

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

ROBERT JOE STRANGE,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-20-1155-J
)	
KIOWA TRIBE OF)	
OKLAHOMA, et al.,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Plaintiff, an Oklahoma prisoner appearing pro se and in forma pauperis, has filed a civil rights complaint under 42 U.S.C. § 1983 “to redress the deprivation, under color of state and federal laws of rights secured by the Constitution of the United States and Kiowa Tribe.” Doc. 1, at 1.¹ Plaintiff asserts jurisdiction under “28 U.S.C. §§ 1331² & 1334 (2x3)”³ and states he is a Kiowa Tribe member. *Id.* He names as Defendants the Kiowa Tribe of

¹ Citations to a court document are to its electronic case filing designation and pagination. Except for capitalization, quotations are verbatim unless otherwise indicated.

² Section 1331 references this Court’s “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331.

³ The undersigned presumes Plaintiff’s reference to section 1334 is a scrivener’s error as that section pertains to the Court’s jurisdiction over “Bankruptcy cases and proceedings.” *See* 28 U.S.C. § 1334.

Oklahoma, the “Treasury Dept. of U.S.,” “Cares Act,” “Tribe’s Information Officer McNeely Tsoodle,” “Elected Tribal Chairperson Komalty,” and “Sheryl Palmer, Treasurer.” *Id.* at 2-4. He sues “all” Defendants “individually and in their official capacities under the color of federal and state laws.” *Id.* at 4.

United States District Judge Bernard M. Jones referred the matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Doc. 3. The undersigned has reviewed the sufficiency of Plaintiff’s claims and recommends the Court dismiss Plaintiff’s action.

I. This Court must screen the complaint.

Federal law requires the Court to screen complaints filed by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss any frivolous or malicious claim, any claim asking for monetary relief from a Defendant who is immune from such relief, or any claim on which the Court cannot grant relief. *Id.* §§ 1915A(b), 1915(e)(2)(B).

II. Standard of review.

The complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556); *see also Gee v. Pacheco*, 627 F.3d 1178, 1184 (10th Cir. 2010). “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

This Court construes “[a] pro se litigant’s pleadings . . . liberally and [holds them] to a less stringent standard than formal pleadings drafted by lawyers.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The Court, however, may not serve as Plaintiff’s advocate, creating arguments on his behalf. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III. Plaintiff’s Coronavirus Aid, Relief, and Economic Security Act (CARES Act) claim.

Plaintiff raises one claim:

The U.S. Treasury and Cares Act allowed the Kiowa Tribe to not follow their guidelines: violated Mr. Strange completed application not once but a second and possible third time. Rules set in place by U.S. Treasury Dept. See Notice 1444-d[.]

Doc. 1, at 5. Elsewhere in his complaint, Plaintiff attempts to explain his sole claim by asserting that the “Kiowa Tribe of Oklahoma [] is in control of cares act economic impact payments to incarcerated Indians” and “is intrusted with [his] affairs of monetary payouts from the U.S. Treasury (IRS CARES Act 2020

March).” *Id.* at 2-3. He states he has “no use for food vouchers[,] gift cards, utility bills, house paymaents nor school supplies, tablets or internet services” and wants “cash on trust fund only.” *Id.* at 3. He complains that the Kiowa Tribe officials responsible for doling out tribal assistance money have excluded “incarcerated Indians” in violation of federal case law. *Id.* at 3-4 (citing “*Scholl v. Mnuchin*, No. 4:20-CV-5309-PJH (N.D. Cal.)”).

Plaintiff seeks declaratory relief, “a preliminary and permanent instruction on denying all defendants Komalty, Palmer, Tsoodle, and et. al. Kiowa Tribal Members involved in Cares Act handling the payout: COVID-19 Cares Act 2020 ‘Executive Branch’ and board members included,” \$150,000 in compensatory damages against each Defendant, punitive damages against each Defendant, a jury trial, costs to be paid by the Kiowa Tribe of Oklahoma, an “audit” of “all donated U.S. Treasury/Cares Act,” and any additional relief the Court “deems just and proper.” *Id.* at 5-6.

IV. Background of the CARES Act.

A. The Coronavirus Relief Fund.

The CARES Act became effective at the beginning of the COVID-19 pandemic in March of 2020. *See* CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). A portion of the CARES Act, known as the “Coronavirus Relief Fund,” allocated \$150 billion to “States, Tribal governments, and units of local government” with funds “to cover only those costs . . . that—

- (1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
- (2) were not accounted for in the budget most recently approved as of March 27, 2020, for the State or government; and
- (3) were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021.”

42 U.S.C. § 801(d). The amount paid to a Tribal government was determined:

From the amount set aside under subsection (a)(2)(B) for fiscal year 2020, the amount paid under this section for fiscal year 2020 to a Tribal government shall be the amount the Secretary shall determine, in consultation with the Secretary of the Interior and Indian Tribes, that is based on increased expenditures of each such Tribal government (or a tribally-owned entity of such Tribal government) relative to aggregate expenditures in fiscal year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available under subsection (a)(2)(B) for fiscal year 2020 are distributed to Tribal governments.

Id. § 801(c)(7).

B. The CARES Act economic impact payments (EIP) to all eligible taxpayers.

“The CARES Act, codified in part at section 6428 of the Internal Revenue Code, 26 U.S.C. § 6428, establishes a tax credit for eligible individuals in the amount of \$1,200 (\$2,400 if filing a joint return), plus \$500 multiplied by the number of qualifying children.” *Scholl v. Mnuchin*, 2020 WL 6065059, at *1 (N.D. Cal. Oct. 14, 2020) (citing 26 U.S.C. § 6428(a)). The Act defines an eligible individual as “any individual other than (1) any nonresident alien individual,

(2) any individual who is allowed as a dependent deduction on another taxpayer's return, and (3) an estate or trust." 26 U.S.C. § 6428(d). "The EIP is an advance refund of the subsection (a) tax credit" *Scholl*, 2020 WL 6065059, at *1; *see* 26 U.S.C. § 6428(f)(2) (explaining that "[f]or purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such taxable year if this section . . . had applied to such taxable year"). Inmates are not excluded from receiving an EIP based solely on their status as "incarcerated individuals." *See Scholl*, 2020 WL 6065059, at *19-20 (upholding the plaintiffs' Administrative Procedures Act challenge to the IRS's interpretation of the CARES Act and "finding that incarcerated individuals are not excludable as an 'eligible individual' under the Act"); *see also* Doc. 1, Ex. 2.

C. The Kiowa Tribe's CARES Act financial assistance program.

The undersigned takes judicial notice of the Kiowa Tribe's official website, which explains to its members that the Tribe's CARES Act assistance program "may be used for the following for economic loss related to COVID-19: cleaning supplies, personal protective equipment (PPE), medical care, food, shelter, health, education, subsistence, housing, elder and disabled care, water, sewer, electricity, propane/gas, emergencies and disaster relief related

to COVID-19.”⁴ See <https://kiowatribe.org> (last visited Jan. 21, 2021). If eligible, then a tribal member “may receive a payment of \$1,000 due to financial hardship endured from loss of income and increased costs due to COVID-19.” *Id.* In the application, the Tribe explains that the program “is a general welfare assistance program and not an entitlement and should not be considered income.”

V. Plaintiff has not established this Court’s jurisdiction over his claims.

“A plaintiff creates federal-question jurisdiction by means of a well-pleaded complaint establishing either that federal law creates the cause of action or that the plaintiff’s right to relief depends on resolution of a substantial question of federal law.” *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1274 (W.D. Okla. 2009) (citing *Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999)). Plaintiff bears the burden of demonstrating jurisdiction and identifying the statutory or constitutional provision under which his claim arises. *Id.* at 1274-75. Plaintiff references 28 U.S.C. § 1331, 42 U.S.C. § 1983 and the CARES Act as his sources of subject-matter jurisdiction, but none apply to redress Plaintiff’s claims. See *id.* at 1275 (“To determine

⁴ Cf. *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (courts have “discretion to take judicial notice of publicly-filed records . . . concerning matters that bear directly upon the disposition of the case at hand”).

[whether the complaint arises under federal law] the court must separately consider each of the federal statutes upon which jurisdiction is predicated and determine whether the alleged facts show that the claims . . . in question arise under these federal laws. Simply put, the question is whether these substantive federal statutes apply.”).

A. 28 U.S.C. § 1331 does not provide Plaintiff with a substantive basis for federal jurisdiction.

“[F]ederal question jurisdiction depends upon alleging a federal claim ‘arising under the Constitution, laws or treaties of the United States.’” *Nahno-Lopez*, 627 F. Supp. 2d at 1277 (quoting § 1331). So, section 1331, by itself, does not supply a substantive basis for federal jurisdiction. *Id.* It only gives this Court jurisdiction “when a federal question arises based on *other* federal law.” *Id.* (emphasis in original).

B. 42 U.S.C. § 1983 does not provide Plaintiff with a cause of action because he alleges no deprivation of a constitutional or federal right and names no state actors.

“To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988); *see* 42 U.S.C. § 1983 (creating a private cause of action when persons acting under color of State law violate another’s “rights, privileges, or immunities secured by the Constitution and

laws”). For a § 1983 action to proceed against an individual, that individual must be a person acting under color of state law. *See, e.g., Jenkins v. Currier*, 514 F.3d 1030, 1033 (10th Cir. 2008) (“Plaintiffs alleging a violation of § 1983 must demonstrate they have been deprived of a right secured by the Constitution and the laws of the United States, and that the defendants deprived them of this right acting under color of law.” (internal quotation marks omitted)).

Plaintiff alleges Kiowa Tribal officials deprived him of money to which he was entitled under the CARES Act in violation of state, federal and tribal law. Doc. 1, at 2-5. However, “[a] § 1983 action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law.” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (internal quotation marks omitted). And the CARES Act itself, as explained below, does not provide for an individual cause of action. Thus, Plaintiff has not sufficiently alleged the deprivation of a constitutional or federal right. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (stating that “§ 1983 merely provides a mechanism for enforcing individual rights secured elsewhere, i.e., rights independently secured by the Constitution and laws of the United States” and explaining that “one cannot go into court and claim a violation of § 1983—for § 1983 by itself does not protect anyone against anything” (internal alterations and quotation marks omitted)).

He also fails to identify any state actors. Plaintiff sues Kiowa Tribal officers in their official and individual capacities. But, “[b]ecause Tribal officials are not officers of the state, they are not state actors for purposes of a § 1983 action.” *Ouart v. Fleming*, No. CIV-08-1040-D, 2010 WL 1257827, at *7 (W.D. Okla. Mar. 26, 2010) (citing *E.F.W. v. Stephen’s Indian High School*, 264 F.3d 1297, 1305 (10th Cir. 2001)).

As no claims lie under § 1983, Plaintiff cannot use it as a vehicle to invoke this Court’s subject-matter jurisdiction. *See, e.g., Steele v. Steele*, No. CIV-17-198-F, 2017 WL 5244798, at *1 (W.D. Okla. Feb. 27, 2017) (“Because plaintiff has not alleged sufficient facts demonstrating a violation of federally-protected rights or that defendant is a state actor, he has failed to invoke the court’s federal subject-matter jurisdiction under § 1983 and [28 U.S.C.] § 1343(a)(3).”).⁵ The undersigned therefore recommends dismissal of Plaintiff’s § 1983 claim without prejudice.⁶

⁵ Although not referenced by Plaintiff, 28 U.S.C. § 1343 also does not provide a basis for the Court’s subject-matter jurisdiction. *See Steele*, 2017 WL 5244798, at *1 (“The failure to properly allege facts demonstrating state action by the defendant also strips the court of subject matter jurisdiction alleged under 28 U.S.C. § 1343(a)(3).”).

⁶ The Indian Civil Rights Act also confers no subject matter jurisdiction in this case for declaratory, injunctive, and monetary damage remedies. *See* 25 U.S.C. § 1302; *Valenzuela v. Silversmith*, 699 F.3d 1199, 1202-03 (10th Cir. 2012) (“Section 1302 does not waive tribal sovereign immunity and does not provide a civil cause of action in federal court against tribal officials.”). The only federal relief available under the Indian Civil Rights Act against a tribe

C. There is no private cause of action under the CARES Act to enforce 42 U.S.C. § 801.

It is not this Court's function to raise up a cause of action where a statute has not created one. *See Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) ("With the passage of time, of course, we have come to appreciate that, 'like substantive federal law itself, private rights of action to enforce federal law must be created by Congress' and 'raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (internal alteration omitted))). A private right of action to enforce federal law "must be created by Congress" through the language of the statute. *Alexander*, 532 U.S. at 286. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.*

Plaintiff challenges the Kiowa Tribe's apparent decision to deny him an assistance payment out of the funds it received under 42 U.S.C. § 801. Doc. 1,

or its officers is a writ of habeas corpus. *Valenzuela*, 699 F.3d at 1203 (citing *White v. Pueblo of San Juan*, 728 F.2d 1307, 1311 (10th Cir. 1984)). "Actions for any other relief must be brought through tribal forums." *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987).

at 3-4.⁷ Whatever the basis for the Tribe’s decision to deny him funds, however, Plaintiff has no private cause of action under § 801 to challenge the Tribe’s decision.

The language of Section 801 does not expressly create a private cause of action. *See* 42 U.S.C. § 801. And the fact the statute provides the Inspector General of the Department of the Treasury with monitoring and oversight of the receipt, disbursement, and use of funds strongly indicates Congress intended no private right of action. *See* 42 U.S.C. § 801(f); *Nahno-Lopez*, 627 F. Supp. 2d at 1278 (“The fact that the statute provides for penalties and imprisonment strongly indicates that no private action was intended”); *see also Radix Law PLC v. JPMorgan Chase Bank*, 2020 WL 8020120, at *4 (D. Ariz. Dec. 21, 2020) (“Even if Plaintiff had a viable argument on the merits, this claim would be dismissed because there is no private right of action to enforce [the agent fee provision of] the CARES Act.”). Thus, Plaintiff’s reliance on the CARES Act as a source of jurisdiction is misplaced as it does not provide an independent basis for this Court to exercise its federal-question jurisdiction over Plaintiff’s claims.

⁷ Plaintiff references these tribal funds as “IRS CARES MONEY,” Doc. 1, at 3, but the Tribe’s welfare payments came from funds received under 42 U.S.C. § 801, not 26 U.S.C. § 6428. *See supra* Part IV(A-C).

D. Plaintiff's implied assertion of jurisdiction under *Bivens*⁸ is insufficient to invoke the Court's jurisdiction.

Plaintiff claims various Tribal officers acted under color of federal law. Doc. 1, at 1. Assuming Plaintiff is asserting a *Bivens* claim against these officers it is also deficient to invoke this Court's subject-matter jurisdiction.

"To state a *Bivens* action, plaintiff must allege circumstances sufficient to characterize defendants as federal actors." *Romero v. Peterson*, 930 F.2d 1502, 1506 (10th Cir. 1991). "[A] *Bivens* action provides a basis for seeking relief from a federal employee acting within the scope of employment for the violation of constitutional rights." *Madden v. Usry*, No. CIV-16-524-R, 2016 WL 8650481, at *1 (W.D. Okla. Aug. 26, 2016) (citing *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1103 (10th Cir. 2005)), *aff'd sub nom. Madden v. Bob Usry Plumbing*, 671 F. App'x 708 (10th Cir. 2016).

Plaintiff does not allege any facts indicating the named Tribal officers were federal actors who were acting under color of federal law. *See, e.g., Romero*, 930 F.2d at 1507 (holding that "to be federal officers[,] defendants [who were tribal officers] must have been acting as employees or agents of the federal government, or must have been using their federal badges or other indicia of authority in furtherance of the business of another entity or person").

⁸ *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

And the Tribe's acceptance of federal funds did not convert the Tribal officers into federal actors when providing welfare payments to Kiowa Tribe members. *See, e.g., E.F.W.*, 264 F.3d at 1307-08 (holding that tribal officials did not become state actors by virtue of an Intergovernmental Agreement with the state regarding state funding of a tribal social services agency providing services for Indian children). The undersigned thus recommends dismissal of any implied *Bivens* claim Plaintiff asserts for lack of subject-matter jurisdiction. *See Steele*, 2017 WL 5244798, at *2 (dismissing complaint for lack of subject-matter jurisdiction under *Bivens* where plaintiff failed to allege facts indicating the defendant was a federal officer who was acting under color of federal law).

VI. Sovereign immunity deprives the Court of jurisdiction over the Federal Government and its agencies.

Plaintiff names as Defendants the "Treasury Dept. of U.S." and "Cares Act COVID-19 Response Needs Assessment." Doc. 1, at 3. But "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994).

Plaintiff has not identified any waiver of sovereign immunity applicable to this case and Congress has not extended the *Bivens* remedy to claims against the United States or federal agencies. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71-72 (2001); *see Gallegos v. Cty. Jail/Facility Lincolnton, Ga.*, No. CIV-18-

734-R, 2018 WL 5118589, at *1 (W.D. Okla. Oct. 22, 2018) (“A *Bivens* claim can be brought only against federal officials in their individual capacities’ and cannot be asserted directly against the United States, federal agencies, or federal officials acting in their official capacities.” (quoting *Smith v. United States*, 561 F.3d 1090, 1099 (10th Cir. 2009) (internal alteration omitted))).⁹ This Court therefore lacks jurisdiction over Plaintiff’s claims against the Federal Government and its agencies. *See Governor of Kan. v. Kempthorne*, 516 F.3d 833, 846 (10th Cir. 2008) (holding that “neither the district court nor this court possess[ed] jurisdiction to hear this case” where the United States had not waived its sovereign immunity from suit). Accordingly, the undersigned recommends dismissing without prejudice Plaintiff’s claims against the “Treasury Dept. of U.S.” and “Cares Act COVID-19 Response Needs Assessment.” *See id.* (holding dismissal based on sovereign immunity should be without prejudice).¹⁰

⁹ Plaintiff has named no individual federal officers in his complaint.

¹⁰ Plaintiff cites a California case where a class of incarcerated individuals successfully sued under the CARES Act. Doc. 1, at 2-3; *see Scholl*, 2020 WL 6065059, at *1. Plaintiff’s attempt to piggyback onto that case, however, is misplaced. In *Scholl*, the plaintiffs sued for equitable relief under the Administrative Procedures Act (APA) to challenge an Internal Revenue Service (IRS) decision which they claimed was contrary to law and arbitrary and capricious. 2020 WL 6065059, at *11. The *Scholl* court found that the APA provided a “broad waiver of immunity” and that the plaintiffs could proceed with their APA claims because the IRS’s decision was final and the plaintiffs had no adequate alternative to APA review. *Id.* at *9-10. Plaintiff does not

VII. Tribal sovereign immunity deprives the Court of jurisdiction over the Kiowa Tribe and its officials.

“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). “Tribal sovereign immunity is a matter of subject matter jurisdiction” and is addressed under Fed. R. Civ. P. 12(b)(1). *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). “Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States” and federal question jurisdiction under § 1331 does not abrogate this immunity from private suit. *Id.* at 1011 (“Therefore, in an action against an Indian tribe, we conclude that § 1331 will only confer subject matter jurisdiction where another statute provides a waiver of tribal sovereign immunity or the tribe unequivocally waives its immunity.”).

The Kiowa Tribe is a federally recognized tribe and has sovereign immunity from suit unless Congress has authorized suit or the tribe has waived its immunity. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998); *see also Fl. Paraplegic, Ass’n, Inc. v. Miccosukee Tribe of Indians of Fl.*, 166 F.3d 1126, 1131 (11th Cir. 1999) (“Congress abrogates tribal immunity

purport to raise his claims under the APA and does not challenge an agency decision. Rather, he challenges a decision made by the Kiowa Tribe to deny him a welfare payment. The *Scholl* decision has no application here. *See id.* at *11 (“To summarize, plaintiffs are challenging an agency action, not seeking a tax refund.”).

only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the act."). "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). And, "a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008).

There is no allegation that Congress has authorized suit against the Kiowa Tribe under section 1983 or the CARES Act or that the Tribe has waived its sovereign immunity. Thus, the Court has no jurisdiction to entertain Plaintiff's claims for damages or equitable relief against the Kiowa Tribe or its officers in their official capacities. *See Nahno-Lopez*, 627 F. Supp. 2d at 1283 (finding claims for equitable and monetary relief which ran against the Tribe were barred by sovereign immunity).

"An Indian tribe's 'sovereign immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him.'" *Burrell*, 456 F.3d at 1174 (quoting *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 n.1 (10th Cir. 1984)). But, if the relief requested "would operate against the Tribe," then Plaintiff's

claims against the individual Defendants “are barred by the Tribe’s immunity.” *Nahno-Lopez*, 627 F. Supp. 2d at 1284.

Plaintiff requests the individual Defendants change their welfare policy by assisting “Incarcerated Kiowa Indians” and pay him compensatory and punitive damages. Doc. 1, at 4-5. However, the individual tribal officers would only be able to grant the equitable relief requested “because of the offices they hold with the Tribe.” *Nahno-Lopez*, 627 F. Supp. 2d at 1285. For example, if there is a policy in place regarding incarcerated Kiowa Tribe members, the officials could perhaps vote to have the Tribe change the welfare policy but could not do so by acting individually. Thus, Defendants Tsoodle, Komalty, and Palmer cannot be sued individually for such relief because it runs against the Tribe and is barred by the Tribe’s sovereign immunity. *Id.*

The same is true for the monetary damages Plaintiff seeks which would clearly come from the Tribe’s treasury and not personally from the individual Defendants. *See, e.g., Native Am. Distrib.*, 546 F.3d at 1296 (holding that “tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe”). Therefore, the Tribe’s sovereign immunity also bars Plaintiff’s claims for

monetary against these individual Defendants and those claims should be dismissed.¹¹

VIII. Recommendation and notice of right to object.

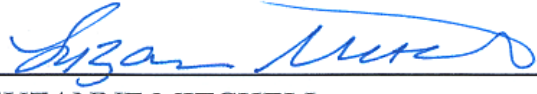
For the reasons discussed above, the undersigned recommends the Court dismiss Plaintiff's complaint in its entirety. The undersigned further recommends the Court deny as moot Plaintiff's motion to amend his complaint to assert his entitlement to a "Kiowa Elder Payment" of \$1,925.00. Doc. 7.

The undersigned advises Plaintiff of his right to file an objection to this Report and Recommendation with the Clerk of Court **on or before February 17, 2021**, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Plaintiff that the failure to file a timely objection to this Report and Recommendation waives the right to appellate review of both the factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

¹¹ Even if Plaintiff had alleged some wrongful conduct fairly attributable to the individuals themselves for which he might have requested damages from the Tribal officers personally, this Court still lacks subject-matter jurisdiction over Plaintiff's claims for all of the reasons the undersigned outlined above.

ENTERED this 27th day of January, 2021.

A handwritten signature in blue ink, appearing to read "Suzanne Mitchell", is written over a horizontal line.

SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE