

D. MICHAEL EAKIN  
Eakin & Berry, PLLC  
208 N. 29<sup>th</sup> St., Suite 204  
P.O. Box 2218  
Billings, MT 59103  
(406) 969-6001; Fax: (406) 969-6007

Attorney for Defendant Klier

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION**

BLOSSOM OLD BULL, Personal	)	
Representative of the Estate of	)	CV-22-109-BLG-KLD
Braven Glenn,	)	
	)	BRIEF IN SUPPORT OF
Plaintiff,	)	RULE 12(b)
v.	)	MOTION TO DISMISS
	)	
UNITED STATES OF AMERICA	)	
and DOES 1- 10,	)	
	)	
Defendants.	)	
_____	)	

Defendant Officer Pam Klier was a Crow Tribal Police officer. (Second Amended Complaint ¶11). At all relevant times, Officer Klier was acting within the scope and course of her employment as a Crow Tribal Police officer. (Second Amended Complaint ¶ 59). Plaintiff maintained an action against Officer Klier in the Crow Tribal Court on the same facts as alleged in this action. That action was dismissed as being filed after the statute of limitations had run.

**I. This Court Lacks Subject Matter Jurisdiction.**

Plaintiff acknowledges that Klier was a tribal police officer. (Plaintiff's Pretrial Statement, Dkt 13, p. 4, Second Amended Complaint, Dkt 17, ¶ 1 ) In the Second Amended Complaint, Plaintiff alleges that Ms. Klier was acting within the course and scope of her employment at all pertinent times. (Second Amended Complaint, Dkt 17, ¶ 59.) Officer Klier was an employee of the Crow Tribe. As a tribal employee, she is cloaked with the Tribe's sovereign immunity. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727. [Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority. Cook has sued Dodd and Purbaugh in their official capacity only, and thus the district court correctly dismissed them from this suit.

Sovereign immunity is jurisdictional in nature. If sovereign immunity exists, the Court lacks subject matter jurisdiction. *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015–16 (9th Cir. 2007) [tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe.]

Officer Klier should be dismissed from this action on the grounds that this Court lacks subject matter jurisdiction over any claim against her because she has the sovereign immunity of the Tribe and was acting within the scope of her employment by the Tribe.

**II. 42 U.S.C. § 1983 Does Not Apply to Tribes or Tribal Employees.**

It does not appear that Officer Klier is a defendant on Count I or II, the claims based on 42 U.S.C. § 1983. To the extent that Plaintiff attempts to assert a § 1983 claim against Klier, it should be dismissed for failure to state a claim. Section 1983 requires that the defendant be acting under color of state law. As a tribal officer, Klier was acting under color of tribal law, not state law. Persons acting under color of tribal law are not subject to 1983 claims. *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir.1983), *cert. denied*, 472 U.S. 1016, (1985); *Evans v. McKay*, 869 F.2d 1341, 1347 (9th Cir. 1989).

To the extent the complaint alleges § 1983 claims against Klier, the claims should be dismissed as to her since she was acting under color of tribal law and was not acting under color of state law.

**III. Montana Constitutional Claims Do Not Apply to Tribal Officers.**

It appears that the Montana constitutional claims are advanced only against unknown Does, not Klier. Once again, Klier was acting in her official capacity as a tribal officer, not a state officer. The Crow Tribe is required to provide those constitutional rights set forth in the Tribal Constitution. Tribal officers have no obligation to extend rights found in the state constitution. Requiring tribal officers

to follow the state constitution would be an infringement on the Tribe's right of self-government. *Worcester v. Georgia*, 31 U.S. 515, 595 (1832).

To the extent the complaint alleges a state constitutional claim against Klier, it should be dismissed as to her since she was acting under color of tribal law and state law does not apply to Crow tribal officers on the Crow Reservation.

#### **IV. The Action Should be Dismissed on *Res Judicata* Grounds.**

Plaintiff filed an action against Defendant Klier in the Crow Tribal Court. (Attached Exhibit 1). Klier moved the tribal Court to dismiss. The tribal trial court granted the motion, finding that the action had been filed after the two-year statute of limitations had run, (Exhibit 1, p. 20).

The tribal court decision is a decision on the merits and bars relitigation of any issue raised or which could have been raised in the Tribal Court. The fact that it was a statute of limitation grounds that caused dismissal does not bar application of res judicata principles. As the Supreme Court has noted, "The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995); *see also, Ruiz v. Snohomish County Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016) [A "dismissal on

statute of limitations grounds is a judgment on the merits” that operates as res judicata.]

The tribal court expressly stated that the dismissal was with prejudice. Plaintiff is now barred from maintaining an action based on the same facts in this Court.

### CONCLUSION

This Court lacks subject matter jurisdiction because of the Crow Tribe’s sovereign immunity. The Complaint fails to state a § 1983 claim because it does not allege any person was acting under color of state law. Finally the action is barred under principles of *res judicata* since the matter has already been litigated in the Crow Tribal Court. For these reasons, the case should be dismissed as to Defendant Klier.

Dated this 10<sup>th</sup> of Mach, 2023.

EAKIN & BERRY, PLLC.

/s/ D. Michael Eakin

D. MICHAEL EAKIN

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief In Support of Rule 12 Motion contains approximately 906 words excluding the caption and certificates.

Dated March 10<sup>th</sup> 2023

/s/ D. Michael Eakin

CERTIFICATE OF SERVICE

I certify that the foregoing rule 12(b) MOTION TO DISMISS was served on March 10, 2023 upon the following persons :

<u>1-4</u>	CM/ECF
_____	US Mail
_____	Email
_____	Fax
_____	Other

1. Clerk of Court
2. Timothy Bechtold, Attorney for Plaintiff
3. Abbie J. N. Cziok, Attorney for Defendant USA
4. John Newman, Attorney for Defendant USA

Dated March 10<sup>th</sup> 2023

/s/ D. Michael Eakin