

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

CROW CREEK SIOUX TRIBE and  
the CROW CREEK HOUSING  
AUTHORITY

CIV. 09-3021

Plaintiffs,

v.

BRIEF IN SUPPORT OF  
MOTION TO DISMISS  
COMPLAINT

SHAUN DONOVAN, in his capacity  
as the Secretary of the DEPARTMENT  
OF HOUSING AND URBAN DEVELOPMENT;  
and RODGER J. BOYD, in his capacity as  
Deputy Assistant Secretary for Native  
American Programs,

Defendants.

The Defendants, by and through counsel, hereby submit the following brief in support of their Motion To Dismiss. The Defendants move to dismiss the above-entitled action for insufficient service of process pursuant to F.R.Civ.P. 12(b)(5), and to dismiss the Plaintiffs' Motion for Judgment on the Pleadings, which was prematurely filed under F.R.Civ.P. 12(c).

The Plaintiffs have failed to properly serve the Defendants with a summons and complaint in this matter, and therefore their Complaint must be dismissed. A motion to dismiss for insufficiency of service of process under F.R.Civ.P. 12(b)(5) is the proper vehicle for Defendants to challenge the method or delivery of a summons and complaint. See 5B C. Miller & A. Wright, Federal Practice and Procedure: Civil § 1353 (3d ed. 2006).

The Defendants in this suit are federal employees being sued in their official capacities<sup>1</sup>. Federal Rule of Civil Procedure 4(i) governs service of process upon the United States, its officers and employees. It provides for service upon federal employees in their official capacity as follows:

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States **and** also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

F.R.Civ.P. 4(i)(2) (emphasis added). The language of Rule 42(i)(2) requires that the United States must be served in addition to the agency, corporation, officer or employee. In order to serve the United States, a party must

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail

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<sup>1</sup>A suit against federal employees in their official capacity is a suit against the United States. "[O]fficial capacity suits ... represent only another way of pleading an action against an entity of which an officer is an agent. Monell v. Department of Social Servs., 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2035 n. 55, 56 L.Ed.2d 611 (1978)," Hankins v. Finnel, 964 F.2d 853, 862 (8th Cir. 1992).

to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

F.R.Civ.P. 4(i)(1)(A).

To this date, Plaintiffs have not complied with the requirements set forth in the applicable rules. See attached “bad service” letter from Diana Ryan, Civil Chief. Plaintiffs have the burden of proving proper service. See Candido v. District of Columbia, 242 F.R.D. 151 (D.D.C. 2007) (citing Light v. Wolf, 816 F.2d 746, 751 (D.C.Cir.1987) (when a defendant challenges service of process in a federal court proceeding, it is the burden of the plaintiff to demonstrate that the procedure the plaintiff employed satisfied the service requirements.) A plaintiff is not relieved of its duty to properly serve its suit upon the defendant even if the defendant is already aware of the action. Adams v. AlliedSignal Gen. Aviation Avionics, 74 F.3d 882, 885 (8th Cir.1996) (district court lacks jurisdiction where defendant is improperly served, whether or not defendant had actual knowledge of lawsuit); see also United States v. Ligas, 549 F.3d 497, 2008 WL 5047770, at \*3 (7th Cir. Dec.1, 2008).

Because these Plaintiffs have not served the Defendants, Plaintiffs have not established the Court has subject matter jurisdiction. See Dillehay v. Department of Housing and Urban Development, 2009 WL 1751890, 1 (8th Cir. 2009) (slip copy) citing Adams, supra, 74 F.3d at 885. Therefore the Court is without authority to consider any motions, including the Plaintiffs' pending Rule 12(c) Motion for Judgment on the Pleadings.

The pending motion is itself improper because the very language of the applicable rule prohibits the filing of a motion for judgment on the pleadings before the pleadings have been closed. See F.R.Civ.P. 12(c) "After the pleadings are closed-- but early enough not to delay trial-- a party may move for judgment on the pleadings". For purposes of Rule 12(c), the pleadings are not closed until at least an answer has been filed; therefore, a motion for judgment on the pleadings is inappropriate where a defendant has not filed an answer to the complaint. See Dorgan v. International Harvester Co., 585 F.2d 1380, 1381 (C.A.N.D., 1978) (finding district court had no power to enter a judgment on the pleadings because the defendant had never been given an opportunity to file an answer, and noting interplay between plain language of Rule 12(c) and the "pleadings" definition in Rule 7(a)); see also, Season-All Industries, Inc., v. Turkiye Sise Ve Cam Fabrikalari, A.S., 425 F.2d 34, 36 (3rd Cir. 1970).

Plaintiffs' motion therefore is premature and contrary to the filing prerequisite

contained in the rule. The Defendants should not be required to respond to a motion when they have not yet been properly served with the Complaint or answered it.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Complaint should be dismissed and the pending motion stricken.

Dated: September 24, 2009

DENNIS E. HOLMES  
ACTING UNITED STATES ATTORNEY

/s/ Diana Ryan

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U.S. Department of Justice

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September 15, 2009

Mario Gonzalez  
522 Seventh Street, Suite 202  
Rapid City, SD 57701-2756

**By Fax: 605-716-6357**

Re: Crow Creek Sioux Tribe, et al. v. Shaun Donovan, et al.

Dear Mr. Gonzalez:

Our office received a copy of the Complaint, Motion for Judgment on the Pleadings, and Memorandum in Support of the motion. We also received a request for waiver of the Summons and Complaint. The United States does not waive service of the Summons. You may send our office a summons addressed to my attention by regular mail to complete service upon the U.S. Attorney. You are further required to serve a Summons and Complaint upon the agency and upon the Attorney General by registered or certified mail. The address for service upon Shaun Donovan, Secretary of the Department of Housing and Urban Development is:

U.S. Department of Housing and Urban Development  
451 Seventh Street SW  
Washington, DC 20410

The address to effect service upon the Attorney General, Eric H. Holder, is:

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Sincerely,

DENNIS R. HOLMES  
UNITED STATES ATTORNEY

Diana Ryan  
Chief, Civil Division

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## F A X T R A N S M I T T A L S H E E T

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TODAY'S DATE: September 15, 2009

SEND TO: Mario Gonzalez

FACSIMILE #: 605-716-6357

FROM: Diana Ryan/erb

RE: Crow Creek Sioux Tribe

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