UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

RUDY "BUTCH" STANKO,	)	
	)	
Plaintiff,	)	Case No. 5:17-cv-5008
	)	
v.	)	**TRIBAL DEFENDANTS' REPLY TO PLAINTIFF'S AMENDED RESPONSE TO MOTION TO DISMISS**
	)	
OGLALA SIOUX TRIBE, et al.,	)	
	)	
Defendants.	)	

COME NOW the Oglala Sioux Tribe, Vannesia Rodriguez, Charles Hunter, Jodie Garnette, Tatewin Means, and John Hussman (hereafter "Tribal Defendants") and file their reply to Plaintiff's response [doc. 9] to Tribal Defendants' motion to dismiss [doc. 7].

INTRODUCTION

Through their motion to dismiss, Tribal Defendants assert that Plaintiff's claims against them should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Specifically, Tribal Defendants assert that Plaintiff's claims against the Tribe and tribal officers, acting in their official capacities, should be dismissed for lack of subject matter jurisdiction because the Tribe and its officers are immune from suit absent a waiver or abrogation of tribal sovereign immunity, and no such waiver or abrogation exists in this case. *See* Tr. Defs. Mem. [doc. 8] at 2-7. Plaintiff's Section 1983 claims against tribal officers, acting in their individual capacities, should be dismissed for lack of jurisdiction because Section 1983 applies to persons acting under color of state law and it does not confer jurisdiction in this Court over causes of action against Indian tribal officers exercising inherent powers of tribal self-government. *Id.* at 7-9. Plaintiff's common law tort claims against tribal officers, acting in their individual capacities, should be dismissed for lack of jurisdiction because those claims do not arise under federal law. *Id*. at 9. In the alternative, Tribal Defendants assert that

Plaintiff's claims against them should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

Plaintiff's substantive responses to the motion to dismiss are addressed below. At the outset, though, Tribal Defendants note that Plaintiff's response is rife with offensive remarks about the Tribe and its history and treaties. *See*, *e.g.*, Pl. Resp. [doc. 9] at 1-2, 8, 9 and n. 5, and 13. Tribal Defendants will not dignify those remarks with a response, except to say that the Tribe's inherent right to self-government, as recognized and affirmed in the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868), is in full force and effect and has never been surrendered by the Tribe or abrogated by Congress. *See*, *e.g.*, *Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556, 568 (1883) (Act of 1877, 19 Stat. 254 (Feb. 28, 1877) guaranteed the right of tribal self-government to the Great Sioux Nation); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980) (tribal right of self-government includes "the right of reservation Indians to make their own laws and be ruled by them") (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)).

ARGUMENT

I. PLAINTIFF'S CLAIM AGAINST THE TRIBE AND HIS OFFICIAL-CAPACITY CLAIMS AGAINST TRIBAL OFFICERS SHOULD BE DISMISSED BASED ON TRIBAL SOVEREIGN IMMUNITY.

The Oglala Sioux Tribe is a "'distinct, independent political communit[y], retaining [its] natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832) and citing *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) and F. Cohen, Handbook of Federal Indian Law 122-123 (1945)).

One attribute of the Tribe's inherent sovereignty is its immunity from unconsented suit in

federal, state, and tribal court. The sovereign immunity of Indian tribes has been upheld and affirmed repeatedly by the Supreme Court and the lower federal courts. *See*, *e.g.*, *Michigan v. Bay Mills Indian Cmty*., 134 S.Ct. 2024, 2030-2031 (2014); Tribal Defs. Mem. of Law [doc. 8] at 3 (collecting cases).

Tribal Defendants are not immune from suit because they are "members of an Indian tribe" or because of "some type of dual citizenship," as Plaintiff suggests. *Cf*. Pl. Resp. [doc. 9] at 2. The Tribe is immune from suit because it is a federally recognized Indian tribe, and "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58 (citations omitted). Simply put, "'without congressional authorization,' the 'Indian Nations are exempt from suit.'" *Id.* (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)).

There is no congressional authorization for Plaintiff's suit. *See* Tribal Defs. Mem. of Law [doc. 8] at 5. In *Santa Clara Pueblo*, the Supreme Court noted:

> It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Nothing on the face of [the Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner, the provisions of [25 U.S.C.] § 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

436 U.S. at 58–59.

Individual tribal officers, acting in their official capacities, are immune from suit because an "official capacity" suit against these officials is the same as a suit against the Tribe itself, and suits against the Tribe are barred by sovereign immunity. *See McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (citations omitted); Tribal Defs. Mem. of Law [doc. 8] at 4 (collecting

cases).

Plaintiff's claims against the Tribe and tribal officers, acting in their official capacities, should be dismissed for lack of subject matter jurisdiction. *See* Tribal Defs. Mem. of Law [doc. 8] at 6-7 (collecting cases holding that the defense of sovereign immunity is jurisdictional in nature, depriving courts of subject matter jurisdiction).

II. PLAINTIFF'S INDIVIDUAL-CAPACITY SECTION 1983 CLAIMS SHOULD BE DISMISSED BECAUSE SECTION 1983 DOES NOT AUTHORIZE SUITS AGAINST TRIBAL OFFICERS EXERCISING INHERENT POWERS OF TRIBAL SELF-GOVERNMENT.

Plaintiff's lawsuit is premised on the U.S. Constitution and 42 U.S.C. § 1983, which provides a cause of action for persons whose rights under the U.S. Constitution are violated by persons acting under color of state law. Plaintiff does not argue that the individual tribal officers in this case were acting under color of state law. He claims that the U.S. District Court "is under the color of South Dakota law," *see* Pl. Resp. [doc. 9] at 13, but even if that were true, it has nothing to do with the tribal officers, all of whom were exercising inherent powers of tribal self-government.

Section 1983 applies to persons acting under color of state law. It does not apply to tribal officers exercising inherent powers of tribal self-government under color of tribal law.

> [N]o action under 42 U.S.C. § 1983 can be maintained in federal court for persons alleging deprivation of constitutional rights under color of tribal law. Indian tribes are separate and distinct sovereignties, and are not constrained by the provisions of the fourteenth amendment. As the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of § 1983 …

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir.1983) (internal citations omitted). *Accord*, *Pistor v. Garcia*, 791 F.3d 1104, 1114–15 (9th Cir. 2015) (noting that tribal officers, sued in their individual capacities, may "be held liable under § 1983 only if they

were acting under color of *state,* not tribal, law") (emphasis in original); *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989) (holding that "actions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law"). *See* Tr. Defs. Mem. of Law [doc. 8] at 7-9. Accordingly, Plaintiff's individual-capacity Section 1983 claims against the tribal officer defendants must fail.

Plaintiff raises the *Bivens* doctrine in his response, *see* Pl. Resp. [doc. 9] at 14, but that doctrine only applies to federal officers acting under color of federal law. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that a violation of the Fourth Amendment by a federal agent acting under color of federal law gives rise to a cause of action for damages). The tribal officers in this action are not federal employees or officials. They are officers of the Tribe, and they acted under color of tribal law, not federal law. The *Bivens* doctrine is not applicable.

Plaintiff also raises the "substantiality doctrine," *see* Pl. Resp. [doc. 9] at 10-11, but that doctrine does not support his case. The substantiality doctrine provides that a federal court may dismiss a complaint for lack of subject matter jurisdiction if the purported federal claims are "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Levine,* 415 U.S. 528, 536 (1974). It does not provide, as Plaintiff suggests, that all constitutional claims must be heard by the federal courts, no matter how attenuated or unsubstantial those claims may be.[1]

Plaintiff further confuses the issue by suggesting that the Indian Civil Rights Act ("ICRA") is a basis for jurisdiction in this case. *See* Pl. Resp. [doc. 9] at 3-4. Plaintiff did not assert a claim under the ICRA in his Complaint. *See* Pl. Compl. [doc. 1]. Even if he had, this

[1] The language Plaintiff purports to quote from *Bell v. Hood*, 327 U.S. 678 (1946), does not appear anywhere in the Supreme Court's opinion. *See* Pl. Resp. [doc. 9] at 10-11. Similarly, the language Plaintiff purports to quote from *Solem v. Helm*, 463 U.S. 277 (1983), and *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988), does not appear in the courts' opinions. *See* Pl. Resp. [doc. 9] at 11-12.

Court would not have jurisdiction over such a claim. The sole remedy available in the federal courts under the ICRA is the writ of habeas corpus, which Plaintiff has not sought. *See Santa Clara Pueblo*, 436 U.S. at 66. The ICRA does not grant federal jurisdiction over claims for money, injunctive, or declaratory relief. Congress provided for "habeas corpus relief, and nothing more" in the federal courts. *Id*.

Plaintiff's reliance on *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F. 2d 682 (10th Cir. 1980), is also misplaced. Since *Dry Creek Lodge* was decided in 1980, the Tenth Circuit has held that *Dry Creek* must be read "narrowly," *Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1157 (10th Cir. 1998); *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984), applying it only in those instances where "no tribal court forum existed for the non-Indian party." *Bank of Okla. v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1170 (10th Cir. 1992). The Eighth Circuit has noted that *Dry Creek Lodge* applies, if at all, only "if there is no functioning tribal court." *Krempel v. Prairie Island Indian Community*, 135 F.3d 621, 622-623(8th Cir. 1997).[2]

The Oglala Sioux Tribe has a functioning Tribal Court. *See* Ex. A to Tribal Defs. Mem. of Law [doc. 8-1] at 7-8. The Tribal Court is a forum that exists for all Indians and non-Indians to assert claims, including claims under the ICRA. In this case, Plaintiff made no attempt to exercise (or exhaust) the remedies available to him in the Tribal Court.

Plaintiff confuses Tribal Court Judge John Hussman with the "judicial branch" of the Tribe. *See* Pl. Resp. [doc. 9] at 3-4. The judicial power of the Tribe is vested in a Supreme Court and the Oglala Sioux Tribal (Inferior) Court, and the courts are independent from the Tribal Council. *Id*. The Supreme Court is comprised of a Chief Justice, two Associate Justices, and one

[2] The Ninth Circuit has rejected the *Dry Creek Lodge* doctrine altogether. *See, e.g.*, *R. J. Williams v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983).

Alternate Justice. OST Law and Order Code, Ch. 1, § 6.2. The Oglala Sioux Tribal (Inferior) Court is comprised of a Chief Judge, four Associate Judges, and one Special Judge. O.S.T. Law and order Code, ch. 1, § 2. If Judge Hussman were disqualified from hearing a claim brought by Plaintiff – because Plaintiff decided to sue Judge Hussman in this case – other Tribal Court judges would be available to hear and decide the claim. Simply put, Plaintiff's claim that *Dry Creek Lodge* applies, or provides federal jurisdiction, in this case is without merit and must be rejected.

III. PLAINTIFF'S INDIVIDUAL-CAPACITY TORT CLAIMS SHOULD BE DISMISSED BECAUSE THEY DO NOT ARISE UNDER FEDERAL LAW.

Plaintiff does not assert that his common law tort claims against the individual tribal officers arise under federal law. Those claims arise, if at all, under tribal law. Accordingly, they should be dismissed.[3]

IV. THE OGLALA SIOUX TRIBE HAS INHERENT AUTHORITY TO PRESERVE PUBLIC ORDER ON THE PINE RIDGE INDIAN RESERVATION.

The Oglala Sioux Tribe has the inherent authority to maintain public safety and preserve public order on the Pine Ridge Indian Reservation. That includes the "authority to detain non-Indians whose conduct disturbs the public order on their reservation." *U.S. v. Terry*, 400 F.3d 575, 579 (8th Cir. 2005). The Eighth Circuit stated in *Terry* that:

> The Supreme Court has recognized that tribal law enforcement authorities possess "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands," and therefore have "the power to restrain those who disturb public order on the reservation, and if necessary to eject them." *Duro v. Reina,* 495 U.S. 676, 696–97 (1990) … Because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power. *See Ortiz–Barraza v. United States,* 512 F.2d 1176, 1180 (9th

[3] The dismissal of Plaintiff's Section 1983 claims against the individual tribal defendants would deprive the Court of supplemental jurisdiction over his common law tort claims under 28 U.S.C. § 1367.

Cir.1975).

Terry, 400 F.3d at 579-580 (holding that Oglala Sioux Tribe police officers had authority to stop and detain non-Indian whose conduct disturbed public order on Pine Ridge Indian Reservation).

Plaintiff appears to argue that he should be permitted to drive at an excessive rate of speed throughout the Reservation without fear of being stopped or detained by tribal law enforcement officers. Plaintiff was stopped on September 22, 2016, for driving fifty-five miles per hour (55 MPH) in a twenty-five mile per hour (25 MPH) zone on Bureau of Indian Affairs Route 27 near Porcupine on the Reservation. *See* Traffic Ticket and Complaint TR-16-1185 (attached hereto as **Exhibit D**). When he was stopped on January 21, 2017, *see* Pl. Compl. [doc. 1], at ¶ 23, he was driving 92 miles per hour (92 MPH) in a sixty-five mile per hour (65 MPH) zone on B.I.A. Route 27.

Plaintiff does not deny that he was speeding. He did not appear in Tribal Court or otherwise defend against the citation. Pl. Compl. [doc. 1] at ¶ 17. If tribal law enforcement officers had reasonable suspicion or probable cause to believe Plaintiff was speeding, then they had the right to stop and detain him for disturbing public order on the Reservation.

Plaintiff cites *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), for the proposition that the Tribe lacks criminal jurisdiction over him. *See* Pl. Resp. [doc. 9] at 4. If Plaintiff had been stopped and detained for a criminal offense, and if he had established that he is a non-Indian, then tribal law enforcement officers would have transported him to the appropriate state or federal law-enforcement officials. The Tribe has the full authority to take these actions under *Duro*, 495 U.S. at 696-697, and *Terry*, 400 F.3d at 579-580.

However, Plaintiff was not stopped or detained for a criminal offense. He was stopped for speeding, which is a civil traffic infraction under tribal law. In general, traffic offenses on the

Pine Ridge Indian Reservation are civil infractions. The Tribe's traffic laws provide that:

> A "traffic infraction" shall be defined to mean an offense designated by the Law and Order Code to be punishable only by a civil penalty.

O.S.T. Ord. No. 02-25 at § 6.01(c) (Sept. 4, 2002) (emphasis added). Plaintiff was stopped and cited for speeding, in violation of Section 622 of O.S.T. Ord. No. 02-25, which provides that:

> Exceeding the speed limit or operating a motor vehicle at a speed which is not reasonable and proper shall be a traffic infraction punishable by a civil penalty not to exceed one thousand dollars ($1,000.00).

Id. at § 622(e) (emphasis added).

The Tribe has the inherent authority to apply its civil traffic laws to non-Indians. The Supreme Court has held that:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565–66 (1981).

Unregulated and unsafe vehicular traffic on reservation roads, including B.I.A. Route 27, pose significant hazards and threats to the health, welfare, and economic security of the Tribe. Unregulated and unsafe traffic on the Reservation can result in severe injury, death, loss of property, financial hardship, and interference with commerce. Through its civil traffic laws, the Tribe regulates traffic on the Reservation to ensure the safe and efficient use of reservation roads for the Tribe, its members, and all other persons on the Reservation, including Plaintiff.

The Tribe has the right to seek compliance with its civil traffic laws by appropriate civil process. If Plaintiff wished to challenge a civil warrant issued by the Tribal Court, he could have

done so by filing a motion to quash, or another appropriate motion. He chose not to do so.

In view of the foregoing, Tribal Defendants submit that the claims underlying Plaintiff's lawsuit are without merit. That said, the Court need not reach these issues. This case should be dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity and failure to state a claim upon which relief can be granted based on the absence of state action under Section 1983.

CONCLUSION

Tribal Defendants ask the Court to dismiss this action for the reasons set forth herein and in the motion [doc. 7] and memorandum of law in support of the motion [doc. 8].

Respectfully submitted this 18th day of March 2017.

/s/ Steven J. Gunn
STEVEN J. GUNN
1301 Hollins Street
St. Louis, MO 63135
Telephone: (314) 920-9129
Facsimile: (800) 520-8341
Email: sjgunn@wulaw.wustl.edu

Attorney for Tribal Defendants Oglala Sioux Tribe, Darwin Long, Derek Thunder Hawk, Sheena Mousseau, and Charles Montileaux

CERTIFICATE OF SERVICE

The undersigned certifies that, on March 18, 2017, a true and accurate copy of the foregoing was served on Plaintiff by depositing the same in United States mail, postage prepaid, to his last known address, as follows:

Rudy Butch Stanko
RRT. 1, Box 171
Gordon, NE 69343

/s/ Steven J. Gunn
STEVEN J. GUNN