

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN;
TOM TEN EYCK,
Guardian of Morgan Ten Eyck; and
MICHELLE TEN EYCK,
Guardian of Morgan Ten Eyck,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
ROBERT NEUENFELDT, individually
and UNKNOWN SUPERVISORY
PERSONNEL OF THE UNITED
STATES, individually,

Defendants.

4:19-CV-04006-LLP

**MEMORANDUM IN SUPPORT OF
MOTION TO AMEND COMPLAINT**

Plaintiffs, by and through undersigned attorneys, respectfully submit this Memorandum in Support of Motion to Amend Complaint.

I. PRELIMINARY STATEMENT

Plaintiffs respectfully move the Court for the entry of an Order pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to amend their Complaint to add causes of action for negligent training, negligent supervision, and negligent retention against the United States of America. This Motion is based upon the recent disclosures by Defendant Robert Neuenfeldt that he was not provided a copy of the Bureau of Indian Affairs Law Enforcement Handbook 3rd Edition (BIA Handbook); was not certified pursuant to the provisions of the BIA

Handbook; and failed to complete Indian Police Academy (IPA) training as required by the BIA Handbook.

Once the Flandreau Santee Sioux Tribe (F.S.S.T.) was awarded the 638 contract issued by the Bureau of Indian Affairs, it was bound by the directives, policies, and procedures set forth in the BIA Handbook. Page 13 of the BIA Handbook specifically states, that “[t]his Handbook shall be the standing orders governing the actions of all personnel of this office and will supersede any former Handbook editions and any current Special Orders. (BIA Law Enforcement Handbook 3rd Edition, attached as Ex. 2.) Further, pursuant to *Gooden v. United States Department of Interior*, the BIA Law Enforcement Handbook sets forth mandatory training policies. 339 F.Supp.2d 1072, 1079 (D.N.D. 2004); *see also United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267 (1991) (discretionary exception not satisfied if there is a statute, rule, regulation or administrative policy that specifically prescribes the course of action); *Berkovitz by Berkovitz v. United States*, 213 F.2d 648 1954 (1988) (no discretionary exception when action violates specific regulatory directive).

Therefore, the United States’ failure to even advise Neuenfeldt of the existence of the BIA Handbook, much less its failure to train him pursuant to the Handbook’s directives and policies, constitutes negligent training, negligent supervision, and negligent retention. As set forth more fully below, there is good cause for Plaintiffs’ motion, the motion is not made to cause undue delay, in bad faith, or dilatory motive, and the United States is unable to demonstrate undue prejudice.

II. FACTUAL BACKGROUND

a. Procedural History.

The Rule 16 Scheduling Order (Doc. 35) was filed on August 10, 2020. The Order set forth October 2, 2020, as the deadline to move to join additional parties and amend the pleadings. (*Id.*) On October 27, 2020, the Court granted an Unopposed Motion to Amend Scheduling Order (Doc. 38.) and set forth new discovery deadlines in an Amended Rule 16 Scheduling Order. (Doc. 39.) On February 15, 2021, the United States filed a Motion to Extend the Second Amended Rule 16 Scheduling Order, specifically requesting to move the trial date to February 8, 2022. (Doc. 47.) Subsequently, on February 23, 2021, the parties filed a Stipulation for Third Amended Rule 16 Scheduling Order (Doc. 48), which was adopted by this Court on March 11, 2021, in the Third Amended Rule 16 Scheduling Order. (Doc. 54.)

Defendant Neuenfeldt's deposition was taken on February 24, 2021. After numerous revelations from Neuenfeldt's sworn testimony, counsel for Plaintiffs advised Defendants of their intention to amend the complaint on March 1, 2021. (*See* Letter dated 3/1/21, attached as Ex. 3.) The letter also requested that Defendants stipulate to the motion. (*Id.*) On March 8, 2021, counsel for the United States advised that it will not consent to the amendment. The transcript of Neuenfeldt's deposition was received on March 5, 2021.

b. The Pursuit.

During the evening of June 17th, and the early morning hours of June 18th 2017, Plaintiffs were passengers in a vehicle driven by Tahlen Bourassa. The Bourassa vehicle was traveling north on 484th avenue when it encountered a southbound highway patrol car driven by Isaac Kurtz. Trooper Kurtz then turned around and activated his patrol car emergency lights. As Bourassa continued north on 484th street, he approached Defendant Neuenfeldt standing on the west side of the road and Moody County Deputy Logan Baldini standing on the east side of the road. Neuenfeldt and Baldini were located at the end of a driveway leading up to where an underaged party had taken place. As Bourassa approached Neuenfeldt and Baldini, Bourassa slowed the vehicle then stopped, as requested by law enforcement. (See Baldini Dep. 60:11-61:1, attached as Ex. 4.) At that time, without any violations of law committed by Bourassa, Neuenfeldt pulled his gun and pointed it at the driver. (See Neuenfeldt Dep. 152:9-16, attached as Ex. 5.) After a brief stop, the truck accelerated and veered to the left, leaving the scene. (See Kurtz Dash Cam Video, attached as Ex. 6.) At this time Neuenfeldt ran to his patrol car and Deputy Baldini joined him. It must be noted that Deputy Baldini had no authority to enter the tribal vehicle and was not a certified law enforcement officer at that time. (See Ex. 4, Baldini Dep. 9:10-16.)

Shortly after the truck left the scene, Defendant Neuenfeldt can be heard over the radio transmission indicating that the front bumper of the truck struck him in the leg claiming that an assault on law enforcement had taken

place. (See Radio Transcript, attached as Ex. 7.) However, the video footage obtained from Trooper Kurtz' dash cam refutes that Neuenfeldt was ever struck the by vehicle. This has been confirmed by forensic videographer, Tim Maher, who has issued an expert report indicating that Neuenfeldt was not struck by the Bourassa vehicle. (See Maher Report, attached as Ex. 8.) Neuenfeldt later reported to Avera Flandreau Hospital complaining of left hip, left thigh and left shoulder injuries. During this visit, Neuenfeldt told the medical provider that "a car had hit him going at a speed of about 20 miles an hour." (See Neuenfeldt Med. Records 0001, attached as Ex. 9.) Neuenfeldt further claimed "that his shoulder hit the mirror on the side of the pickup and the bumper of the pickup hit his left thigh." (*Id.*) During his testimony, Neuenfeldt confirmed that the 7,000-pound truck was traveling between 15 and 25 miles per hour when it allegedly struck him. (Neunfeldt Dep. 294:9-12; Ex. 5.) As a result of these claims, Jeffrey S. Fischgrund, M.D., has provided an expert opinion that "the energy due to translational motion of the pickup was over 10 times that necessary to fracture (break) the femur. Based on the biomechanical considerations, the alleged contact could not have occurred in the manner described by the officer." (See Fischgrund Report, attached as Ex. 10.)

Further, not one eye witness can confirm Neuenfeldt's story. Deputy Baldini, who was closest to the alleged incident, testified to the following:

73:7 Q And if we have a video that shows him off to the
 73:8 side of the vehicle and was never struck by the bumper at all,
 73:9 you wouldn't have any knowledge of him being struck by the

73:10 bumper at all, would you? You didn't see it?

73:11 A I did not see it.

73:12 Q Okay. So you don't have any direct knowledge of
73:13 being hit by the bumper of the vehicle, correct?

73:14 A No.

(Baldini Dep. 73:7-73:14; Ex. 4.) Deputy Brakke was located in the driveway at the time of the alleged incident and also indicated that he did not see Neuenfeldt get hit:

79:15 Q And it's also true that you never saw -- personally

79:16 witnessed Officer Neuenfeldt get struck by the front of the

79:17 bumper?

79:18 A I was not witness to him being hit.

(Brakke Dep. 79:15-18, attached as Ex. 11.) Officer Kurtz was in his patrol car behind the Bourassa vehicle and confirmed that he did not witness the truck strike Neuenfeldt:

138:15 Q Okay. And you didn't see anything with your naked

138:16 eye that would indicate Neuenfeldt got hit by Tahlen Bourassa?

138:17 A Correct.

(Kurtz Dep. 138:15-17, attached as Ex. 12.) The sole basis for the pursuit, a claimed assault on law enforcement, was simply a fabrication to justify Neuenfeldt's actions that evening.

After Neuenfeldt was allegedly struck, the video shows him running to his tribal vehicle and Deputy Baldini getting in the passenger seat. Officer Kurtz was the primary pursuer until roughly four minutes into the pursuit

when he lost sight of the vehicle and terminated his pursuit as primary. (Kurtz Dep. 88:1-15; Ex. 12.) At that time, Neuenfeldt continued to pursue the vehicle for nearly 30 minutes on gravel roads at speeds in excess of 100 mph. At no time did any part of the pursuit involve tribal lands. (Kurtz Dep. 74:7-17, Ex. 12.) During the entirety of Neuenfeldt's pursuit, he was outside of tribal lands and therefore lacked jurisdiction.

Eventually, Neuenfeldt pushed the Bourassa vehicle down a gravel road that was a known dead-end. Neuenfeldt testified that he was aware the road was a dead-end when he deliberately directed the Bourassa vehicle that direction. (Neuenfeldt Dep. 308:16-18; Ex. 5.) As the speeding truck approached the dead-end, Bourassa lost control and rolled the vehicle numerous times — all three occupants were ejected from the truck.

All three kids sustained catastrophic injuries. Morgan Ten Eyck suffered brain and spinal cord injuries, which will forever confine her to a wheel chair without any ability to speak or walk. Micah Roeman sustained numerous fractures to his neck and back. It is believed that Tahlen Bourassa also sustained permanent brain damage. All of these horrific injuries were caused by a complete disregard for nearly every pursuit policy directive as set forth in the BIA Law Enforcement Handbook.

At issue before the Court is whether Plaintiffs should be allowed to amend their complaint to add additional causes of action for negligent training, negligent supervision, and negligent retention. Facts supporting these additional causes of action only recently came to light during the deposition of

Robert Neuenfeldt. The following facts and testimony support allowing Plaintiffs leave of Court to file an Amended Complaint.

c. Neuenfeldt was never provided the BIA Law Enforcement Handbook.

The United States, by and through the Department of the Interior, Bureau of Indian Affairs, contracted with the Flandreau Santee Sioux Tribe (F.S.S.T.) and its Police Department pursuant to 25 U.S.C. § 5321, Indian Self Determination Act, to provide law enforcement services on the Flandreau Santee Sioux Indian Reservation. (See 638 Contract, attached as Ex.14.) The United States certified that Defendant Robert Neuenfeldt was acting within the scope of federal office or employment at the time of the incident out of which Plaintiffs' claims arose. (See Doc. 12.) As such, the United States had a duty to train and supervise its federal law enforcement employees pursuant to the BIA Handbook.

The training manual for 638 contracted tribal police departments and its officers is the Bureau of Indian Affairs Office of Justice Services Law Enforcement Handbook 3rd Edition. Astoundingly, Neuenfeldt testified that he was never provided with the BIA Handbook and had never even seen it until the time of his deposition:

47:18 Q And did you read the manual that guides tribal laws?

47:19 A No.

47:20 Q Ever seen it?

47:21 A I was not given one.

(Neuenfeldt Dep. 47:18-21; Ex. 5.)

Neuenfeldt again confirmed that he was not aware of the requirements for high-speed pursuits because he was never given the BIA manual:

48:13 Q And whether it's the use of firearms or it's
48:14 high-speed pursuits, if you don't read the requirements of the
48:15 manual, it's almost impossible for you to know them, correct?

48:16 MS. ROCHE: Objection, form.

48:17 THE WITNESS: I was given the law and order
48:18 code manual, *not the BIA manual*, which would be the
48:19 specific tribal manual.

(Neuenfeldt Dep. 48:13-19 (emphasis added).) In fact, Neuenfeldt had never reviewed any pursuit policy at any time during his law enforcement career. Neuenfeldt started out with the Moody County Sheriff's Office as a deputy. After being terminated for multiple policy violations, Neuenfeldt was hired by the F.S.S.T. Police Department, and is currently employed by the Flandreau City Police Department. During these three separate jobs in law enforcement, Neuenfeldt did not look at any policy whatsoever regarding pursuits:

44:24 Q Now, I want to ask you, you start a job and you're
44:25 driving a police vehicle and you have the opportunity or might
45:1 have the opportunity to chase somebody with your police
45:2 vehicle, yet you did not look at any policy whatsoever
45:3 regarding pursuits; is that correct?

45:4 MS. ROCHE: Objection, form, argumentative.

45:5 THE WITNESS: Correct.

45:6 BY MR. STEVEN BEARDSLEY:

45:7 Q And that's true when you went to the tribe too. You
45:8 didn't look at any pursuit policy for the tribe either, did
45:9 you?

45:10 A Correct.

45:11 Q So when you went to Flandreau city police, did you

45:12 look at any manual or policy or guideline regarding pursuits
45:13 for the city of Flandreau?

45:14 A No.

(Neuenfeldt Dep. 44:24-45:14; Ex. 5.)

The following BIA Handbook pursuit policies were violated by Neuenfeldt on the night of the chase:

2-24-03 AUTHORIZATION FOR PURSUIT

- A. A vehicle pursuit is a use of force. When an officer elects to use this force, he/she must use the same objective reasonableness standard he/she uses when any force is used in the course of accomplishing police duties.
- B. In any area of their jurisdiction, a law enforcement officer in an authorized emergency vehicle may initiate a vehicle pursuit based on the officer's perception that:
 - 1. There has been a moving and potentially hazardous traffic offense.
 - 2. A felony has just occurred, or is about to occur.
 - 3. The driver is a violent suspect.
 - 4. The suspect exhibits intention to avoid apprehension by refusing to stop when properly directed to do so.
 - 5. The officer's reasonable belief that the suspect, if allowed to flee, presents a potential danger to human life, or may cause serious injury.

2-24-04 FACTORS TO CONSIDER BEFORE ENGAGING IN AND WHILE CONTINUING A PURSUIT.

In all areas of the jurisdiction, officers are expected to end their involvement in a pursuit whenever the risks to their own safety or the safety of others outweigh the danger to the community if the suspect is not apprehended. These considerations include, but are not limited to:

- 1. Seriousness of the crime,
- 2. Potential for apprehending the suspect in the pursuit or by other means,
- 3. Pedestrian and vehicle traffic in the area of the pursuit,
- 4. Potential risk to citizens using the highway,
- 5. Current street and traffic conditions, including the presence or absence of traffic control devices,
- 6. Current weather conditions,
- 7. Current road conditions, including lighting (visibility),
- 8. Risk to the public if the suspect escapes,
- 9. Known identity of the suspect or means to ascertain the suspect's identity and immediately apprehend the suspect,

10. The manner in which the driver of the fleeing vehicle is driving, including:
 - a. Speeds being driven,
 - b. Regard for other traffic,
 - c. Regard and observance of traffic control signs and devices,
 - d. Driver's control of the fleeing vehicle,
 - e. Type and condition of fleeing vehicle, and
 - f. Age of the suspect, if known.

2-24-05 ACTIONS DURING A PURSUIT

- A. Immediately upon initiating a pursuit, the officer in the primary unit will notify dispatch of the following items.
 1. Officers will identify themselves and provide information on location, speed, direction of travel, and vehicle description, including license number if known.
 2. Crime(s) that occupant(s) of the fleeing vehicle are believed to have committed,
 3. Number and description of occupants,
 4. Information on weapons, and
 5. Traffic conditions.
- B. The primary function of a secondary unit while the pursuit is in progress is to move into position and assume the communications responsibilities.
- C. The secondary unit, or monitoring supervisor, will coordinate the activities of other assisting units. The support units will not participate in the actual pursuit, but assist by providing traffic control, vehicle stopping methods, and as resources for the aftermath of the vehicle pursuit termination, i.e., high risk stop, search for suspects fleeing on foot, crime scene security, traffic control at termination point, etc.
- D. Dispatch will notify the on-duty supervisor of the pursuit. The supervisor will monitor the pursuit while moving in the general direction of the pursuit route.
 1. The supervisor is ultimately responsible for terminating the pursuit or allowing it to continue.
 2. The supervisor will continually weigh the risks based on information being received from dispatch and the pursuing units.
3. The supervisor will immediately terminate the pursuit when:
 - a. The pursuit is not in compliance with the requirements of this section,
 - b. The supervisor must judge the risk created by the continuation of the pursuit to the public, the officers, or the suspects, to be greater than the risk created to the public by the suspect's escape or delay in capture.
- E. All officers must immediately terminate a pursuit when advised to do so by:
 1. A supervisor of any jurisdiction the pursuit has entered,
 2. Officers in either the primary or secondary unit.

2-24-06 GUIDELINES FOR PURSUITS

- A. No set of guidelines can address all possible circumstances. As a result, officers are expected to evaluate their actions based on whether the potential benefits of their actions outweigh the risks that are involved. If officers take actions outside these guidelines:
 - 1. They do so with the authorization of a supervisor or senior officer,
 - 2. They articulate the reasons for their actions and
 - 3. These actions will be evaluated based on the totality of the conditions.
 - B. Officers may not ram, bump, or collide with a fleeing vehicle nor pull alongside the vehicle to force it off the roadway. These actions may only be approved by a supervisor when deadly force is necessary to terminate the pursuit.
 - C. Officers involved in a pursuit will not attempt to pass other field units unless specifically authorized by the primary unit or a supervisor.
 - D. Officers involved in a pursuit will maintain proper spacing between vehicles to allow proper braking and reaction time in the event that the lead vehicle stops, turns, or slows.
 - E. Pursuits are limited to two police vehicles, a primary and secondary unit. Additional units may participate if directed by the supervisor or senior officer on duty.
 - F. Officers may only fire their weapons at the vehicle's driver and/or passenger(s) when deadly force is being used against the officers or another by the vehicle's driver or passenger(s). Fire should be directed at the specific individual(s) in the vehicle only after it is determined they are using deadly force and after considering the potential for hitting the target, considering the speeds of the vehicles. Firearms will not be used to disable or attempt to disable a fleeing vehicle.
 - G. Whenever the pursuit extends off roadway, as when the fleeing vehicle leaves the roadway and proceeds cross-country, the pursuing officer(s) must carefully consider whether or not the seriousness of the offense outweighs the risk to his/her safety and the potential damage to the police vehicle or private property. When the risks of pursuit exceed the need to capture the offender, the officer must discontinue pursuit.
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- H. If person(s) attempting to avoid apprehension stop the fleeing vehicle and proceed on foot, the officer will stop, give his/her location, and continue efforts to apprehend on foot. The back-up car, or second police vehicle, will be dispatched in close proximity to offer assistance.
 - I. The pursuing officer will terminate the pursuit when he/she loses sight of the fleeing vehicle for any extended period of time.

(BIA Handbook p. 276-279; Ex. 2.)

The BIA Handbook also covers policies for pursuits beyond reservation jurisdiction or initiated by another agency. These policies were also violated.

2-24-09 PURSUITS-BEYOND JURISDICTION OR INITIATED BY ANOTHER AGENCY

- A. A pursuit may extend beyond the reservation line, but primary control of the pursuit must be relinquished as soon as practical to police personnel of the entered jurisdiction if their policy allows them to enter the pursuit.
- B. The following guidelines govern joining a pursuit initiated by another jurisdiction:
 - 1. Officers must follow LE Handbook Section 2-24-02, Authorization for Pursuit.
 - 2. An officer may participate in a pursuit initiated by another jurisdiction to assist with officer safety concerns but should request that the pursuit be terminated if conditions pose a safety hazard.
 - 3. OJS officers will discontinue pursuits initiated by another jurisdiction when the pursuit continues outside their jurisdiction, unless officer safety becomes a consideration.
- C. Regardless of the location of the pursuit, or the lead agency, officers will act consistent with the procedures and guidelines established in this directive.
- D. When accompanied by civilian passengers, officers may not engage in a pursuit. If a civilian is in the police vehicle at the beginning of a pursuit, the officer will turn the pursuit over to another officer, or leave the civilian at a safe location.
- E. If the violator enters a one-way street against the flow of traffic, or enters a major highway or intersection freeway by proceeding along an exit ramp, the pursuing officer will not follow the violator. The officer will advise communications of the vehicle's location, speed, and direction of travel.

(*Id.* at 281-281.)

The code of conduct, within the BIA Handbook, specifically requires its officers to certify that they have read the manual; Neuenfeldt confirmed that he had not:

178:11 Q Then it says on number 8, I understand this code of
178:12 conduct is in addition to requirements imposed on me and
178:13 applicable to all Department of Interior employees as set
178:14 forth in part 20 of Title 43 of the Code of Federal
178:15 Regulations and 446 of the department manual which I have

178:16 read. Did you do that?

178:17 A I did not.

(Neuenfeldt Dep. 178:11-17; Ex. 5.)

d. Neuenfeldt never signed the certifications required by the BIA Handbook.

Page 23 of the BIA Handbook is titled Law Enforcement Code of Conduct. (See Ex. 2 at p. 23.) The Law Enforcement Code of Conduct sets forth eight separate provisions that every law enforcement officer must read and act in accordance with. Importantly, the code of conduct requires a signature of the officer and a signature of the officer's instructor/supervisor. This document, in its executed form, does not exist.

Page 25 of the BIA Handbook is titled Oath of Office. (Id.) Again, the Oath of Office naturally requires a signature by the law enforcement officer taking the oath. This document, in its executed form, does not exist.

Page 153 of the BIA Handbook is the Request for Use of Government Vehicle between Employees' Domicile and Place of Official Duty. Again, this form is in blank form, and given Neuenfeldt's testimony that he had not seen the BIA Handbook until the time of his deposition, it can be surmised that the form does not exist in its executed form.

e. Neuenfeldt failed to complete the Indian Police Academy Bridge Training Program.

The BIA Handbook requires each officer to complete Indian Police Academy Bridge Training within the first year of employment. (BIA Handbook; Ex. 2 at p. 443). Neuenfeldt started working with the F.S.S.T. in January of

2016, more than one year from the date of this incident — June 18, 2017. Not surprisingly, Neuenfeldt had not completed the required Bridge Training:

112:17 Q Now, as I understand it, at the time of this
112:18 incident in June of 2017, you had not received your bridge
112:19 training by the tribe, correct?

112:20 MS. ROCHE: Objection, form.

112:21 THE WITNESS: Correct.

(Neuenfeldt Dep. 112:17-21; Ex. 5.)

Apparently, Neuenfeldt was sent to a “jurisdiction thing” held in South Carolina in November of 2017, which was after the chase in June of 2017:

113:2 Q Okay. And you didn't ever receive your bridge
113:3 training?

113:4 A No, we went to the -- that jurisdiction thing in
113:5 South Carolina.

113:6 Q That was November of 2017?

113:7 A Yep.

113:8 Q Okay. So you got jurisdiction training at that
113:9 time, but you didn't ever receive the bridge training that is
113:10 discussed in the manuals?

113:11 MS. ROCHE: Objection, form. Objection,
113:12 calls for a legal conclusion.

113:13 THE WITNESS: I don't know nothing about the
113:14 manual.

(Neuenfeldt Dep. 113:2-14; Ex. 5.) Without the appropriate Bridge Training, Neuenfeldt did not have authority to act as a police officer on the day of the chase.

As previously indicated, the entirety of the chase took place outside

Indian Tribal Lands, and therefore, outside of Neuenfeldt's tribal jurisdiction. Neuenfeldt confirmed that he was never directly called to assist with Moody County on the evening of June 17, 2017, and Neuenfeldt was never cross-deputized:

127:13 Q Okay. And no one, when you left tribal land,
127:14 conferred upon you jurisdiction to assist. They didn't call
127:15 you up and say you've got jurisdiction now to help us, right?

127:16 MS. ROCHE: Objection, form.

127:17 BY MR. STEVEN BEARDSLEY:
127:18 Q Nobody called and told you that?

127:19 A Not like that, no.

127:20 Q And nobody called and asked for your assistance.
127:21 Brakke didn't call, Wellman didn't call, Baldini didn't call,
127:22 correct?

127:23 A Not specifically.

127:24 MS. ROCHE: Objection, form.

127:25 BY MR. STEVEN BEARDSLEY:
128:1 Q So there was no correct call that conferred some
128:2 sort of jurisdiction on you –

128:3 MS. ROCHE: Objection, form –

128:4 BY MR. STEVEN BEARDSLEY:
128:5 Q -- correct?

128:6 MS. ROCHE: -- calls for a legal conclusion.

128:7 THE WITNESS: No direct call to me
128:8 personally, no.

128:9 BY MR. STEVEN BEARDSLEY:
128:10 Q And there was no deputization by anyone, correct?

128:11 A Not that I'm aware of.

(Neuenfeldt Dep. 127:13-128:11; Ex. 5.)

Astoundingly, Neuenfeldt had never been trained regarding jurisdiction issues by the F.S.S.T., the BIA, or the United States' government prior to June 2017:

27:16 Q So what other training did you receive from either
27:17 the tribe or the federal government regarding jurisdiction
27:18 prior to November 30th, 2017?

27:19 A None.

27:20 Q Okay. When you began to work for the tribe January
27:21 2016, did you receive training by either the BIA, the tribe,
27:22 or the federal government?

27:23 A No.

(Neuenfeldt Dep. 27:16-23; Ex. 5.) Neuenfeldt was also never trained regarding high-speed pursuits:

36:9 Q And if I'm understanding you correctly, you didn't
36:10 get any training from the federal government or the BIA or the
36:11 tribe regarding pursuits?

36:12 A No.

(Neuenfeldt Dep. 36:9-12; Ex. 5.)

Tribal officer conduct off reservation lands is governed by the Tribal Assist Agreement it has with Moody County. The Assist agreement specifically sets forth the circumstances that a tribal officer can assist outside the reservation boundaries. (See Assist Agreement; attached Ex. 13.) Supplemental law enforcement protection is only authorized "in the event of emergency, disaster or widespread conflagration that has developed or threatens to develop the control of either party." (*Id.*) On the evening of June 17, 2017, there was no emergency, disaster, or widespread conflagration.

(Neuenfeldt Dep. 260:20-261-24, Ex. 5.)

On the evening of June 17, 2017, Defendant Neuenfeldt had not been properly trained and certified to even conduct police work on tribal lands, much less lead a high-speed pursuit outside of his jurisdiction. The failure to properly train, supervise, and retain Neuenfeldt falls directly with the United States and it should be held to answer for its dereliction of duties.

III. DISCUSSION

“Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). “A motion to amend is a procedural matter governed by federal law.” *Meyers v. American States Ins. Co.*, 926 F.Supp 904, 908-09 (D.S.D. 1996) (Piersol, J.) (citing *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252, 1258 (8th Cir. 1996)).

The Federal Rules of Civil Procedure, specifically Rule 15(a), provides in relevant part that “[a] party may amend the party’s pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*” (Emphasis added.) “As explained by the Supreme Court, absent a good reason for denial-undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of amendment-leave to amend should be granted.” *Meyers*, 926 F.Supp at 909 (internal quotations and citation omitted). Delay alone is not enough to warrant denial of

permission to amend; prejudice to the nonmovant must also be shown. *Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005). “[A] motion to amend should be denied on the merits ‘only if it asserts clearly frivolous claims or defenses.’” *Becker v. Univ. of Neb. At Omaha*, 191 F.3d 904, 908 (8th Cir. 1999) (citing *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1233, 1255 (8th Cir. 1994)).

The party opposing the amendment bears the burden of proving that some reason exists to deny leave to amend. *Roberson v. Hayti Police Dep’t.*, 241 F.3d 992, 995 (8th Cir. 2001). In deciding whether a proposed amendment should be allowed, “the court should not consider the likelihood of success unless the claim is ‘clearly frivolous,’ ” *Popp Telecom v. American Sharecom, Inc.*, 210 F.3d 928, 944 (8th Cir.200).

A. Good Cause

Good cause supports Plaintiffs’ Motion to Amend Complaint because they were unaware until recently that the United States failed to even provide Neuenfeldt with the BIA Handbook, much less ensure that he followed the proper certifications and training as required in the BIA Handbook. This information only came to light during Neuenfeldt’s deposition, which was taken on February 24, 2021. Prior to Neuenfeldt’s testimony, Plaintiffs were without sufficient knowledge to assert claims for negligent training, negligent supervision and negligent retention.

B. Undue Delay, In Bad Faith, Or Dilatory Motive

Plaintiffs' Motion to Amend Complaint is not made to cause undue delay, in bad faith, or dilatory motive. Plaintiffs have as much desire as the Defendants, if not more, to bring this lawsuit to a conclusion. Further, Plaintiffs have pursued this matter diligently in serving numerous discovery requests and taking eight depositions. All parties have been working diligently to complete discovery in this case. This is evidenced by the number of depositions that have been completed. Further, the parties have stipulated on numerous occasions to extend the scheduling order to accommodate with the enormous discovery workload in this case.

C. Undue Prejudice

Defendants will not suffer any undue prejudice due to an amendment of the Complaint: (1) The amendment will not cause additional costs or preparation; (2) there has not been a loss of critical evidence; and (3) Defendants have a fair opportunity to present its defense. See 61A Am. Jur. 2d. Pleading § 777 (discussing factors considered in determining prejudice regarding motion to amend). Plaintiffs are not seeking to add additional parties, but merely assert new claims as a result of newly discovered evidence. Any anticipated claim of prejudice, as a result of delay, is refuted by the United State's recent motion to the Court to extend the discovery deadlines and the trial date in this matter. (See Doc. 47.) Further, the burden of proof of prejudice is on the party opposing the amendment. *Roberson*, 241 F.3d at

995. Defendants are unable to meet that burden and therefore Plaintiffs' motion should be granted.

IV. CONCLUSION

The interests of justice support Plaintiffs' motion to add additional causes of action against the United States of America for negligent training, negligent supervision, and negligent retention. Plaintiffs are not making this motion for dilatory purposes, and Defendants will not suffer undue prejudice if the motion is granted. Therefore, Plaintiffs' respectfully request that this Court issue an Order allowing additional causes of action to be asserted against the United States, file and serve upon the Defendants Plaintiffs' Second Amended Complaint.

Dated this 31st day of March, 2021.

BEARDSLEY, JENSEN & LEE, Prof. L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2021, a true and correct copy of the foregoing has been served on the following by the following means:

John Nooney	<input checked="" type="checkbox"/>	First Class Mail
Robert J. Galbraith	<input type="checkbox"/>	Hand Delivery
Nooney & Solay	<input type="checkbox"/>	CM/ECF System
632 Main Street	<input checked="" type="checkbox"/>	Electronic Mail
Rapid City, SD 57709		

Meghan Roche	<input checked="" type="checkbox"/>	First Class Mail
Assistant U.S. Attorney	<input type="checkbox"/>	Hand Delivery
PO Box 2638	<input type="checkbox"/>	CM/ECF System
Sioux Falls, SD 57101-26387	<input checked="" type="checkbox"/>	Electronic Mail

/s/ Michael S. Beardsley
Michael S. Beardsley