-CV-281-JHP-TLW
)	
Osage Nation Government, et. al.,)	
Defendants.)	

MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW the Defendant, Osage Nation Government, and for its Motion to Dismiss states as follows:

1. Defendant Osage Nation Government moves to dismiss this action because this Court does not have jurisdiction to hear the matter herein.
2. Defendant Osage Nation Government moves to dismiss this action under Federal Rules of Civil Procedure, Rule 12(b)(6) as Plaintiff has failed to state a claim upon which relief can be granted.
3. Defendant Osage Nation Government moves to dismiss this action as the Osage Nation is a sovereign Indian Nation, the Nation and all of its administrative offices, departments, agencies and instrumentalities are immune from suit or process.

WHEREFORE, Defendant prays for judgment herein as set forth herein above and that the instant case be dismissed with prejudice and such other and further relief as the Court may deem just and proper.



 Jeff S. Jones, OBA #18404
 1223 Grandview
 Pawhuska, OK 74056
 (918) 287-5659 Fax: (918) 287-5468
 jsjones@osagenation-nsn.gov

BRIEF IN SUPPORT

This Court does not have jurisdiction to hear the matter alleged. The relief requested flows from several alleged Oklahoma state court probate matters. A review of the Oklahoma District Court records for Osage County shows only one case, *In the Matter of the Estate of Charles B. St. John, Jr.*, Osage County District Court Case Number PB-2013-17. Based on a review of the Oklahoma District Court Records, Plaintiff Russell Allen Passons appears to be appealing actions taken by a State Court Judge in a state court probate matter along with appealing several other probate matters that may or may not exist. The State of Oklahoma has procedure in place to appeal a lower court decision to the Oklahoma Supreme Court¹. This action should have been commenced in the Oklahoma Supreme Court². Based on this Court's lack of jurisdiction, this Motion to Dismiss must be sustained.

Plaintiff has failed to state a claim for which relief can be granted. FRCP 12(b)(6) states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
(6) failure to state a claim.

Plaintiff in this case has not stated a claim for which relief can be granted. The pleadings filed in this case do not set out enough facts to determine if this Court has jurisdiction for any type of relief. The pleadings filed in this case contain a litany of events that happened in multiple state probate cases, but never are there enough facts to state a claim. A claim simply is not stated in any pleadings filed in this case. Plaintiff has failed to state a claim on which relief can be

¹ 58 O.S. §721

² 58 O.S. §724 states: An appeal in a probate proceeding must be taken as appeals in other cases in the district court.

granted and Defendant's Motion to Dismiss should be sustained.

The Osage Nation and all of its administrative offices, departments, agencies and instrumentalities have sovereign immunity and, as such, cannot be sued. The Constitution of the Osage Nation, Article XIX, states that the Osage Nation is immune from suit or process in any forum except to the extent that the Osage Nation Congress expressly waives its sovereign immunity. Plaintiff nowhere in any of the pleadings in the Court file claims a waiver of sovereign immunity from Congress.

The U.S. Supreme Court in *Kiowa Tribe of Okla. v. Mfg. Tech's. Inc.*, 523 U.S. 751 (1998), held that Indian nations are immune from suits by individuals and state agencies in any court, including tribal, state and federal courts, unless the U.S. Congress or the Indian nation itself waives sovereign immunity unequivocally. Tribes may invoke sovereign immunity in tribal, state and federal courts; if properly invoked, a tribe's immunity defeats all claims seeking judicial relief. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

In addition, *Kiowa Tribe of Okla. v. Mfg. Tech's. Inc.* established that this sovereign immunity extends to include activities by the Indian nations whether or not they are considered "commercial" or "governmental" — even if said activity occurs outside Indian country. *Id.* at 755. Based on *Kiowa Tribe of Okla.*, defendant Osage Nation Government has sovereign immunity and cannot be sued.

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) states that Indian nations and their governmental units are immune from lawsuits. A tribe may consent to the jurisdiction of a court through a waiver of immunity, but any such waiver must be clear and unequivocally expressed. *Id.* at 509. Defendant never alleges a clear and

unequivocal waiver of sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) holds that the right to sovereign immunity arises from Indian tribes' presence before the birth of the United States of America. Congress may abrogate a tribe's sovereign immunity, but such abrogation "cannot be implied" and "must be unequivocally expressed." *Id.* at 58. Again, nowhere in the pleadings does Plaintiff assert that there is a waiver of sovereign immunity that is unequivocally expressed by Congress. Plaintiff does not assert this waiver because it does not exist.

In the present case, no abrogation of sovereign immunity exists concerning this alleged claim, and Plaintiff has presented no assertion or evidence of any action that constitutes an abrogation or waiver of tribal immunity, either by Congress or by the Nation, that would allow this suit to proceed. It would be impossible for Plaintiff to make such an assertion because there has been no such action waiving or abrogating immunity to suit. Additionally, the Osage Nation Government has not exercised any authority to consent to sue or be sued by any official action. Because neither Congress nor the Nation has clearly and unequivocally abrogated or waived the Nation's sovereign immunity from suit, this Court lacks subject matter jurisdiction over the instant case and the sovereign immunity defeats all of the Plaintiff's claims for judicial relief.

CONCLUSION

For the reasons set forth above, the Osage Nation Government respectfully requests that this case be dismissed in its entirety as to this defendant, that the Motion to Dismiss be sustained and that the Court award such other and further relief as it may deem just and proper.

CERTIFICATE OF MAILING

I, Jeff S. Jones, do hereby certify that I mailed a true and correct copy of the above and foregoing document with proper postage prepaid thereon on the day 26th of February, 2015 to:

Secretary Interior
1849 C. Street, N.W.
Washington, D.C. 90240

Asst. Sec. Interior
1849 C. Street, N.W.
Washington, D.C. 90240

Robin Phillips, (Act. Super.)
BIA-Osage Agency
P.O. Box 1539
Pawhuska, OK 74056

Department of Interior
1849 C. Street, N.W.
Washington, D.C. 90240

Bureau Of Indian Affairs
P.O. Box 1539
Pawhuska, OK 74056

Indian Affairs
1849 C. Street, N.W.
Washington, D.C. 90240

Estate Patricia A. St. John
Address Unknown

Estate John D. Passons
Address Unknown

Estate Charles Barritt St. John
Address Unknown

Estate Herbert St. John
Address Unknown

Estate Ann St. John
Address Unknown

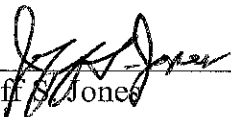
Estate William St. John
Address Unknown

Estate of Dora St. John
Address Unknown

Estate Gra-Tah-Scah
Address Unknown

Estate Ke-Ah-Som-Patt
Address Unknown

Estate of Pierce St. John
Address Unknown



Jeff S. Jones