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 **REPLY 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.

ARGUMENT

I. Tribal Sovereign Immunity Bars this Action Against Officer Romero

A. Official Capacity Claims

In Plaintiff's Response Brief, although there is significant discussion relating to the individual capacity claims, Plaintiff makes no argument nor cites any authority which would support an official capacity claim against either officer. Indeed, despite the caption and the

[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."

actual claims found in the Complaint, the argument made in support there being a valid individual capacity claim against the officers is that the "the Tribe is not a real party in interest" and "there was no action or claim sought against the Tribe; the suit is against the officers in their individual capacity under *Bivens*[.]" Doc. 32 at 5. Officer Romero submits that any argument in favor of an official capacity claim is therefore waived, and the official capacity claims found in the Complaint be dismissed. *See Chavero-Linares v. Smith*, 782 F.3d 1038, 1040 (8th Cir. 2015) (*citing Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) ("Claims not raised in an opening brief are deemed waived.").

Here, the tribe's sovereign immunity undisputedly protects Officer Romero (and the Tribe) 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 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

Plaintiff cites a significant amount of case law that stands for the proposition that Eleventh Amendment Immunity does not bar an individual capacity claim against a state actor. That, of course, is not disputed here, but has no application to tribal actors. In addition, Plaintiff cites to *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015). However, the reasoning in *Pistor* has not been adopted in the 8th Circuit, and in fact was recently explicitly rejected by Judge Piersol in *Tom Ten Eyck & Michelle Ten Eyck v. United States*, 463 F. Supp. 3d 969 (D.S.D. 2020), where he reasoned:

> This Court is hesitant to conclude, as does the Ninth and Tenth Circuits, that the general principles of sovereign immunity always apply to define the boundaries of tribal sovereign immunity. Without a doubt, a state or federal law enforcement officer sued for damages in his or her individual capacity for allegedly violating a person's constitutional rights would generally not be entitled to claim sovereign immunity, but would only be entitled only to personal immunity defenses. *See Hafter v. Melo*, 502 U.S. 21, 30-31 (1991) ("[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983."); *Mehrkens v. Blank*, 556 F.3d 865, 869 (8th Cir. 2009) ("In *Bivens*, the Supreme Court established a right of individuals to sue individual federal agents for damages for unconstitutional conduct in [certain circumstances]."). However, as the Supreme Court recently stated in *Upper Skagit Indian Tribe v. Lundgren*, "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." 138 S.Ct. 1649, 1654, 200 L. Ed. 2d 931 (2018) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States.").
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> There is nothing in Supreme Court or Eighth Circuit precedent that compels this Court to conclude that a tribal official is precluded from invoking the defense of tribal sovereign immunity to a claim for money damages alleged against the officer in his individual capacity *if* such claim arises from the officer exercising the tribe's inherent sovereign powers. While a money judgment would not pull from the tribal treasury, the Court concludes that permitting such a claim would have the effect of interfering with a tribe's inherent powers of self-government. . . .
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> In sum, in determining whether tribal sovereign immunity bars a claim for damages against [the officer in his individual capacity] depends on whether or not [he] 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 980 -983.

In this case, 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

In Officer Romero's opening brief, it was stated that "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." Although still true, it is important to note that since then, the United States Supreme Court has further discouraged the finding of implied causes of action in *Egbert v. Boule*, 213 L.Ed.2d 54, 64-67 (U.S. 2022). Indeed, the Supreme Court went so far as to state, in the majority opinion, that "if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution."

With the backdrop, it is even more appropriate to 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)).

Plaintiff's argument against this is that Officer Romero was acting as a federal actor because the Tribe had a 638 contract with the BIA and the investigation could have led to jurisdiction for charging a crime under either tribal or federal law. However the argument that the Major Crimes Act gives potential rise to federal criminal jurisdiction was considered and rejected in *Boney v. Valline*, 597 F. Supp. 2d 1167 (D. Nev. 2009), with the Court reasoning

"Defendant went to the scene to enforce tribal law against a member of the Tribe, which constitutes conduct within the Tribe's inherent sovereignty. In sum, Defendant was not performing a function that was traditionally the exclusive prerogative of the federal government." *Id.* at 1176.

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 assert federal jurisdiction pursuant to 42 USC § 1983. In Plaintiff's Response Brief, although there is significant discussion relating to the *Bivens* claim, Plaintiff makes no argument nor cites any authority which would support a § 1983 claim against either officer. Officer Romero submits that any argument in favor of an § 1983 claim is therefore waived, and the official capacity claims found in the Complaint be dismissed. *See Chavero-Linares v. Smith*, 782 F.3d 1038, 1040 (8th Cir. 2015) (*citing Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) ("Claims not raised in an opening brief are deemed waived.").

"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). 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

Plaintiff attempts to avoid *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (8th Cir. 2019) only by arguing "*Stanko* is distinguishable in that Plaintiff does not assert that Defendants Antman and Romero were 'tribal officers acting in their individual capacities under color of tribal law' when violating Jacob Archambault's rights." Doc. 32 at 10. Although that language is not used, the undisputed allegations of the complaint make clear that Officer Antman and Romero were employees of Rosebud Sioux Tribal Law Enforcement and were enforcing tribal law. *See* Doc. 1.

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.

Plaintiff argues that no authority is cited for this argument. However, that is not accurate. It is accurate that counsel was unable to find any case law that addresses whether a tribal law statute of limitation has the same effect of a state law statute of limitation in a § 1983 or Bivens action. However, neither did Plaintiff, other than citing the same general proposition as Officer

Romero that a state law statute of limitation generally applies (without any Court addressing its application when/if the cause of action arose within the exterior boundaries of an Indian Reservation). Just because no court has addressed the argument does not mean that the argument has been rejected.

As reasoned previously, the basis for "borrowing" a state statute of limitations where a federal statute is silent is long held. But the limitation is not truly "borrowed." Rather, the reasoning of the courts authorizing this practice was that 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 civil jurisdiction was with the tribal court system,[2] 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)

[2] Plaintiff contests the assertion of tribal jurisdiction. However, Plaintiff provides no support for an argument as to why there would not be tribal civil jurisdiction relating to a claim of a tribal member adverse to tribal law enforcement within the exterior boundaries of the reservation. *See Stanko,* 916 F.3d 694, 699 (8th Cir. 2019) ("This jurisdiction would obviously include a civil damage action by Stanko alleging that tribal officers acting in their individual capacities under color of tribal law violated his civil rights on reservation land.")

(*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 statute 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 5th day of July, 2022.

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