IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

JADE MOUND, ET AL., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. 1:21-cv-00081-DLH-CRH UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT OR IN THE ALTERNATIVE DISMISS JURISDICTIONALLY DEFICIENT CLAIMS

The United States replies in support of it motion to dismiss, Doc. 8.

I. The Tribe's Road Maintenance Activities are Subject to the DFE.

Plaintiffs refuse to squarely address the United States' principal DFE argument – that under ISDEAA, the RMP and TTP Contracts, 25 C.F.R. § 170.803, and Eighth Circuit precedent including Walters and Metter, the Tribe may exercise discretion, subject to policy considerations including available funding, in deciding which road maintenance to undertake. Those decisions are not reviewable through the FTCA. Because the Tribe has policy-based discretion to choose when and what maintenance to do, the question of what requirements may exist down the decision tree is not reached. Plaintiffs sidestep this threshold issue, reframing the argument to call attention to a ND-DOT data entry guidebook that fails to support Plaintiffs' argument that there are mandatory culvert inspection requirements and the Tribe failed to meet them.

A. Maintenance Priorities for Route 3 Are Subject to the Exercise of Discretion.

The Tribe has layers of discretion regarding road maintenance. The first layer recognizes the Tribe lacks unlimited resources and can choose which maintenance to do, and when. Under 25 C.F.R. Pt. 170 and the TTP Contract the Tribe has discretion over TTP maintenance. Both explicitly say adherence to maintenance standards is subject to economic policy. The first clause of 25 C.F.R. § 170.803, "To what standards must a Tribal transportation facility be maintained?"

prefaces and limits all that follows: "Subject to availability of funding, Tribal transportation facilities must be maintained under either: … or (b) Another … State, … maintenance standard negotiated in an ISDEAA road maintenance self-determination contract[.]" (emphasis added). The TTP Contract uses the same and similar language. Doc. 9 at 26-27.[1]

The RMP Contract gives the Tribe even more latitude:

> The Tribe seeks to contract all road maintenance and related function required to preserve, upkeep and restore eligible Indian Reservation Roads …, rights-of-way and structures, as nearly as possible or practicable[2] to their original condition within available funding,
> …
> The degree or extent of maintenance to be performed shall be in accordance with Tribal standards and specifications contained in this Contract. The frequency and type of maintenance shall be at the discretion of the authorities charged thereof, taking into consideration traffic requirements, weather conditions and the availability of funds.

Doc. 12-1 at 6-7 (emphasis added). "The Contractor [Tribe] shall exercise full discretion over the funds made available subject only to the provisions of this contract and Federal law." Doc 12-1 at 25. The Tribe unequivocally has discretion to determine the frequency and type of maintenance, taking into account social and economic policies. The DFE analysis should end there, in favor of the United States.

There is a second layer of policy-based discretion, tied directly to the ND-DOT Maintenance Standards adopted in the RMP Contract, which is also explicitly subject to policy decisions, including economic policies, by the Tribe:

> Road Maintenance Program Standards. Subject to the availability of funding, the Tribe shall administer the Road Maintenance program, functions, services and activities contracted herein to ensure - to the greatest extent feasible given the limitations of contract funding - the safety of [TTP] roads and bridges.

[1] Page numbers refer to ECF-assigned page numbers rather than source-material page numbers.
[2] "Decisions concerning what constitutes 'practicable' require the exercise of discretion which is protected by FTCA § 2680(a)." Rosebush v. United States, 119 F.3d 438, 442 (6th Cir. 1997).

Doc 12-1 at 8 (emphasis added). The Tribe, taking into account economic policies—such as availability of funding—gets to decide what maintenance to do, how to do it, and when. The Tribe's compliance with the ND-DOT Maintenance Standards is conditioned upon policy choices by the Tribe, including how it chooses to allocate and prioritize its limited resources. Accordingly, compliance with the ND-DOT Maintenance Standards is not itself a mandatory requirement for purposes of the DFE insofar as the Tribe's decisions are susceptible to policy considerations. Maintenance decisions by the Tribe plainly fall within the DFE.

This is settled law. In Estate of Walters v. United States, CIV 05-3007, 2006 WL 8453000 (D.S.D. March 29, 2006) aff'd Walters v. United States, 474 F.3d 1137 (8th Cir. 2007), three separate accidents on a BIA road resulted in a death, injuries, and property damage. As here, the plaintiffs claimed negligence for failing to properly inspect, post warning signs, and maintain the road. Walters held, "The amount of maintenance, the monies spent on it, and the allocation of personnel to attend to it, are the types of choices that the discretionary function exceptions were designed to shield." Id. at *3. "BIA regulations allow the BIA to exercise discretion in the maintenance of roads. There is a presumption that 'the [BIA's] acts are grounded in policy when exercising that discretion.'" Id. at *4 (quoting Demery v. Dep't of Interior, 357 F.3d 830, 833 (8th Cir. 2004)). "[D]ay-to-day decisions as to road maintenance involve choice or judgment as to which of a range of permissible courses is the wisest." Id. "The regulations provide broad discretion to maintain reservation roads 'subject to the availability of funds.'" Id. at *3.

The Eighth Circuit affirmed, "Where the applicable statutes, regulations, or policies allow the government to take budgetary considerations into account, the discretionary function

exception applies." Walters, 474 F.3d at 1139.[3] "Because the applicable regulations expressly required the BIA to consider the availability of funds in deciding whether to perform maintenance on its roads, we conclude the district court correctly held the discretionary function exception shields the government[.]" Id. at 1140 (emphasis added). See also Doc. 9 at 23-25 re Metter v. U.S. Army Corps of Eng'r, 9 F. Supp. 3d 1090 (D. Neb. 2014)("Metter I"), aff'd Metter v. United States, 785 F.3d 1227 (8th Cir. 2015)("Metter II").[4]

B. The Coding Guide Neither Applies Nor Creates Any Specific Mandatory Maintenance Duties for the Tribe.

1. ND-DOT Road Maintenance Standards Do Not Include the Coding Guide.

The RMP Contract shows the Tribe and BIA agreed to "the most current Road Maintenance Standards of the State of North Dakota Department of Transportation." Doc. 9 at 19. The ND-DOT Road Maintenance Standards in effect in July 2019 were (1) Maintenance Operations Manual 2017; and, (2) NDDOT Snow and Ice Control Manual 2018-2019. Doc. 12 at

[3] Plaintiffs cite ARA Leisure Servs. v. United States, 831 F.2d 193 (9th Cir. 1987) and O'Toole v. United States, 295 F.3d 1029 (9th Cir. 2002) to argue economic considerations do not support DFE. Doc. 19 at 33. Walters unequivocally held the opposite, "Where the applicable statutes, regulations, or policies allow the government to take budgetary considerations into account, the discretionary function exception applies." 474 F.3d at 1139. Moreover, in Nat'l Union Fire Ins. v. United States, 115 F.3d 1415, 1421-22 (9th Cir. 1997) the Ninth Circuit explicitly limited the holding in ARA Leisure, stating "where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function. O'Toole recognizes that repair decisions that are subject to "the availability of appropriations" are "the product of choice, protected under the first part of the [DFE] test." 295 F.3d at 1035.

[4] Plaintiffs cite Mandel v. United States, 793 F.2d 964, 967 (8th Cir. 1986) to argue it is "well established in the Eighth Circuit" that DFE only applies to the exercise of discretion at the "planning," not the "operational," level. Doc. 19 at 19, 30-33. This distinction was rejected 30 years ago by United States v. Gaubert, 499 U.S. 315 (1991). The Supreme Court explained its precedent never "suggest[ed] that decisions made at an operational level could not also be based on policy," and said case law making reference to such a standard was "perpetuating a nonexistent dichotomy between discretionary functions and operational activities." Id. at 326; see also Estate of Walters, at *3 (Eighth Circuit in 2006 noting rejection of Mandel distinction).

¶7, Docs. 12-3, 12-4, and 12-5. Contradicting BIA's declaration, Plaintiffs summarily and without support try to engraft "North Dakota Bridge Inspection Procedures Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges and Pontis Bridge Inspection Manual" ("Coding Guide") (Doc. 20-1) onto the "Road Maintenance Standards" adopted by the Tribe through the RMP Contract. Doc 19 at 13, 21.

The Coding Guide addresses how data is supposed to be coded and entered into the Pontis Bridge Management System database.[5] There is nothing in the TTP or RMP Contracts

[5] Plaintiffs characterize the Coding Guide as "North Dakota Bridge Inspection Procedures," which it most definitely is not. Even a cursory reading shows the Coding Guide is not a how-to manual for inspecting bridges (or culverts); rather, it is a how-to guide for recording, coding and entering data into ND-DOT's then-existing Pontis database.

> Pontis, the bridge management system of choice for a growing number of States, is now better than ever with the release of Version 4.1. The software can assist highway agencies in organizing their bridge data and analyzing complex engineering and economic factors to make smart decisions about maintaining, improving, and replacing structures. … The Pontis system's database can store a complete bridge inventory and bridge condition history, as well as project development and tracking information.

See https://www.fhwa.dot.gov/publications/focus/02jul/bridges.cfm (accessed October 20, 2021). See also Coding Guide, Doc. 20-1 at 10-11, Introduction ("This latest edition revised the Guide to provide more thorough and detailed guidance in evaluating and coding specific bridge data. Several items collected previously have been deleted while new items have been added for an improved and more comprehensive data base. Some items in the Guide have also been expanded to provide more definitive and explicit explanations and instructions for coding." And "The NBIS and Pontis manuals have been combined now that the Pontis database is the only Bridge Database that the NDDOT currently maintains. This Guide, which has been endorsed by the AASHTO Subcommittee for Bridges and Structures, has been prepared for use by the states in recording and coding the data elements that will comprise the National Bridge Inventory data base." And "Each state is encouraged to use the codes and instructions in this Guide. However, its direct use is optional; each state may use its own code scheme provided that the data is directly translatable into the Guide format." And, "The SI&A sheet is intended to be a tabulation of the pertinent elements of information about an individual structure. Its use is optional, subject to the statements in the preceding paragraph of this Introduction. It is important to note that the SI&A sheet is not an inspection form but merely a summary sheet of bridge data required by the FHWA to effectively monitor and manage a national bridge program.") (emphasis added). SI&A is short for Structure Inventory and Appraisal Sheet which is "The graphic representation of the data recorded and stored for each NBI record in accordance with this Guide." Id. at 13.

requiring the Tribe to use Pontis. The Tribe agreed to undertake road maintenance, not data-entry procedures for bridge-inspection coding. Moreover, nothing in the RMP or TTP Contracts requires the Tribe to adhere to any bridge-related manuals Plaintiffs propose, or any other publication not agreed to, simply because it references culverts.

2. The Coding Guide Does Not Contain Mandatory, Specific Inspection Requirements and Is Not Devoid of Judgment or Choice.

Even if, arguendo, the Coding Guide is included among ND-DOT Maintenance Standards, there is a third layer of discretion for the Tribe. Namely, the Coding Guide does not contain mandatory, specific obligations the Tribe must perform without exercising "judgment or choice." See Doc. 9 at 15-16. "Under Berkovitz [by Berkovitz v. United States, 486 U.S. 531, 536 (1988)], an agency policy strips government employees of discretion when it 'specifically prescribes a course of action for an employee to follow.' … [T]o remove discretion, the policy must constitute a "specific mandatory directive." C.R.S. by D.B.S. v. United States, 11 F.3d 791, 799 (8th Cir. 1993); see also Buckler v. United States, 919 F.3d 1038, 1048 (8th Cir. 2019) ("These various provisions simply lack the required specificity and mandatory language."). If the relevant authority is intended to serve as a guideline or advisory document, or implicates the exercise of judgment, then it does not constitute a specific, mandatory directive. See Aragon v. United States, 146 F.3d 819, 824-25 (10th Cir. 1998)(manual was "intended for guidance" and provided "Air Force personnel discretion in their decisions."). Use of predominantly permissive terms such as "guidance" and "recommended," rather than mandatory language, is a "clear signal" the text is intended to be a guideline rather than mandatory. See Herden v. United States, 726 F.3d 1042, 1047 (8th Cir. 2013); Riley v. United States, 486 F.3d 1030 (8th Cir. 2007).

The "inspection requirement" language cited by Plaintiffs does not create the kind of mandatory, specific obligation that deprives the Tribe of all judgment or choice, stripping it of

the DFE protections outlined in the opening brief and above. The Coding Guide itself does not describe any specific techniques or steps that must be taken to conduct an inspection, or how frequently such inspections must occur. Nonetheless, Plaintiffs repeatedly (see, e.g. Doc. 19 at 13-27) describe the Coding Guide (and CIM, addressed infra) as having "required" or "mandated" that the Tribe take certain actions in conformity with them. A close reading of the pages cited reveals such phrasing is actually not present at all, but is rather Plaintiffs' argumentative gloss on the text. Plaintiffs cite the Coding Guide (Doc. 20-1) at i-ii (ECF pp. 10-11); vii (ECF p. 16); 111-113 (ECF pp. 130-132); 129-131 (ECF pp. 148-150); and 283 (ECF p. 302), none of which actually specifically mandate that anybody do anything and which inherently involve the exercise of judgment and choice with respect to coding. Presenting a lot of guidelines and tables describing various structural conditions, without more, is insufficient to establish a specific, mandatory obligation sufficient to defeat DFE. The actual Coding Guide language does not comport with Plaintiffs' aggressive characterization of it as requiring or mandating certain conduct by the Tribe.[6]

3. The CIM Is Not a Standard, Specification, or Regulation and Does Not Contain Mandatory, Specific Requirements Devoid of Judgment or Choice.

Plaintiffs—proceeding ipse dixit from the flawed premise that the Coding Guide applies—matter-of-factly declare the Coding Guide "also incorporate[s]" the CIM. Doc. 19 at

[6] Plaintiffs' brief is also rife with unsupported factual assertions such as: "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." And, "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.)" And "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.)" Doc. 19 at 18-19. Such assertions, however, are irrelevant to the analysis necessary to decide this motion.

13. The Coding Guide language cited by Plaintiffs, however, does no such thing. Instead, it says: "For a detailed discussion regarding the inspection and rating of culverts, consult Report No. FHWA-IP-86-2, Culvert Inspection Manual, July 1986." Doc. 20-1 at 148. That weak invitation is hardly the kind of specific, mandatory language contemplated by the Supreme Court as sufficient to deprive the United States of its sovereign immunity. See Berkovitz, 486 U.S. at 536 (a specific, mandatory obligation is such that the "employee has no rightful option but to adhere to the directive.").

On its very first page, the CIM provides the following disclaimer:

> NOTICE
> This document is disseminated under the sponsorship of the Department of Transportation in the interest of information exchange. The United States Government assumes no liability for its contents or use thereof. The contents of this report reflect the views of the contractor, who is responsible for the accuracy of the data presented herein. The contents do not necessarily reflect the official policy of the Department of Transportation. This report does not constitute a standard, specification, or regulation.

Doc. 20-2 at 3 (emphasis added). This language should end the inquiry.

There is nothing in the TTP or RMP Contracts binding the Tribe to the CIM. It is not part of the ND-DOT Road Maintenance Standards. Even if, arguendo, it could be construed as such, the CIM does not set forth specific, mandatory actions sufficient to prevent the application of DFE. "This manual provides guidelines for the inspection and evaluation of existing culverts." Doc. 20-2 at 4 (emphasis added). Like the Coding Guide, it provides samples, guidelines, and recommendations; it does not mandate specific action.

And, if the Court were to reject all of the foregoing layers of discretion, and instead find the Tribe subject to specific, mandatory inspection requirements, DFE would still defeat Plaintiffs' claims because the inspection process inherently has elements of choice and judgment.

> Mr. Buckler appears to argue that mandatory duties exist in relation to these inspection targets in that inspectors must take action in response to "imminent dangers." Such

> required responses, however, do not remove inspectors' discretion as to the manner in which they carry out their inspection to look for, and determine the existence of, imminent dangers. Instead, required actions following the discovery of an imminent danger are duties flowing from an antecedent determination—a determination necessarily rooted in discretion.

Buckler, 919 F.3d at 1049 (citing Myers v. United States, 17 F.3d 890, 895-96 (6th Cir. 1994)). Moreover, a mandatory requirement to inspect does not necessarily lead to a corresponding mandatory, specific requirement to correct problems identified during the inspection, particularly here, where the Tribe's discretion with respect to maintenance responsibilities is firmly established. See Clark v. United States, 695 F. App'x 378, 386-87 (10th Cir. 2017).

C. The Tribe's Discretion Advances Social, Economic, and Political Policies.

The United States' opening brief addressed (1) the legal standard and presumptions for the second prong of the DFE analysis (Doc. 9 at 34-35), and (2) law and facts showing the Tribe's exercise of discretion was susceptible to social, economic, and political policy analysis (see e.g. Doc. 9 at 7, 10-11 (Tribal Resolution Nos. 204-16, 209-17, and 306-14), 24 (Metter and Baum cases), 16-17, 35-36 (ISDEAA)). The entire discussion about "subject to available funding," Walters, and 25 C.F.R. § 170.803, supra, also reflects economic policy considerations.[7]

D. Whether to Post Warning Signs Is a Discretionary Function.

The Complaint makes multiple unsupported pronouncements about the Tribe's alleged duty to "erect warning signage" regarding "unsafe conditions" and the "extreme safety hazard" posed by culverts. Doc. 1 at ¶¶19, 59, 80. The United States' opening brief addressed Plaintiffs'

[7] Plaintiffs misplace reliance on Mandel v. United States, 793 F.2d 964 (8th Cir. 1986); Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986); and Appley Bros. v. United States, 164 F.3d 1164 (8th Cir. 1999). All are premised on failure to comply with specific, mandatory policies, which is not the case here. See also Estate of Walters, at *5 (distinguishing Mandel and Aslakson).

"failure to warn" claims and why they were subject to DFE. Doc. 9 at 21, 31-34. It can be summed up as follows:

> As to any claimed lack of warning signs, the question of whether to post any warning sign involves a discretionary function.
>
> > The BIA's first decision (whether to warn or not) is susceptible to a policy analysis that weighs the benefits of warning (e.g., increased safety) with its costs (e.g., the cost of erecting warnings).

Estate of Walters, 2006 WL 8453000 at *5 (quoting Demery, 357 F.3d at 834).

Plaintiffs argue Cope v. Scott, 45 F.3d 445 (D.C. Cir. 1995) and Parrish v. United States, 157 F. Supp. 3d 434 (E.D.N.C. 2016) defeat DFE because under their facts the discretion to post warning signs existed, but was not policy-based—failing the second element of the DFE test. The Eighth Circuit, however, has unequivocally reached a different conclusion:

> [O]ur court has repeatedly characterized discretion in the context of safety inspections or safety warnings as susceptible to policy choice due to the need to balance safety against governmental efforts and costs and the need for professionals on the ground to adapt to the conditions they face in determining how to expend limited resources in the efforts to identify dangers.

Buckler, 919 F.3d at 1052. The Eighth Circuit specifically declined to follow Cope in Metter II, 785 F.3d at 1232. See Doc. 9 at 36-38. Parrish relied on Cope; Parrish is not persuasive.

II. In the Alternative, the Court Lacks Subject-Matter Jurisdiction Over Claims Plaintiffs Failed to Administratively Exhaust.

A. The Peterson and Vander Wal Estates Failed to Present Survival Claims.

Plaintiffs all but concede Jade Mound, Personal Representative of Trudy Peterson ("Peterson Estate") and Ron Vander Wal, Personal Representative of Jim Vander Wal ("Vander Wal Estate") (collectively "the Estates") "technically" failed to include personal injury survival claims on their SF-95 administrative claim forms. Plaintiffs argue this failure should be excused

because the Estates put Interior on sufficient notice of these claims.[8] To find such notice, Plaintiffs ask the Court to disregard the import of the wrongful death claims the Estates did present, accept clues Plaintiffs pulled from over 8,600 pages of supporting documentation, assume facts the Estates did not allege, and discern personal injury survival claims the Estates never made. No other court in the Eighth Circuit has found proper presentment of an administrative tort claim under such circumstances.

First, there is no question the Estates omitted personal injury claims from their SF-95s.[9] See Doc. 9 at 41-43. Plaintiffs attempt to conjure such claims by arguing each Estate submitted its own administrative claim and "claimed expenses that can only be claimed in a survival action, such as funeral expenses[.]" Doc. 19 at 38. But while a personal representative is the proper party to present a survival claim, a personal representative is also a proper party to present a wrongful death claim. N.D.C.C. § 32-21-03(2). Similarly, while it would be appropriate for a personal representative to seek recovery of funeral expenses and other economic losses through a survival claim, a personal representative may also seek to recover such expenses through a wrongful death claim. N.D.C.C. § 32-03.2-04(1). In fact, in their Complaint, Plaintiffs included

[8] Plaintiffs argue the Court should "liberally construe this claim for minimal notice." Doc. 19 at 38. This is a notice standard of Plaintiffs' own invention that attempts to graft one articulation of liberality onto another and thereby relax the FTCA's jurisdictional presentment requirement. The Eighth Circuit has cautioned that while it will "liberally construe an administrative charge for exhaustion of remedies purposes, we also recognize that there is a difference between liberally reading a claim which lacks specificity, and inventing, ex nihilo, a claim which simply was not made." Allen v. United States, 590 F.3d 541, 544 (8th Cir. 2009)(quotation omitted).

[9] Plaintiffs cite Ford v. United States, 640 F. Supp. 2d 1065 (E.D. Ark. 2009), that allowed the plaintiff to pursue a wrongful death claim despite not writing an amount in the wrongful death box on her SF-95. Doc. 19 at 45. However, in Ford the plaintiff had provided the agency with notice of her husband's death. 640 F. Supp. 2d at 1072. Here the Estates provided no notice of personal injury to the decedents separate from the wrongful death claim. Further, Ford is of limited persuasive value following the Eight Circuit's decision in Mader v. United States, 654 F.3d 794, 805 (8th Cir. 2011)(en banc) which reinforced that "strict compliance with [28 U.S.C.] § 2675(a) is a jurisdictional prerequisite to suit under the FTCA."

"funeral, burial, and other expenses all to Plaintiff's economic damages" in their Wrongful Death claims as opposed to their Survival Claims, where they seek only non-economic damages. Doc. 1 at ¶¶62, 67, 72, 77.

Further, the Estates' administrative claims omit "crucial facts" that would lead a reader to infer the Estates were asserting personal injury survival claims in lieu of or in addition to their wrongful death claims. See Hennager v. United States, No. 3:19-cv-258, 2020 WL 7295832, at *5 (D.N.D. Nov. 4, 2020), R. and R. adopted, 2020 WL 7024481 (Nov. 30, 2020)("A plaintiff may not proceed with a claim in federal district court where crucial facts forming the basis of that claim were omitted from the administrative claim."). These omitted crucial facts include any allegations of conscious pain and suffering and any gap in time[10] between the accidents and decedents' deaths. See NoDak Mut. Ins. Co. v. Stegman, 647 N.W.2d 133, 138 (N.D. 2002)(recognizing "conscious pain and suffering" as a "permissible element of damages in a personal injury action"); Sheets v. Graco, 292 N.W.2d 63, 66-67 (N.D. 1980)(recognizing "conscious pain and suffering" damages under survival statute).

Plaintiffs do not identify allegations of conscious pain and suffering anywhere within the voluminous documentation they submitted to Interior. Instead, Plaintiffs argue a "legally trained reader would infer a survival action claim" because this documentation included "facts narrating how the decedents swallowed mud while being swept away in a current." Doc. 19 at 38-39. In support, for Vander Wal, Plaintiffs cite only a note in his claim addendum that Vander Wal's "cause of death was determined to be blunt head, chest, abdominal, pelvic and extremity injuries

[10] Plaintiffs respond "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." Doc. 19 at 45. The time of pronounced death in no way evidences actual time of death; the bodies of the decedents were not recovered until many hours after the accident.

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." Doc. 19 at 44. For Peterson, Plaintiffs cite an autopsy report comment stating Peterson's body was covered in mud and there was mud in her nostrils. Doc. 19 at 44-45. Plaintiffs, without more, suggest correlation equals causation when inferring conscious pain and suffering.

Based on these limited references to mud in and on the decedents, whose bodies were recovered from a flooding creek, Plaintiffs ask the Court to find the Estates presented claims to Interior for conscious pain and suffering. Even a legally trained reader, reviewing a claim for wrongful death, would not infer the Estates were asserting personal injury survival claims in lieu of or in addition to the wrongful death claims.[11] See Beresford v. United States, No. 3:16-cv-56, 2017 WL 11188291, at *6 (S.D. Iowa Jan. 10, 2017)("This does not mean … an administrative complaint is sufficient if the United States is put on notice of other, unstated facts, which in turn might support a separate theory of liability. The United States is not charged with mining the record for potential, but unidentified, facts from which a claim might be inferred.").

Indeed, the administrative claim addenda Plaintiffs filed with their response show the Estates presented only wrongful death claims to Interior. Docs. 20-8, 20-9. While the addenda include sections describing the emotional pain and loss experienced by the decedents' families, they do not include any sections discussing the decedents' pain and suffering.

Upon review of (1) the SF-95s showing the Estates asserted claims for wrongful death but not personal injury, Docs. 10-1, 10-5; (2) the addenda describing the impact of the decedents'

[11] Compare the lack of allegations in the administrative record regarding conscious pain and suffering with the explicit description of such in the Complaint at paragraphs 66-67 and 76-77. If the Estates had provided such a description of conscious pain and suffering on their SF-95s or anywhere in their supporting documentation, a legally trained reader would have been more likely to infer the Estates were presenting personal injury survival claims.

deaths on their heirs, but lacking any discussion of the decedents' pain and suffering, Docs. 20-8, 20-9; and (3) the lack of any reference to the decedents' conscious pain and suffering in the extensive documentation Plaintiffs submitted to Interior, no legally trained reader would infer personal injury survival claims in lieu of or in addition to the Estates' wrongful death claims. Interior was in no position to "meaningfully consider" the Estates' personal injury claims for settlement because the Estate had not presented them. See Mader, 654 F.3d at 800-01. Plaintiffs have not met their burden of showing the Estates satisfied the presentment requirement. The survival claims must be dismissed for failure to exhaust administrative remedies.

B. Mrs. Willard Did Not Present an Administrative Tort Claim.

Without citing a single case in support, Plaintiffs argue the Court should apply "common sense" and find Mrs. Willard presented a claim for loss of consortium because Mr. Willard presented a personal injury claim stating he was married. Plaintiffs argue that because consortium claims are "derivative" of personal injury claims in North Dakota, it follows from Mr. Willard's presentation of a personal injury claim that Mrs. Willard should be deemed to have presented a loss of consortium claim.[12] Doc. 19 at 48-49. As the United States has established, Courts in the Eighth Circuit have rejected Plaintiffs' argument several times, including in a case applying North Dakota law. Doc. 9 at 47-48 (citing, inter alia, Allen v. United States, Case No. 2:07-cv-2, 2008 WL 11441847, at *1 (D.N.D. Feb. 6, 2008)); see also Skellham, Doc. 25 at 3 (dismissing loss of consortium claim).

[12] The cases Plaintiffs cite to show a loss of consortium claim is "derivative" of a personal injury claim in no way support the idea that a personal injury claim is a sufficient condition for a loss of consortium claim. See Doc. 19 at 48. This Court recently recognized that "under North Dakota law, a spouse's claim for loss of consortium is an independent right, not contingent upon the rights or liabilities of the other spouse."). Skellham v. United States, Case 1:17-cv-00091, Doc. 25 at 3 (D.N.D. April 17, 2018)(citing Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1249 (8th Cir. 1985)).

Plaintiffs' effort to distinguish Manko v. United States, 830 F.2d 831, 840 (8th Cir. 1987), and the cases citing it, is unavailing. The dispositive fact in all these cases is that the spouse or equivalent of the injured party failed to present the agency with an administrative claim for loss of consortium; the type of initial injury makes no difference in the analysis. See, e.g., Skellham, Doc. 25 at 3; Allen, 2008 WL 11441847, at *1; Azizi ex rel. Azizi v. United States, 338 F. Supp. 2d 1057, 1060-61 (D. Neb. 2004); Estate of Miller v. United States, 157 F. Supp. 2d 1071, 1074-75 (S.D. Iowa 2001). The Court should dismiss Mrs. Willard's claim for failure to exhaust administrative remedies.

CONCLUSION

Plaintiffs have not met their burden to establish subject-matter jurisdiction through waiver of sovereign immunity. The United States' motion to dismiss should be granted and this case dismissed.

Dated this 22nd day of October, 2021.

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