UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

Jade Mound, et al., Plaintiffs, vs. The United States of America, Defendant.	Case No. 1:21-cv-00081-DLH-CRH **Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss Complaint or in the Alternative Dismiss Jurisdictionally Deficient Claims**

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I. INTRODUCTION

In the pre-dawn hours of July 9, 2019, a culvert on Kenel Road located on the Standing Rock Indian Reservation washed out and created a gaping chasm.[1]

Separate vehicles driven by Trudy Peterson, James Vander Wal, Steven Willard, and Evan Thompson plunged into the chasm and into the rushing water below. Ms. Peterson and Mr. Vander Wal were swept far down stream and died. Autopsies later revealed mud blocking both of their airways. Mr. Willard and Mr. Thompson were

[1] Travis Svihoven, *Families file claim against BIA over deadly reservation road washout*, BISMARCK TRIBUNE (Sept. 9, 2020) https://bismarcktribune.com/news/local/bismarck/families-file-claim-against-bia-over-deadly-reservation-road-washout/article_f19c4afc-ee04-579a-b9b0-8ef1e8736433.html (last accessed October 7, 2021).

rescued from their partly submerged vehicles but suffer from severe and permanent injures.

It is undisputed that the United States Bureau of Indian Affairs knew before the events of July 9, 2019 that the Kenel Road culvert was in disrepair. Plaintiffs brought a Federal Tort Claim Act ("FTCA") lawsuit alleging that the Bureau of Indian Affairs failed to safely inspect, maintain, repair, and erect warning signage for the culvert on the Kenel Road—despite Defendant's actual knowledge that the culvert was unsafe and in need of replacement.

Defendant has moved to dismiss Plaintiffs' complaint, arguing that (1) the discretionary function exception to the FTCA bars Plaintiffs' suit and (2) Plaintiffs failed to satisfy the FTCA's presentment requirement as to Ms. Peterson's survival claim, Mr. Vander Wal's survival claim, and Mrs. Willard's loss of consortium claim.

Defendant's motion should be denied. First, as a matter of law, the discretionary function exception does not apply in this case. Second, Plaintiffs satisfied and/or exhausted their administrative remedies as to all asserted claims before bringing suit under law.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background of the Bureau of Indian Affairs' Obligations

The Bureau of Indian Affairs ("BIA") is a "public authority" under 23 U.S.C. § 101(a)(21). The BIA has a duty and is responsible for operating safe roads identified as "BIA System Roads" on the National Tribal Transportation Facility Inventory. 23 U.S.C.

§ 202(a)(8)(B)(i) (the BIA "shall retain primary responsibility, including annual funding request responsibility, for [BIA] road maintenance programs on Indian reservations."). BIA Route 3, locally known as Kenel Road, is a BIA System Road and is listed on the National Tribal Transportation Facility Inventory. (Decl. of LeRoy Gishi in Support of U.S. Mot. to Dismiss Compl. or in the Alternative Dismiss Jurisdictionally Deficient Claims ("Gishi Decl.") at ¶¶ 4, 10); *see also* 23 U.S.C. § 202(a)(8)(B)(i). The BIA's mechanism for executing its duties is the BIA's Road Maintenance Program and the Tribal Transportation Program. 25 U.S.C. § 318a5; 23 U.S.C. § 202.

B. Self-Determination Contracts under the Indian Self-Determination and Education Assistance Act

The BIA may execute, but not delegate, its duties by entering into an Indian Self-Determination and Education Assistance Act (P.L. 93-638) contract, colloquially known as "638 contracts" or "self-determination contracts." *See* 25 U.S.C. § 5321(a) ("The Secretary [of the Interior] is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs[.]"). Under these contracts, the federal government supplies funding to a tribal organization, which allows the tribal organization to execute a program or service that the federal government otherwise would have provided directly. *FGS Constructors, Inc. v. Carlow Enters.*, 64 F.3d 1230, 1234 (8th Cir. 1995). In these circumstances, the individuals performing functions under these contracts act as the federal government in carrying out its duties. *United States v. Schrader*, 10 F.3d 1345,

1350 (8th Cir. 1993) (individuals performing functions under self–determination contracts are deemed to be federal employees); *Pourier v. United States*., 138 F.3d 1267, 1268 (8th Cir. 1998) (a tribe carrying out a self–determination contract is deemed to be a part of the federal government, and its employees are federal employees).

In this case, the Standing Rock Sioux Tribe (the "Tribe") entered into a self-determination contract with the federal government, Contract A17AV00461 ("RMP Contract"). (Decl. of Brenda Red Wing in Support of U.S. Mot. to Dismiss Compl. or in the Alternative Dismiss Jurisdictionally Deficient Claims ("Red Wing Decl."), Ex. 1.). The RMP Contract allocated funding from a funding source known as the Road Maintenance Program, 25 U.S.C. § 318a, to ensure safe roads on the Standing Rock Indian Reservation in North Dakota. *Id*. In the RMP Contract, the government contracted the Tribe as its employees to execute its duties for the reservation's roads. *Id.* at § (a)(2) ("The tribe seeks to contract all road maintenance and related function…."); *see also id.* ("Daily operation and administration of the Road Maintenance Program at the Standing Rock Agency, including emergency road maintenance services and other authorized maintenance functions included in 25 CFR Part 170, Appendix A to Subpart G[.]"). The RMP Contract provided that the Tribe would maintain the subject roads in accordance with "the most current Road Maintenance Standards of the State of North Dakota Department of Transportation . . ."[2] *Id*. at § (b)(4)(D).

[2] The RMP Contract period of performance ran from October 1, 2016 to September 30, 2019 and was in effect during 2018.

C. The North Dakota Bridge Inspection Procedure and Federal Highway Administration National Bridge Inventory Guidelines

The Road Maintenance Standards adopted by Defendant and the Tribe in the RMP Contract included the North Dakota Bridge Inspection Procedures, issued by the North Dakota Department of Transportation in March 2013. (Decl. Timothy Q. Purdon in Opp'n of U.S.' Mot. to Dismiss Compl. or in the Alternative Dismiss Jurisdictionally Deficient Claims ("Purdon Decl."), Ex. 1.) The North Dakota Bridge Inspection Procedures expressly apply to all metal pipe culverts with a diameter of eight (8) feet or more. (Purdon Decl., Ex. 1 at vii.) If a culvert is subject to the North Dakota Bridge Inspection Procedures, the responsible entity must regularly inspect and record the condition of the culvert in accordance with Pontis, the widely used bridge inspection and inventory system based on the U.S. Federal Highway Administration National Bridge Inventory system coding guidelines. (Purdon Decl., Ex. 1 at i-ii, 111-113.) The North Dakota Bridge Inspection Procedures require parties to inspect and report (1) an "overall condition rating" of the culvert with an application of one of eleven enumerated rating codes, as well as (2) a specific element-by-element rating of the culvert along eight dimensions. (Purdon Decl., Ex. 1 at 113, 283.)

The North Dakota Bridge Inspection Procedures also incorporate the Federal Highway Administration's Culvert Inspection Manual (the "FHWA Culvert Inspection Manual"). (Purdon Decl., Ex. 1 at 129.) The FHWA Culvert Inspection Manual sets forth a number of discrete requirements regarding culvert inspections. Culverts must be inspected by an inspector who is registered or qualified to register as a professional

engineer, or who has a minimum of five years in culvert inspection assignments and undergone comprehensive training. (Purdon Decl., Ex. 2 at 8.) Inspectors must perform a structure inventory and appraisal at least every two years. (Purdon Decl., Ex. 2. at 45-50.) Inspectors must follow the specific maintenance rating system outlined in the FHWA Culvert Inspection Manual, which includes, *inter alia*, conducting emergency repairs, posting warning signage, and/or rerouting traffic when a culvert is sufficiently degraded. *Id*. Inspectors must also perform "remaining life" analyses on culverts. *Id*.

D. Performance of the RMP Contract

Defendant does not offer, nor are Plaintiffs aware of, any evidence that Defendant complied with the mandatory inspection and reporting requirements incorporated into the RMP Contract. Evidence indicates that as early as 2014, Defendant recognized that the Kenel Road Culvert was "failing." (Red Wing Decl., Ex. 5 at 2.) Yet Defendant failed to inspect and report the condition of the Kenel Road Culvert or take any of the mandated maintenance or mitigation actions required by the North Dakota Bridge Inspection Procedures and FHWA Culvert Inspection Manual.

E. The Kenel Road Culvert Washout

In the early morning hours of July 9, 2019, the Kenel Road Culvert experienced heavy, but not uncommon, rain. Due to flooding from the rain, the Kenel Road Culvert washed out and left a large chasm in the highway. Shortly after, around 5:00 a.m. and before dawn's first light, four people driving in separate vehicles drove across this section of highway. These four people were:

- Trudy Peterson of Mobridge, SD, a sixty-year-old woman and mother to three children on her way to work at the dialysis clinic in Fort Yates;

- James Vander Wal of Mobridge SD, a sixty-five-year-old man and father to four children returning to Mobridge from Bismarck as part of his U.S. Mail delivery work duties;

- Evan Thompson, an enrolled member of the Standing Rock Sioux Tribe, a thirty-one-year-old father to four children heading to work as a bus driver on the Sitting Bull College's bus; and

- Steven Willard, of Fort Yates, ND, a fifty-year-old father to four children headed to his job at the Standing Rock Water Treatment Plant.

All four vehicles plunged into the unknown and unseen chasm. Tragically, Mr. Vander Wal and Ms. Peterson lost their lives. Mr. Thompson and Mr. Willard suffered serious injuries.

F. Submission of Federal Torts Claims Act Claims and Lawsuit

Before filing the Complaint at issue, Plaintiffs' counsel sent a letter to the U.S. Department of the Interior on September 9, 2020 submitting eleven administrative tort claims related to the washout via Form-95s. (Purdon Decl., Ex. 10.)[3] These claims were:

- Jade Mound (Personal Representative of Trudy Peterson) – Survival Action Claim and Property Damage Claim;

- Jade Mound (Individual Capacity) – Wrongful Death Claim;

- Jason Peterson –Wrongful Death Claim;

- Jenna Peterson –Wrongful Death Claim;

- Ron Vander Wal (Personal Representative of Jim Vander Wal) – Survival Action Claim;

[3] In addition, Plaintiffs submitted descriptive addendums and accompanying materials, such autopsies and police reports of the incident.

- Ron Vander Wal (Individual Capacity) – Wrongful Death Claim;
- Kari Beth Johnson –Wrongful Death Claim;
- Lee Vander Wal – Wrongful Death Claim;
- Marie Lynn Vander Wal – Wrongful Death Claim;
- Steven Willard – Property Damage, Personal Injury and derivative Loss of Consortium Claims; and
- Evan Thompson – Personal Injury Claim.

In these submissions, Plaintiffs submitted separate and distinct administrative tort claims from the personal representatives of Mr. Vander Wal and Ms. Peterson's estates to pursue survival action claims.

Six months passed with no acceptance or denial of these claims from the government. On April 8, 2021, Jade Mound, as Personal Representative of the estate of Trudy Peterson, and on behalf of the heirs at law; Ron Vander Wal, as Personal Representative of the estate of James Vander Wal, and on behalf of the heirs at law; Evan Thompson, Steven Willard, and Sonja Willard (collectively "Plaintiffs") filed the Complaint, Doc. 1, seeking damages from the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680.

III. ARGUMENT

A. Federal Rule 12(b)(1) Standard of Review

Motions under Fed. R. Civ. P. 12(b)(1) may assert either a "facial" or "factual" attack on jurisdiction. Where a party brings a factual attack, a district court may look outside the pleadings to affidavits or other documents, allow an evidentiary hearing, and receive evidence by any rational mode of inquiry. *See Harris v. P.A.M. Transp., Inc.*,

339 F.3d 635, 637 n.4 (8th Cir. 2003); *Buckler v. United States*, 919 F.3d 1038, 1044 (8th Cir. 2019).

"If the jurisdictional issue is 'bound up' with the merits it is within the district court's discretion to decide whether to evaluate the evidence under the summary judgment standard." *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018) (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 203 n.19 (1974)). "Summary judgment is only proper where the evidence, viewed in the light most favorable to the nonmovant, shows that no genuine issue of material fact exists, such that the movant is entitled to judgment as a matter of law." *Grage v. N. States Power Co.*, 813 F.3d 1051, 1054 (8th Cir. 2015) (citation and quotation omitted). "There is no genuine issue of material fact when 'the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.'" *Id.* (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)). "The party moving for summary judgment generally has the burden of demonstrating the absence of any genuine issues of material fact." *Zimmerli v. City of Kansas City*, 996 F.3d 857, 863 (8th Cir. 2021) (citing *Grage*, 813 F.3d at 1054).

B. This Court Has Jurisdiction Because the Discretionary Function Exception Does Not Apply

Plaintiffs' claims do not fall within the scope of the discretionary function exception to the FTCA. For this reason, Defendant's motion should be denied.

The FTCA allows individuals to sue the United States for damages for personal injury or death resulting from the negligence or wrongful acts of its employees while acting within the scope of their employment. 28 U.S.C. § 1346(b). The United States is

liable to the claimant to the same extent as a private individual would be under the same circumstances. *Id.*

The FTCA's broad waiver of sovereign immunity is subject to several exceptions. 28 U.S.C. § 2680. One exception is the discretionary function exception, which provides that the United States cannot be held liable for the negligence of its employees who are performing a discretionary function or duty. *Id.* at § 2680(a).

Determining whether the discretionary function exception applies in a case involves a two-step inquiry. First, a court must consider whether the action "is a matter of choice for the acting employee," since "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The discretionary function exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow[;]" in such circumstances, "the employee has no rightful option but to adhere to the directive." *Id*. Moreover, even if statutes and regulations provide a government agency with discretionary authority, the agency's "discretionary authority may nevertheless be restricted or conditioned by mandatory directives and obligations adopted" by the agency. *North Dakota v. United States*, 480 F. Supp.3d 917, 927 (D.N.D. 2020).

Second, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Berkovitz*, 486 U.S. at 536. The discretionary function exception is based on Congress' desire to "prevent judicial 'second-guessing'

of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy." *Id.* (emphasis added); *see also Varig Airlines*, 467 U.S. at 814 ("By fashioning an exception for discretionary governmental functions . . . Congress took steps to protect the Government from liability that would seriously handicap efficient government operations.") (quotation and citation omitted).

It is well established in the Eighth Circuit that "decisions on the policy or planning level are generally protected by the discretionary exception, whereas decisions made at the operational level are not." *Mandel v. United States*, 793 F.2d 964, 967 (8th Cir. 1986) (citing *Bergmann v. United States*, 689 F.2d 789, 791 (8th Cir. 1982)). When a government agency fails to follow a policy or process the agency has adopted, the discretionary function exception does not apply. *North Dakota v. United States*, 480 F. Supp. 3d at 927 ("no decision 'susceptible to policy analysis' is made in how to follow an already established . . . process.").

Exceptions to the FTCA, including the discretionary function exception, are construed narrowly. The Supreme Court has admonished lower courts against "unduly generous interpretations of the exceptions [to the FTCA]," which "run the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 491 (2006) (internal citations and quotations omitted). The Eighth Circuit has likewise

warned that construing the exceptions to the FTCA expansively "would result in the exception swallowing the rule . . . [and] immunize from judicial review all government activity except the most ministerial acts." *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986). An expansive approach to the FTCA exceptions would negate "Congress' clear intent" in enacting the FTCA. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (citations omitted). "[I]f the word 'discretionary' is given a broad construction, it could almost completely nullify the goal of the [FTCA]." *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997). As the Ninth Circuit explained, "[e]very slip and fall, every failure to warn, every inspection and maintenance decision can be couched in terms of policy choices based on allocation of limited resources . . . Instead, in order to effectuate Congress's intent to compensate individuals harmed by government negligence, the FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly. *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002).

In this case, Defendant fails both prongs of the discretionary function exception test. First, the challenged conduct in this case was not discretionary. Second, it was not the type of conduct that Congress meant to protect, i.e., a decision susceptible to social, economic, or political policy analysis.

1. The Challenged Conduct is Not Discretionary

In order for Defendant to gain the protection from liability afforded by the discretionary function exception, the action it seeks to protect must have been discretionary or not governed by a mandatory statute, policy, or regulation. If the action is not discretionary, it cannot be shielded under the discretionary function exception.

Here, the first question is does "a federal statute, regulation, or policy specifically prescribe [ ] a course of action" that was not followed? *Berkovitz*, 486 U.S. at 536. If so, the Government's actions are not discretionary, the exception does not apply, and this Court has jurisdiction.

The challenged conduct in this case was not discretionary. As Defendant acknowledges, pursuant to the RMP Contract, Defendant formally adopted "the most current Road Maintenance Standards of the State of North Dakota Department of Transportation, and State of South Dakota Department of Transportation, as appropriate, to carry out the activities authorized under this Contract." (Def. Mem. at 19.) The Road Maintenance Standards adopted by Defendant included the North Dakota Bridge Inspection Procedures. The North Dakota Bridge Inspection Procedures expressly set forth "INSPECTION REQUIREMENTS" applicable to "ALL METAL PIPE CULVERTS" with a diameter of eight (8) feet or more:

SCOPE OF WORK

The work shall consist of the on-site inspection and recording of structure related items for bridges on:

State Highway System
Urban Highway System
County On-System
County Off-System

INSPECTION REQUIREMENTS BY SYSTEM

State System -	ALL REINFORCED BOX CULVERTS, except for cattle passes.
	ALL METAL PIPE CULVERTS having a nominal diameter of eight (8) feet or more
	BRIDGES AND MULTIPLE PIPE where the total span length is twenty (20) feet or greater.
County and Urban System -	ALL BRIDGES AND MULTIPLE PIPE installations whose total span length is twenty (20) feet or greater.
Transporter Erector Route(s) -	ALL BRIDGES AND CULVERTS having a span length of five (5) feet or greater.

(Purdon Decl., Ex. 1 at vii (emphasis added).)[4] The North Dakota Bridge Inspection Procedures thus applied to the Kenel Road Culvert, which had a diameter of approximately nine (9) feet. (*See* Def. Mem. at 36 ("The [Kenel Road Culvert] was a massive piece of infrastructure, approximately 9 feet in diameter and 178 feet long.").)

Pursuant to the North Dakota Bridge Inspection Procedures, Defendant was required to frequently inspect and record the condition of the Kenel Road Culvert. Such inspection was required to be performed in accordance with Pontis, the widely used bridge inspection and inventory system based on the U.S. Federal Highway Administration National Bridge Inventory system coding guidelines. Defendant was required to inspect and report (1) an "overall condition rating" of the culvert, as well as (2) a specific element-by-element rating of the culvert. (Purdon Decl., Ex. 1 at 113, 283.)

As to the "overall condition rating," the North Dakota Bridge Inspection Procedures mandated Defendant "evaluate the alignment, settlement, joints, structural condition, scour and other items associated with culverts" and apply one of eleven enumerated rating codes:

[4] BIA Route 3/Kenel Road is also known as State Highway 1806. The Kenel Road Culvert was thus subject to the "State System" inspection requirements set forth in the North Dakota Bridge Inspection Procedures.

Rate and code the condition in accordance with the previously described general condition ratings and the following descriptive codes:

Code	Description
N	Not applicable. Use if structure is not a culvert.
9	No deficiencies.
8	No noticeable or noteworthy deficiencies which affect the condition of the culvert. Insignificant scrape marks caused by drift.
7	Shrinkage cracks, light scaling and insignificant spalling which does not expose reinforcing steel. Insignificant damage caused by drift with no misalignment and not requiring corrective action. Some minor scouring has occurred near curtain walls, wingwalls or pipes. Metal culverts have a smooth symmetrical curvature with superficial corrosion and no pitting.
6	Deterioration or initial disintegration, minor chloride contamination, cracking with some leaching or spalls on concrete or masonry walls and slabs. Local minor scouring at curtain walls, wingwalls or pipes. Metal culverts have a smooth curvature, non-symmetrical shape, significant corrosion or moderate pitting.
5	Moderate to major deterioration or disintegration, extensive cracking and leaching or spalls on concrete or masonry walls and slabs. Minor settlement or misalignment. Noticeable scouring or erosion at curtain walls, wingwalls or pipes. Metal culverts have significant distortion and deflection in one section, significant corrosion or deep pitting.
4	Large spalls, heavy scalling, wide cracks, considerable efflorescence or opened construction joint permitting loss of backfill. Considerable settlement or misalignment. Considerable scouring or erosion at curtain walls, wingwalls or pipes. Metal culverts have significant distortion and deflection throughout, extensive corrosion or deep pitting.
3	Any condition described in Code 4 but which is excessive in scope. Severe movement or differential settlement of the segments or loss of fill. Holes may exist in walls or slabs. Integral wingwalls nearly severed from culverts. Severe scour or erosion at curtain walls, wingwalls or pipes. Metal culverts have extreme distortion and deflection in one section, extensive corrosion or deep pitting with scattered perforations.
2	Integral wingwalls collapsed, severe settlement of roadway due to loss of fill. Section of culvert may have failed and can no longer support embankment. Complete undermining at curtain walls and pipes. Corrective action required to maintain traffic. Metal culverts have extreme distortion and deflection throughout with extensive perforations due to corrosion.
1	Bridge closed. Corrective action may put back in light service.
0	Bridge closed. Replacement necessary.

Id. at 129-131.

As to the specific, element-by-element inspection and rating Defendant was required to perform, the North Dakota Bridge Inspection Procedures mandated Defendant inspect and record the "condition state" of the culvert with respect to eight enumerated defects:

Defect	Condition State 1	Condition State 2	Condition State 3	Condition State 4
Corrosion	None	Freckled Rust	Section Loss	The condition is beyond the limits established in condition state three (3), warrants a structural review to determine the strength or serviceability of the element or bridge, or both.
Cracking/Fatigue	None	Arrested Cracks Exist	Moderate Cracks Exist	
Connections	Sound	Sound	Isolated Failures	
Seams	Sound	Sound	Localized Failure	
Distortion	None	None	Tolerable without reducing load capacity	
Scour	None	Arrestment or Counter-measures exist, or both	Minor	
Settlement	None	Arrestment or Counter-measures exist, or both	Minor	
Load Capacity	No Reduction	No Reduction	No Reduction	

Id. at 283.

Defendant was further required to comply with the standards set forth in the FHWA's Culvert Inspection Manual, which the North Dakota Bridge Inspection Procedures incorporated. *Id*. at 129. The FHWA Culvert Inspection Manual imposed a number of obligations on Defendant. First, Defendant was required to have the culvert inspected by an inspector who was registered or qualified to register as a professional engineer, or who had a minimum of five years in culvert inspection assignments and underwent comprehensive training. (Purdon Decl., Ex. 2 at 8.) Second, Defendant was required to perform a structure inventory and appraisal of the culvert at least every two years. *Id*. at 45, 50. Third, Defendant was required to evaluate the condition of the culvert in accordance with the following maintenance rating system:

Maintenance Urgency Index	Maintenance Immediacy of Action	Inspection Course of Action
9	No repairs needed.	Note in inspection report only.
8	No repairs needed. List specific items for special inspection during next regular inspection.	
7	No immediate plans for repair. Examine possibility of increased level of inspection.	
6	By end of next season - add to scheduled work.	
5	Place in current schedule - current season - first reasonable opportunity.	Special notification to superior is warranted.
4	Priority - current season - review work plan for relative priority - adjust schedule if possible.	
3	High priority - current season as soon as can be scheduled.	
2	Highest priority - discontinue other work if required - emergency basis or emergency subsidiary actions if needed (post, one lane traffic, no trucks, reduced speed, etc.)	Notify superiors verbally as soon as possible and confirm in writing.
1	Emergency actions required - reroute traffic and close.	
0	Facility is closed for repairs.	

Id. at 62. As shown above, actions with a maintenance urgency score of three, four, or five warranted special notification to superiors and placement in the current season maintenance schedule either "as soon as can be scheduled" or at the "first reasonable opportunity." Actions with a maintenance urgency score of one or two warranted verbal notification to superiors "as soon as possible," discontinuation of other work, and emergency actions such as rerouting traffic, posting warning signage and implementing traffic and speed reductions. *Id*.

Finally, the FHWA Culvert Inspection Manual required Defendant to perform "remaining life" analyses on the culvert:

> Under SI&A item 63, Remaining Life, the inspector estimates the number of years that remain before major rehabilitation or replacement of the culvert is required. The estimate should be based on the design life of the barrel material, the years of service prior to the inspection, and the condition of the culvert at the time of the inspection. The current condition

> and the performance of the culvert material under similar conditions are the key considerations. Where durability is a problem, electrical resistivity and pH measurements may be helpful in estimating the remaining life.

Id. at 157.

There is no evidence that Defendant followed these mandatory inspection and maintenance requirements. As early as June 2014, Defendant recognized that the culvert was "failing" and in need of urgent repair. (Red Wing Decl., Ex. 5 at 2.) Yet between June 2014 and July 9, 2019, Defendant failed to properly inspect or take any appropriate maintenance action as required by the North Dakota Bridge Inspection Procedures and the FHWA Culvert Inspection Manual:

- Defendant was required to inspect and report a Pontis-compliant "overall condition rating" of the culvert. (Purdon Decl., Ex. 1 at 113.) Defendant failed to do so.
- Defendant was required to inspect and report a Pontis-compliant element-by-element rating of the culvert. (Purdon Decl., Ex. 1 at 283.) Defendant failed to do so.
- Defendant was required to have the culvert inspected by a qualified inspector who was either registered as or qualified to register as a professional engineer, or who had a minimum of five years in culvert inspection assignments and underwent comprehensive training. (Purdon Decl., Ex. 2 at 8.) Defendant failed to do so.
- Defendant was required to prepare a remaining life estimate of the culvert. (Purdon Decl., Ex. 2 at 157.) Defendant failed to do so.
- Defendant was required to evaluate the culvert in accordance with the FHWA's "maintenance urgency index" and take appropriate emergency subsidiary actions such as posting warning signage and implementing traffic and speed reductions. (Purdon Decl., Ex. 2 at 62.) Defendant failed to do so.

As a result of Defendant's negligence, by July 9, 2019 the Kenel Road Culvert was in a state of severe disrepair and posed an extreme safety hazard.

Defendant's failure to comply with the mandatory inspection, reporting, and maintenance requirements it adopted pursuant to the RMP Contract was a direct cause of the tragic events of July 9, 2019. Defendant recognized—and was on notice—that the culvert was "failing" as early as 2014. (Red Wing Decl., Ex. 5 at 2.) Yet Defendant neglected to inspect and report either its overall condition or its "condition state" with respect to the eight defects enumerated in the North Dakota Bridge Inspection Procedures (Corrosion; Cracking/Fatigue; Connections; Seams; Distortion; Scour; Settlement; Load Capacity). Had the Defendant properly inspected the culvert, it would have been apparent that the culvert possessed defects rising to the level of "Condition State 4"—warranting a "structural review to determine the strength and serviceability of the element or [culvert], or both." (Purdon Decl., Ex. 1 at 283.)

Likewise, had Defendant properly inspected the "failing" culvert, it would have been apparent that maintenance actions rising to level one or two on the "Maintenance Urgency Index" set forth in the FHWA Culvert Inspection Manual were required. (Purdon Decl., Ex. 2 at 62.) Such scores would have required Defendant to discontinue other work and undertake emergency repairs or subsidiary actions, such as posting warning signs, implementing traffic and speed reductions, or closing the relevant section of Kenel Road and rerouting traffic. *Id*. Had any of these actions been taken prior to July 9, 2019, the tragic events of that morning could have been avoided.

Upon adoption by Defendant via the RMP Contract, it became mandatory for Defendant to comply with the inspection requirements set forth in the North Dakota Bridge Inspection Procedures and the FHWA Culvert Inspection Manual. This

conclusion is supported by case law. In *North Dakota v. United States*, the State of North Dakota sued the United States over the United States Army Corps of Engineers' issuance of a *de facto* special-use permit to Dakota Access Pipeline ("DAPL") protesters to use Corps-managed lands. No. 1:19-CV-00150, 2020 WL 6164987 (D.N.D. Aug. 19, 2020). The Plaintiff alleged that the protesters set up encampments and caused property damage requiring remediation. *Id*. at 919. The Court concluded that, although "the Corps may have had discretion in how to enforce permit violations on its property," and although the applicable regulations "[did] not require any specific enforcement conduct by the Corps in response to the protesters' conduct . . . the Corps [sic] failure to comply with the mandatory permitting process tainted all other decisions made by the Corp." *Id*. at 929, 932. "The Corps failed to follow the process that was adopted, resulting in the DAPL protesters being able to use Corps-managed land without the restrictions, protections and liability/bond requirements that a proper permit would have required. As a result, there was no limitation on the gathering and no bond available to clean up the spoiled environment that was left. For these reasons, the Court concludes the discretionary function exception does not apply because the Corps failed to follow a mandatory permit application process at the outset." *Id*. at 931.

Similarly, in *Buckler v. United States*, the Eighth Circuit Court of Appeals reversed a dismissal based on the discretionary function exception where there was a factual question whether the governmental agency, in fact, followed its inspection protocol. 919 F.3d 1038, 1053-54 (8th Cir. 2019). The court in *Buckler* acknowledged that mine inspectors had discretion in conducting safety inspections including inspecting

equipment and worker training documents. Both parties agreed that at least some level of examination of the training records was required but differed on the manner of examination. *Id*. at 1050. The Eighth Circuit held that while the mine inspector had discretion in the manner of conducting the review, i.e., whether to review all records or just a sampling, the government employee lacked discretion to entirely forego the inspection of the training records. *Id*. at 1053. The court stated: "we believe it is permissible, when analyzing the discretionary function exception, to recognize that some duties are mandatory in that they must be performed in some fashion, even if the manner in which they are performed involves protected discretion." *Id*. (emphasis in original).

Appley Bros. v. United States is also instructive. 164 F.3d 1164, 1172 (8th Cir. 1999). In *Appley Bros.*, the plaintiffs commenced an action against the United States for losses as a result of the United States Department of Agriculture's allegedly negligent inspection of a federally licensed warehouse. *Id*. at 721. When a federally-licensed grain company failed to correct reported shortfalls from an initial grain inspection, the UDSA's policy "required that a new form be issued." *Id*. at 725. The ultimate decision to close a warehouse, such as plaintiff's, was a discretionary function of the USDA. *Id*. However, before exercising that discretion, the USDA "had no discretion . . . as to whether they should check to see if Bird Grain had cured the deficiencies found on April 1 and to issue a new TW-125 reporting information." *Id*. In other words, even though the ultimate decision to close a storage facility was discretionary, the agency failed to perform a prerequisite mandatory duty under the agency's policies. *See id*.

Because of this failure, the Eighth Circuit found the district court had jurisdiction and the discretionary function exception did not bar the plaintiffs' claims. *See id*.

The same is true in this case. Even if the Defendant may have had some discretion over how to respond to risks identified upon inspecting the Kenel Road Culvert, Defendant's failure to properly inspect the culvert in accordance with the inspection requirements Defendant adopted pursuant to the RMP Contract was not protected by the discretionary function exception. It was a prerequisite mandatory duty, with which Defendant failed to comply.

2. The Challenged Conduct is Not Susceptible to Policy Analysis

Even if the Court were inclined to conclude Defendant's failure to follow the inspection requirements set forth in the North Dakota Bridge Inspection Procedures was discretionary, it should still conclude the discretionary function exception does not apply. The second prong of the discretionary function analysis looks at whether the conduct is "susceptible to policy analysis." *North Dakota*, 480 F. Supp.3d at 930 (citing *Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013). Defendant's failure to comply with its inspection requirements was not a decision susceptible to policy analysis.

a. Defendant's Conduct Was Not a "Policy" Decision

It is well established in this Circuit that "decisions on the policy or planning level are generally protected by the discretionary exception, whereas decisions made at the operational level are not." *Mandel v. United States*, 793 F.2d 964, 967 (8th Cir. 1986) (citing *Bergmann* 689 F.2d at 791). In *Mandel*, the Eighth Circuit affirmed a district court decision holding that the discretionary function exception did not apply to the National

Park Service's failure to warn of the hazards of swimming at a swimming hole adjacent to a national park, where a patron dove into the water and hit his head on a submerged rock. The Court observed that "the Park Service knew generally that the [river] was laced with submerged rocks," published a brochure generally warning of "the danger of submerged rocks," and had erected a warning sign at one location on the river. *Id*. at 967. Based on these facts, the *Mandel* Court concluded that the discretionary function exception did not apply. It was not the decision to institute a policy of warning park users of the hazards of boating on and swimming in the river that was the issue, but rather the failure of Park Service personnel to comply with previously adopted safety policy. *Id*.

Similarly, in *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986), the Eighth Circuit held that the discretionary function exception does not apply to governmental conduct that involves the execution of a previously adopted safety policy that is neither regulatory in nature nor grounded in social, economic, or political policy. In *Aslakson*, the plaintiff's son was killed in a boating accident when the aluminum mast of his sailboat made contact with electrical power lines owned and operated by the Western Area Power Administration (WAPA), an agency of the United States government. The plaintiff alleged that defendant was negligent in failing to provide adequate vertical clearance between the power lines and the surface of the water.

The District Court found the government was immune from tort suit under the discretionary function exception, stating: "WAPA personnel sent to review the power lines over Devils Lake determined the transmission lines over Creel Bay were not a

safety hazard. This was a discretionary function of the type exempted from the FTCA by 28 U.S.C. § 2680(a)." *Id*. at 690. The Eighth Circuit reversed:

> WAPA's determination that the power lines over Creel Bay were not a safety hazard did not involve an evaluation of the relevant policy factors; rather it was a decision made by WAPA officials charged with the responsibility of implementing an already established policy . . . Although such a policy necessarily involves some degree of judgment on the part of government officials, it is not the kind of judgment that involves the weighing of public policy considerations. On the contrary, it is the kind of judgment that requires the knowledge and professional expertise of government employees who implement government policies . . . Aslakson's challenge to the governmental activity involved here goes not to the policy itself or to the manner in which WAPA chose to implement that policy. Furthermore, the challenged conduct is neither regulatory in nature nor administrative decision-making grounded in social, economic, or political policy. Rather, Aslakson claims WAPA officials were guilty of failing to comply with their own safety policy in the maintenance of their electrical transmission lines. This claim smacks of ordinary garden-variety negligence.

Id. at 693-94 (internal citations and quotations omitted).

Plaintiffs' claims in the instant case are analogous to those asserted by the Plaintiffs in *Mandel* and *Asklason*. Here, the Defendant failed to comply with its own inspection policy by failing to inspect the Kenel Road Culvert as required by the standards Defendant adopted via the RMP Contract. Plaintiffs do not challenge the inspection policy itself or the manner in which Defendant chose to implement that policy; rather, they challenge Defendant's complete failure to comply with that policy. Plaintiffs' claims are directed at Defendant's negligent conduct at the operational level, not the policy or planning level.

Case law in other circuits likewise demonstrates that the discretionary function exception does not apply to government conduct at the operational level. *See, e.g.*, *Navarette v. United States* 500 F.3d 914, 916 (9th Cir. 2007) (discretionary function exception did not apply where the defendant failed to comply with safety plan providing that dangerous terrain conditions would be properly marked or fenced); *Maryls Bear Medicine v. United States*, 241 F.3d 1208, 1209 (9th Cir. 2000) ("[O]nce the government has undertaken responsibility for the safety of a project, the execution of that responsibility is not subject to the discretionary function exception. The decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not.")

Defendant points to general "subject to available funding" clauses to argue that its failure to inspect or maintain the Kenel Road Culvert was discretionary. *See, e.g.*, (Def. Mem. at 20.) Defendant's argument lacks merit. "The allocation of funds among projects aimed at bringing roads up to the standards is not a decision 'of the nature and quality that Congress intended to shield from tort liability.' To hold otherwise would permit the discretionary function exception to all but swallow the Federal Tort Claims Act. Budgetary constraints underlie virtually all governmental activity." *ARA Leisure Serv.v. U.S.*, 831 F.2d 193, 196 (9th Cir. 1987) (quoting *Varig Airlines*, 467 U.S. at 813) (internal citations omitted)*; see also O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002) (an "agency's decision to forego, for fiscal reasons, the routine maintenance of its property maintenance that would be expected of any other landowner is not the kind of policy decision that the discretionary function protects.").

Moreover, the two cases upon which Defendant primarily relies in making its discretionary function argument are distinguishable from the instant action in important respects. First, in *Estate of Walters v. United States*, the District of South Dakota concluded that the discretionary function exception applied because the only regulation invoked by the plaintiffs in that action, 25 C.F.R. Part 170, did "not require a particular course of action with regard to maintenance of roads." CIV 05-3007, 2006 WL 8453000, at *3 (D.S.D. Mar. 29, 2006), *aff'd sub nom. Walters v. United States*, 474 F.3d 1137 (8th Cir. 2007). In the present case, by contrast, the North Dakota Bridge Inspection Procedures and FHWA Culvert Inspection Manual did require a particular course of action with regard to the inspection and maintenance of the Kenel Road Culvert, and Defendant failed to comply with the required course of action.

Second, in *Demery v. United States Dep't of Interior*, the Eighth Circuit upheld the application of the discretionary function exception upon concluding that the challenged action—aerating Belcourt Lake in order to protect the lake's environment and aquatic habitats—were "obvious issues of policy." 357 F.3d 830, 833 (8th Cir. 2004). The instant case does not involve such "obvious issues of policy." Plaintiffs do not challenge any social, economic, or political policy decision by Defendant. Rather, Plaintiffs challenge Defendant's failure to inspect and maintain the Kenel Road Culvert in accordance with the road maintenance standards adopted by Defendant pursuant to the RMP Contract.

b. Defendant's Failure to Post Warning Signage Did Not Further Any Statutory Policy

Defendant's failure to warn of the potential hazard posed by the Kenel Road Culvert in its state of disrepair is not susceptible to policy analysis. A failure to warn is generally deemed discretionary "only where it bears some relationship to the agency's overall purpose." *Parrish v. United States*, 157 F. Supp. 3d 434, 445–46 (E.D.N.C. 2016) (collecting cases). In *Cope v. Scott*, the D.C. Circuit held that the National Park Service could be liable for inadequate warning when it failed to post sufficiently numerous and specific signs warning of slippery road conditions along a rural road in the District of Columbia. 45 F.3d 445, 452 (D.C. Cir. 1995). Although the road was located in a national park, it was used primarily for commuter travel. In holding that the duty to warn was non-discretionary, the court observed that frequently the National Park Service's failure to warn properly would be characterized as discretionary because such decisions required "difficult policy judgments balancing the preservation of the environment against the blight of excess signs." *Id*. However, on the circumstances of the case, the court reasoned that the Park Service's "failure to warn" was not discretionary because the Park Service did not maintain the road for the purpose of environmental preservation. *Id*. Thus, because the National Park Service maintained the road in question for a purpose outside the scope of its statutory and regulatory mission, its failure to warn was not insulated from suit on the basis of "discretion."

Similarly, in *Parrish v. United States*, the district court held that the United States Postal Service's failure to warn patrons of potential tripping hazards on an allegedly

negligently maintained sidewalk was not discretionary, and thus was not shielded by the discretionary function exception. The court rejected the United States' discretionary function argument, reasoning "it is difficult to imagine an social, economic, or political justification for the Postal Service's failure to inspect that also is grounded in its statutory purpose." 157 F. Supp. 3d at 443.

In the instant case, Defendant's failure to warn drivers of the hazards of the Kenel Road Culvert cannot be described as having been "grounded in" any statutorily-defined purpose. Accordingly, Defendant's failure to warn is not susceptible to policy analysis and the discretionary function exception does not apply.

c. Defendant Has Not Invoked the Discretionary Function Exception in Comparable Cases

Finally, Plaintiffs respectfully note that Defendant has agreed to settlement when named as a Defendant in comparable culvert-washout actions. In *Kevin Wright, et al. v. United States*, for example, plaintiffs filed a wrongful death action against defendant after heavy rains caused an allegedly inadequately maintained culvert underlying BIA Highway 10 in the Lower Brule Reservation in South Dakota to wash out. Case No. 12-civ-3034 (D.S.D. Dec 28, 2012); (Purdon Decl., Exs. 16 and 17.) On information and belief, Defendant settled the action without seeking dismissal under Rule 12(b)(1).

C. Plaintiffs Satisfied the FTCA's Presentment Requirement for the Survival Action Claims and Loss of Consortium Claim

The Defendant also argues that the Plaintiffs have failed to properly present Trudy Peterson's and Jim Vander Wal's estate's survival action claims along with Sonja Willard's loss of consortium claim. That contention is not supported by the

submissions, record, and case law. The Defendant was properly placed on notice of these claims. The FTCA provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a).

"[C]ompliance with § 2675(a)'s presentment requirement is a jurisdictional precondition to filing an FTCA suit in federal district court." *Mader v. United States*, 654 F.3d 794, 805 (8th Cir. 2011) (en banc) (citing *Allen v. United States*, 590 F.3d 541, 544 (8th Cir. 2009). In applying this presentment requirement,

> The Eighth Circuit has held that '[w]hile § 2675(a) bars suit unless a claim is first 'presented' to the appropriate federal agency, the FTCA does not expressly articulate in § 2671, its definitions section, what information must be included in a properly 'presented' claim." Accordingly, this circuit has subscribed to a "minimal notice requirement" in holding that an FTCA claim is properly "presented" when an agency receives (1) written notification of the alleged claim sufficient to enable it to thoroughly investigate its potential liability and (2) written notification of the alleged value of the claim.

Dobrinska v. United States, No. 3:11-CV-03015, 2012 WL 113037, at *2 (W.D. Ark. Jan. 13, 2012) (quoting *Mader,* 654 F.3d at, 798 (8th Cir.2011), (citing *Farmers State Sav.s Bank v. Farmers Home Admin.,* 866 F.2d 276, 277 (8th Cir.1989)).[5]

[5] One Eighth Circuit district court has issued an opinion that is critical of *Dobrinska* and opining that the Eighth Circuit abrogated the "minimal notice" standard in *Mader v. United States*, 654 F.3d 794 (8th Cir. 2011). *Rollo-Carlson as trustee for Flackus-Carlson v. United States*, No. 18CV02842ECTECW, 2019 WL 1243017, at *5 (D. Minn. Mar. 18, 2019).

The presentment requirement "is meant to 'provide[ ] federal agencies a fair opportunity to meaningfully consider, ascertain, adjust, determine, compromise, deny, or settle FTCA claims prior to suit.'" *Parker v. United States*, No. 8:18CV123, 2018 WL 4953013, at *4 (D. Neb. Oct. 11, 2018) (quoting *Mader*, 654 F.3d at, 800-01). "Accordingly, a properly presented claim under § 2675(a) must include 'sufficient information for the agency to investigate the claim'" and "narrate facts from which a legally trained reader would infer a legal claim." *Id.* at *4 *(citing Mader*, 654 F.3d at 800); *Beattie v. United States*, No. 97-916, 1998 WL 668042, at *11 (D. Minn. July 16, 1998) (quotations and citations omitted). The Eighth Circuit has repeatedly stated it will "liberally construe an administrative charge for exhaustion of remedies purposes[.]" *Parisi v. Boeing Co.*, 400 F.3d 583, 585 (8th Cir. 2005). When analyzing administrative claims, such as civil claims made under the 1964 Civil Rights Act, the Eighth Circuit has also concluded that "[t]he proper exhaustion of administrative remedies gives the plaintiff a green light to bring [the] claim, along with allegations that are 'like or reasonably related' to that claim, in federal court." *Id.* (quoting *Shannon v. Ford Motor Co.*, 72 F.3d 678, 684 (8th Cir. 1996).

Here, liberally construing this claim for minimal notice, a legally trained reader would infer a survival action claim was being asserted because the claims included: (1) distinct Form 95s from the personal representatives on behalf of the estate, (2) claimed expenses that can only be claimed in a survival action, such as funeral expenses, and (3)

But *Mader* did not abrogate the "minimal notice standard" and issued a holding on the presentment requirement of the FTCA. *Dobrinska's* well-reasoned opinion expressly analyzed this reasoning in *Mader*, determined that the "minimal notice standard" was the correct standard in the 8th Circuit, and applied it as such.

facts narrating how the decedents swallowed mud while being swept away in a current.[6]

1. Defendant Was Placed on Notice Regarding the Survival Action Claims

a. Specific Individual Claims Were Brought on Behalf of the Estates via Personal Representatives

First, the government has been presented with separate claims from personal representatives on behalf of the deceased estates - the only entities that can pursue North Dakota survival action claims. Under North Dakota law, wrongful death claims and survival actions are closely related because they arise from the same act and are "dependent upon the injuries sustained by the deceased, and ensues from the injuries which caused his death." *Sheets v. Graco, Inc.*, 292 N.W.2d 63, 66 (N.D. 1980). While they are closely related, however, they are technically distinct claims and must be brought by different representatives. Pursuant to N.D.C.C. §§ 32-21-01- 04, damages from a wrongful death claim belong to the decedent's heirs at law and, if there is no surviving spouse, a wrongful death claim must be brought by "the surviving children, if any". In contrast, damages from a survival action belong to the estate of the deceased and the

[6] The Court should also consider that the government has not identified any prejudice in its ability to investigate these claims from the alleged technical deficiency. These claims involve one singular incident. They have a total demand in the Form 95s that include the monetary demand for the survival actions. They include death certificates, autopsies, and a plethora of additional materials involving the incident. The government has not articulated how its alleged failure to understand that survival actions were being asserted prejudiced its fair opportunity to meaningfully investigate this claim and consider pre-suit resolution.

survival action must be brought by a personal representative. *See* N.D.C.C. 30.1–18–03(3).

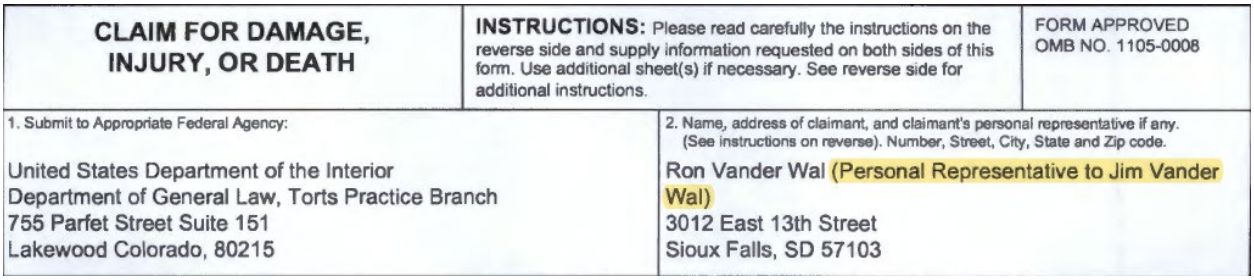
In this case, Trudy Peterson's and Jim Vander Wahl's surviving children submitted Form 95 wrongful death claims per their authority by N.D.C.C. §§ 32-21-03. Two of these surviving children, Trudy Peterson's daughter Jade Mound and Jim Vander Wal's son Ron Vander Wal, submitted separate Form 95 claims for the survival actions on the behalf of the estate in their capacity as personal representatives. This representative capacity was marked at the top of the Form 95 claims and included with the claims were their respective appointments as personal representatives. (Purdon Decl., Ex. 3, 5, 14, 15.) The government also received electronic PDFs of these Form 95 claims, both in physical flash drives and through digital transfer, respectively titled "Signed Form 95 – Estate of Trudy Peterson.PDF" and "Signed Form 95 – Estate of Jim Vander Wal.PDF". (Purdon Decl. at ¶ 9) (emphasis added).

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008
1. Submit to Appropriate Federal Agency: United States Department of the Interior Department of General Law, Torts Practice Branch 755 Parfet Street Suite 151 Lakewood Colorado, 80215	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Jade Mound (Personal Representative of Trudy Peterson) 919 3rd Street East Mobridge SD 57601	

Figure 1: The top of Trudy Peterson's Survival Action Form 95 brought by the estate (highlighting added).

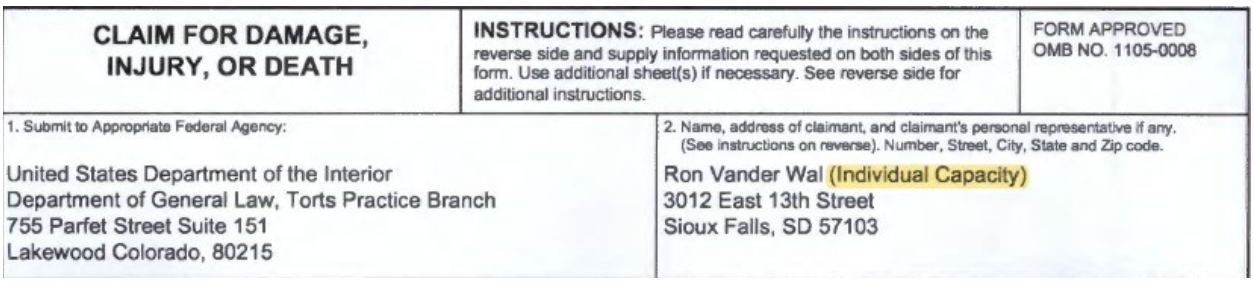
CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008
1. Submit to Appropriate Federal Agency: United States Department of the Interior Department of General Law, Torts Practice Branch 755 Parfet Street Suite 151 Lakewood Colorado, 80215	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Jade Mound (Individual Capacity) 919 3rd Street East Mobridge, SD 57601	

Figure 2: The top of Trudy Peterson's Wrongful Death Form 95 brought by surviving child Jade Mound (highlighting added).



CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008
1. Submit to Appropriate Federal Agency: United States Department of the Interior Department of General Law, Torts Practice Branch 755 Parfet Street Suite 151 Lakewood Colorado, 80215	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Ron Vander Wal (Personal Representative to Jim Vander Wal) 3012 East 13th Street Sioux Falls, SD 57103	

Figure 3: The top of Jim Vander Wal's Survival Action Form 95 brought by the estate (highlighting added).



CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008
1. Submit to Appropriate Federal Agency: United States Department of the Interior Department of General Law, Torts Practice Branch 755 Parfet Street Suite 151 Lakewood Colorado, 80215	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. Ron Vander Wal (Individual Capacity) 3012 East 13th Street Sioux Falls, SD 57103	

Figure 4: The top of Jim Vander Wal's Wrongful Death Form 95 brought by Ron Vander Wal (highlighting added).

Additionally, the respective addendums incorporated by each Form 95 state that "[t]he total sum of damages sustained by [the] heirs and estate is [demand sum] as described below." (emphasis added). (Purdon Decl., Ex. 8 at 1, Ex. 9 at 1.) The notice letter for the claim also identified a distinction between the claims being brought:

> Our clients are victims who were seriously injured or killed in the washout: the Estate of Trudy Peterson, the Estate of Jim Vander Wal, Steven Willard, and Evan Thompson. We additionally represent numerous heirs with the Estates of Jim Vander Wal and Trudy Peterson.

(emphasis added). (Purdon Decl., Ex. 10 at 1.)

"[E]vidence of a representative's authority to act on behalf of the claim's beneficiaries under state law ... is not a pointless administrative hurdle – it is fundamental to the meaningful administrative consideration and settlement process

contemplated in" the FTCA. *Mader*, 654 F.3d at 803–04; *see also* 28 C.F.R. § 14.2(a) ("A claim is properly presented when a Federal agency receives . . . . Evidence of the title or legal capacity of the person signing as an agent, executor, administrator, parent, guardian, or other representative.").

Indeed, every case cited by the government in its brief on this issue shows that bringing a personal representative claim is critical to placing the government on notice of a survival action. In *Harris v. United States*, No. 18-0424-CV-W-BP, 2018 WL 5726212, at *3 (W.D. Mo. Nov. 1, 2018), the court reasoned that a survival claim was not properly presented primarily because the plaintiff did not present any authority as a personal representative to bring the survival claim under Missouri law. *Id.* ("the correspondence from the VA does not demonstrate . . . (more importantly) that she had the authority to act as the personal representative of the Decedent's estate.") (emphasis added). Here, of course, the government was presented with the assignment of personal representatives and the specific Form 95s pursuing that authority. In *Hayden v. United States*, the court held the claim was not properly presented because the plaintiff did not present any authority to act as a personal representative to bring the survival claim under Missouri law. No. 4:12 CV 2030 DDN, 2013 WL 1148967, at *3 (E.D. Mo. Mar. 19, 2013). The *Hayden* court looked at the Form 95s, which did not show the representative of the estate or the estate itself as a claimant. *Id*. That is inapposite to this case, where specific Form 95 claims have been explicitly submitted in the personal representatives' name and their showing authority to act as personal representatives.

The government additionally cites one case from the Tenth Circuit that it suggests is persuasive, *Pickard v. United States* No. 18-cv-2372, 2019 WL 329570, at *4 (D. Kan. Jan. 25, 2019). But the facts in *Pickard* involve just one Form 95 submitted by an heir, again, without any personal representative status which the court determined could not reasonably be interpreted to give notice of a survival claim. *Id*. Again in the instant case, a separate Form 95 was filed on behalf of the estate by the personal representative along with wrongful death Form 95s.

b. Plaintiffs Sought Damages Specific to Survival Action Claims

In the instant case, claimed survival action damages are reflected in the Form 95 demands. As understood by the government and featured prominently in its briefing, "[t]he elements of damages recoverable under survival statutes are generally as follows: conscious pain and suffering; medical expenses; funeral and burial expenses; and loss of earnings, usually from the time of injury to the time of death." *Sheets*, 292 N.W.2d at 67 (emphasis added). Here, when making the estate's survival action claims, Trudy Peterson's and Jim Vander Wal's personal representatives submitted funeral and burial expenses that were featured in the claims' notice letter, Form 95 addendums, and in itemized bills accompanying the addendums. (Purdon Decl., Ex. 10 at 3, Ex. 8 at 2, Ex. 9 at 2.) As shown by its citation and explanation of survival action damages in its brief, the government is, and was, aware that these claimed expenses constitute survival action claims. Further, Trudy Peterson's personal representative submitted claims for

her vehicle's damage from the washout, an economic claim that belongs to the estate through the survival action.[7]

c. Plaintiffs Submitted Numerous Facts Showing Decedent Pain and Suffering

The addendums and materials submitted by the Plaintiffs described facts that put the government on notice for emotional distress damages, such as pain, suffering, mental, and anguish before their respective deaths. The very first section of Mr. Vander Wal's addendum states:

> Due to the large size of the washout and darkness, Mr. Vander Wal drove into the chasm which he was unaware of. Mr. Vander Wal's vehicle was swept down river and was found deceased about a mile from the crash site. The cause of death was determined to be blunt head, chest, abdominal, pelvic and extremity injuries due to motor vehicle collision. The medical examiner's report also noted upper airway obstruction as a significant condition, and indicated Mr. Vander Wal's airway was occluded by mud.

(Purdon Decl., Ex. 9 at 1 (emphasis added).)

A legally trained reader reading this description would apply common sense. They would understand that Mr. Vander Wal's personal representative was asserting that Mr. Vander Wal was swept away in the creek and suffered a horrible death by inhaling mud and suffocating to death alone after his vehicle first fell into the creek. These are emotional distress damages that constitute a survival action. Likewise, Trudy Peterson's addendum states: "Ms. Peterson's vehicle was washed downstream and later located by law enforcement." (Purdon Decl., Ex. 8 at 1 (emphasis added).) Ms.

[7] Mr. Vander Wal's personal representative has no claim for vehicle damages because Mr. Vander Wal was driving a work vehicle.

Peterson's autopsy was also submitted with her Form 95, stating her body was covered in mud and that "mud present in nares [nostrils]". (Purdon Decl., Ex. 11 at 4.) Finally, the death certificates submitted in both claims identify a gap in time between their falls into the creek, which occurred at about 5:00 a.m., and the time of their pronounced deaths.[8] (Purdon Decl., Ex. 12, 13.)

2. Technical Deficiencies in Form 95s Do Not Warrant Dismissal

The government's briefing also states that because the personal representatives' Form 95s left their 12(b) personal injury boxes blank, that it totally omits survival actions. First, none of the precedent the defendant cites, explained *supra*, supports that extremely broad proposition because the claims submitted need to be viewed in their entirety. Second, courts throughout the Eighth Circuit have rejected similar arguments by the government based on technical deficiencies in a claim form. For example, in *Ford v. United States*, a widow submitted a Form 95 claim and left the wrongful death damages box empty while, like here, asserting a total damages sum. In response to the government's argument that the blank box waived the claim, the court reasoned:

> Mrs. Ford did not write an amount in the "wrongful death" box, but she did put the agency on notice that there had been a death and that the total amount sought was $1,500,000. The SF–95 states in the box for the total damages claimed, 'failure to specify may cause forfeiture of your rights,' but it does not say that the failure to apportion the damages between damages for personal injury and wrongful death will cause a forfeiture of the claimant's rights. Furthermore, the regulation upon which the United States relies—28 C.F.R. § 14.2(a)—does not require an executed SF–95, much less an SF–95 in which every potentially relevant box is completed. Section 14.2(a) requires an SF–95 "or other written notification of an incident,

[8] Mr. Vander Wal's death certificate notes his time of death as 14:30 and Ms. Peterson's certificate notes that her time of death was 19:20.

> accompanied by a claim for money damages in a sum certain....” Here, Mrs. Ford gave written notification of the incident and stated a claim for money damages in a sum certain, which is all that § 14.2(a) requires. Mrs. Ford substantially complied with § 14.2(a).

640 F. Supp. 2d 1065, 1071–72 (E.D. Ark. 2009).

Courts across the United States are clear – a mere technical deficiency such as filling out the wrong box in a Form 95 – does not warrant dismissal of the claim. *See also White v. United States*, 907 F. Supp. 2d 703, 705 (D.S.C. 2012) (“[A]s long as the claim and other documentation submitted to the governmental agency provides sufficient notice to enable investigation and settlement, courts have found a technically deficient [form] sufficient to confer jurisdiction upon the court.”) (compiling cases across jurisdictions); *Slapak v. United States*, No. 16-CV-762-JPG, 2018 WL 706935, at *4 (S.D. Ill. Feb. 5, 2018) (“. . . the absence of a figure in the space for the personal injury claim amount is not fatal where other parts of the administrative claim clearly indicate that the decedent suffered personal injuries before his death and that the plaintiff was seeking some recovery for those injuries.”); *Brunson v. United States*, No. CIV.A. 09-3341, 2010 WL 4158930, at *4 (E.D. Pa. Oct. 22, 2010) (holding survival action claim constructively presented without personal injury box filled on Form 95); *see also Est. of Michael Keating ex rel. Marie Keating v. Coatesville VA Med. Ctr.*, No. 10-2672, 2010 WL 4343179, at *2 (E.D. Pa. Nov. 2, 2010) (“Numerous courts have not required strict compliance, instead looking at the substance and not the form of the notice.”) (compiling cases).

Here, although the personal representative Form 95s technically left the “personal injury” 12(b) box empty, Ms. Peterson’s personal representative does include

property damages in box 12(a) and both personal representatives list a total claim which include a demanded sum for the survival action claims. (Purdon Decl., Ex. 3.) In other words, the defendant was plainly on notice of the plaintiffs' claims and dismissal is unwarranted. *See Ford*, 640 F. Supp. 2d at 1071–72 (holding government properly notified where "[plaintiff] did not write an amount in the [correct] box, but she did put the agency on notice that there had been a death and that the total amount sought was $1,500,000.").

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
23,335.06		1,597,982.16	1,621,317.22

Figure 5: The filled damages form brought by Trudy Peterson's personal representative.

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
		1,130,722.24	1,130,722.24

Figure 6: The completed damages form brought by Jim Vander Wal's personal representative.

If this Court determines that the personal injury box 12(c) is meant for a survival action claim because it is technically a personal injury action, it should not hold that a technical failure to shift the same sum of damages to that box is a complete waiver of the plaintiff's rights to assert their intended survival action claim. *See White*, 907 F. Supp. at 705 ("[A]s long as the claim and other documentation submitted to the governmental agency provides sufficient notice to enable investigation and settlement, courts have found a technically deficient [form] sufficient to confer jurisdiction upon the court.") Further, the government's argument that because box 12(d) states "Failure to specify may cause forfeiture of your rights" the claim is waived, that argument has been rejected by courts in the 8th Circuit because the box "does not say that the failure to

apportion the damages between damages for personal injury and wrongful death will cause a forfeiture of the claimant's rights." *Ford*, 640 F. Supp. 2d at 1071–72.

In conclusion, the government was plainly placed on notice of the survival claims because a legally trained reader would infer a survival action claim was being asserted. *Beattie v. United States*, No. 97-916, 1998 WL 668042, at *11 (D. Minn. July 16, 1998). In this case, distinct Form 95s from the personal representatives pursuing the survival claims were presented, claimed expenses that can only be claimed in a survival action were presented, and facts narrating the pain and suffering before death were presented.

3. Defendant Was on Notice Regarding Sonja Willard's Lost Consortium Claim

The government finally argues that because Mrs. Willard did not present an individual Form 95 for her lost consortium claim, she therefore failed to satisfy the FTCA administrative process. But here, a reasonable legal mind had sufficient information to place it on notice of this claim because the government knew Mr. Willard was married. Loss of consortium claims are derivative claims under North Dakota law. *Anderson v. Otis Elevator Co.*, 453 N.W.2d 798, 800 (N.D. 1990); *see also Sime v. Tvenge Assocs. Architects & Planners, P.C.*, 488 N.W.2d 606, 610 (N.D. 1992); *cf. Carlson v. GMR Transp., Inc.*, 863 N.W.2d 514, 521 (N.D. 2015). Derivative claims are inextricably intertwined with and necessarily related to a personal injury claim.

While the government cites *Manko v. United States*, 830 F.2d 831, 840 (8th Cir. 1977) as instructive, it is distinct from this matter. *Manko* found in some circumstances

that a spouse must file an FTCA claim to pursue a lost consortium claim, specifically a federal statutory remedy under the Swine Flu Act of 1976 which created a unique cause of action. In contrast, North Dakota lost consortium claims are authorized by N.D.C.C. § 32–03.2–04 and derived from the common law where they are necessarily related to a personal injury action and cannot exist without the personal injury action.[9] *Weigel v. Lee*, 752 N.W.2d 618, 621 (N.D. 2008).

It is undisputed that the BIA was notified that Mr. Willard was married in his Form 95. (Purdon Decl., Ex. 18.) Mr. Willard's Form 95 addendum details how the injury has caused him pain and suffering and hinders his ability to interact with loved ones, such as his grandchildren. (Purdon Decl., Ex. 19 at 4.) A reasonable legal mind would apply common sense and understand from these facts that the relationship between Mr. Willard and his wife suffered and that a lost consortium claim was being asserted. This Court should apply this reasoning to find that the government was placed on minimal notice of Mrs. Willard's lost consortium claim.

[9] While the government cites *Allen v. United States*, No. 2:07-CV-2, 2008 WL 11441847, at *1 (D.N.D. Feb. 6, 2008) as applying *Manko*, 830 F.2d 831 to hold that a spouse must submit a lost consortium claim in the FTCA, the Court in *Allen* broadly applied *Manko's* holding to a medical malpractice FTCA claim. But as discussed *supra*, *Manko* involved a unique federal cause of action created by statute and did not involve a North Dakota lost consortium claim.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Defendant's motion should be denied.

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