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12 and Doug Grandchamp

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

LANNY and KRIS TREASURE,

Plaintiffs,

v.

UNITED STATES OF AMERICA  
BUREAU OF INDIAN AFFAIRS;  
THE ASSINIBOINE AND SIOUX  
TRIBES OF THE FORT PECK  
INDIAN RESERVATION; DALE  
GRANDCHAMP; DOUG  
GRANDCHAMP; AND JOHN DOES  
1-5

Defendants.

Civil Action No.  
4:20-cv-00075-BMM-JTJ

**THE ASSINIBOINE AND SIOUX  
TRIBES OF THE FORT PECK  
INDIAN RESERVATION AND  
TRIBAL AGENTS, including DOUG  
GRANDCHAMP's  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

**MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS**

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## **INTRODUCTION**

COMES NOW, the undersigned Georgette H. Boggio, appearing on behalf of the Defendants the Assiniboine and Sioux Tribes of the Fort Peck Reservation and their agent Doug Grandchamp (referred hereafter collectively as “Fort Peck Tribes”). Pursuant to Local Rule 7.1(d)(1)(A), counsel hereby submits the following memorandum in support of its Motion to Dismiss.

## **STATEMENT OF FACTS**

The Fort Peck Tribes are a federally recognized sovereign Indian Nation. As part of its governmental powers, the Fort Peck Tribes have established the Turtle Mound Buffalo Ranch (herein “Ranch”). The buffalo herd was established by the Fort Peck Tribes to serve cultural, spiritual, sustenance and economic purposes for the benefit of Fort Peck tribal members. The Bureau of Indian Affairs is not involved in the management of the Ranch.

The Ranch is run by the Fort Peck Tribes’ Fish and Game Department, located approximately 20 miles northwest of Poplar, Montana. The Fort Peck Tribes’ Fish

1 and Game Department is managed by tribal employee Robbie Magnan, Fish and  
2 Game Director. The Ranch is located entirely within the exterior boundaries of the  
3 Fort Peck Indian Reservation.

4 Robbie Magnan is an enrolled tribal member of the Fort Peck Tribes. Robbie  
5 Magnan resides within the exterior boundaries of the Fort Peck Indian Reservation.

6 The Ranch is approximately 15,000 acres. The Ranch is located on almost  
7 entirely federal trust land, except for one 80 acre parcel of fee land. All of the Ranch  
8 land relevant to the issues at question are located on federal trust land. Within the  
9 Ranch, the buffalo's food supply is supplemented by hay as part of the management  
10 of the herd.

11 During the time period in question, the Fort Peck Tribes Fish and Game  
12 Department did not possess a swather within its equipment inventory. The Fort Peck  
13 Fish and Game Department, through Director Magnan, participated in a crop share  
14 agreement with Dale and Doug Grandchamp who were allowed to swath hay on  
15 tribal trust properties designated by Director Magnun. This crop share was to  
16 facilitate the gathering of hay for tribal buffalo located on the Turtle Mound Buffalo  
17 Ranch. In exchange for swathing parcels designated by the Tribes, Doug  
18 Grandchamp and Dale Grandchamp were allowed to retain a percentage of the hay  
19 swathed.

1 Both Doug Grandchamp and Dale Grandchamp own their separate swathers.  
2 When they participated in this crop share, either Doug Grandchamp or Dale  
3 Grandchamp would bring their personally-owned swather to the tribal trust parcels  
4 designated by Director Magnan, and kept sixty percent (60%) of the hay that they  
5 swathed and the remaining forty percent (40%) was left and available for the tribal  
6 buffalo herd.  
7

8 On or about August 31, 2018, there were three parcels that the Fort Peck Tribal  
9 Fish and Game Department designated to be swathed. Two of the parcels were  
10 located further up north on the Ranch and were not contiguous to the area in question  
11 in the complaint.  
12

13 On or about August 31, 2018, Doug Grandchamp, an employee with the Fort  
14 Peck Tribes, using his personal swather, had swathed the two northern parcels and  
15 had returned his swather to his personal shop and was assisting Director Magnan in  
16 sorting the swathed hay on the northern parcels.  
17

18 While Mr. Doug Grandchamp and Director Magnan were up at the non-  
19 contiguous northern parcels, an individual by the name of Chris Forsness approached  
20 Director Magnun about completing the swathing of the hay and participating in the  
21 crop-share agreement that the Buffalo Ranch had with both Doug Grandchamp and  
22 Dale Grandchamp. Director Magnun agreed to let Chris Forsness swath the one  
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1 portion of the Southern parcel T6228. Chris Forsness obtained the use of Dale  
2 Grandchamp's swather to complete the swathing of hay.

3 While Chris Forsness was swathing using Dale Grandchamp's swather, a fire  
4 started, and Chris Forsness reached out to Doug Grandchamp and Director Magnan.  
5 Both Director Magnan and Doug Grandchamp responded to the area of fire to assist  
6 in putting it out and called the Bureau of Indian Affairs (BIA) Fire Service. The BIA  
7 Fire Service responded to the fire and directed the response to the fire. Director  
8 Magnan and Doug Grandchamp stayed on site until the late evening to ensure that  
9 the fire was contained on the Ranch. This evening, the fire had only burned on  
10 property that was part of the Ranch, and located entirely on land held in trust.  
11

12  
13 Doug Grandchamp is an enrolled member of the Fort Peck Tribes. Doug  
14 Grandchamp is an employee of the Fort Peck Tribes in the position of Rangeland  
15 Technician within the Natural Resources Department. Doug Grandchamp resides  
16 within the exterior boundaries of the Fort Peck Indian Reservation.  
17

18 On or about September 1, 2018, a fire ignited in the vicinity of the previous  
19 fire from the night before. The area covered by the fires that took place on August  
20 31 and September 1, 2018, was approximately 15 miles long and is entirely within  
21 the exterior boundaries of the Fort Peck Indian Reservation.  
22

23 The Plaintiff's claim damage to real property a portion of which is property  
24 they own in fee status, as well as land they lease from both individual tribal members  
25

1 and the Fort Peck Tribes, all of which is on information and belief, held in federal  
2 trust.

### 3 ARGUMENTS

#### 4 I. The Court Lacks Subject Matter Jurisdiction.

5  
6 “A party invoking the federal court’s jurisdiction has the burden of proving  
7 the actual existence of subject matter jurisdiction.” *Thompson v. McCombe*, 99 F.3d  
8 352, 353 (9<sup>th</sup> Cir. 1996). The Treasures must prove the existence of this Court’s  
9 subject matter jurisdiction over claims against the Fort Peck Tribes and their agents  
10 and employees.  
11

##### 12 A. Sovereign Immunity

13 Where an Indian tribe and its employees have sovereign immunity a federal district  
14 court lacks subject matter jurisdiction over the case. Therefore, a Rule 12(b)(1)  
15 motion to dismiss based on tribal sovereign immunity must be granted.  
16

17 Tribal sovereign immunity “extends to business activities of the tribe, not  
18 merely to governmental activities.” *Allen v. Gold Country Casino*, 464 F.3d 1044,  
19 1046 (9<sup>th</sup> Cir. 2006). Tribal sovereign immunity is jurisdictional, *Thompson*, 962  
20 P.2d at 579-80; its recognition is non-discretionary, *Miller v. Wright*, 705 F.3d 919,  
21 927 (9<sup>th</sup> Cir. 2013); and it bars suit against a tribe “irrespective of the merits” of the  
22 claims against the tribe, *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d  
23 416, 418-19 (9<sup>th</sup> Cir. 1989) (citations omitted). Tribal sovereign immunity is  
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25



1 determined by federal law because it “is not subject to diminution by the states.”  
2 *Thompson*, 962 at 581 (quoting *Kiowa Tribe of Okla. v. Mfg Tech., Inc.*, 523 U.S.  
3 751, 754 (1998)).

4 “Tribal sovereign immunity protects Indian tribes from suit absent express  
5 authorization by Congress or clear waiver by the tribe.” *Cook v. AVI Casino*  
6 *Enterprises, Inc.*, 548 F.3d 718, 725 (9<sup>th</sup> Cir. 2008). Tribal sovereign immunity “also  
7 protects tribal employees in certain circumstances,” *Maxwell v. County of San*  
8 *Diego*, 708 F.3d 1075, 1086 (9<sup>th</sup> Cir. 2013), namely, where a tribe’s officials are  
9 sued in their official capacities. “A suit against . . . [a tribe’s] officials in their official  
10 capacities is a suit against the tribe [that] is barred by tribal sovereign immunity.”  
11 *Miller v. Wright*, 705 F.3d 919, 927-28 (9<sup>th</sup> Cir. 2013), cert. denied, 133 S. Ct. 2829  
12 (2013).

13 “[T]he issue of tribal sovereign immunity is [quasi-]jurisdictional.” *Pan Am.*  
14 *Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9<sup>th</sup> Cir. 1989). Normally,  
15 “[s]ubject-matter jurisdiction’ refers to ‘the courts’ statutory or constitutional power  
16 to adjudicate the case.” *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)  
17 (quoting *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 89 (1998)) (emphasis  
18 omitted). Under that general rule, “when a federal court . . . lacks subject-matter  
19 jurisdiction, the court must dismiss the complaint.” *Leeson v. Transamerica*  
20 *Disability Income Plan*, 671 F.3d 969, 975 n.12 (9<sup>th</sup> Cir. 2012) (quoting *Arbaugh v.*  
21  
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1 *Y&H Corp.*, 546 U.S. 500, 514 (2006)). Sovereign immunity’s “quasi-jurisdictional  
2 . . . nature,” by contrast, means that “[i]t may be forfeited where the [sovereign] fails  
3 to assert it and therefore may be viewed as an affirmative defense.” *Arizona v.*  
4 *Bliemeister (in re Bliemeister)*, 296 F.3d 858, 861 (9<sup>th</sup> Cir. 2002). In other words,  
5 sovereign immunity is not “jurisdictional in the sense that it must be raised and  
6 decided by this Court on its own motion,” *Patsy v. Bd. Of Regents of State of Fla.*,  
7 457 U.S. 496, 515 n. 19 (1982), but rather in the sense that it “may be asserted at  
8 any time.” *Mitchell v. Franchise Tax Board (In re Mitchell)*, 209 F.3d 1111, 1117  
9 (9<sup>th</sup> Cir. 2000), *abrogated on other grounds as recognized by Hibbs v. Dep’t of*  
10 *Human Res.*, 273 F.3d 844, 853 n.6 (9<sup>th</sup> Cir. 2001).

13 Although sovereign immunity is only quasi-jurisdictional in nature, Rule  
14 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit. *See,*  
15 *e.g., Maxwell*, 708 F.3d at 1081. In the context of a Rule 12(b)(1) motion to dismiss  
16 on the basis of tribal sovereign immunity, “the party asserting subject matter  
17 jurisdiction has the burden of proving its existence,” i.e. that immunity does not bar  
18 the suit. *Miller*, 705 F.3d at 923 (quoting *Robinson v. United States*, 586 F.3d 683,  
19 685 (9<sup>th</sup> Cir. 2009)).

22 The United States Supreme Court has held that “Indian Tribes have long been  
23 recognized as possessing the common law immunity from suit traditionally enjoyed  
24 by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The  
25

1 Court in *Santa Clara* further examined whether Tribal officers were also protected  
2 by the Tribe's sovereign immunity from suit:

3       Although Congress clearly has power to authorize civil actions against  
4 tribal officers, and has done so with respect to habeas corpus relief in §  
5 1303, a proper respect both for tribal sovereignty itself and for the  
6 plenary authority of Congress in this area cautions that we tread lightly  
in the absence of clear indications of legislative intent.

7 *Santa Clara Pueblo*, 436 U.S. at 60. The Court specifically stated that the Indian  
8 Civil Rights Act “does not impliedly authorize actions for declaratory or injunctive  
9 relief against either the tribe or its officers.” *Id.* at 72.

10       Because the relief requested by the Plaintiff in this case, if granted, would run  
11 against the Fort Peck Tribes itself, the Tribes' sovereign immunity protects any  
12 Tribal employees named and performing actions in their official capacities. *See*  
13 *Fletcher v. United States*, 116 F.3d 1315, 1324 (10<sup>th</sup> Cir. 1997); *Kenai Oil and Gas,*  
14 *Inc. v. Department of the Interior*, 522 F. Supp. 521, 531 (D. Utah 1981) (“Tribal  
15 immunity may not be evaded by suing tribal officers . . .”), *aff'd*, 671 F.2d 383 (10<sup>th</sup>  
16 Cir. 1982).

17       This principle has been applied to protect state and federal officials sued in  
18 their official capacity. *See, e.g., Hafer v. Melo*, 502 U.S. 21 (1991) (state); *Larson v.*  
19 *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949) (federal).  
20 Because there is no reason to treat tribal immunity differently from state or federal  
21 immunity in this sense, tribal immunity protects tribal officials against claims in their  
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1 official capacity. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)  
2 (employing same rules for waiver of tribal immunity as are employed for waiver of  
3 state and federal immunity because no principled reason required different  
4 treatment). Thus, the Fort Peck Tribe's employees and agents in this case are entitled  
5 to sovereign immunity as far as the official capacity claims, unless there is an  
6 unequivocally expressed waiver either by the Tribe or abrogation by Congress.  
7 *Fletcher v. United States*, 116 F.3d at 1324. The Fort Peck Tribes has not waived  
8 sovereign immunity for the Treasures' claims in this case. The Complaint should be  
9 dismissed because it lacks allegations of conduct by any Tribal employees or agents  
10 in their individual capacities in connection with each claim.  
11  
12

13 B. The Federal Torts Claim Act is Not a Congressional Abrogation of Tribal  
14 Sovereign Immunity  
15

16 The Plaintiffs assert jurisdiction over the Bureau of Indian Affairs based on  
17 the Federal Tort Claims Act (28 U.S.C. §2671, et seq.), 28 U.S.C. §§ 1331, and 28  
18 U.S.C. 1346(b)(1). Compl. at Paragraph 9.  
19

20 The Federal Tort Claims Act is not a grant of jurisdiction over Tribal entities  
21 to the federal courts. It merely makes available a remedy against U.S. Federal  
22 Agencies. The Federal Tort Claims Act does not contain an express consent to sue  
23 tribes and is not a congressional waiver of tribal sovereign immunity simply because  
24 the Plaintiff asserts that federal questions against the Bureau of Indian Affairs exist  
25

1 in this case. Entities outside of the Federal Government only become implicated  
2 under the Federal Tort Claims Act when they are acting as either an “instrumentality  
3 or agency of the United States.” 28 U.S.C. §2671.

4 Because the Federal Torts Claims Act is limited in its application to acts  
5 committed or omitted by or on behalf of the United States, the Fort Peck Tribes are  
6 not subject to any duties or liabilities under the Federal Tort Claims Act for acts  
7 taken in their management of the Ranch. The Fort Peck Tribes were not acting as an  
8 instrumentality or agency of the United States when its employees were swathing  
9 hay for the tribal buffalo herd.  
10  
11

12 C. Failure to Raise Issues of Federal Law against the Tribes

13 Issues closely connected to tribal operations on the Fort Peck Reservation,  
14 such as the issues Plaintiff attempts to raise in this case with respect to the Fort Peck  
15 Tribes, are not a matter over which federal courts have subject matter jurisdiction.  
16 *Ordinance 59 Ass’n v. Babbitt*, 970 F. Supp. 914, 925 (D. Wyo. 1997).  
17

18 As noted in *Santa Clara* “[tribal courts have repeatedly been recognized as  
19 appropriate forums for exclusive adjudication of disputes affecting important  
20 personal and property interests of both Indians and non-Indians.]” 436 U.S. at 65  
21 (citations omitted).  
22

23 The Ranch is an internal tribal affair, run internally by the Fort Peck Tribes  
24 for the benefit of tribal members.  
25

1 The Plaintiffs seek to impose State of Montana civil regulatory authority in  
2 Federal Court in their Counts Two and Four based on alleged acts to have  
3 originated on tribal trust land within the exterior boundaries of the Fort Peck Indian  
4 Reservation. Further, Doug Grandchamp is not only an employee of the Fort Peck  
5 Tribes, but an enrolled tribal member who resides within the Fort Peck Indian  
6 Reservation. Further, to the degree that Director Magnan is implicated as a “John  
7 Doe”, he is also an employee of the Fort Peck Tribes working within his official  
8 capacity, as well as Fort Peck Tribal member residing within the Fort Peck Indian  
9 Reservation. It is well-established precedent that the State has no authority to  
10 regulate the affairs of the Tribes and Tribal members on the Reservation. *Williams*  
11 *v. Lee*, 358 U.S. 217, 220 (1959).

12 The conduct of the Fort Peck Tribes, their tribal employees and their tribal  
13 citizens within the exterior boundaries of the Fort Peck Indian Reservation is  
14 squarely within the exclusive civil regulatory authority of the Fort Peck Tribes.

## 15 **II. Plaintiff Fails to State a Claim upon which Relief can be Granted**

16 The Plaintiffs fail to state a claim upon which relief can be granted against the Fort  
17 Peck Tribes and their employees and the Fort Peck Tribes and their agents should  
18 therefore be dismissed, even assuming *arguendo* that the Fort Peck Tribes and their  
19 tribal employees are subject to both federal jurisdiction and state regulatory  
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1 authority. Therefore, a Rule 12(b)(6) motion to dismiss based on failure to state a  
2 claim must be granted.

3 “Dismissal is proper only where there is no cognizable legal theory or an  
4 absence of sufficient facts alleged to support a cognizable legal theory.” *Taylor v.*  
5 *Yee*, 780 F.3d 928, 935 (9<sup>th</sup> Cir. 2015).  
6

7 The standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544  
8 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) states pleadings must contain “a  
9 short and plain statement of the claim showing that the pleader is entitled to relief.”  
10 Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 does not require ‘detailed  
11 factual allegations,’ but it demands more than an unadorned, the-defendant-  
12 unlawfully-harmed-me accusation.” *Iqbal*, at 678 (*citing Twombly*, at 555). “To  
13 survive a motion to dismiss, a complaint must contain sufficient factual matter,  
14 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (*citing*  
15 *Twombly*, at 570). A claim is plausible on its face “when the plaintiff pleads factual  
16 content that allows the court to draw the reasonable inference that the defendant is  
17 liable for the misconduct alleged.” *Id.* at 678 (*citing Twombly*, at 556). “But where  
18 the well-pleaded facts do not permit the court to infer more than the mere  
19 possibility of misconduct, the complaint has alleged—but it has not “show[n]”—  
20 “that the pleader is entitled to relief.” *Iqbal*, at 679 (quoting Fed. R. Civ. P.  
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1 8(a)(2)). Plaintiff's Complaint fails to state any plausible claim under the  
2 application of this framework. Therefore, dismissal is proper.

3 A. The Plaintiffs Failed to Demonstrate a Duty by the Fort Peck Tribes

4 Plaintiffs argue that the Tribes breached their duty to act in a reasonable  
5 manner when they swathed hay without fire precautions. The Plaintiff's cite Mont.  
6 Code Ann. § 50-63-103. The Montana Supreme Court has been only applied this  
7 statute to fires that were either intentionally set, or to fires resulting from willful or  
8 wanton conduct, and has defined willful, wanton, or reckless conduct as an act for  
9 which "it is apparent, reasonably should have been apparent, to the defendant that  
10 the result was likely to prove disastrous to the plaintiff, and [the defendant] acted  
11 with such indifference toward, or utter disregard of such a consequence that it can  
12 be said he was willing to perpetuate it." *Jobe v. City of Polson*, 2004 MT 183, 322  
13 Mont. 15, 94 P.3d, 743, 746 (2004)(quoting *Wollaston v. Burlington Northern, Inc.*  
14 188 Mont. 192, 612 P.2d 1277, 1280 (1980)). The Plaintiffs allegations fall short.  
15 The Plaintiffs have not pled that the Fort Peck Tribes started the fire intentionally.  
16 Even assuming all the facts presented by the Plaintiffs, the Plaintiffs allege at most  
17 that the Tribes caused an accidental fire. They do not provide any information that  
18 the Tribes had any duty to swath with the fire precautions they list.  
19

20 Further, the Plaintiffs' claim that the swather was operated when one tire  
21 along with the rim was missing based on a picture that was taken seventeen days  
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1 after the fire took place on the Ranch. Compl. at ¶ 20. A picture of the swather after  
2 the fire occurred is not a plausible fact to support the condition of the swather prior  
3 to the fire and sitting unattended for 17 days. While the allegation that a swather  
4 could operate and move with one entire tire missing is not plausible on its face, the  
5 Plaintiffs pled facts are based on the condition of the swather after it was burned.  
6 Short of the picture, the Plaintiff's pled facts regarding the operation of the swather  
7 in poor condition is pure conclusion.  
8

9  
10 The facts in the Complaint must "raise a right to relief above the speculative  
11 level," and into the "realm of plausible liability." *Twombly*, at 555. Although  
12 properly alleged facts must be construed in favor of the plaintiff, a court need "not  
13 accept as true conclusory allegations, unwarranted factual inferences, or legal  
14 conclusions." *Gentilello v. Rege*, 627 F.3d 540, 544 (5<sup>th</sup> Cir. 2010); *see also Iqbal*,  
15 at 678 (court is not required to accept mere legal conclusions as true).  
16

17 B. The Plaintiff's Failed to Meet the Elements of Nuisance or Trespass  
18

19 The Plaintiffs allege that the Fort Peck Tribes or their agents swathed hay as  
20 to create a nuisance. Under Montana Code Ann. § 27-30-10, a nuisance action must  
21 be based on conduct of a defendant that is either intentional, negligent, reckless or  
22 ultrahazardous. Again, the Plaintiffs do not plead that the Fort Peck Tribes or their  
23 agents intentionally started a fire. The Plaintiff's bare legal conclusion that by  
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1 swathing without a fire truck, water tender or fire extinguisher that this was a  
2 nuisance fails to state an adequate claim under the laws of Montana.

3 Plaintiff's allegation of trespass also fails to state a claim upon which relief  
4 can be granted. The tort of trespass is an intentional tort, and requires a showing that  
5 the tortfeasor intended to enter or remain on upon the property owned or controlled  
6 by another, or cause another third party or thing to enter the property. *Davis v.*  
7 *Westphal*, 2017 Mt. 276, P 16, 389 Mont. 251, 259, 405 P.3d 73, 82 (2017). Again,  
8 the Plaintiffs have not pled that the Fort Peck Tribes or its agents intentionally caused  
9 the fire to enter the property of Plaintiff. Thus, the intentional element of trespass  
10 was not met.  
11  
12

### 13 CONCLUSION

14 This Court should grant the Fort Peck Tribes and Doug Grandchamp's Motion  
15 to Dismiss against the Plaintiffs for the foregoing reasons.  
16

17 Respectfully submitted,

18 /s/Georgette H. Boggio

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS contains 3466 words as calculated by Microsoft Word, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

ELK RIVER LAW OFFICE, PLLP

/s/ Georgette H. Boggio  
Georgette H. Boggio

**CERTIFICATE OF SERVICE**

I certify that on May 18, 2021, I electronically filed the foregoing with the Clerk of Court via CM/ECF System, which will send notification of such filings to the attorneys of record.

ELK RIVER LAW OFFICE, PLLP

/s/ Georgette H. Boggio  
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