No. 17-3176

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RUDY "BUTCH" STANKO,
Plaintiff-Appellant,

v.

OGLALA SIOUX TRIBE, *et al*.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA,
JEFFREY L. VIKEN, DISTRICT JUDGE,
CASE NO. 5:16-CV-05105-JLV

BRIEF OF APPELLEES

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

Appellate Case: 17-3176 Page: 1 Date Filed: 04/02/2018 Entry ID: 4645769

SUMMARY OF THE CASE

The Oglala Sioux Tribe is a "'distinct, independent political communit[y], retaining [its] original 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)). The Tribe's right to self-government was guaranteed in the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). *See Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556, 568 (1883). It includes the right to maintain public safety and order on the Pine Ridge Indian Reservation. *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005).

Appellant Rudy "Butch" Stanko brought this action for damages against the Tribe and tribal officials for alleged violations of the U.S. Constitution, 42 U.S.C. § 1983, and the common law of torts. The District Court dismissed all claims against the Tribe and tribal officers acting in their official capacities based on the doctrine of tribal sovereign immunity. The District Court dismissed the individual-capacity claims against the tribal officers because the Constitution does not apply to Indian tribes or tribal officers exercising inherent powers of tribal self-government. *Santa Clara Pueblo*, 436 U.S. at 55-56 (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)). Further, tribal forums are available to vindicate Appellant's rights. *Id*. at 65-66.

This case raises important questions of tribal sovereign immunity, tribal self-government, and federal jurisdiction. Appellees request 20 minutes of oral argument.

Appellate Case: 17-3176 Page: 2 Date Filed: 04/02/2018 Entry ID: 4645769

TABLE OF CONTENTS

SUMMARY OF THE CASE i

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. MR. STANKO'S CLAIMS AGAINST THE OGLALA SIOUX TRIBE ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY 9

II. MR. STANKO'S OFFICIAL CAPACITY CLAIMS AGAINST THE TRIBAL OFFICERS ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY 14

III. SECTION 1983 DOES NOT CONFER JURISDICTION OVER MR. STANKO'S INDIVIDUAL-CAPACITY CLAIMS AGAINST TRIBAL OFFICERS EXERCISING INHERENT POWERS OF TRIBAL SELF-GOVERNMENT 15

IV. MR. STANKO'S COMMON LAW TORT CLAIMS AGAINST THE INDIVIDUAL TRIBAL OFFICERS ACTING IN THEIR INDIVIDUAL CAPACITIES DO NOT ARISE UNDER FEDERAL LAW 22

CONCLUSION 26

CERTIFICATES OF FILING, SERVICE, AND COMPLIANCE 28

Appellate Case: 17-3176 Page: 3 Date Filed: 04/02/2018 Entry ID: 4645769

TABLE OF AUTHORITIES

CASES

Alden v. Maine, 527 U.S. 706 (1999) 10, 11

Alvarado v. Table Mt. Rancheria, 509 F.3d 1008 (9th Cir. 2007) 13

Amerind Risk Mgmt. Corp. v. Malaterre, 633 F.3d 680
(8th Cir. 2011) 3, 11, 13-14

Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation, 495 F.3d 1017 (8th Cir. 2007) 25, 26

Bank of Okla. v. Muscogee (Creek) Nation, 972 F.2d 1166
(10th Cir. 1992) 20

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971)..19

Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173 (10th Cir. 2010) 10

C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe,
532 U.S. 411 (2001)...11, 12

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 9

City of Milwaukee v. Illinois & Michigan, 451 U.S. 304 (1981)...........................22

Dillon v. Yankton Sioux Tribe Housing Auth., 144 F.3d 581(8th Cir. 1998)..........11

Dry Creek Lodge v. Arapahoe and Shoshone Tribes,
623 F. 2d 682 (10th Cir. 1980)..20

Duro v. Reina, 495 U.S. 676 (1990)...6

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)...22

Evans v. McKay, 869 F.2d 1341 (9th Cir. 1989)..18

Ex parte Kan-gi-shun-ca (Crow Dog), 109 U.S. 556 (1883) i

F.D.I.C. v. Meyer, 510 U.S. 471 (1994) 13

Fisher v. Dist. Ct., 424 U.S. 382 (1976)..23

Gaming World Int'l v. White Earth Band of Chippewa Indians,
317 F.3d 840 (8th Cir. 2003)..25

Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) 23

Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040
(8th Cir. 2000) 11, 14

Hedberg v. State Farm Mut. Auto Ins., 350 F.2d 924 (8th Cir. 1965) 22

Inyo County v. Paiute-Shoshone Indians of the Bishop
Community of the Bishop Colony, 538 U.S. 701 (2003) 18

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 8 (1987)...26

Jones v. Meehan, 175 U.S. 1 (1899)...16

Jones v. United States, 16 F.3d 979 (8th Cir. 1994) 15

Kiowa Tribe v. Mfg. Technologies, Inc., 523 U.S. 751 (1998).........................10, 11

Krempel v. Prairie Island Indian Community, 125 F.3d 621
(8th Cir. 1997) 21

Lewis v. Clarke, 137 S.Ct. 1285 (2017)...4, 14

Longie v. Spirit Lake Tribe, 400 F.3d 586 (8th Cir. 2005)...........................4, 23-24

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)..18

McMillian v. Monroe County, 520 U.S. 781 (1997) 4, 9, 14-15

McNutt v. Gen. Motors Acceptance Corp. of Indiana,
298 U.S. 178 (1936)...25

Appellate Case: 17-3176 Page: 5 Date Filed: 04/02/2018 Entry ID: 4645769

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 5

Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) 3, 9, 10, 11

Montana v. United States, 450 U.S. 544 (1981) 7

National Farmers Union Inc. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985)...24

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21 (1st Cir. 2000).. 25-26

Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe,
498 U.S. 505 (1991)...11

Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y, 163 F.3d 1150
(10th Cir. 1998) 20

Ortiz–Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975)..............................6

Pistor v. Garcia, 791 F.3d 1104 (9th Cir. 2015)... 17-18

Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977)..................................11, 13

Reservation Tel. Coop. v. Three Affiliated Tribes,
76 F.3d 181 (8th Cir.1996)...24

R.J. Williams Co. v. Fort Belknap Housing Authority,
719 F.2d 979 (9th Cir. 1983)...17, 21

Roff v. Burney, 168 U.S. 218 (1897) 16

Rupp v. Omaha Indian Tribe, 45 F.3d 1241 (8th Cir. 1995) 11

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ....*passim*

Appellate Case: 17-3176 Page: 6 Date Filed: 04/02/2018 Entry ID: 4645769

Standing Rock Sioux Indian Tribe v. Dorgan,
505 F.2d 1135 (8th Cir. 1974) 25

Talton v. Mayes, 163 U.S. 376 (1896) ....i, 4, 16

Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g,
476 U.S. 877 (1986) 10, 11

United States v. Hudson & Goodwin, 7 Cranch 32 (1812) 22

United States v. Kagama, 118 U.S. 375 (1886) 16

United States v. Mazurie, 419 U.S. 544 (1975) 5, 16

United States v. Mitchell, 463 U.S. 206 (1983) 13

United States v. Orleans, 425 U.S. 807 (1976) 1

United States v. Quiver, 241 U.S. 602 (1916) 16

United States v. Sherwood, 312 U.S. 584 (1941) 13

United States v. Terry, 400 F.3d 575 (8th Cir. 2005) 6-7

United States v. Testan, 424 U.S. 392 (1976) 11

United States v. Wheeler, 435 U.S. 313 (1978) 16-17

United States ex rel. Kishell v. Turtle Mountain Housing Auth.,
816 F.2d 1273 (8th Cir. 1987) 24

Weeks Constr. Inc. v. Oglala Sioux Housing Auth., 797 F.2d 688
(8th Cir. 1986) 4, 23, 24

Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) 22-23

West v. Atkins, 487 U.S. 42 (1988) 4, 18

White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984) 20

Appellate Case: 17-3176 Page: 7 Date Filed: 04/02/2018 Entry ID: 4645769

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989)....................................12

Williams v. Lee, 358 U.S. 217 (1959)..5, 16, 23

Worcester v. Georgia, 6 Pet. 515 (1832) ....i, 16

TREATIES

Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851)... i, 5

Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868).. i, 5

STATUTES

25 U.S.C. § 1302...19, 20

25 U.S.C. § 1303...12

28 U.S.C. § 1331...*passim*

28 U.S.C. § 1332.. 24-25

28 U.S.C. § 1343...1

28 U.S.C. § 1346(b)(1)...1

28 U.S.C. § 136...26

42 U.S.C. § 1983...*passim*

TRIBAL LAWS

Oglala Sioux Tribe Ord. No. 01-22 (Jul. 30, 2001) 12-13

Oglala Sioux Tribe Ord. No. 02-25 (Sept. 4, 2002)..7

Oglala Sioux Tribe Ord. No. 15-16 (Sept. 28, 2015) 13

Appellate Case: 17-3176 Page: 8 Date Filed: 04/02/2018 Entry ID: 4645769

OTHER AUTHORITIES

8 FED. PROC., L. ED. § 20:586 (Feb. 2018) 23

32 AM. JUR. 2D FEDERAL COURTS § 370 (Feb. 2018) 23

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1945) 16, 17

JURISDICTIONAL STATEMENT

Appellant Rudy "Butch" Stanko ("Mr. Stanko") brought this action against the Oglala Sioux Tribe ("Tribe") and officers of the Tribe in the U.S. District Court for the District of South Dakota ("District Court"). His complaint alleges violations of 42 U.S.C. § 1983 ("Section 1983") and the common law. *See* Appellant's Appendix ("App.") 2-3, 7-8.

Mr. Stanko alleges that the District Court had jurisdiction over his Section 1983 claims pursuant to 28 U.S.C. §§ 1331 and 1343, which confer jurisdiction in the federal district courts over actions arising under federal law and Section 1983, respectively. App. 3; Appellant Br. 5.[1]

The Tribe and tribal officials filed a motion to dismiss for lack of jurisdiction in the District Court in which they contended that:

1. Mr. Stanko's Section 1983 and common law claims against the Tribe and tribal officers, acting in their official capacity, should be dismissed for lack of subject matter jurisdiction because the Tribe and its officers acting in their official

---

[1] In the District Court, Mr. Stanko also alleged that the court had jurisdiction over his complaint under the Federal Tort Claims Act (FTCA). App. 4. He does not repeat that allegation on appeal. *See* App. Br. 5. The District Court properly held that the FTCA is inapplicable to this case, since it only authorizes suits against the Federal government for certain torts committed by federal employees and it does not authorize suits against Indian tribal governments, tribal officers, or any other individuals. App. 22 (citing *United States v. Orleans*, 425 U.S. 807, 813 (1976); 28 U.S.C. § 1346(b)(1)).

Appellate Case: 17-3176 Page: 10 Date Filed: 04/02/2018 Entry ID: 4645769

capacities are immune from suit absent a waiver or abrogation of tribal sovereign immunity, and no such waiver or abrogation exists in this case; and

2. Mr. Stanko'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 federal jurisdiction over causes of action against Indian tribal officers exercising inherent powers of tribal self-government; and

3. Mr. Stanko's common law 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 its Order of September 20, 2017, the District Court held that:

1. The District Court did not have jurisdiction over Mr. Stanko's Section 1983 and common law claims against the Tribe or tribal officials acting in their official capacities in that: the Tribe has sovereign immunity from suit; the Tribe's sovereign immunity extends to tribal officials acting in their official capacity; Mr. Stanko has not identified a waiver of the Tribe's sovereign immunity; and the Tribe's sovereign immunity deprives the court of jurisdiction over Mr. Stanko's claims against the Tribe and tribal officials acting in their official capacity, App. at 16-18, 23; *see also id.* at 12, 14; and

2. Section 1983 does not confer jurisdiction over Mr. Stanko's claims against the tribal officials acting in their individual capacity, App. 22; and

3. Mr. Stanko's common law claims against the tribal officials acting in their individual capacity were dismissed. App. 23.

The Tribe and tribal officials contend on appeal that the District Court did not, and does not, have jurisdiction over Mr. Stanko's claims and, accordingly, those claims were properly dismissed.

STATEMENT OF THE ISSUES

1. Whether the doctrine of tribal sovereign immunity, which bars "any suit against a tribe absent congressional authorization (or a waiver)," *Michigan v. Bay Mills Indian Cmty*., 134 S.Ct. 2024, 2031 (2014), required dismissal of Mr. Stanko's suit against the Oglala Sioux Tribe, since Congress has not authorized the suit and the Tribe has not waived its immunity.

- *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014)
- *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011)

2. Whether the District Court properly dismissed Mr. Stanko's suit against officers of the Oglala Sioux Tribe in their official capacities since an official-capacity suit against these officers is the same as a suit against the Tribe itself, and suits against the Tribe are barred by tribal sovereign immunity.

Appellate Case: 17-3176 Page: 12 Date Filed: 04/02/2018 Entry ID: 4645769

- *Lewis v. Clarke*, 137 S.Ct. 1285 (2017)
- *McMillian v. Monroe County*, 520 U.S. 781 (1997)

3. Whether the District Court properly dismissed Mr. Stanko's Section 1983 claims against officers of the Oglala Sioux Tribe, acting in their individual capacities, because Section 1983 applies to persons acting under color of state law, not Indian tribal officers exercising inherent powers of tribal self-government.

- *West v. Atkins*, 487 U.S. 42 (1988)
- *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
- *Talton v. Mayes*, 163 U.S. 376 (1896)
- 42 U.S.C. § 1983

4. Whether the District Court properly dismissed Mr. Stanko's common law tort claims against officers of the Oglala Sioux Tribe, acting in their individual capacities, since those claims do not arise under federal law.

- *Longie v. Spirit Lake Tribe*, 400 F.3d 586 (8th Cir. 2005)
- *Weeks Constr. Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 688 (8th Cir. 1986)
- 28 U.S.C. § 1331

STATEMENT OF CASE

The Oglala Sioux 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). The Tribe possesses sovereignty over both its members and its territory. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). It has the right to make its own laws and be ruled by them. *Williams v. Lee,* 358 U.S. 217, 220 (1959).

At all relevant times, Appellees Vannesia Rodriguez, Charles Hunter, Jodie Garnette, Tatewin Means, and John Hussman were officers of the Tribe. Ms. Rodriguez and Ms. Garnette served as officers of the Oglala Sioux Tribe Corrections Department, which is a department within the tribal government. App. 2, 4, 11; Appellant Br. 7-8. Mr. Hunter served as an officer of the Oglala Sioux Tribe Department of Public Safety, which is a department within the tribal government. *Id*. Ms. Means served as the Oglala Sioux Tribe Attorney General, and Mr. Hussman served as a judge in the Oglala Sioux Tribal Court. *Id.* The tribal judiciary is a branch of the tribal government. *See* Oglala Sioux Tribe Const., art. V, *reprinted in* Appellees' Appendix ("Appellee App.") 7-9.

Appellate Case: 17-3176 Page: 14 Date Filed: 04/02/2018 Entry ID: 4645769

Mr. Stanko, a nonmember of the Tribe, alleges that he was "falsely arrested and wrongly imprisoned" by the Tribe and its officers and ordered "to strip naked at gunpoint, and then robbed." Appellant Br. 2.

The Tribe and its officers categorically deny these allegations and note that they are untested and unproven. The District Court dismissed the complaint based on facial challenges to the court's jurisdiction and the sufficiency of the complaint. In so doing, the District Court was required to (and did) accept as true all factual allegations in the complaint, and it was required to (and did) view those allegations in the light most favorable to Mr. Stanko. *See* App. 12-13, 18-20.

The District Court dismissed Mr. Stanko's case for lack of subject matter jurisdiction based on tribal sovereign immunity and for failure to state a claim under Section 1983 based on the absence of state action.

This Court has recognized that the Oglala Sioux Tribe has the inherent authority to maintain public safety and preserve public order on the Pine Ridge Indian Reservation, including the "authority to detain non-Indians whose conduct disturbs the public order on their reservation." *United States v. Terry*, 400 F.3d 575, 579 (8th Cir. 2005).

> 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

Appellate Case: 17-3176 Page: 15 Date Filed: 04/02/2018 Entry ID: 4645769

> 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 Cir.1975).

Id. at 579-580.

Mr. Stanko alleges that he was stopped more than once by tribal law enforcement officers for driving at an excessive rate of speed on the Reservation.[2] If tribal law enforcement officers had reasonable suspicion or probable cause to believe Mr. Stanko was disturbing public order on the Reservation, then they had the right to stop and detain him. *Terry*, 400 F.3d at 579-580.

Speeding is a civil infraction, not a crime, under tribal law.[3] The Tribe has the inherent authority to apply its civil traffic laws to non-Indians, since unregulated and unsafe vehicular traffic on Reservation roads poses significant hazards and threats to the health, welfare, and economic security of the Tribe. *See Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding that, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within

---

[2] He 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* App. 4; Def. Reply [doc. 10] at 8, Exh. D [doc. 10-1]. When he was stopped on January 21, 2017, App. 5, 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. *See* Def. Reply [doc. 10] at 8.

[3] *See* Def. Reply [doc. 10] at 8-9 (citing Oglala Sioux Tribe Ord. No. 02-25 §§ 6.01(c), 622(e) (Sept. 4, 2002)).

Appellate Case: 17-3176 Page: 16 Date Filed: 04/02/2018 Entry ID: 4645769

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").

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 to ensure the safe and efficient use of Reservation roads for the Tribe, its members, and all other persons on the Reservation, including Mr. Stanko.

The Tribe has the right to seek compliance with its civil traffic laws by appropriate civil process. If Mr. Stanko wished to challenge that process, he could have done so by filing an appropriate motion or action in the Oglala Sioux Tribal Court. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).

Mr. Stanko chose not to exercise or exhaust his remedies in tribal court. Instead, he filed a federal suit for money damages against the Tribe and its officers, alleging violations of Section 1983 and the United States Constitution.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Mr. Stanko's claims against the Tribe for lack of jurisdiction because the Tribe is immune from suit absent a waiver or

abrogation of tribal sovereign immunity, *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031 (2014), and no such waiver or abrogation exists in this case.

The District Court properly dismissed Mr. Stanko's official capacity claims against the officers of the Tribe for lack of jurisdiction because "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) (internal citations, quotation marks, and brackets omitted).

The District Court properly dismissed Mr. Stanko's Section 1983 claims against the officers of the Tribe, acting in their individual capacity, because Section 1983 applies to persons acting under color of state law and it does not confer jurisdiction in the Federal courts over causes of action against Indian tribal officers exercising inherent powers of tribal self-government.

The District Court properly dismissed Mr. Stanko's common law tort claims against officers of the Tribe, acting in their individual capacity, since those claims do not arise under federal law.

ARGUMENT

I. MR. STANKO'S CLAIMS AGAINST THE OGLALA SIOUX TRIBE ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY.

The Oglala Sioux Tribe possesses sovereign immunity from unconsented suit. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 11 (1831), the Supreme Court held that Indian tribes are "domestic dependent nations," with inherent sovereign

Appellate Case: 17-3176 Page: 18 Date Filed: 04/02/2018 Entry ID: 4645769

authority over their members and their territory, and in *Santa Clara Pueblo*, 436 U.S. at 58, 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)." *Bay Mills Indian Cmty*., 134 S.Ct. at 2030-2031 (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 Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1182-1183 (10th Cir. 2010) (internal citations, quotation marks, and brackets 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 Indian tribes. If permitted, claims against governments for "compensatory damages, attorney's fees, and even punitive damages," like the claims asserted by Mr. Stanko,

Appellate Case: 17-3176 Page: 19 Date Filed: 04/02/2018 Entry ID: 4645769

"could create staggering burdens" and pose "a severe and notorious danger" to the governments and their resources. *Alden*, 527 U.S. at 750.

The doctrine of tribal sovereign immunity has been upheld and affirmed repeatedly by the Supreme Court and this Court. *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); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) ("Tribes possess immunity because they are sovereigns predating the Constitution").

Congress has not abrogated the Tribe's sovereign immunity. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc.*, 532 U.S. at 416-417 (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 Supreme Court held that the Indian Civil Rights Act did not abrogate tribal sovereign immunity or authorize suits against Indian

Appellate Case: 17-3176 Page: 20 Date Filed: 04/02/2018 Entry ID: 4645769

tribes:

> 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.

Further, Section 1983 does not abrogate tribal sovereign immunity. The Supreme Court has held that, "in enacting § 1983, Congress did not intend to override well-established immunities under the common law." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Section 1983 does not apply to, or even mention, Indian tribal governments or tribal officers exercising inherent powers of tribal self-government. *See* Argument III, *infra*.

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 *Citizen Band of Potawatomi Indian Tribe*, 498 U.S. at 509). The Tribe has acted to preserve and protect its sovereign immunity. 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

Appellate Case: 17-3176 Page: 21 Date Filed: 04/02/2018 Entry ID: 4645769

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

Oglala Sioux Tribe Ord. No. 01-22 (Jul. 30, 2001), *reprinted in* Appellee App. 54-55. 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.

Oglala Sioux Tribe Ord. No. 15-16 § 1(a) (Sept. 28, 2015), *reprinted in* Appellee App. 56-60.

In the absence of an abrogation or waiver of the Tribe's sovereign immunity, the Court has no jurisdiction over Mr. Stanko's claims against the Tribe. "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). "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).

This Court has held that tribal sovereign immunity is a "threshold jurisdictional question" and an abrogation or waiver of tribal sovereign immunity is a "jurisdictional prerequisite" for any suit against an Indian tribe. *Amerind*, 633 F.3d

Appellate Case: 17-3176 Page: 22 Date Filed: 04/02/2018 Entry ID: 4645769

at 684-685, 686 (citing *Hagen*, 205 F.3d at 1044). Mr. Stanko "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 could not, and did not, meet that burden in this case. The District Court noted that Mr. Stanko "has not identified a waiver of sovereign immunity," App. 14, and properly dismissed his suit against the Tribe.

II. MR. STANKO'S OFFICIAL-CAPACITY CLAIMS AGAINST THE TRIBAL OFFICERS ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY.

The District Court noted that, "[t]he Tribe's immunity extends to its officers acting in their official capacities." App. 18 (citing *Lewis v. Clarke*, 137 S.Ct. 1285, 1290-91 (2017)). In *Lewis*, the Supreme Court held that:

> lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent …
>
> In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official …
>
> Defendants in an official-capacity action may assert sovereign immunity.

137 S. Ct. at 1290-91 (internal citations and quotation marks omitted). *Accord*, *McMillian*, 520 U.S. at 785 n.2 (noting that "a suit against a governmental officer in

Appellate Case: 17-3176 Page: 23 Date Filed: 04/02/2018 Entry ID: 4645769

his official capacity is the same as a suit against the entity of which the officer is an agent, and … victory in such an official-capacity suit imposes liability on the entity that the officer represents") (internal citations, quotation marks, and brackets omitted).

The District Court properly held that Mr. Stanko's official-capacity claims against the tribal officers "fail as a matter of law" because "[t]hese claims are against the Tribe, which is immune from suit." App. 18.

III. SECTION 1983 DOES NOT CONFER JURISDICTION OVER MR. STANKO'S INDIVIDUAL-CAPACITY CLAIMS AGAINST TRIBAL OFFICERS EXERCISING INHERENT POWERS OF TRIBAL SELF-GOVERNMENT.

The District Court dismissed Mr. Stanko's Section 1983 claims against the individual tribal officers acting in their individual capacities. The court held that, "Section 1983 does not provide jurisdiction for plaintiff's claims against the Individual Tribal Defendants." App. 22 (citing *Jones v. United States*, 16 F.3d 979, 981 (8th Cir. 1994)). The court further held that, "Mr. Stanko's § 1983 allegations fail to state a claim upon which relief can be granted." App. 21.

Mr. Stanko's Section 1983 claims are based on alleged violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. *See* App. 7-8. 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 apply to or restrain

Appellate Case: 17-3176 Page: 24 Date Filed: 04/02/2018 Entry ID: 4645769

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*

Appellate Case: 17-3176 Page: 25 Date Filed: 04/02/2018 Entry ID: 4645769

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 the 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.

> [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,

Appellate Case: 17-3176 Page: 26 Date Filed: 04/02/2018 Entry ID: 4645769

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").[4]

Dismissal of Mr. Stanko's Section 1983 claims for lack of subject matter jurisdiction was proper. So, too, was dismissal for failure to state a claim upon which relief can be granted. The Supreme Court has held that to state a claim under Section 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 citation and quotation marks omitted). The conduct at issue must be fairly attributable to the state for liability under Section 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Mr. Stanko did not allege that the Tribal Defendants were acting under color of state law. They were not. Mr. Stanko did not allege participation by any state officials. There was none. Therefore, Mr. Stanko failed to plead sufficient facts to

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

Appellate Case: 17-3176 Page: 27 Date Filed: 04/02/2018 Entry ID: 4645769

support a claim under Section 1983 for any alleged deprivation of his constitutional rights.

Mr. Stanko raises the *Bivens* doctrine in his brief, *see* Appellant Br. 11-12, 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.

Mr. Stanko further suggests that the Indian Civil Rights Act ("ICRA") is a basis for federal jurisdiction in this case. *See* Appellant Br. 10-11 (citing 25 U.S.C. § 1302). Mr. Stanko did not assert a claim under the ICRA in his complaint. *See* App. 2-9. Even if he had, this 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 Mr. Stanko 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*.

Appellate Case: 17-3176 Page: 28 Date Filed: 04/02/2018 Entry ID: 4645769

The proper forum for ICRA claims seeking relief other than a writ of habeas corpus is tribal court, not federal court. The Supreme Court held in *Santa Clara Pueblo* that:

> implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.

436 U.S. at 65–66 (internal citations omitted).

Plaintiff's reliance on *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F. 2d 682 (10th Cir. 1980), is misplaced. Since *Dry Creek Lodge* was decided in 1980, the Tenth Circuit has held that it 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), and has applied 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).

Appellate Case: 17-3176 Page: 29 Date Filed: 04/02/2018 Entry ID: 4645769

This Court has noted that *Dry Creek Lodge* applies, if at all, only "if there is no functioning tribal court." *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622-623 (8th Cir. 1997).[5]

The Oglala Sioux Tribe has a functioning Tribal Court. *See* Appellee App. 7-9. 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, Mr. Stanko made no attempt to exercise (or exhaust) the remedies available to him in the Tribal Court.[6]

Thus, it is simply not true, as Mr. Stanko suggests, that without federal jurisdiction over this case, there would be "a dark hole in America," where government officials could "abuse people without consequence or accountability." Appellant Br. 9.

---

[5] The Ninth Circuit has rejected the *Dry Creek Lodge* doctrine altogether. *See, e.g.*, *R. J. Williams.*, 719 F.2d at 981.

[6] In the District Court, Mr. Stanko implied that no tribal forum was available to him since the "judicial branch (John Hussman) of the tribe" conspired against him. Pl. Resp. to Mot. to Dismiss [doc. 9] 3-4. Judge Hussman denied these allegations, and Mr. Stanko does not appear to repeat this argument on appeal. However, it is worth noting that, in making this argument in the District Court, Mr. Stanko confused Tribal Court Judge John Hussman with the "judicial branch" of the Tribe. The judicial power of the Tribe is vested in a Supreme Court and an Inferior Court, each with numerous justices and judges, and each independent from the Tribal Council. App. 7-9. If, for any reason, Judge Hussman were disqualified from hearing a claim brought by Mr. Stanko, other Tribal Court judges would be available to hear and decide the claim.

Appellate Case: 17-3176 Page: 30 Date Filed: 04/02/2018 Entry ID: 4645769

IV. MR. STANKO'S COMMON LAW TORT CLAIMS AGAINST THE INDIVIDUAL TRIBAL OFFICERS ACTING IN THEIR INDIVIDUAL CAPACITIES DO NOT ARISE UNDER FEDERAL LAW.

The District Court properly dismissed Mr. Stanko's common law tort claims against the individual tribal officers acting in their individual capacities. App. 23. The District Court did not have jurisdiction over those tort claims under 28 U.S.C. § 1331 because the claims do not arise under federal law.

The federal courts are courts of limited jurisdiction, and the statutes conferring jurisdiction on the federal courts are strictly construed. *Hedberg v. State Farm Mut. Auto Ins.,* 350 F.2d 924, 928 (8th Cir. 1965). Mr. Stanko alleges that the District Court had jurisdiction over his common law tort claims under 28 U.S.C. § 1331. *See* App. 3; Appellant Br. 5. He does not identify the federal common law under which his tort claims arise. There is none.

The Supreme Court has noted that, "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312 (1981) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *United States v. Hudson & Goodwin*, 7 Cranch 32 (1812)).

The federal courts have refused to fashion a federal common law of torts. *See Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 520 (1953) (Jackson, Black, Minton, J.J., dissenting) (noting that, "*Erie R. Co. v. Tompkins* held that there is

no federal common law of torts and that federal courts must not improvise one of their own but must follow that state's law which is applicable to the case"). *See also* 8 FED. PROC., L. ED. § 20:586 (Feb. 2018) (collecting cases); 32 AM. JUR. 2D FEDERAL COURTS § 370 (Feb. 2018) (same). Further, this Court has held that, "section 1983 does not create a general federal law of torts." *Goodman v. Parwatikar*, 570 F.2d 801, 805 (8th Cir. 1978).

In this case, if a common law cause of action lies, it arises under tribal law, not federal law, and is properly heard in tribal court, not federal court. In *Weeks Constr. Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 688 (8th Cir. 1986), this Court affirmed the dismissal of a common law breach of contract action brought by a nonmember contractor against a tribal housing authority. The Court held that the contract claim was "governed by local, not federal, law," and thus, there was "no subject matter jurisdiction … based on a federal question." *Id.* at 672 (citations omitted).

Similarly, in *Longie v. Spirit Lake Tribe*, 400 F.3d 586 (8th Cir. 2005), this Court affirmed the dismissal of a quiet title action brought in federal court by a member of an Indian tribe against the tribe because the action arose under tribal law, not federal law:

> Federal courts have consistently affirmed the principle that it is important to guard "the authority of Indian governments over their reservations." *Williams v. Lee,* 358 U.S. 217, 223 (1959); *see also Fisher v. Dist. Ct.,* 424 U.S. 382, 387–88 (1976) (per curiam)

Appellate Case: 17-3176 Page: 32 Date Filed: 04/02/2018 Entry ID: 4645769

> (finding no state court jurisdiction over adoption of child member of the tribe because such jurisdiction "would interfere with the powers of [tribal] self-government" and "would cause a corresponding decline in the authority of the Tribal Court"). In light of the fact that "Indian tribes retain attributes of sovereignty over both their members and their territory," and out of our obligation to avoid impairing "the authority of the tribal courts," *United States ex rel. Kishell v. Turtle Mountain Housing Auth.,* 816 F.2d 1273, 1276 (8th Cir. 1987), we will exercise our section 1331 jurisdiction in cases involving reservation affairs only in those cases in which federal law is determinative of the issues involved…

Id. at 589. "We ask therefore whether federal law or local/tribal law controls the existence and enforceability of [plaintiff's] asserted right." *Id*. (citing *Weeks*, 797 F.2d at 692). When a claim is "contingent upon tribal law, not federal law," as is the case with Mr. Stanko's common law tort claims, there is no federal jurisdiction under Section 1331. *Id*. at 591.

The *Longie* Court further noted:

> Even when an Indian law case involves a federal question, other jurisprudential considerations may nevertheless prevent it from proceeding in federal district court. For example, with very few exceptions we require that the parties exhaust tribal court remedies so that the tribal court may first consider the limits of its own sovereignty and may develop a full record.

400 F.3d at 590 (citing *National Farmers Union Inc. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 855–56 (1985); *Reservation Tel. Coop. v. Three Affiliated Tribes,* 76 F.3d 181, 184 (8th Cir.1996)).

It should be noted that Mr. Stanko has not alleged diversity jurisdiction, and his complaint does not meet the diversity requirements of 28 U.S.C. § 1332. Mr.

Appellate Case: 17-3176 Page: 33 Date Filed: 04/02/2018 Entry ID: 4645769

Stanko's complaint does not contain allegations regarding the citizenship of the parties. Nor does it allege that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Instead, the complaint alleges only that the amount in controversy is "in excess of twenty dollars," App. 2, or "at least $10,000," *id.* at 9, or "in excess of $50,000." *Id*. at 3.

These defects are fatal. The Supreme Court had held that the party seeking the exercise of jurisdiction of the federal district court "must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936).

No diversity jurisdiction exists in this case because Mr. Stanko has sued the Oglala Sioux Tribe and "an Indian tribe is not a citizen of a state for diversity purposes." *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007).[7]

> Diversity jurisdiction requires, inter alia, complete diversity of citizenship between all plaintiffs, on one hand, and all defendants, on the second hand. An Indian tribe, however, is not considered to be a citizen of any state. Consequently, a tribe is analogous to a stateless person for jurisdictional purposes. It follows that, notwithstanding the

[7] *Accord*, *Gaming World Int'l v. White Earth Band of Chippewa Indians,* 317 F.3d 840, 847 (8th Cir. 2003) ("Diversity jurisdiction is not available here under 28 U.S.C. § 1332 because Indian tribes are neither foreign states nor citizens of any state") (internal citations omitted); *Standing Rock Sioux Indian Tribe v. Dorgan,* 505 F.2d 1135, 1140 (8th Cir. 1974) (holding that, "an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction").

Appellate Case: 17-3176 Page: 34 Date Filed: 04/02/2018 Entry ID: 4645769

> joinder of other diverse parties, the presence of an Indian tribe destroys complete diversity.

Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27 (1st Cir. 2000) (internal citations omitted).

More importantly, the Supreme Court has held that nothing in the statutory grant of diversity jurisdiction suggests a congressional intent to override the federal policy of deference to tribal courts:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact. In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 8, 18 (1987) (internal citations, quotation marks, and ellipses omitted). *See also id*. at 17.

Finally, Mr. Stanko cannot rely on supplemental jurisdiction under 28 U.S.C. § 1367 to bring his common law claims against the tribal officers as no additional claim establishes federal jurisdiction. *See Auto-Owners Ins. Co.*, 495 F.3d at 1023.

CONCLUSION

For the foregoing reasons, the District Court's order and judgment of dismissal should be affirmed.

Appellate Case: 17-3176 Page: 35 Date Filed: 04/02/2018 Entry ID: 4645769

Respectfully submitted this 2nd day of April 2018.

/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 Appellees

CERTIFICATES OF FILING, SERVICE, AND COMPLIANCE

I certify that on April 2, 2018, I filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the Court's Case Management/Electronic Case Filing system ("CM/ECF") system.

I certify that all parties and counsel of record in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify that this document complies with the type-volume limitation of FRAP 32(a)(7)(B) in that it contains 6,832 words, excluding the cover page, table of contents, table of authorities, statement regarding oral argument, signature block, and certificates of filing, service, and compliance.

I certify that this document complies with the typeface and type-style requirements of FRAP 32(a)(5),(6) in that it has been prepared using a proportionally spaced typeface in 14-point Times New Roman font and all case names are italicized.

I certify that all required privacy redactions have been made.

I certify that within 5 days of receipt of notice that the brief has been filed, I will transmit 10 paper copies of the brief to the Clerk of the Court.

I certify that, prior to filing, I scanned this file using Avast Mac Security, Version 13.4, updated on April 2, 2018, which indicates that it is free of viruses.

/s/ Steven J. Gunn
STEVEN J. GUNN