UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

RUDY "BUTCH" STANKO, Plaintiff, v. OGLALA SIOUX TRIBE, et al., Defendants.	Case No. 5:17-cv-05008 **TRIBAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

COME NOW the Oglala Sioux Tribe, Vannesia Rodriguez, Charles Hunter, Jodie Garnette, Tatewin Means, and John Hussman (hereafter "Tribal Defendants"), by and through counsel, and file this memorandum of law in support of their motion to dismiss this action for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), or in the alternative, for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

The Oglala Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868).

Plaintiff brings this action against the Oglala Sioux Tribe ("Tribe") and tribal officers for alleged deprivations of civil rights secured by 42 U.S.C. § 1983 ("Section 1983") and the United States Constitution and for alleged violations of the common law. *See* Pl. Compl. [doc. 1] at 1-2, 6-7. Plaintiff seeks an award of monetary damages, including compensatory and punitive damages, against the Tribe and its officers. *See id*. at 7-8.

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. 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. 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.

In the alternative, Plaintiff's claims against Tribal Defendants should be dismissed for failure to state a claim upon which relief can be granted.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY IS A JURISDICTIONAL BAR TO PLAINTIFF'S CLAIMS AGAINST THE OGLALA SIOUX TRIBE AND ITS OFFICERS ACTING IN THEIR OFFICIAL CAPACITIES.

As a federally recognized Indian tribe, the Oglala Sioux Tribe possesses sovereign immunity from unconsented suit. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Supreme Court held that Indian Tribes are "domestic dependent nations," with inherent sovereign authority over their members and their territory, and in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that suits against Indian tribes are barred by tribal sovereign immunity.

The Supreme Court has "time and again treated the 'doctrine of tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty*., 134 S.Ct. 2024, 2030-2031 (2014) (quoting *Kiowa Tribe v. Mfg. Technologies, Inc*., 523 U.S. 751, 756 (1998)).

Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986). The courts have noted that:

> Not only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but "immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy."

Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1182-1183 (10th Cir. 2010) (internal citations omitted). *Accord, Alden v. Maine,* 527 U.S. 706, 715 (1999) (noting the "close and necessary" relationship between sovereignty and sovereign immunity, which is "central to sovereign dignity").

Tribal sovereign immunity is necessary to protect the economic security of the Oglala Sioux Tribe and other Indian tribes. The courts have long recognized that claims for "compensatory damages, attorney's fees, and even punitive damages," like the claims asserted here by Plaintiff, "could create staggering burdens" and pose "a severe and notorious danger" to governments and their resources. *Alden*, 572 U.S. at 750.

The doctrine of tribal sovereign immunity has been upheld and affirmed repeatedly by the Supreme Court and the lower federal courts. *See*, *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030-2031; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416-417 (2001); *Kiowa Tribe*, 523 U.S. at 754; *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo,* 436 U.S. at 58; *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 172-173 (1977); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998).

Tribal sovereign immunity extends to tribal officers acting in their official capacities. It is well settled that an "official capacity" suit against a governmental official is the same as a suit against the government itself. The Supreme Court explained that, "a suit against a governmental officer 'in his official capacity' is the same as a suit 'against [the] entity of which [the] officer is an agent,'" *McMillian v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) and *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690, n. 55 (1978)), and "victory in such an 'official-capacity' suit 'imposes liability on the entity that [the officer] represents.'" *Id*. (quoting *Brandon v. Holt*, 469 U.S. 464, 471 (1985)).

In the context of State sovereign immunity, the Supreme Court has held that:

> absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity. That is so because, as discussed above, a judgment against a public servant in his official capacity imposes liability on the entity that he represents.

Kentucky v. Graham, 473 U.S. 159, 169 (1985) (internal quotations and citations omitted).

The same rule applies to tribal governments. The doctrine of tribal sovereign immunity extends to tribal officers acting in their official capacities. *See*, *e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011); *Cook v. AVI Casino Enterprises, Inc*., 548 F.3d 718, 727 (9th Cir. 2008); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 86 (S.D. N.Y. 2002) (citing *Davis v. Littell,* 398 F.2d 83, 84–85 (9th Cir.1968), *cert. denied.* 393 U.S. 1018 (1969); *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians,* 862 F. Supp. 995, 1002 (W.D.N.Y.1994)); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997).

In this case, at all relevant times, Defendants Rodriguez, Hunter, Garnette, Means, and Hussman were officers of the Tribe. Defendants Rodriguez and Garnette served as officers of the Oglala Sioux Tribe Corrections Department, which is a department within the tribal government.

Defendant Hunter served as an officer of the Oglala Sioux Tribe Department of Public Safety, which is a department within the tribal government. Defendant Means served as the Oglala Sioux Tribe Attorney General and Defendant Hussman served as a judge in the Oglala Sioux Tribal Court. The tribal judiciary is a branch of the tribal government. *See* O.S.T. Const., Art. V (attached hereto as **Exhibit A**).

In the absence of an express abrogation or waiver of sovereign immunity, the Tribe and its officers acting in their official capacities are immune from suit. Congress has not abrogated the Tribe's sovereign immunity. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 416-417 (2001) (quoting *Santa Clara Pueblo,* 436 U.S. at 58, and citing *United States v. Testan*, 424 U.S. 392, 399 (1976)). It has not done so. In *Santa Clara Pueblo*, the Court held that the Indian Civil Rights Act did not abrogate tribal sovereign immunity or authorize suits against Indian tribal governments for alleged violations of the Act. 436 U.S. at 58-59. Further, Section 1983 does not abrogate tribal sovereign immunity; it does not apply to, or even mention, Indian tribal governments or tribal officers exercising inherent powers of tribal self-government. *See* Argument II, below.

The Tribe has not waived its sovereign immunity. The Supreme Court has held that, "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enterprises*, 532 U.S. at 418 (quoting *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)). The Tribe has acted to preserve and protect its sovereign immunity, including the immunity of tribal officers from suit in any civil action arising from the performance of their official duties. Oglala Sioux Tribal Ordinance No. 01-22 provides that:

> [T]he Oglala Sioux Tribal Council, acting in the exercise of their Constitutional and Reserved Powers does hereby declare the Oglala Sioux Tribe, Oglala Sioux

> Tribal Officials, and Oglala Sioux Tribal Employees, acting in their official capacity, immune from suit, based on the Doctrine of Sovereign Immunity ….

O.S.T. Ord. No. 01-22 (Jul. 30, 2001) (attached hereto as **Exhibit B**). Similarly, Oglala Sioux Tribal Ordinance No. 15-16 provides that:

> The Oglala Sioux Tribe and its governing body, the Oglala Sioux Tribal Council, and its departments, programs, and agencies shall be immune from suit in any civil action and its officers, employees, and agents shall be immune from suit in any civil action for any liability arising from the performance of their official duties.

O.S.T. Ord. No. 15-16 § 1(a) (Sept. 28, 2015) (attached hereto as **Exhibit C**).

In the absence of an abrogation or waiver of the Tribe's sovereign immunity, the Court has no jurisdiction over Plaintiff's claims against the Tribe and its officers acting in their official capacities. "Sovereign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). *Accord*, *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Puyallup Tribe*, 433 U.S. at 172; *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Amerind Risk Mgmt. Corp*, 633 F.3d at 684-685, 686; *Hagen*, 205 F.3d at 1044; *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). It is a "threshold jurisdictional question" and an abrogation or waiver of tribal sovereign immunity is a "jurisdictional prerequisite" for any suit against the Tribe. *Amerind*, 633 F.3d at 684-685, 686 (citing *Hagen*, 205 F.3d at 1044).

"Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mt. Rancheria,* 509 F.3d 1008, 1015-16 (9th Cir.2007). "As immunity is a limitation on federal court jurisdiction, a motion to dismiss based on tribal immunity is appropriately examined under Fed. R. Civ. P. 12(b)(1))." *Bassett v. Mashantucket Pequot Museum & Research Ctr. Inc.*, 221 F. Supp. 2d 271, 276 (D. Conn. 2002). *Accord Robbins v. U.S. Bureau of Land Mgmt.,* 438 F.3d 1074, 1080 (10th Cir. 2006) (holding

that the defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable); *Amore v. Frankel,* 228 Conn. 358, 364, 636 A.2d 786 (1994) (holding that, "the doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss").

Plaintiff "bear[s] the burden of proving that either Congress or [the Tribe] has expressly and unequivocally waived tribal sovereign immunity," *Amerind*, 633 F.3d at 685-686 (citations omitted), and he has not met that burden in this case.

II. PLAINTIFF'S SECTION 1983 CLAIMS AGAINST TRIBAL OFFICERS ACTING IN THEIR INDIVIDUAL CAPACITIES SHOULD BE DISMISSED BECAUSE SECTION 1983 APPLIES TO PERSONS ACTING UNDER COLOR OF STATE LAW AND IT DOES NOT CONFER JURISDICTION OVER CLAIMS AGAINST TRIBAL OFFICERS EXERCISING INHERENT POWERS OF TRIBAL SELF-GOVERNMENT.

Plaintiff's Section 1983 claims are based on alleged violations of the Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by officers of the Oglala Sioux Tribe. *See* Pl. Compl. [doc. 1] at 6-7. It is well settled that the Bill of Rights and Fourteenth Amendment restrain the powers of the federal and state governments, but they do not restrain the inherent powers of self-government of Indian tribes. In *Santa Clara Pueblo*, the Supreme Court made clear that:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832); see *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886). See *United States* v. *Wheeler*, 435 U.S. 313 (1978). They have power to make their own substantive law in internal matters, see *Roff* v. *Burney*, 168 U.S. 218 (1897) (membership); *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States* v. *Quiver*, 241 U.S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, *e. g., Williams* v. *Lee*, 358 U.S. 217 (1959).

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton* v. *Mayes*, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not "[operate] upon" "the powers of local self-government enjoyed" by the tribes. *Id*., at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment.

436 U.S. at 55-56.

Indian tribes and tribal officials exercise inherent powers of tribal self-government. With limited exceptions not applicable here, tribes do not exercise delegated federal power. Nor do they exercise powers under state law. The Supreme Court has made clear that, "[t]he powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished*.'" *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)).

Section 1983 provides, in relevant part, that:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress ….

42 U.S.C. § 1983.

Indian tribes are not States or Territories, and tribal officials do not act under color of statutes, ordinances, regulations, customs or usages of any State or Territory. Section 1983 does not apply to Indian tribal governments or tribal officers exercising inherent powers of tribal self-government.

The Supreme Court recently noted its assumption that Indian tribes are not subject to suit under Section 1983. *See Inyo County, California, et al., v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, et al*., 538 U.S. 701, 709 (2003).

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.

Alternatively, Plaintiff's claims against the current and former Tribal employees are subject to dismissal because he has not stated a claim under § 1983. To state a claim under § 1983, a plaintiff must show that the alleged deprivation of a constitutional right was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id*. at 49 (internal quotation omitted). The conduct at issue must be fairly attributable to the state for liability under § 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Here, Plaintiff has not alleged that the Tribal Defendants were acting under color of state law. They were not. Plaintiff has not alleged participation by any state officials. There was none. Therefore, Plaintiff has failed to plead sufficient facts to support any claim under Section 1983 for any alleged deprivation of his constitutional rights. Therefore, this Court should dismiss for failure to state a claim upon which relief can be granted.

III. PLAINTIFF'S COMMON LAW TORT CLAIMS AGAINST TRIBAL OFFICERS ACTING IN THEIR INDIVIDUAL CAPACITIES SHOULD BE DISMISSED BECAUSE THEY DO NOT ARISE UNDER FEDERAL LAW.

Plaintiff's common law tort claims against tribal officers acting in their individual capacities should be dismissed for lack of jurisdiction because they do not arise under federal law. Those claims arise, if at all, under tribal law.

CONCLUSION

For the foregoing reasons, Tribal Defendants' Motion to Dismiss should be granted and this action should be dismissed with prejudice.

Respectfully submitted this 17th day of February 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on February 17, 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
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Gordon, NE 69343

/s/ Steven J. Gunn
STEVEN J. GUNN