IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHARLEE ARCHAMBAULT individually and as PERSONAL REPRESENTATIVE OF THE ESTATE OF JACOB ARCHAMBAULT, Plaintiffs, v. THE UNITED STATES OF AMERICA, JOSHUA ATMAN and JAY ROMERO SR., individually and in their official capacity as police officers for the ROSEBUD SIOUX TRIBAL LAW ENFORCEMENT SERVICES, and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	3:22-cv-03002-RAL **MEMORANDUM IN SUPPORT OF DEFENDANT JAY ROMERO'S MOTION TO DISMISS**

Defendant Jay Romero,[1] by and through his attorney of record, Justin L. Bell of May, Adam, Gerdes & Thompson LLP, respectfully submits this Memorandum in Support of Defendant Jay Romeo's Motion to Dismiss.

FACTUAL ALLEGATIONS

Charlee Archambault, individually and as the Personal Representative appointed for Jacob Archambault by the Todd County Clerk of Courts for the South Dakota Unified Judicial System, filed this Complaint on January 24, 2022 in Federal District Court seeking damages for alleged constitutional violations based on her son, Jacob Archambault (a tribal member), being shot and killed following a traffic stop on January 27, 2019, by Rosebud Sioux Tribal Officers

[1] This Complaint is captioned against Jay Romero Sr. The correct name of this Defendant is Jay A. Romero. To avoid confusion, this defendant will be referred to as "Jay Romero," "Defendant Romero," or "Officer Romero."

Joshua Antman and Jay Romero within the exterior boundaries of the Rosebud Sioux Tribal Reservation, after the officers were sent by Rosebud Sioux Tribe Dispatch. (Docket 1 at p. 3-5.) Plaintiff asserts claims under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983. (Docket 1 at p. 1.)

As it relates to Officer Romero, Plaintiff brings this action against him individually, and "in his official capacity as [a] police officer[] for the RST Tribal Law Enforcement Services[.]" (Docket 1 at p. 1.) Ms. Archambault alleges a general allegation that Officers Antman and Romero acted as police officers under color of federal and state law. (Docket 1 at p. 2 ¶ 6.) However, there is no specific allegations to support such a claim.

Specifically, in Count I, Plaintiff alleges a *Bivens* claim seeking damages against the tribal officers, and alleges that Officers Antman and Romero, while acting under the color of federal law and as federal employees, used "excessive, unreasonable, and unwarranted force" violating Jacob Archambault's rights under the Fourth and Fifth Amendments of the United States Constitution. (Docket 1 at pp. 6-9 ¶¶ 40-55.). However, there are no specific allegations as to enforcement of federal or state law, rather than tribal law.

In Count II, III, and IV, Plaintiff makes general allegations of Constitutional violations resulting in "wrongful death," "loss of familial relationship," and "violation of civil rights," however those counts are brought under 42 U.S.C. § 1983 seeking damages against the "Defendants" in their individual capacities as to Count II and "Defendants" generally in Counts III and IV. (Docket 1 at pp. 9-10 ¶¶ 54-56, 10-11 ¶¶ 57-60, at p.11 ¶¶ 61-66). Once again, there are no specific allegations as to enforcement of federal or state law, rather than tribal law.

LEGAL STANDARD

In 2009, the United States Supreme Court clarified the governing standard for motions to dismiss brought pursuant to Rule 12(b)(6).

> [U]nder Rule 12(b)(6), this court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the complainant. Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."

Minn. Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Moreover, a Fed.R.Civ.P.12(b)(1)[2] motion to dismiss can be treated in the same manner as a motion under 12(b)(6) depending upon the type of attack made by the moving party:

> "The existence of subject-matter jurisdiction is a question of law that this court reviews *de novo*." *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011). "A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack'" on jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id*. (internal citations omitted). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id*. (internal citation omitted). The method in which the district court resolves a Rule 12(b)(1) motion—that is, whether the district court treats the motion as a facial attack or a factual attack—obliges us to follow the same approach. *BP Chemicals Ltd. v. Jiangsu Sopo Corp*., 285 F.3d 677, 680 (8th Cir. 2002).

Carlsen v. GameStop, Inc., 833 F.3d 903, 908 (8th Cir. 2016). Determining whether a claim has facial plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *United States v. Big Crow*, No. 2016

[2] "[S]overeign immunity is a jurisdictional question." *Hagen v. Sisseton-Wahpeton Cmty. Coll*., 205 F.3d 1040, 1043 (8th Cir. 2000)

WL 884901, at *2 (D.S.D. Mar. 2, 2016) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

On the other hand, this Court may look at matters outside the pleadings in a factual attack. "The trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn v. United States*, 918 F.2d 724, 728 n. 4 (8th Cir. 1990). In a factual attack, the plaintiff bears the burden of establishing by a preponderance of the evidence that the court possesses subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

In this case, Officer Romero makes a facial attack on the jurisdictional allegations of the complaint, but alternatively makes a factual attack if the Court finds that the allegations give rise to a factual dispute that precludes judgment on a facial attack.

ARGUMENT

I. Tribal Sovereign Immunity Bars this Action Against Officer Romero

A. Official Capacity Claims

Plaintiff's complaint states: "At all relevant times herein, Defendants Joshua Michael Atman and Jay Romero Sr. were employed by and acting as police officers under the color of state and federal law for the Rosebud Sioux Tribal Law Enforcement, and both defendants are being sued in their individual and official capacity." (Docket 1 at p. 2 ¶ 6.) Given the claims in this Complaint, it is unclear whether the claim is an official capacity claim as an employee of the

Rosebud Sioux Tribe or as an alleged employee of the United States. Given that the caption states the official capacity claim is alleged against Officer Romero in his "official capacity as [a] police officer[] for the ROSEBUD SIOUX TRIBAL LAW ENFORCEMENT SERVICES[sic]," and that there is a separate claim directly against the United States of America, it is assumed that the official capacity claim it is intended to be an official capacity claim against Romero as an employee of a tribal government.[3]

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662, 670 (8th Cir. 2015) (q*uoting Kiowa Tribe v. Manufacturing Techs*., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)). Absent a clear and unequivocal waiver or congressional authorization, this Court does not have subject matter jurisdiction over an action against a federally recognized tribe. *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2030-31, 188 L. Ed. 2d 1071 (2014). In a suit for damages, tribal immunity also protects tribal employees acting in their official capacities and within the scope of their authority, as the relief would run directly against the tribe itself. *Baker Elec. Coop., Inc, v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1999) (*quoting N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty*., 991 F.2d 458, 460 (8th Cir. 1993)); *see also Cohen's Handbook of Federal Indian Law* § 7.05[1][a], at 638 (Nell Jessup Newton et al. eds., 2012).

Here, the tribe's sovereign immunity protects Officer Romero against any official capacity claims. Plaintiff alleges that Romero was employed by the Rosebud Sioux Tribe ("the Tribe")—a federally recognized Indian tribe—as a police officer. (Docket 1 at p. 2 ¶ 6.). The

[3] To the extent the official capacity claim is intended as an official capacity claim against Officer Romero as an employee of the United States, Romero adopts the arguments made in the memorandum filed by the United States as to the claim being barred in that capacity.

Complaint does not allege that Congress has authorized this suit or that the Tribe has waived its sovereign immunity. Thus, Plaintiff's claims for money damages against Officer Romero in his official capacities are barred by tribal sovereign immunity and must be dismissed.

B. Individual Capacity Claims

"[A] plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 727 (9th Cir. 2008); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) (stating that in determining whether a state official may be liable for money damages in his official capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading."). In order to determine if sovereign immunity applies, a court must ask whether lawsuits brought against officers or employees of the tribe "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). If the court answers that question in the affirmative, then the action is, in reality, an official capacity action, and the individual employee is entitled to sovereign immunity. *See id*. at 167.

This underpinning was recently examined in *Tom Ten Eyck & Michelle Ten Eyck v. United States*, 463 F. Supp. 3d 969 (D.S.D. 2020). After a review of the relevant case law, Judge Piersol concluded that "in determining whether tribal sovereign immunity bars a claim for damages against [the officer in his individual capacity] depends on whether or not [the officer] was exercising the inherent sovereign powers of the Tribe. If so, the Court concludes that permitting such a claim to proceed would have the effect of interfering with the Tribe's powers of self-government." *Id.* at 983. In that case, Judge Piersol determined that since the tribal officer was assisting state and county officials on non-tribal owned land regarding an offense

committed by non-tribal members, the officer was not exercising the inherent sovereign powers of the Tribe, and therefore was not subject to tribal sovereign immunity. He contrasted it with other cases where such should apply:

> By contrast, in *Lantry v. McMinn*, the court concluded that tribal sovereign immunity extended to a tribal police officer who was executing a tribal search warrant, signed by a tribal judge, on a house owned by a tribal member and located on the Reservation. Civ. No. 08-638, 2010 U.S. Dist. LEXIS 163975, 2010 WL 11629661 at *9 (D. Nev. Mar. 3, 2010). The court acknowledged that Indian tribes have inherent power to enforce their criminal laws against tribe members. *Id*. at *8. Because the officer was acting within the scope of the Tribe's inherent authority, the court concluded that he was entitled to the benefit of tribal immunity for the claims asserted against him. *See id.* Similarly, in *Dry v. United States*, the Tenth Circuit Court of Appeals held that tribal sovereign immunity extended to actions by tribal law enforcement officers who were "act[ing] as agents of the Tribe pursuant to their inherent sovereign power to exercise criminal jurisdiction over intratribal offenses." 235 F.3d 1249, 1255 (10th Cir. 2000).

Applying this same analysis, Officer Romero was plainly exercising the inherent sovereign powers of the Tribe, and therefore is protected by subject to tribal sovereign immunity. Based on the allegations in the complaint, Officer Romero was a tribal actor on tribal land, sent by Rosebud Sioux Tribal Dispatch, enforcing tribal law on a tribal member. Permitting such a claim to proceed would have the effect of interfering with the Tribe's powers of self-government, and therefore, this claim should be dismissed on the basis of tribal sovereign immunity.

II. Bivens does not extend to tribal officers exercising inherent sovereign powers of a Tribe

Whether *Bivens* should ever be expanded to allow an individual capacity claim against a tribal officer is an issue that has been left undecided by the United States Supreme Court and the Eighth Circuit Court of Appeals. In *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (8th Cir. 2019), the Eighth Circuit was faced with whether a non-Indian could bring a *Bivens* claim against a tribal law enforcement officer. Judge Viken, the District Court Judge in the *Stank* case, ruled

that *Bivens* did not so extend. On appeal, the majority of the panel recognized such a determination was a "complex inquiry," reasoning:

> Broadly stated, the question is whether the "substantiality doctrine" reflected in *Bivens* should be extended to permit a non-Indian to bring a damage action in federal court for violation of his constitutional rights by tribal officers acting under color of tribal law, when non-Indian citizens have a right to bring that action against officials acting elsewhere under color of state or federal law. To be sure, the Supreme Court "has made clear that expanding the *Bivens* remedy is now a disfavored judicial activity," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017). However, determining whether there are "special factors counselling hesitation" to extend *Bivens* is a complex inquiry. *Id*. at 1857-58.

Id. at 699.

However, a majority of the panel, though recognizing that Plaintiff's "federal cause of action is highly questionable," *id.* at 700, chose not to resolve the *Biven's* question, and instead affirmed dismissal of the action on the alternative ground that the non-Indian plaintiff failed to exhaust an available tribal court remedy. *Id.* at 699. Judge Gruender, on the other hand (in his concurring opinion), reasoned that the panel should not sidestep the *Bivens* issue and affirm the reasoning of the District Court. Officer Romero submits that this Court should follow the reasoning of Judge Gruender, make the "complex inquiry" and "follow the Supreme Court's lead, refuse to extend *Bivens*, and leave it to Congress to create any new cause of action." *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 700 (8th Cir. 2019) (Gruender, J., concurring in part and concurring in the judgment); *see also Ziglar v. Abbasi*, 137 S.Ct. 1843, 1857 (2017) ("the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.' Indeed, the Court has refused to do so for the past 30 years." (internal citations omitted)).

This complex inquiry was analyzed in length in *Boney v. Valline*, 597 F. Supp. 2d 1167 (D. Nev. 2009). In summary, the District Court reasoned:

> allowing a Bivens action against a tribal law enforcement officer solely on the basis of [an] Indian tribe having a 638 contract with the BIA implicates the tribe's inherent sovereignty, which constitutes a special factor militating against extending *Bivens* to this new context. As explained above, the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co*., 480 U.S. at 14. Given the facts of the present case--a tribal law enforcement officer enforcing tribal law against a tribe member on tribal territory--the extension of *Bivens* to this particular context has dangerous implications for disrupting the long-recognized boundaries between the sovereignty of the United States and that of Indian tribes and disregarding Indian tribes' inherent right of self-government. In light of these special considerations touching upon an Indian's tribe's sovereignty, the creation of a private right of action against tribal law enforcement officers for civil rights violations committed in the course of conducting tribal business is a decision more appropriately left to legislative judgment. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (The Supreme Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." (citations omitted)).

Id. at 1183. In short, given the direction of the Supreme Court in light of the tribe's inherent sovereignty (which constitutes a special factor militating against extending *Bivens*), this Court should refuse to extend *Bivens* and dismiss Count I or any claim based on *Bivens.*

III. Officer Romero cannot be sued pursuant to 42 USC § 1983 because he was not acting under "color of state law"

Counts II through IV federal jurisdiction pursuant to 42 USC § 1983. "To survive dismissal of [a] section 1983 cause of action, [a plaintiff] must have sufficiently alleged the [defendant] deprived them of a right 'secured by the Constitution and laws' of the United States, and the deprivation was caused by a person or persons acting under color of state law." *Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006) (*citing* 42 U.S.C. § 1983 and *Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978)). "It is settled law that a defendant acting under tribal authority is not acting under color of state law and that

'[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.'" *Van Nguyen v. Foley*, No. 21-cv-991 (ECT/TNL), 2021 U.S. Dist. LEXIS 207283, at *18 (D. Minn. Oct. 27, 2021) (*citing Coleman v. Duluth Police Dept*., No. 07-cv-473 (DWF/RLE), 2009 U.S. Dist. LEXIS 26670, 2009 WL 921145, at *23-24 (D. Minn. Mar. 31, 2009) (*quoting R.J. Williams Co. v. Fort Belknap Hous. Auth*., 719 F.2d 979, 982 (9th Cir. 1983)) (collecting cases); *Charland v. Little Six, Inc*., 112 F. Supp. 2d 858, 866 (D. Minn. 2000), aff'd 13 Fed. App'x 451 (8th Cir. 2001); *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (recognizing that Indian tribes are separate sovereigns predating the Constitution, and therefore, are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority").

Plaintiff does not allege any facts to support an allegation that Officer Romero was acting as a state, rather than tribal, actor, that he ever acted pursuant to any state authority, or that he acted in concert with any state actors. To the contrary, based on the allegations in the complaint, Officer Romero was a tribal actor on tribal land, and Officers Antman and Romero were enforcing tribal law relating to a tribal member. Accordingly, Count II through IV (or any action based on 42 USC § 1983) must be dismissed.

IV. Plaintiff failed to exhaust her tribal court remedies

"The Supreme Court has repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (*citing Iowa Mutual Ins. Co.,* 480 U.S. at 14); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982)). Tribal courts play a vital role in tribal self- government, and the Federal Government has consistently

encouraged their development." *Id. (citing Iowa Mutual*, 480 U.S. at 14-15). "Civil jurisdiction over tribal-related activities on reservation land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Id.* "The deference that federal courts afford tribal courts concerning such activities occurring on reservation land is deeply rooted in Supreme Court precedent. Because a federal court's exercise of jurisdiction over matters relating to reservation affairs can impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself." *Id.* (*citing National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985)).

The exhaustion requirement encourages the Federal Government's policy of tribal self-government, ensures that "a full record is developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed," and provides an opportunity for the tribal court system to explain its basis for asserting jurisdiction. *See id.* (8th Cir. 1994). Once tribal remedies are exhausted, a federal court may then review the tribal court's decision regarding jurisdiction. If jurisdiction was proper in the tribal court, "proper deference… precludes relitigation of issues raised and resolved in the tribal court." *Iowa Mutual*, 480 U.S. at 19.

In *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (8th Cir. 2019), the Court applied the doctrine affirming dismissal of a claim as it relates to non-Indian Plaintiff claims, reasoning:

> "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court 'a full opportunity to determine its own jurisdiction.'" *Iowa Mut*., 480 U.S. at 16, *quoting Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention . . . ." *Iowa Mut*.,

> 480 U.S. at 16 n.8. Tribal court jurisdiction is not at issue here. "Indian tribes retain inherent sovereign power . . . to exercise civil authority over the conduct of non-Indians . . . within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66; *see Strate v. A-1 Contrs*., 520 U.S. 438, 456-59, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). Whether tribal officers violated the civil rights of a non-Indian traveling on the reservation unquestionably has a direct effect on the political integrity and welfare of the Tribe.
>
> In this case, the federal court has jurisdiction but whether Stanko has a federal cause of action is highly questionable. Though there is no case pending in tribal court, "the reasons for exhaustion cited in *National Farmers Union* -- the policy of supporting tribal self-government, the advantages of allowing a full record to be developed in tribal court, and the benefit of receiving the tribal court's expertise on these issues of tribal sovereignty -- apply whether or not the dispute is already pending in tribal court." *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1303 (8th Cir. 1994) (Loken, J., concurring). Moreover, there is an important additional reason to exhaust tribal court remedies in this case. As we have explained, Stanko has no damage claim under ICRA in federal court. However, "[t]ribal 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." *Santa Clara*, 436 U.S. at 65. Thus, tribal court resolution of a tribal law claim under ICRA might well moot or otherwise affect Stanko's assertion of a direct federal claim for violation of his federal constitutional rights. Though this antecedent issue is a question of tribal law rather than state law, the circumstances warrant application of what is called *Pullman* abstention "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984)

Id. at 699-700.

In this case, there is a stronger argument for application. There is no question the Tribal Court had jurisdiction over Plaintiff's claims. Jacob Archambault was a tribal member and the claim relates to Rosebud Sioux Tribal Officers within the exterior boundaries of the Rosebud Sioux Tribal Reservation. Even more so than in dealing with non-members, whether tribal officers violated the civil rights of the tribe's own members on the reservation unquestionably has a direct effect on the political integrity and welfare of the Tribe. Plaintiff had the full ability to litigate this matter in tribal court but chose not to do so. Accordingly, in line with the

reasoning in *Stanko*, this matter should be dismissed for Plaintiff's failure to exhaust her tribal court remedies.

V. Plaintiff's Complaint is Time Barred.

Defendant recognizes general settled law is that "the limitations period for a section 1983 action is governed by the statute of limitations for personal injury actions in the state in which the claim accrues." *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995) (*citing Wilson v. Garcia*, 471 U.S. 261, 280 (1985)). The same principle applies to *Bivens* claims. *Id.* The State of South Dakota has adopted "a specific statute [which] provides that civil rights actions must be brought within three years after the alleged constitutional deprivation occurred or the action will be barred." *Bell v. Fowler*, 99 F.3d 262, 266 (8th Cir. 1996). However, the Rosebud Sioux Tribe has adopted the following statute of limitation:

> 4-2-4 STATUTE OF LIMITATIONS--Unless otherwise specifically provided in this Code, the following limitations on bringing of a civil action will apply.
>
> > (1) Any action arising against the Tribe or its officers or employees arising of their official duties must be commenced within one year of the date the cause of action accrued.
> >
> > (2) Any other cause of action must be commenced within two years the cause of action accrued provided, however, that any cause of action based upon fraud or misrepresentation shall not be deemed to have accrued until the aggrieved party has discovered the facts constituting fraud or misrepresentation.

See §4-2-4 of the Law & Order Code of the Rosebud Sioux Tribe, available at <https://narf.org/nill/codes/rosebudcode/title4civilprocedure.pdf >. The underlying allegations in question took place on January 27, 2019. (Docket 1 at p. 3 ¶ 10). This action was filed on January 24, 2022. *See generally* Docket 1. If the tribal statute of limitation applies, then this case is plainly time barred.

It is not disputed that nearly every civil rights decision on topic refers to borrowing a forum "state" statute of limitation applying. However, there seems to be no case law directly on point to what statute of limitation should apply when civil jurisdiction would have appropriately been had by a Tribe.

The basis for "borrowing" a state statute of limitations where a federal statute is silent is long held. In fact, limitation is not truly "borrowed" but rather the underlying jurisdiction's statute of limitation is allowed as a defense to a federal cause of action unless there is a federal law that contradicts that limitation. *See O'Sullivan v. Felix*, 233 U.S. 318, 322, 34 S. Ct. 596, 598 (1914) ("That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the State is established beyond controversy by cases cited by the Circuit Court and by *McLaine v. Rankin*, 197 U.S. 154, 158."). This caselaw repeatedly refers to a "state" statute of limitation because the "state" had the underlying civil jurisdiction in each of the applicable cases. However, in this case, since jurisdiction was with the tribal court system, it is the Rosebud Tribal Code's statute of limitation which remains enforceable in absence of a federal law which sets a statute of limitation. Since this is the case here, the statute of limitation would be one year.

Utilization of the tribal statute of limitation is in line with recognition of "the Federal Government's longstanding policy of encouraging tribal self-government." *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (*citing Iowa Mutual Ins. Co.,* 480 U.S. at 14); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982)). It would be contrary to that policy for federal courts to apply a state adopted statute of limitation when the tribe has set a specific statute of limitation for this exact type of claim, specifically when "[c]ivil jurisdiction over tribal-related activities on reservation land

presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute." *Id.* Indeed, to supplant tribal authority by applying a state adopted statue of limitation for tribal related activities goes to the very heart of tribal inherent sovereignty for which the Federal Government has long encouraged. In line with that policy, Officer Romero would encourage this court to "borrow" the tribal statute of limitation and dismiss the action on the basis that the claim is time barred.

CONCLUSION

Because this action is barred by tribal sovereign immunity, because *Bivens* should not be extended to tribal officers, because 42 USC § 1983 does not extend to tribal officials not acting under color of state law, because Plaintiff failed to exhaust her tribal court remedies, and because it is time barred, this Court should grant Officer Romero's Motion to Dismiss.

Dated this 25th day of April, 2022.

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