IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL ALLEN PASSONS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 14-CV-281-JHP-TLW
	)	
OSAGE NATION GOVERNMENT, et al.,	)	
	)	
Defendants.	)	

UNITED STATES OF AMERICA'S MOTION TO DISMISS

COMES NOW the United States of America, on behalf of federal defendants the Department of the Interior, "Secretary of the Interior," "Assistant Secretary of the Interior," "Indian Affairs," Bureau of Indian Affairs, and "Superintendent Osage Agency (B.I.A.)" by and through Danny C. Williams, Sr., United States Attorney for the Northern District of Oklahoma, and Cathryn D. McClanahan, Assistant United States Attorney, and respectfully requests this Court to dismiss this action against the federal defendants pursuant to Fed. R. Civ. P. 8, 12(b)(1), and 12(b)(6) for the following reasons:

I. Osage headrights and the probate procedure

As discussed below, Plaintiff's particular claims or causes of action directed towards federal officials or employees in this matter are somewhat vague. However, some discussion of the background of Osage headrights may be helpful in deciphering Plaintiff's Amended Complaint (Dkt. 8).

The Osage reservation (now Osage County) was allotted pursuant to the Act of June 28, 1906, 34 Stat. 539. The surface estate was entirely allotted to individual Osage members, and the entire mineral estate was reserved to the United States in trust for the Osage Tribe (now the Osage Nation). Each allottee was given one headright share, which allowed the holder to obtain a

pro rata part of the income from the mineral estate. *Id*. The headrights were passed down through probate estates and transfers. The headrights have become fractionated over time. *See Fletcher v. United States*, 02-CV-427-GKF-FHM (N.D. Okla.), Dkt. 1122.

Federal statutes have continued the process of transfer of Osage headrights by probate. Act of April 18, 1912, 37 Stat. 86 ("1912 Act"); Act of Oct. 21, 1978, 92 Stat. 1660 ("1978 Act") and Act of Oct. 30, 1984, 98 Stat. 3163. The 1912 Act began (and the 1978 Act continued) a system of administrative approval of the wills of Osages through the Osage Agency of the Bureau of Indian Affairs. Under this two-step procedure, a will is first submitted to the Osage Agency for approval. After an agency decision, probate is commenced in state court. It is the state court that distributes assets pursuant to an approved will (or by intestacy if the will is not approved). The state court is bound by the decision of the agency Superintendent as to Osage restricted property.

II. The Court should dismiss the Amended Complaint as violative of Fed. R. Civ. P. 8.

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, the plaintiff is to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Further, "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). On occasion, lengthy or confusing and disjointed complaints can warrant dismissal for failure to comply with Rule 8. *George v. Kraft Foods Global, Inc.*, No. 06-CV-798, 2007 WL 853998, at *3 (S.D. Ill. March 16, 2007); *see also United States v. Lockheed-Martin Corp.*, 328 F.3d 374, 376-78 (7th Cir. 2003) (the complaint covering 155 pages was so confusing that neither the court nor the adverse parties should be required to "try to fish a gold coin from a bucket of mud."), *cert. denied*, 540 U.S. 968 (2003). A complaint must meet its obligation to "apprise the court of sufficient allegations to allow it to conclude, if the allegations are proved, that the claimant has a

legal right to relief." *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1371 (10th Cir. 1979). It is not the role of either the Court or Defendants to sort through a lengthy, conclusory, and poorly drafted complaint in order to construct a cause of action. *See Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371-72 (10th Cir. 1989). The Court has the power to dismiss a complaint when a plaintiff fails to comply with the Federal Rules of Civil Procedure, "including Rule 8(a)(2)'s 'short and plain statement' requirement." *Gometz v. United States*, 334 F. App'x 889, 892 (10th Cir. 2009), citing *Kuehl v. F.D.I.C.*, 8 F.3d 905, 908 (1st Cir. 1993), *cert. denied*, 511 U.S. 1034 (1994).

In this matter, Plaintiff first filed a Complaint that was over 100 pages long. Dkt. 1. Then, Plaintiff filed an "Amended Civil Rights Complaint" with a three page introductory section followed by an additional 22 pages. Dkt. 8. While the Amended Complaint is legible and, for the most part, written in understandable language, the federal defendants are unclear as to the precise cause of action to which they must answer. After a citation to a laundry list of statues, Plaintiff sets out three separate "allegations" in his Amended Complaint, each with a long narrative of "supporting facts," followed by a request for relief that is generalized against all defendants. Consequently, the United States moves to dismiss the Amended Complaint altogether under Fed. R. Civ. P. 8.

While *pro se* pleadings should be "construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers," *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), that standard does not override a *pro se* plaintiff's responsibility to provide a simple and concise statement of his claims and the specific conduct that gives rise to each asserted claim. *See Willis v. MCI Telecomms.*, 3 F. Supp. 2d 673, 675 (E.D.N.C. 1998), *aff'd*, 161 F.3d 5 (4th Cir. (N.C.) 1998). This court cannot be a *pro se* litigant's advocate. *Hall*, 935 F.2d at 1110.

III. The Amended Complaint fails to state a basis for jurisdiction against the federal defendants.

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a motion to dismiss may be granted if the court does not have subject matter jurisdiction over the matter. The determination of subject matter jurisdiction is a threshold question of law. *Madsen v. United States ex. rel. United States Army Corps of Engineers*, 841 F.2d 1011, 1012 (10th Cir. 1987). As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. Const. Art. III, § 2; *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994). The court applies a rigorous standard of review when presented with a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. *Consumers Gas & Oil, Inc. v. Farmland Indus. Inc*., 815 F. Supp. 1403, 1408 (D. Colo. 1992). "[T]he party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

The United States may only be sued if it consents. *United States v. Dalm*, 494 U.S. 596, 608 (1990). "Such a waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute." *Fostvedt v. United States*, 978 F.2d 1201, 1202 (10th Cir.1992), *cert. denied*, 507 U.S. 988 (1993). The Tenth Circuit has held "in unequivocal terms, that general jurisdictional statutes may not act to waive sovereign immunity." *Burge v. I.R.S.* 39 F.3d 1191 (10th Cir. 1994) (citing *Lonsdale v. United States*, 919 F.2d 1440, 1443-44 (10th Cir. 1990)).

In his Amended Complaint, Plaintiff names as party defendants the Department of the Interior, the Secretary of the Interior in "his/her official capacities," the Bureau of Indian Affairs, the Assistant Secretary of the Interior "in their official capacities," and the Superintendent of the Osage Agency "in their official capacity. Although John Doe defendants are named and

purportedly sued in their individual capacities, they are each identified as "fractional share and headright owners" and not federal officials, agents or employees.

A. 28 U.S.C. § 1346(a)(b)(1) does not provide jurisdiction against the federal defendants.

The first claim for jurisdiction by Plaintiff is "28 [U.S.C.] § 1346(a)(b)(1) United States as Defendants for Money Damages." Dkt. 8 at 11. Presumably, Plaintiff is attempting to invoke the Federal Tort Claims Act ("FTCA"). The FTCA provides a waiver of sovereign immunity for tort claims

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1); *United States v. Olson*, 546 U.S. 43, 44 (2005) (sovereign immunity is waived under the FTCA when "local law would make a 'private person' liable in tort" law). The United States is deemed liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. "[T]he FTCA does not itself create a substantive cause of action against the United States; rather, it provides a mechanism for bringing a state law tort action against the federal government in federal court." *Lomando v. United States*, 667 F.3d 363, 372 (3d Cir. 2011) (citation omitted).

The Supreme Court has noted that

> [t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955); *see also Rayonier Inc. v. United States*, 352 U.S. 315, 319–320 (1957) (Congress, in adopting the FTCA, sought to prevent the

unfairness of allowing "the public as a whole" to benefit "from the services performed by Government employees," while allocating "the entire burden" of government employee negligence to the individual, "leav[ing] him destitute or grievously harmed.").

In this instance, Plaintiff is not alleging a state-law based tort at all. As set out in his Amended Complaint, he hopes to accomplish something with respect to probates settled years (decades, in fact) ago. Plaintiff's Amended Complaint stems from the very unique administrative duties the United States carries out with respect to probates of Osage wills and decisions that must be made as to Osage restricted property. There simply is no state tort claim analog in this matter. "Again, nothing in [28 U.S.C. § 1346] creates for the Plaintiff an independent cause of action." *Karara v. U.S. Dept. of Educ.*, No. 08-CV-614, 2009 WL 230704, at *4 (D.Colo. Jan. 30, 2009).

B. 28 U.S.C. § 1357 does not provide jurisdiction against the federal defendants.

Plaintiff cites also to 28 U.S.C. § 1357, which reads:

> The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.

As Plaintiff asserts no cause of action related to the United States' collection of revenues or a State voting issue, this statute is inapplicable. It certainly does not create an independent cause of action or provide a waiver of sovereign immunity to conjure jurisdiction in this case.

C. 28 U.S.C. § 2415(c) does not provide jurisdiction against the federal defendants.

Additionally, Plaintiff cites to 28 U.S.C. § 2415 which addresses "Time for Commencing Actions Brought by the United States." This action is not brought by the United States, and, in

any event, this statute does not create an independent cause of action that would vest this court with jurisdiction to proceed.

D. 28 U.S.C. § 1343(a) does not provide jurisdiction against the federal defendants.

The Tenth Circuit has specifically addressed the viability of an action brought pursuant to 28 U.S.C. 1343 (another section cited by Plaintiff) and declined to find any jurisdictional foundation in the statute:

> When federal court jurisdiction is invoked pursuant to this statute, we must look to the specific "Act of Congress providing for the protection of civil rights" invoked to determine whether that Act by its terms expresses Congress' consent to suits against the United States by persons in the plaintiff's position.

Salazar v. Heckler, 787 F.2d 527, 529 (10th Cir. 1986).

E. *Bivens* does not provide jurisdiction against the federal defendants.

Plaintiff also contends that jurisdiction is appropriate as a *Bivens*-style action. However, as noted above, all federal officials are named in their official capacities (as all of their actions complained of were taken in the actors' official governmental capacity). The Tenth Circuit recently noted that

> [a]lthough government actors may be held liable for select constitutional violations in their *individual* capacities, *see, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), government actors in their *official* capacities are absolutely immune from suit for money damages, *see Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002) ("A *Bivens* action may not be brought against federal agencies or agents acting in their official capacities."). In essence, a claim against a public official in his official capacity "operates as a claim against the United States" or against the official's employer, *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001), and these entities are immune from *Bivens* claims, *see Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) ("The prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP."); *FDIC v. Meyer*, 510 U.S. 471, 486, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (holding federal agencies immune from *Bivens* claims for money damages).

Gowadia v. Stearns, 596 F. App'x 667, 670-71 (10th Cir. 2014). In short, it is impossible to assert *Bivens* constructional-based claims in the actor's official capacity as Plaintiff does with respect to all federal defendants in this matter.

Moreover, merely citing to the *Bivens* action is insufficient to provide a jurisdictional basis for this Court. "When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) (federal employees, when sued in their official capacities, are immune from suit unless sovereign immunity has been waived) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985)). *See also Weaver v. United States*, 98 F.3d 518, 520-21 (10th Cir. 1996). However, it is well-established that the United States is immune from suit unless it has consented to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The United States has not waived its sovereign immunity for constitutional torts. *Bivens*, 403 U.S. at 410. *See FDIC*, 510 U.S. at 483-86 (holding that a *Bivens* action may not be brought against the United States).

F. 28 U.S.C. § 1331 does not provide jurisdiction against the federal defendants.

As stated above, the Tenth Circuit has clearly held that general jurisdictional statutes do not confer jurisdiction to sue the United States as they are not specific waivers. "Consequently, 28 U.S.C. § 1331 cannot provide jurisdiction." *Burge*, 39 F.3d at 1191 at *1.

G. The Administrative Procedures Act cannot provide jurisdiction against the federal defendants in the matter of probate decisions made decades ago.

Finally, Plaintiff cites to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701–08. The APA allows for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The Amended Complaint is not clear on this point, but it does center on numerous probates and some

alleged failure to given notice of the probates. As discussed above, however, at no relevant time have Osage estates been subject to the Secretary's authority to even *make* an administrative determination. Under the terms of the statutes cited above, Osage estates must be probated in the state courts of Oklahoma. No federal statute permits administrative determination by the federal defendants of death and heirship, and Plaintiff cannot cite to any particular administrative decision that can be appealed.

In any event, the limitations period of 28 U.S.C. § 2401(a) limits the scope of that waiver and, thus, governs the jurisdiction of the Court. *See Ute Distribution Corp. v. Secretary of Interior of United States,* 584 F.3d 1275, 1282 (10th Cir. 2009), *cert. denied*, 560 U.S. 905 (2010) (suggesting that Section 2401(a) is jurisdictional); *Urabazo v. United States*, 947 F.2d 955, No. 91–6028, 1991 WL 213406, at *1 (10th Cir. Oct. 21, 1991), *cert. denied*, 505 U.S. 1223 (1992) (holding action should be dismissed for lack of jurisdiction because it is barred by limitations period of § 2401(a)). In cases under the APA, the statute of limitations begins running at the point in time that the agency's action becomes final. *Velarde v. United States,* 992 F.Supp. 1235, 1240 (D.Colo. 1998). The Court's subject matter jurisdiction over APA actions is limited to claims regarding "final agency actions" that are raised within the relevant statute of limitations. *See* 5 U.S.C. § 704; *see also Gordon v. Norton*, 322 F.3d 1213, 1219–20 (10th Cir. 2003) (affirming dismissal for lack of subject matter jurisdiction because, inter alia, challenged action was not final agency action).

IV. Plaintiff's claim against the federal defendants fails to state a claim upon which relief can be granted.

The Federal Rules of Civil Procedure states that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). *See also Goldman v. Belden*, 754 F.2d 1059, 1065 (2d Cir. 1985) ("a Rule 12(b)(6) motion is addressed to

the face of the pleading"). The court must accept the well-pleaded allegations of the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff. *See Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). However, to withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The burden is on the plaintiff to frame 'a complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Corp.*, 550 U.S. at 556). A complaint must set forth sufficient facts to elevate a claim above the level of mere speculation. *Id*.

Plaintiff's Amended Complaint concerns probate proceedings that have been closed for decades. In a case involving an Osage probate, this Court recently considered its reach in such matters and found that federal courts do not have jurisdiction to intervene in state court probate actions regarding Osage property. *Vaughn v. Currey*, 13-CV-273-TCK-PJC (N.D. Okla.) Dkt. 58 at 3. Rather, parties that are complaining about actions and events in an Osage probate action must take those issues to the state probate court. Consequently, it appears that this district has already settled the issue – Plaintiff cannot seek relief in federal district court concerning Osage probate actions.

Respectfully submitted,

UNITED STATES OF AMERICA

DANNY C. WILLIAMS, SR.
United States Attorney

s/Cathryn D. McClanahan

CATHRYN D. McCLANAHAN, OBA No. 14853
Assistant United States Attorney
110 West 7th Street, Suite 300
Tulsa, Oklahoma 74119
T: 918-382-2700
cathy.mcclanahan@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, I electronically transmitted the foregoing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Jeff S. Jones
jsjones@osagenation-nsn.gov
Counsel for Defendant Osage Nation Government

I hereby certify that on May 8, 2015, I transmitted the forgoing, via U.S. Mail, to the following who is not an ECF registrant:

Russell Allen Passons
#107049
Idaho Correctional Institution
381 W. Hospital Dr.
Orofino, ID 83544
Pro Se Plaintiff

s/Chris Watson
Chris Watson
Legal Assistant