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

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

**UNITED STATES OF AMERICA'S REPLY**
**IN SUPPORT OF ITS 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 replies to Plaintiff's response (Dkt. 51) to the United States' Motion to Dismiss (Dkt. 42).

## I. Plaintiff's Proposed Second Amended Complaint is procedurally improper and, especially with respect to his purported *Bivens*-based claims, does not substantively negate the United States' Motion to Dismiss.

At a number of points, Plaintiff seems to suggest that the United States' arguments are nullified based upon his proposed amendments to his Amended Complaint. Specifically, he contends that the addition of particular names (in lieu of unknown defendants) renders the United States' motion moot.

Plaintiff filed his Complaint in this matter on May 29, 2014. Dkt. 1. He then filed an Amended Complaint on July 14, 2014. Dkt. 8. The United States filed its Motion to Dismiss (Dkt. 42), here at issue, on May 8, 2015. Having been granted an extension of time until July 21,

2015, to file a response to this motion (Order at Dkt. 46), Plaintiff filed a response (Dkt. 51) and a Motion for Leave to File an Amended Supplemental Complaint (Dkt. 52) on July 23, 2015. As more fully set out in the United States' concurrently filed response to Plaintiff's Motion for Leave, this proposed Second Amended Complaint is untimely. Moreover, it is futile, as it does nothing to ameliorate the fatal flaws described in the United States' Motion to Dismiss.

As the United States pointed out, the Plaintiff's claim of a *Bivens*-based action simply was not appropriate as the officials of the United States were all sued by Plaintiff in their official capacities. The Supreme Court created a *Bivens* cause of action for money damages against federal employees in their individual capacities for constitutional violations. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As the Tenth Circuit has explained, "there is no such animal as a *Bivens* suit against a public official tortfeasor in his or her official capacity. Instead, any action that charges such an official with wrongdoing while operating in his or her official capacity as a United States agent operates as a claim against the United States." *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001) (citations omitted). Plaintiff claims he has now cured this fatal flaw because of his "discovery of names of defendants." Dkt. 51 at 2. However, mounting a viable *Bivens* claim at this point is not a matter of simply crossing out the words "official capacity" and replacing them with "individual capacity" or of plugging in the proper name of the Secretary of Interior (as opposed to naming the office only).[1]

Liability in a *Bivens* action may be imposed upon a defendant only if he is personally responsible for the constitutional violation alleged in the complaint. *Pahls v. Thomas*, 718 F.3d

[1] In any event, a suit against an individual requires that Plaintiff serve all individual defendants pursuant to Federal Rule of Civil Procedure 4(e). *See Armstrong v. Sears*, 33 F.3d 182, 186–87 (2d Cir. 1994). Here, the record is devoid of any evidence that Plaintiff has attempted to serve, let

1210, 1225 (10th Cir. 2013). *Respondeat superior* liability is not available in a *Bivens* suit. *Id*. Here, Plaintiff has failed to properly plead any constitutional violation, much less one personally perpetrated by Secretary of the Interior Sally Jewell, Assistant Secretary of Indian Affairs Kevin Washburn, or Superintendent of the Osage Agency Robin Phillips. As an official capacity claim against an individual federal official is really a suit against the office that the official represents, *see Griess v. Colorado*, 841 F.2d 1042, 1045 (10th Cir. 1988), the individual defendants are immune from liability in their official capacities.

## II. The Amended Complaint, as well as the proposed second amended complaint, violates Fed. R. Civ. P. 8(a)(1) and states no legitimate basis for jurisdiction.

As discussed in the United States' motion, Plaintiff's causes of action against the federal defendants are not fairly discernable. If anything, the additional conclusory and confusing statements made within Plaintiff's two most recent filings further support this argument. At this point, the federal government can discern nothing more from Plaintiff's submissions but that he is unhappy regarding a probate decision made decades ago. The actual basis of any claim for which the federal defendants could be called to answer is obscured.

## III. Plaintiff misconstrues the concept of a "final agency action" that may be addressed pursuant to the Administrative Procedures Act.

Plaintiff argues that each time payments are made or distributed to Osage headright holders, a new action accrues. But, the Tenth Circuit has expressly rejected the concept that the limitations clock can be manipulated in such a way by holding that "the continuing wrong doctrine cannot be employed where the plaintiff's injury is definite and discoverable." *Ute Distrib. Corp. v. Sec'y of the Interior*, 584 F.3d 1275, 1283 (10th Cir. 2009) (internal citations omitted). The probate proceeding which inflicted the alleged injury here concluded decades ago.

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alone completed service on, the defendants purportedly sued pursuant to *Bivens*.

In his conclusion, Plaintiff seems to concede that this alleged wrong agency decision "spans Plaintiff[']s whole life." Dkt. 51 at 6. In other words, the decision complained of is admittedly well beyond than the six year limitations period prescribed by 28 U.S.C. § 2401(a). Plaintiff's proposal to perpetually thwart the limitations period is unreasonable: a person generations removed from the approval of a will and a state court probate proceeding cannot simply generate a claim by writing to a federal agency and receiving a response that he then pegs as "final" agency action. If it were so, anyone could revive any agency action – even those well-settled for decades.

## IV. Plaintiff now (improperly) adds a Freedom of Information Act claim.

Apparently for the first time, Plaintiff's response to the United States' motion raises a purported Freedom of Information Act ("FOIA") claim. Dkt. 51 at 2. A responsive filing, however, is an inappropriate forum for raising an independent claim against the government. *Cox v. Koch*, No. 11-CV-771-CVE-TLW, 2013 WL 6002225, at *26 (N.D. Okla. Nov. 12, 2013). It may be that Plaintiff is contending that he has not received documents that deliver a headright share to him to which he believes himself entitled. Nonetheless, the relief that Plaintiff has consistently sought does not appear to include the discovery of documents kept in the United States' system of records, as would be expected for a legitimate FOIA claim. Dkt. 1 at 34-43.

## V. Plaintiff musters no substantive response to the majority of the points raised in the United States' Motion to Dismiss.

For the most part, Plaintiff simply resorts to a conclusory statement that Defendants' "claim" (apparently referring to arguments advanced in the motion) "must be denied" with little more explanation or argument. For example, 28 U.S.C. § 1357, cited by Plaintiff as a basis for jurisdiction, is (according to its plain wording) applicable only to revenue collection and state election issues. Nonetheless, Plaintiff summarily states that "Defendants claim of 28 USC 1357

not providing jurisdiction for Defendants must be denied." Dkt. 51 at 3. What follows is another description of the wrongs allegedly perpetrated against Plaintiff due to a decades old will approval and the probate distribution imposed by a state court. Similarly, with respect to the United States' argument that Plaintiff failed to state a claim upon which relief can be granted, Plaintiff simply retorts that "[r]elief can be granted." *Id*. at 2. Plaintiff offers no viable legal response to the United States' contentions.

The central failure of Plaintiff's understanding appears to be the nature of the Osage headrights system of transfer. As the government explained in its motion (Dkt. 42 at 2), these headrights transfer by probate. Wills are submitted to the Osage Agency (an office of the Bureau of Indian Affairs) for approval. After that preliminary decision, probate is commenced in state court, and it is the state court that finally distributes assets. The limited role of the federal government in Plaintiff's alleged wrong was completed with the approval of a will decades ago. The state court ordered distribution and headright assignments that followed were also made decades ago.

Wherefore, Plaintiff's arguments lacking substance or merit, the United States of America respectfully re-urges its Motion to Dismiss (Dkt. 42).

Respectfully submitted,

UNITED STATES OF AMERICA

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 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:

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*Counsel for Defendant Osage Nation Government*

I hereby certify that on August 4, 2015, I transmitted the forgoing, via U.S. Mail, to the following who is not an ECF registrant:

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s/Chris Watson
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