

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSEPH VINCENT KAUTH,  
Plaintiff,  
v.  
KAELIN MANUEL,  
Defendant.

Case No.: 1:23-cv-01731-SKO (PC)

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT’S  
MOTION TO DISMISS**

(Doc. 22)

Plaintiff Joseph Vincent Kauth, a county jail inmate, is proceeding pro se and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s Fourth Amendment excessive force claim.

**I. INTRODUCTION<sup>1</sup>**

Defendant Kaelin Manuel filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on October 1, 2024. (Doc. 22.) Plaintiff filed an opposition on November 18, 2024<sup>2</sup> (Doc. 27), and Defendant replied on December 2, 2024 (Doc. 29).

//

---

<sup>1</sup> On October 3, 2024, with the consent of all parties, this matter was reassigned to Magistrate Judge Sheila K. Oberto for all purposes including entry of judgment. (*See* Doc. 25.)

<sup>2</sup> Portions of this filing are signed and dated October 11, 2024 (*see* Doc. 27 at 4, 15). In another portion of the filing, Plaintiff signed and dated the document November 7, 2024 (*see id.* at 10).

1           **II.     PLAINTIFF’S FIRST AMENDED COMPLAINT**

2           Plaintiff alleges that on May 2, 2023, he was visiting friends at the Tule River Indian  
3           Reservation when for “reasons unknown to” him, Defendant and four other officers with the Tule  
4           River Tribal Police responded to the friends’ address, where four adults and three minors were  
5           present. As Plaintiff attempted to exit the residence, all law enforcement officers were stationed  
6           in front with their weapons drawn and he was immediately fired upon with non-lethal rubber  
7           bullets. In fear for his life, Plaintiff ran back inside, “yelling for the cops to quit shooting, I was  
8           unarmed and there were kids inside the residence.”

9           Plaintiff further contends that when he received “no response from the cops,” he feared  
10          they would enter the residence and shoot him again. Afraid for his life, he exited the house and  
11          ran to his all-terrain vehicle (ATV) and drove away. Plaintiff states he did not have “any weapon  
12          or object on” his person, did not make any hand gestures or threatening maneuvers that could be  
13          construed as harmful, and both of his hands were on the handlebars of the ATV. He states that,  
14          for “reason unknown and unprovoked,” Defendant aimed her weapon at the back of his head and  
15          upper back, shooting him with a “bullet [lethal] at a distance of 50-100 yards” while he was  
16          speeding in the opposite direction of the officers. Plaintiff asserts Defendant was never in any  
17          danger and that the incident was captured on her body worn camera. Plaintiff alleges Defendant’s  
18          use of excessive force deprived him of his Fourth Amendment rights and her actions were “very  
19          malicious and intentional.”

20           **III.     SUMMARY OF THE PARTIES’ BRIEFING**

21                   *Defendant’s Motion to Dismiss (Doc. 22)*

22          Defendant Manuel is a tribal police officer employed with the Department of Public  
23          Safety of the Tule River Indian Tribe. Plaintiff’s excessive force claim arises following an  
24          incident on May 2, 2023, involving Defendant. Defendant contends a section 1983 action cannot  
25          be maintained against those acting “under color of tribal rather than state law.” Plaintiff’s  
26          complaint warrants dismissal because it alleges Defendant is a tribal police officer who  
27          encountered Plaintiff on tribal land during an incident involving Defendant and other tribal police  
28          officers. Plaintiff did not state or describe involvement by “any state officials or the delegation of

1 any state authority to” her. Defendant contends Plaintiff’s complaint must be dismissed for a  
2 failure to state a claim upon which relief can be granted. Defendant further contends that to the  
3 extent Plaintiff’s complaint sues her in an official capacity, Plaintiff’s suit is barred by the Tule  
4 River Indian Tribe’s sovereign immunity and should be dismissed on that basis.

5 ***Plaintiff’s Opposition (Doc. 27)***

6 Plaintiff contends his suit against Defendant Manuel concerns “personal capacity” only.  
7 He states first amended complaint alleges that “Defendant was acting under color of state law”  
8 and “came up with a plan to arrest” him “for a state bench [warrant]. (working under, hand in  
9 hand and for the color of state law).” Defendant knew he “was a non-native with a state [warrant]  
10 ... never wanted for any crime on the Tule Indian Reservation.” Defendant contacted him “for the  
11 Tulare County Sheriff’s Office,” and Plaintiff attaches four pages from a Tule River Tribal Police  
12 report that he contends “clearly states” Defendant “did a wants and [warrants] check a day prior  
13 to the incident” revealing the Tulare County warrant. Plaintiff alleges that when Defendant  
14 “decided she was going to search and locate Plaintiff for the Tulare County Sheriff Office,”  
15 Defendant was acting under color of state law. Plaintiff asks the Court to deny Defendant’s  
16 motion to dismiss because “Defendant was acting in conjunction with the state agency Tulare  
17 County and there by extension and definition was under the color of state law.” Plaintiff notes  
18 “this Court has found a cognizable civil rights claim under 42 U.S.C § 1983 ‘twice.’”<sup>3</sup>

19 Plaintiff’s opposition includes his own declaration in which he states that: (1) he is  
20 appearing pro se; (2) he is suing Defendant in her “personal capacity;” (3) “Defendant was  
21 acting under the color of state law;” (4) the attached police reports “are original and unaltered;”  
22 (5) the Court has found his claim cognizable; and (6) he demands a jury trial.

23 ***Defendant’s Reply (Doc. 29)***

24 Defendant contends Plaintiff’s opposition fails to identify any facts set forth in the first  
25 amended complaint “that even suggest” Defendant is a state actor or imbued with state authority.

26 \_\_\_\_\_  
27 <sup>3</sup> Plaintiff is advised that during screening the Court is required to liberally construe a pro se complaint and  
28 accept all asserted facts as true. While the Court permitted Plaintiff’s complaint to proceed past screening,  
Defendant may properly challenge the Court’s jurisdiction by way of a motion to dismiss pursuant to Rule  
12 of the Federal Rules of Civil Procedure.

1 Defendant maintains Plaintiff's failure cannot be remedied by improper reliance on extrinsic  
2 evidence or new allegations that were not asserted in the operative complaint. Because further  
3 amendment would be futile, Defendant requests the motion to dismiss be granted and that the first  
4 amended complaint be dismissed with prejudice.

#### 5 **IV. APPLICABLE LEGAL STANDARDS**

##### 6 *Dismissal Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure*

7 Federal Rule of Civil Procedure 12(b)(1) allows a defendant to raise the defense, by  
8 motion, that the court lacks jurisdiction over the subject matter of an entire action or of specific  
9 claims alleged in the action. "Because standing and mootness both pertain to a federal court's  
10 subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under  
11 Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214, 1242  
12 (9th Cir. 2000).

13 There are two types of motions to dismiss for lack of subject matter jurisdiction: a facial  
14 attack, and a factual attack. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733  
15 (9th Cir. 1979). When a party makes a facial attack on a complaint, the attack is unaccompanied  
16 by supporting evidence, and it challenges jurisdiction based solely on the pleadings. *Safe Air for*  
17 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If the motion to dismiss constitutes a  
18 facial attack, the Court must consider the factual allegations of the complaint to be true and  
19 determine whether they establish subject matter jurisdiction. *Savage v. Glendale High Union Sch.*  
20 *Dist. No. 205*, 343 F.3d 1036, 1039 n.1 (9th Cir. 2003). In the case of a facial attack, the motion  
21 to dismiss is granted only if the nonmoving party fails to allege an element necessary for subject  
22 matter jurisdiction. *Id.*

23 In the case of a factual attack, district courts "may review evidence beyond the complaint  
24 without converting the motion to dismiss into a motion for summary judgment." *Safe Air for*  
25 *Everyone*, 373 F.3d at 1039. In that instance, "[n]o presumptive truthfulness attaches to plaintiff's  
26 allegations." *Thornhill*, 594 F.2d at 733 (internal citation omitted). The burden to demonstrate  
27 subject matter jurisdiction is on the party asserting the claim. *See Harris v. KM Indus., Inc.*, 980  
28 F.3d 694, 699 (9th Cir. 2020). And where the moving party makes a factual challenge to the

1 court's subject matter jurisdiction by offering affidavits or other evidence in support of the  
2 motion, the opposing or non-moving party must present similar evidence "necessary to satisfy the  
3 burden of establishing that the court, in fact, possesses subject matter jurisdiction." *St. Clair v.*  
4 *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). If the nonmoving party fails to meet its burden  
5 and the court determines that it lacks subject matter jurisdiction, the court must dismiss the action.  
6 Fed. R. Civ. P. 12(h)(3).

7 ***Dismissal Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure***

8 A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro*  
9 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In resolving a 12(b)(6) motion, the Court's review is  
10 generally limited to the "allegations contained in the pleadings, exhibits attached to the complaint,  
11 and matters properly subject to judicial notice." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519  
12 F.3d 1025, 1030-31 (9th Cir. 2008) (internal quotation marks & citations omitted). Dismissal is  
13 proper if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged  
14 under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.  
15 1988) (citation omitted).

16 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
17 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556  
18 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court  
19 "accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light  
20 most favorable to the non-moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998  
21 (9th Cir. 2010) (citation omitted). In addition, the Court construes pleadings of pro se prisoners  
22 liberally and affords them the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.  
23 2010) (citation omitted). However, "the liberal pleading standard ... applies only to a plaintiff's  
24 factual allegations," not his legal theories. *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989).

25 ***Sovereign Immunity***

26 "The issue of tribal sovereign immunity is 'quasi jurisdictional' in the sense that it 'may  
27 be asserted at any time.'" *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d  
28 1232, 1237 (D. Alaska 2019) (quoting *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015)).

1 “Although sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a  
2 proper vehicle for invoking sovereign immunity from suit.” *Pistor*, 791 F.3d at 1111; *see also*  
3 *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017) (“A sovereign  
4 immunity defense is ‘quasi-jurisdictional’ in nature and may be raised in either a Rule 12(b)(1) or  
5 12(b)(6) motion”). “In the context of a Rule 12(b)(1) motion to dismiss on the basis of tribal  
6 sovereign immunity, ‘the party asserting subject matter jurisdiction has the burden of proving its  
7 existence,’ i.e., that immunity does not bar the suit.” *Pistor*, 791 F.3d at 1111 (quoting *Miller v.*  
8 *Wright*, 705 F.3d 919, 923 (9th Cir. 2013)). In resolving such a motion, “no presumptive  
9 truthfulness attaches to a plaintiff’s allegations” and “a district court may hear evidence regarding  
10 jurisdiction and resolve factual disputes where necessary.” *Id.* (internal quotations & brackets  
11 omitted); *see also Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014); *Gregory*  
12 *Vill. Partners, L.P. v. Chevron U.S.A., Inc.*, 805 F. Supp. 2d 888, 895 (N.D. Cal. 2011).

## 13 V. DISCUSSION

### 14 *Defendant Manuel Is Not Entitled to Immunity*

15 Plaintiff’s first amended complaint is silent as to capacity. (*See* Doc. 11.) Where a pro se  
16 complaint is silent as to capacity, the Court presumes the named official was sued in a personal or  
17 individual capacity. *See Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 42 F.3d 1278,  
18 1284 (9th Cir. 1994) (“Where state officials are named in a complaint which seeks damages under  
19 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities”);  
20 *see also Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir. 1999) (Ninth Circuit has “presumed that  
21 officials necessarily are sued in their personal capacities where those officials are named in a  
22 complaint, even if the complaint does not explicitly mention the capacity in which they are  
23 sued”). Further, as Plaintiff states in his opposition, he is suing Defendant in her personal capacity  
24 only. (Doc. 27.)

25 The Ninth Circuit has held “tribal defendants sued in their individual capacities for money  
26 damages are not entitled to sovereign immunity, even though they are sued for actions taken in  
27 the course of their official duties.” *Pistor*, 791 F.3d at 1112; *see Hafer v. Melo*, 502 U.S. 21, 27  
28 (1991) (“officers sued in their personal capacity come to court as individuals”).

1 As an initial matter, the Court notes that Defendant Manuel’s challenge to the first  
2 amended complaint is a facial attack. *Thornhill*, 594 F.2d at 733. The Court will not address  
3 Defendant’s Rule 12(b)(1) argument concerning tribal immunity because Defendant Manuel in  
4 not being sued in her official capacity as a tribal police officer as Plaintiff’s suit names Defendant  
5 Manuel only in her personal or individual capacity. Thus, Defendant’s motion to dismiss the first  
6 amended complaint pursuant to Rule 12(b)(1) will be denied.

7 ***Plaintiff’s First Amended Complaint Fails to State a Claim Upon Which Relief***  
8 ***Can be Granted***

9 The Civil Rights Act under which this action was filed provides:

10 Every person who, under color of any statute, ordinance, regulation,  
11 custom, or usage, of any State or Territory or the District of  
12 Columbia, subjects, or causes to be subjected, any citizen of the  
13 United States or other person within the jurisdiction thereof to the  
14 deprivation of any rights, privileges, or immunities secured by the  
15 Constitution and laws, shall be liable to the party injured in an action  
16 at law, suit in equity, or other proper proceeding for redress....

17 42 U.S.C. § 1983. To state a claim under section 1983, a plaintiff must allege that (1) the  
18 defendant acted under color of state law and (2) the defendant deprived him or her of rights  
19 secured by the Constitution or federal law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185  
20 (9th Cir. 2006).

21 In his first amended complaint, Plaintiff alleges Defendant Manuel used “excessive force  
22 under color of federal and state law.” (*See* Doc. 11 at 6.) The question whether Plaintiff’s  
23 operative complaint survives a challenge under Rule 12(b)(6) turns on whether Defendant was  
24 acting under color of state law.

25 “The traditional definition of acting under color of state law requires that the defendant in  
26 a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only  
27 because the wrongdoer is clothed with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49  
28 (1988). 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). An action is under color of  
state law when the state’s role in the action is “significant.” *Lopez v. Dep’t of Health Servs.*, 939  
F.2d 881, 883 (9th Cir. 1991). The general rule is that tribal police officers do not act under color

1 of state law within the meaning of section 1983. *R.J. Williams Co. v. Fort Belknap Hous. Auth.*,  
2 719 F.2d 979, 982 (9th Cir. 1983). However, tribal officers “who act in concert with officers of  
3 the state are acting under the color of state law within the meaning of section 1983.” *Evans v.*  
4 *McKay*, 869 F.2d 1341, 1348 (9th Cir. 1989).

5 ***Defendant Manuel Was Not a State Actor***

6 When tribal officers discover violations of state and federal law by any person within the  
7 reservation, they may detain the violators and turn them over to state or federal authorities. *Ortiz-*  
8 *Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975).

9 As noted above, Plaintiff contends Defendant Manuel acted under color of state law  
10 during the incident on May 2, 2023. A review of the first amended complaint reveals otherwise.  
11 Plaintiff fails to allege facts that demonstrate Defendant Manuel acted “in concert with officers of  
12 the state” or any other governmental body who were “acting under the color of state law within  
13 the meaning of section 1983.” *Evans*, 869 F.2d at 1348. Nor does Plaintiff allege facts to  
14 demonstrate that the state’s role, or any other governmental body’s role, such as Tulare County,  
15 was “significant.” *Lopez*, 939 F.2d at 883. Plaintiff’s allegations show that Defendant Manuel was  
16 accompanied only by other Tule River tribal law enforcement personnel.

17 The Court considered the allegations contained in Plaintiff’s first amended complaint only  
18 as it is required to do in addressing a motion to dismiss. *Manzarek*, 519 F.3d at 1030-31 (in a  
19 motion to dismiss, a court’s consideration is limited to the “allegations contained in the pleadings,  
20 exhibits attached to the complaint, and matters properly subject to judicial notice”). The Court  
21 did not consider the additional facts asserted by Plaintiff in his opposition to Defendant’s motion  
22 to dismiss.

23 To the extent Plaintiff offers extrinsic evidence in the form of Tule River Tribal Police  
24 incident reports in support of his opposition to Defendant’s motion to dismiss, the Court “may not  
25 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of*  
26 *Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Rule 12(b)(6) provides that “when matters  
27 outside the pleading are presented to and not excluded by the court, the motion shall be treated as  
28 one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given



1 reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Fed.  
2 R. Civ. P. 12(b)(6).

3         There are, however, exceptions to the requirement that consideration of extrinsic evidence  
4 converts a Rule 12(b)(6) motion to a motion for summary judgment. *Id.* The Court “may consider  
5 material which is properly submitted as part of the complaint on a motion to dismiss without  
6 converting the motion to dismiss into a motion for summary judgment.” *Id.* If the documents are  
7 not physically attached to the complaint, they may be considered if the documents' authenticity is  
8 not contested, and the plaintiff's complaint necessarily relies on them. *Id.* at 689 (citations  
9 omitted). Here, the extrinsic evidence offered by Plaintiff does not fit within the exception for not  
10 converting the Rule 12(b)(6) motion into a motion for summary judgment because, even  
11 assuming authentication is not contested, the incident report information was not relied upon in  
12 Plaintiff's first amended complaint. Plaintiff's first amended complaint states that for “reasons  
13 unknown” Defendant and other tribal officers responded to his friend's home on May 2, 2023.  
14 Thus, Plaintiff's operative complaint does not rely upon evidence that Defendant sought out  
15 Plaintiff due to a Tulare County arrest warrant. Nor is the proffered extrinsic evidence properly  
16 incorporated by reference or subject to judicial notice. *See United States v. Ritchie*, 342 F.3d 903,  
17 908-09 (9th Cir. 2003). In short, this evidence is properly excluded.

18         In sum, this Court finds Defendant acted pursuant to tribal law. A section 1983 action is  
19 not the proper vehicle to present a claim challenging conduct by a defendant who acted under  
20 color of tribal law. *R.J. Williams Co.*, 719 F.2d at 981-82; *Balistreri*, 901 F.2d at 699 (dismissal is  
21 proper where the complaint lacks a cognizable legal theory).

22         Lastly, the Court notes that dismissing Plaintiff's first amended complaint with leave to  
23 amend would be futile. As discussed above, Plaintiff cannot state a claim as a matter of law. *See*  
24 *Hartmann v. CDCR*, 707 F.3d 1114, 1130 (9th Cir. 2013) (“A district court may deny leave to  
25 amend when amendment would be futile”). Because Plaintiff cannot state a Fourth Amendment  
26 excessive force claim against Defendant Manuel as a matter of law, this action will be dismissed  
27 for failure to state a claim upon which relief may be granted.

28 //

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**III. CONCLUSION AND ORDER**

The Court’s denial of the motion to dismiss pursuant to Rule 12(b)(1) does not mean this action proceeds because the Court has granted Defendant’s motion to dismiss pursuant to Rule 12(b)(6), which results in a dismissal of the action. Based upon the foregoing, the Court

**HEREBY ORDERS:**

1. Defendant’s Motion to Dismiss (Doc. 22) is **GRANTED in part and DENIED in part**. The motion to dismiss pursuant to Rule 12(b)(1) is denied and the motion to dismiss is granted pursuant to Rule 12(b)(6).<sup>4</sup>
2. Plaintiff’s first amended complaint (Doc. 11) is **DISMISSED**, with prejudice, pursuant to Rule 12(b)(6).
3. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: March 20, 2025

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE

---

<sup>4</sup> The Court’s denial of the motion to dismiss pursuant to Rule 12(b)(1) does not mean this action proceeds because the Court has granted Defendant’s motion to dismiss pursuant to Rule 12(b)(6), which results in a dismissal of the action.