UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck; and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, v. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	Civ. 19-4006-LLP Civ. 19-4007-LLP **UNITED STATES' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

The United States of America, by and through its counsel of record, hereby replies to its Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) to dismiss all counts against the United States under the Federal Tort Claims Act ("FTCA") because the United States has not waived its sovereign immunity, and the Court lacks subject matter jurisdiction.

INTRODUCTION

Robert Neuenfeldt was a tribal police officer for the Flandreau Santee Sioux Tribe ("FSST") on June 18, 2017, who was providing law enforcement services that evening pursuant to a 638 contract. Although he is deemed to be a fictional federal employee for broad purposes of coverage under the Federal Tort Claims Act ("FTCA") for his conduct, he was not a federal investigative officer for purposes of the intentional tort exception to the FTCA. The so-called law enforcement proviso only waives the United States' sovereign immunity for enumerated intentional torts committed by "any officer of the United States who is empowered by law to

execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Neuenfeldt was not cross-deputized and did not have a Special Law Enforcement Commission ("SLEC"), that would empower him by law to be a federal officer or enforce federal law. Furthermore, it is undisputed that Neuenfeldt was enforcing state law on June 18, 2017, while he was on scene lawfully pursuant to a proper mutual assist agreement request from Moody County for alleged violations of state law. Thus, the Court lacks jurisdiction over Plaintiffs' common law assault and battery claim, and it must be dismissed.

The intentional tort exception not only precludes jurisdiction over the enumerated torts, but also any claim "arising out of" an assault and battery. The Supreme Court and Eighth Circuit have taken an expansive view of the "arising out of" language, precluding all claims but those stemming from distinct and antecedent duties, and leaving intact the bar of immunity for any claim that "arises out of" an assault or battery. Plaintiffs' direct negligence and employment-related negligence claims against the United States arise out of the intentional tort claim because the direct negligence claim is a re-casted assault or battery claim meant to improperly circumvent § 2680(h). Both negligence claims are further barred because the United States did not have an "entirely independent," antecedent duty to Plaintiffs that is distinct from the 638 contractual relationship between the United States and the Tribe/Neuenfeldt. Because Plaintiffs cannot establish that Neuenfeldt committed a tort, they equally cannot establish that Neuenfeldt's employer committed a tort.

Finally, Neuenfeldt's allegedly negligent conduct resulting from his decision to respond to Deputy Brakke's request for "any available units" until the conclusion of the pursuit, are protected by the discretionary function exception to the FTCA because his law enforcement pursuit decisions are the type that allow for the exercise of judgment and are grounded in public policy. Any

allegation that the Bureau of Indian Affairs ("BIA"), through the Office of Justice Services ("OJS"), had a mandatory duty or obligation to reassume the Flandreau Santee Sioux Tribe's 638 contract for law enforcement services is further barred by the discretionary function exception. For all of the reasons stated below, all counts against the United States (Counts I, III, and V) must be dismissed.

FACTUAL INACCURACIES

The United States relies on its facts alleged in its Brief in Support of Its Motion to Dismiss for the entire recitation of facts that occurred on June 17-18, 2017. Docket 97 at 3-17. Plaintiffs made a number of factual misstatements in their response brief, and the United States will respond to those inaccuracies either here or, as appropriate, below.

I. A Moody County Deputy Made a Proper Request for Mutual Aid Assistance

Plaintiffs argue that Neuenfeldt lacked "jurisdiction" to be on the scene of the house party because Deputy Brakke never called and asked for Neuenfeldt's help on June 17-18, 2017, and because there was never an emergency. However, Plaintiffs ignore undisputed evidence and insinuate law enforcement officers are lying to achieve their objectives.

There is no dispute that Deputy Brakke radioed the Moody County dispatch at 11:50 a.m. to let dispatch know that there was another house party going on at the scene. Docket 91-3 at 32; 91-4 at 4. There is no dispute that Chief Neuenfeldt could hear each radio transmission between Moody County employees and Moody County's dispatcher because the FSST used a shared dispatcher and radio channel. Docket 97 at 4; Docket 112 (Plaintiffs' admitting SUMF ¶¶ 11-13). Next, Deputy Brakke testified that after he provided information for the house party to his dispatcher, he went over to the Brookings inter-agency channel and asked for "any available units" or "can you start all units to my location" and "went on to explain about the kids running and the

number of vehicles." Docket 91-3 at 47, 57 (Brakke Deposition). Deputy Brakke admits that in his request for any available units, he did not specify who he was asking for help from. *Id.* at 47. Deputy Brakke testified that he asked for "additional units" because it could have been deemed "an emergency." *Id.* at 46. Deputy Baldini also confirmed that Deputy Brakke made a call for "a general assist" on the radio. Docket 91-5 at 18 (Baldini Deposition).

Plaintiffs lack any factual support for their argument that Deputy Brakke never asked for "any available unit" or made a general call for assistance. Plaintiffs state that Deputy Brakke's and Deputy Baldini's testimony regarding "phantom calls" for assistance on the inter-agency channel should be discredited "because their testimony is refuted by the only radio log[1] that exists on record." Docket 109 at 8 n.1. Even though there are no call logs from the inter-agency channel, the absence of a document does not contradict two police officers' sworn testimony. *See e.g., United States v. Ganaway*, CR. 20-271, 2022 WL 605235, at *3 (E.D. Mo. March 1, 2022) (finding the United States could not be compelled to produce dash or body cam that did not exist and finding defendant "offered no evidence (documentary or testimonial) to rebut [police officer]'s credible testimony" on the issue). This is particularly true when it is Plaintiffs' own assertion that Deputy Brakke did not like Chief Neuenfeldt, so there should be no assumption that Deputy Brakke would lie for Neuenfeldt. Furthermore, if Plaintiffs wanted to discover the inter-agency logs, it was their burden[2] to obtain them from the State of South Dakota to prove their case by a preponderance of

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[1] A request for assistance on a different radio channel and to a different dispatcher would not appear on the Moody County dispatch log.

[2] A Brookings inter-agency radio log would not be in the possession of the United States, as there is no federal agency involved. Deputy Brakke testified that the inter-agency channel would be maintained by the State of South Dakota. Docket 91-3 at 47-48, 61. Additionally, Plaintiffs cite *Acosta v. La Piedad Corporation*, 894 F.3d 947, 950 (8th Cir. 2018) for the proposition that the United States had a burden to obtain certain discovery. *Acosta* does not stand for the proposition that Plaintiffs cite, and even if it did, it is distinguishable because that case dealt with a narrow

the evidence.

Based on the undisputed evidence, Carl Brakke made a request for any available unit over the radio, which included to the Flandreau Santee Sioux Tribe. Sheriff Wellman testified that his Moody County employees "obviously were outnumbered and tried to call in other resources to try to contain the situation." Docket 91-1 at 33. Sheriff Wellman testified that under the Mutual Assist Agreement, his deputies could call the tribal police officers and ask for help. *Id.* at 63. Sheriff Wellman concluded that Deputy Brakke made "a request for assistan[ce]," but it was not to Neuenfeldt specifically. *Id.* at 39. But he also said that there was, in general, a radio call for backup to all available units, and "the tribe falls into that." *Id.* at 40-41. Finally, Sheriff Wellman admitted that if Chief Neuenfeldt heard a request for assistance from Deputy Brakke that Chief Neuenfeldt would have authority under the Mutual Assist Agreement to assist in Moody County. *Id.* at 69. For these reasons, a proper request was made by the Moody County Sheriff's designee to the FSST Chief of Police. The policy specifically affords for an informal request, as long as it is direct. A request that is orally made and orally heard must be direct.

The secondary request for assistance was made when the party attendee had a seizure. Docket 91-4 at 4; Docket 91-3 at 38-39. Deputy Brakke requested an ambulance. *Id.* The call log also notes a request for EMS services. Docket 91-4 at 4. Neuenfeldt testified that he heard Brakke's request[3] for assistance, and he responded because he had EMS training and he might have gotten

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question, the judicial enforcement of administrative subpoena issued by a federal agency with authority to investigate violations of the FLSA. The United States is defending this action and did not have this document within its possession.

[3] Plaintiffs attempt to argue that Neuenfeldt told BIA Investigator Brock Baker that Deputy Brakke made a request for a 10-54 call. This is unsupported by the transcript of the interview, where Neuenfeldt stated that Brakke was asking for assistance. Docket 110-5 at 14-15. When the investigator was pressing for more details regarding the various ways someone can call for backup or assistance, that Neuenfeldt said "<u>Generally</u>, he would say, 10-54, which means everybody and

to the scene of the accident first. Docket 91-2 at 132-133, 260-62. He noted that seizures can be deadly and that he would have taken over for the seizing person if he got there before the ambulance did. *Id.* at 132-133. Ambulances were dispatched from Flandreau and Dell Rapids, and the Trent Fire Department also responded because that is the way emergencies work. Docket 91-14 at 1. Neuenfeldt also testified that he did arrive on scene prior to the ambulance(s), but the seizure had completed upon his arrival. Docket 91-2 at 133.

The mutual aid agreement allows mutual aid "in the event of <u>or the threat of an emergency</u>[.]" Docket 93-1 at USA001450 (emphasis added). Deputy Brakke testified that an officer may request emergency backup in "any situation that an officer felt like he was not able to maybe safely do whatever he's trying to do or in a situation where he needs more units." Roche Decl., Ex. A at 12-13 (additional excerpts of Brakke's deposition). Brakke testified he requested "any available units" here. Deputy Brakke testified that "there's a part where I don't know or it could be an emergency, hence why I asked for additional units." Docket 91-3 at 46. Neuenfeldt heard the requests for assistance, and he responded.

Plaintiffs advance Sheriff Wellman's testimony and Deputy Brakke's testimony that prior to June 18, 2017, Moody County employees were directed to give Chief Neuenfeldt a "10-22" or an order to stand down or stop (essentially to go away) if he "jumped" a call for Moody County. Docket 109 at 11-12. Sheriff Wellman testified that Neuenfeldt would "jump a call" if he would "show up on a call or on a traffic stop that he was not requested for backup or any kind of mutual aid at that point." Docket 109 at 12 (citing Wellman's deposition). Neuenfeldt's response to two requests for assistance is clearly not "jumping a call." This was not a traffic stop. There was a call

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anybody that hears on the radio responds[,]" but there is no indication that Neuenfeldt told Baker that Brakke made a 10-54 call on June 18, 2017. *Id.* at 15 (emphasis added).

for assistance to any available unit who could hear the request over the Moody County channel and the inter-agency channel. There was a second request for an ambulance or EMS when someone had a seizure. Deputy Brakke requested assistance multiple times and deemed the situation to be at least the "threat of emergency" pursuant to the mutual aid agreement. Docket 91-3 at 46. Finally, no police officer ever told Chief Neuenfeldt to leave the scene once he responded to the request for assistance. When Sheriff Wellman was asked if he thought Chief Neuenfeldt's response to the scene was improper, he said: "I do not." Roche Decl., Ex. B (Wellman Depo. at 70-72). Sheriff Wellman also testified that generally if one mutual aid party requests assistance from the other, the assisting party would help first and figure out the logistics after the fact. *Id.* at 57, 61-62. Plaintiffs' argument is simply an irrelevant character attack and should be ignored.

II. Joel Chino's Testimony Regarding the FSST's 638 Contract and Neuenfeldt

Plaintiffs argue extensively that the United States was responsible for "ensuring" that the Flandreau Santee Sioux Tribe, as a contractor, performed certain provisions of the 638 contract and that this duty is distinguishable from Neuenfeldt's employment relationship with the FSST. But the most important parts of Mr. Chino's testimony were excluded from Plaintiffs' brief.

Joel Chino Kaydahzinne testified that he was the Assistant Agent in Charge ("ASAC") for District I of the OJS, which included the states of North Dakota, South Dakota, and Nebraska. Docket 110-3[4] at 17. In that role, he was "the direct supervisor" for OJS's "direct service programs." *Id.* at 21. Each OJS district has two different types of operations: 1) direct services, where "we have federal officers working, federal agents working, along with all the administrative staff that are all federal employees" and 2) tribal programs, which are operated by the tribes and

[4] Plaintiffs' filing of Mr. Chino's entire deposition transcription violates D.S.D. Civ. LRs 7.1B2 and 56.1C.

are usually operated as 638 or self-determination contracts. *Id.* at 21. Mr. Chino's job related to the self-determination contracts is as an approving official or is designated "as the awarding official's technical representative." *Id.* at 21.

The only supervisory obligation that the BIA retained with respect to the FSST's 638 contract was noted in the Annual Funding Agreement, which provided that "[t]he Government, through the Bureau of Indian Affairs, shall . . . [p]rovide technical assistance and guidance, as needed, to the Contractor[,]" and "monitor Contractor performance under this contract[,]" which included "[p]eriodic on-site technical assistance visits, as needed and/or requested by the Contractor[.]" *Id.* Mr. Chino testified in his deposition and via affidavit that he personally provided technical assistance and on site visits with the FSST. Docket 110-3 at 43, 63-64, 142; Docket 92 ¶¶ 3-6.

Mr. Chino testified that BIA/OJS does not give directives over the 638 tribes. Docket 110-3 at 22. He stated OJS is not a direct supervisor of the tribes. *Id.* Specifically, Mr. Chino testified that "[i]f there's things that they need assistance on in regards to their self-determination contract, we provide technical assistance in whatever aspect they may be asking for that assistance in." *Id.* at 21-22. Mr. Chino stated that OJS informed 638 tribes of the laws and standards that they had to strive to meet pursuant to the 638 contract. *Id.* at 24. When Plaintiffs' counsel asked if OJS was in charge of the Tribe pursuant to the 638 contract, Mr. Chino said no. *Id.* at 38-39. Mr. Chino also said that OJS did not have control over the Tribe pursuant to the terms of the 638 contract either. *Id.* at 39. When asked if OJS had supervisory capacity over the Tribe pursuant to a 638 contract, Mr. Chino said "[n]ot at all." *Id.* at 39. Mr. Chino stated there was a difference in Mr. Chino supervising his staff "that are federal employees in direct service programs and a tribe performing the functions of their contract, because they are responsible for the functions and the operations of

that – of that contract." *Id.* at 39-40. Mr. Chino specifically testified that the BIA does not train officers on jurisdictional issues, as that is the Tribe's function under the contract. *Id.* at 40-41. These facts are relevant to responsive arguments discussed below.

ARGUMENT

I. Intentional Tort Exception Bars All Claims Against the United States

A. Assault and Battery

Plaintiffs argue that the law enforcement proviso should apply to waive sovereign immunity for their assault and battery claim, and the Court should find Neuenfeldt is an investigative or law enforcement officer of the United States government, because he was vested with apparent authority or because the Eighth Circuit has broadly viewed "federal investigative officers" as including federal employees with non-traditional law enforcement roles. First, even if such authority existed here, apparent authority is non-cognizable under the FTCA. Second, in *Millbrook v. United States*, 569 U.S. 50 (2013), the Supreme Court addressed the issue of whether federal Bureau of Prisons correctional officers who already had authority under law to execute searches, to seize evidence, or to make arrests for violations of Federal law could be considered a federal investigative or law enforcement officer pursuant to Section 2680(h) when the alleged harm committed against Plaintiff "did not take place during an arrest, search, or seizure of evidence." *Id.* at 53. The Supreme Court did not address the issue of an employee who did not already have such authority and, thus, the line of cases discussing the necessity of tribal officers having SLECs to be considered federal investigative officers is not impacted by *Millbrook.*

The Eighth Circuit further has never expanded the law enforcement proviso to a non-federal employee and should not do so when the BIA has expressly provided a regulation that may grant federal authority to a non-federal authority in the exact circumstances afforded for here.

Furthermore, all of the district courts who sit near Indian country and have examined this precise issue have found that the intentional tort exception bars subject matter jurisdiction when a tribal police officer does not have his SLEC card. Dismissal is appropriate.

1. Neuenfeldt Is Not an Officer of the United States

An "investigative or law enforcement officer" under the law enforcement proviso is defined as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). The inquiry should end when reviewing the first clause of "any officer of the United States." Neuenfeldt was a tribal police officer. Neuenfeldt took an oath of office from the Flandreau Santee Sioux Tribal Court on January 13, 2016, that he would "uphold and enforce the laws of the Flandreau Santee Sioux Tribe." Roche Decl., Ex. C (Oath of Office dated January 13, 2016). Neuenfeldt was paid[5] by the Flandreau Santee Sioux Tribe, and he was hired by the Flandreau Santee Sioux Tribe. Docket 91-2 at 27. There is no dispute Neuenfeldt was not cross-deputized by the BIA and he did not have his SLEC card, the only avenue available to Neuenfeldt to be considered a federal officer for § 2680(h) purposes under these circumstances. Docket 92 ¶ 8.

Neuenfeldt is not a federal employee. The only reason he is a fictional federal employee for broad subject matter jurisdiction under the FTCA is because Congress enacted the ISDEAA to promote self-determination contracts with Tribes and provided that tribal employees are deemed employees of the Bureau of Indian Affairs for FTCA purposes while acting within the scope of their employment in carrying out the contract or agreement. *See* Pub. L. 101-512, Title III, § 314,

[5] Mr. Chino testified that if there is a 638 contract with a tribe, the chief of police is being paid by the tribe rather than the federal government. Roche Decl., Ex. C at 26. Chief Neuenfeldt's pay stub establishes that on June 17-18, 2017, he was being paid by the Flandreau Santee Sioux Tribe. Roche Decl., Ex. D.

Nov. 5, 1990, 104 Stat. 1959, as amended Pub. L. 103-138, Title III, § 308, Nov. 11, 1993, 107 Stat. 1416. However, being a fictional federal employee does not turn Neuenfeldt into an officer of the United States. Instead, there is a specific process for determining when and if tribal employees operating under a 638 contract can be deemed "federal officers" and it is expressly controlled by the terms of a permissive federal regulation. *See* 25 C.F.R. § 12.21(b) ("Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers; however, they may be commissioned on a case-by-case basis.") (emphasis added); *see also Boney v. Valline*, 597 F. Supp. 2d 1167, 1177 (D. Nev. 2009) (stating "nothing in the ISDEAA, or in relevant case law, suggests that the mere existence of a 638 contract between the BIA and a tribe for the provision of law enforcement services automatically confers federal law enforcement authority upon the officers in tribal police departments.").

Plaintiffs cite to *Millbrook*, 569 U.S. 50 and *Iverson v. United States*, 973 F.3d 843 (8th Cir. 2020), for the proposition that the Eighth Circuit and the Supreme Court take a broad view of what constitutes a federal investigative officer. But Plaintiffs cite case law for apples to avoid an express process and a fulsome body of caselaw discussing oranges. In *Millbrook* (BOP correctional officers), *Iverson* (TSA screeners), *Pellegrino v. U.S. Trans. Security Admin.*, 937 F.3d 164 (3d Cir. 2019) (TSA security officers), and *Bunch v. United States*, 880 F.3d 938 (7th Cir. 2018) (ATF forensic chemist; dispute in fact on whether he was empowered by law), all of the employees are federal employees who are empowered by some federal statute to conduct their duties and responsibilities as federal employees, even if those duties are not traditionally law enforcement focused.

Here, a fictional federal employee cannot transform into a federal officer unless certain conditions are met. Those conditions clearly were not met. Thus, Plaintiffs cannot clear the first

hurdle of establishing that Neuenfeldt was an officer of the United States because he lacked his SLEC card or any other source that would transform him into an officer of the United States.

2. Neuenfeldt Was Not Empowered by Law

Plaintiffs cannot establish that Neuenfeldt was "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law" because there was no grant of authority through the only appropriate source for tribal police officers, a cross-deputization agreement and an SLEC card. Furthermore, apparent authority is not a valid theory of liability under the FTCA (*see infra*), so Plaintiffs' claims that Neuenfeldt was empowered by the United States' alleged failure to act or his own mistaken belief of his authority must be rejected.

Plaintiffs seem to argue that federal authority to investigate or enforce federal criminal law in Indian country simply vests in any person who wishes to exercise that authority or mistakenly believes he can act with impunity. Plaintiffs argue that Neuenfeldt was empowered because he was delegated legal power. Docket 109 at 27 (citing *Iverson*, 973 F.3d at 851). This argument cannot withstand even shallow analysis. Plaintiffs never establish the source of said empowerment or delegation, statutorily or from a person. Instead, tribal police officers <u>may</u> be empowered <u>by law</u> to execute searches, to seize evidence, or to make arrests for violations of Federal law depending on a case-by-case determination by the Secretary of the Interior through a cross-deputization agreement[6] or an SLEC commission. *See United States v. Henderson*, CR. 18-4112, 2018 WL 10216422, at *5-6 (D. Ariz. 2018) ("[T]here must be some other mechanism [than a 638 contract] that grants tribal officers federal employee status, namely a Special Law Enforcement Commission.").

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[6] For a cross-deputization agreement, the Secretary of the Interior may authorize tribal officers to "make inquiries of any person" related to the "carrying out in Indian country" of any federal law and to "perform any other law enforcement related duty[.]" 25 U.S.C. § 2803(5).

The Secretary of the Interior has Congressional authority to promulgate rules "relating to the enforcement of" federal criminal law and "relating to" ISDEAA contracts to perform the functions of the Branch of Criminal Investigations. 25 U.S.C. § 2805. The Secretary promulgated such a rule, lawfully implementing 25 C.F.R. § 12.21, which is entitled "What authority is given to Indian country law enforcement officers to perform their duties?" The regulation provides:

> BIA law enforcement officers are commissioned under the authority established in 25 U.S.C. 2803. BIA may issue law enforcement commissions to other Federal, State, local and tribal full-time certified law enforcement officers to obtain active assistance in enforcing applicable Federal criminal statutes, including Federal hunting and fishing regulations, in Indian country.
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> (a) BIA will issue commissions to other Federal, State, local and tribal full-time certified law enforcement officers only after the head of the local government or Federal agency completes an agreement with the Commissioner of Indian Affairs asking the BIA issue delegated commissions. The agreement must include language that allows the BIA to evaluate the effectiveness of these special law enforcement commissions and to investigate any allegations of misuse of authority.
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> (b) Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers; however they may be commissioned on a case-by-case basis.

25 C.F.R. § 12.21.

Under the terms of this regulation, it distinguishes that "BIA law enforcement officers" (i.e., BIA employees) have federal authority established in 25 U.S.C. § 2803. However, the "BIA may issue law enforcement commissions to other Federal, State, local and tribal full-time certified law enforcement officers to obtain active assistance in enforcing applicable Federal criminal statutes . . . in Indian country." *Id.* (emphasis added) The regulation specifically provides that "Tribal law enforcement officers operating under a BIA contract or compact are not automatically commissioned as Federal officers; however, they may be commissioned on a case-by-case basis." *Id.* at 12.21(b).

There is uncontroverted evidence that Neuenfeldt was not commissioned pursuant to this regulation. Docket 92 ¶ ¶ 5-8 (Chino Decl.). Furthermore, the 638 contract at issue confirms the clear language in 25 C.F.R. § 12.21(b), that "Tribal officers are authorized to enforce Title 18, Chapter 53 of the United States Code and investigate violations thereunder, only if tribal officers have obtained the BIA Special Law Enforcement Commission." *See* Docket 93-1 (LaRocque Declaration, Ex. 1 at USA001393-1394) (emphasis added). Furthermore, BIA/OJS employee Joel Chino has testified on behalf of the BIA that FSST police officers did not enforce federal statutes, and if Mr. Neuenfeldt were to testify that he did enforce federal crimes that Neuenfeldt "would be incorrect" because Neuenfeldt did not have "authority to enforce federal laws." Docket 113-4 at 95-96; 129. Mr. Chino testified that Neuenfeldt enforced tribal crimes, but not federal crimes. *Id.* at 127. He further testified that Neuenfeldt was solely a tribal officer rather than a BIA officer. *Id.* at 129.

As discussed above, Plaintiffs attempt to shift the lens from whether Neuenfeldt was an officer of the United States or whether Neuenfeldt was "empowered by law" instead to that Neuenfeldt clearly engaged in police work and believed he had authority to enforce federal law. Again, in each of the cited cases above, those federal employees were found to be empowered by federal statutes to sufficiently allow the claim to proceed. *See Iverson v*, 973 F.3d at 850-51 (finding TSA is empowered pursuant to the Airport Transportation Security Act ("ATSA")), *Pellegrino*, 937 F.3d at 172 (same; ATSA and Aviation Security Act), and *Bunch*, 880 F.3d at 943-946 (denying summary judgment because the record lacked sufficient evidence of whether chemist was empowered by law but discussing ATF statutory and regulatory law pertaining to its own employees). And, the employees in those cases had to have been empowered by federal statute to "execute searches, to seize evidence, or to make arrests for violations of Federal law," before they

could be considered as federal investigative or law enforcement officers for § 2680(h) purposes. These cases are inapplicable to a tribal officer who was not empowered by any law, let alone any law empowering him to "execute searches, to seize evidence, or to make arrests for violations of Federal law."

Plaintiffs allege that the United States argues Neuenfeldt cannot be a federal investigative officer because "he never received SLEC training" and "the fact that the Government refused to train him cannot be used as a shield." Docket 109 at 26. Plaintiffs misunderstand the argument. The United States merely argues that there is a process set by 25 C.F.R. § 12.21 that requires two steps before a tribal police officer is authorized to enforce federal law. The first step is that the BIA and the tribe must have a cross-deputization agreement or an SLEC agreement. The second step is that an individual officer may then be commissioned or cross-deputized on a case-by-case basis. 25 C.F.R. § 12.21. The undisputed evidence is that there was no cross-deputization or SLEC agreement between OJS and the FSST. Docket 92 ¶ 8. Thus, Neuenfeldt could not have been individually commissioned or cross-deputized. *Id.* The evidence further establishes that Neuenfeldt was not cross-deputized or individually commissioned. The United States is not using this process as a shield, when, in fact, it is a sovereign immunity argument that cannot be waived and is meant to protect the public by limiting those tribal officers who are empowered to enforce federal law to those receiving individual commissioning on their own merits. 25 C.F.R. § 12.21. Simply put, tribal officers, including Neuenfeldt, do not have the ability to empower themselves to enforce federal law.

3. Neuenfeldt Could Not Execute Searches, Seize Evidence, or Make Arrests for Violations of *Federal Law.*

Knowing that Neuenfeldt was not empowered by law to investigate or enforce federal law, Plaintiffs argue that Neuenfeldt was self-empowered to effectuate searches because of his belief

that he had federal authority. In so doing, they argue that "Neuenfeldt act[ed] under his apparent authority." Docket 109 at 20. Plaintiffs then spend pages arguing that not only did Neuenfeldt himself believe he was a federal officer, but that he also would sometimes make arrests for violations of federal law[7] or would execute search warrants pertaining to potential violations of federal law.

First, as Judge Kornmann said in response to a similar argument in *Locke*, even assuming a tribal officer executed federal arrests or executed search warrants that fact did not "sufficiently allege that [the tribal officer] is a federal law enforcement officer" and it was "common knowledge that local police officers and county sheriffs or deputies assist tribal officers and federal officers as well on occasion and vice versa."[8] *Locke v. United States*, 215 F. Supp. 2d 1033, 1038-1039 (D.S.D. 2002).

Next, Plaintiffs' apparent authority argument is both factually incorrect and ignores a foundational legal principle of the FTCA – apparent authority is non-cognizable under the FTCA.

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[7] Plaintiffs note in their response brief that this Court has previously found that Neuenfeldt was acting under color of federal law when responding to the house party. Docket 109 at 22 (citing Docket 31). Respectfully, this was a preliminary finding where the facts were not robustly presented to the Court on Neuenfeldt's motion to dismiss, as discovery had not yet occurred. Furthermore, while the Court may examine similar facts to reach its conclusions, the standard of whether an actor is acting under color of federal law is distinct from the § 2680(h) standard of being "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h).

[8] It is conceivable that an individual detained by a tribal officer, where the officer does not have an SLEC and does not have authority to enforce federal law, could ultimately be arrested for a violation of federal law. *See Duro v. Reina*, 495 U.S. 676, 697 (1990) ("Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities."). Furthermore, the Supreme Court has stated that tribal law enforcement officers without SLECs may detain non-Indians under reasonable suspicion that they are violating state or federal law until the relevant state or federal agents arrive. *United States v. Cooley*, 141 S. Ct. 1638 (2021).

Plaintiffs specifically argue that "[u]nder South Dakota law, the Government empowered Neuenfeldt to execute searches, seize evidence and make arrest for violations of federal law because it enabled him to operate from a position of federal authority." Docket 109 at 30. Plaintiffs then cite specific South Dakota apparent authority law, noting that "a principal may be held liable for [the tort] committed by an agent within his apparent authority, even though the agent acts solely to benefit himself. *Id.* (quoting *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 277 (S.D. 1986) (citations omitted).

The United States did not enable Neuenfeldt to operate from a position of federal authority. Plaintiffs brought forth no evidence that supports this factual leap other than letters that were issued to the Tribe as a Contractor in the technical assistance process. The statutes and regulations are clear how a tribal police officer like Neuenfeldt could obtain authority to enforce federal law. The statutes, regulations, and the 638 contract were available to Neuenfeldt and not hidden from him or the public. The stated regulatory processes were not followed. And as to this argument's legal validity, unfortunately for Plaintiffs, the Eighth Circuit has very clearly held that apparent authority is not an available source of liability against the United States under the Federal Tort Claims Act. *See Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) ("Concluding that apparent authority is not a basis for FTCA liability in South Dakota[.]").

Instead, the existing law in this district pertaining to tribal officers' status as federal investigative officers under the law enforcement proviso is unchanged by *Millbrook* for all of the distinguishing reasons discussed in *supra* sections. *Locke*, *Buxton*, and *Bob* all continue to direct that a tribal police officer must have an SLEC to be a federal investigative officer under the law enforcement proviso. Understanding this, Plaintiffs attempt to distinguish their case by arguing that these previous cases were dismissed because those plaintiffs failed to rebut the undisputed

affidavit that the tribal officer lacked an SLEC. But that is the exact situation here, where the only new evidence Plaintiffs bring forth following jurisdictional discovery in resistance to the United States' 12(b)(1) argument is that Neuenfeldt believed he had authority to enforce federal law. A person's belief that they are a federal officer cannot rebut unrefuted evidence that Neuenfeldt did not follow the only pathway to obtaining federal authority. *See Bob v. United States*, Civ. 07-5068-RHB, 2008 WL 818499, at *3 (D.S.D. March 26, 2008) (dismissing the action and finding additional discovery will not help because even if a tribal officer was assisting in the enforcement of federal law, it would not cause the tribal law enforcement officers to become federal law enforcement officers) (quoting *Locke*, 215 F. Supp. at 1038-39). Such a holding would not only go against the entire weight of the case law directly on point, but would be untenable in that any federal employee who believed they had law enforcement authority could subject the United States to liability for the enumerated intentional torts listed in 28 U.S.C. § 2680(h), in direct contradiction to Congress' express language. Instead, employees have to be specifically "empowered" and it is not sufficient for employees to merely "believe" they are so empowered.

Plaintiffs attempt to distinguish *Gatling*, which was issued post-*Millbrook*, because *Gatling* did not discuss *Millbrook* at all. Docket 109 at 34, n.6. However, *Gatling* further establishes that the proper focus of a tribal officer's status as a federal investigative officer is rightfully centered on his or her SLEC status. The *Gatling* court did not discuss *Millbrook* because it did not need to discuss *Millbrook*. The published opinions from one Court of Appeal and multiple district courts that sit adjacent to Indian country (Arizona, Montana, Nevada, New Mexico, and Utah) that have reviewed this precise issue have all dismissed cases where the officer lacks an individual commission. *See Dry v. United* States, 235 F.3d 1249 (10th Cir. 2000); *see also Gatling v. United States*, Civ. 15-08070, 2016 WL 147920, at *5 (D. Ariz. Jan. 13, 2016); *Pablo v. United States*,

Civ. 06-127, 2008 WL 11347937, at *2 (D. Mont. June 25, 2008); *Etsitty-Thompson v. United States*, Civ. 13-159, 2013 WL 4052621, at *3 (D. Utah Aug. 12, 2013); *Boney*, 597 F. Supp. 2d at 1178-80 (dismissing case from District of Nevada); *Trujillo v. United States*, 313 F. Supp. 2d 1146 (D.N.M. 2003). This conclusion is further supported because the Eighth Circuit upheld Judge Kornmann's dismissal in *Locke*, finding that it agreed "with the district court that it lacked jurisdiction over those claims. Thus, the court properly dismissed [plaintiff's] complaint." *Locke v. United States*, 63 Fed. App'x 971, 972 (8th Cir. 2003) (citing 28 U.S.C. § 2680(h); *Sheridan v. United States*, 487 U.S. 392, 399 (1988); *Stratmeyer v. Engberg*, 649 N.W.2d 921, 925 (S.D. 2002)).

Plaintiffs' arguments are simply arguments – they do not change facts. Neuenfeldt is not a federally-commissioned police officer and no further discovery will change this fact. *See Henin v. Cancel*, 708 F. Supp. 2d 1315, 1319 (S.D. Fla. 2010) (dismissing assault and battery claim, negligence claim, IIED claim against the United States because tribal police officers did not have SLEC; thus, they were "not federally-commissioned officers" and "extended discovery will not change this fact."). The bar of sovereign immunity remains as to Plaintiffs' assault and battery claim, and the Court must dismiss it.

B. Negligence for Neuenfeldt's Pursuit Conduct and Employment Negligence

1. Plaintiffs' Direct Negligence Claim Recasts the Assault and Battery Claim and Is Barred by 28 U.S.C. § 2680(h).

The FTCA does not waive sovereign immunity for those claims "arising out of" assault or battery. 28 U.S.C. § 2680(h). Courts interpret "arising out of" broadly. *Wilburn v. United States*, 616 F. App'x 848, 857 (6th Cir. 2015). Further, when applying the law enforcement proviso found in § 2680(h), a court's task is "to identify 'those circumstances which are within the words and reason of the exception' – no less and no more." *Kosak v. United States*, 465 U.S. 848, 853 n. 9

(1984).

Plaintiffs claim that they "have asserted from the beginning of this lawsuit that Neuenfeldt was negligent by jumping a call outside of his jurisdiction of the reservation and recklessly asserting himself on a scene he had no authority to be at[,]" and that he "re-started a pursuit that had been terminated and that he had no authority to even join to begin with." Docket 109 at 36. But that is not how their claims were pleaded. The Amended Complaint tells Plaintiffs' tale.

Plaintiffs first alleged all of their actions against the United States as negligence and then stated immediately after the negligence claim, under their intentional tort claim, "[t]he actions, set forth above, [which included negligence and an excessive force claim] constitute common law assault and battery." Docket 76 ¶ 67. Plaintiffs further alleged that the actions of Defendants "were malicious, reckless, intentional, and caused damages to the Plaintiffs." An assault or a battery cannot arise from carelessness because there is specific intent for one and not the other. *McCabe v. United States*, 2012 WL 13076549, at *3 (D.N.M. 2012) ("Plaintiff's argument that an act can be both intentional and negligent is simply not supported by any case law . . . [o]ne is intentional and the other is not.") (citation omitted).

Plaintiffs admit this is the same claim by arguing that they have a right to dual pleading under South Dakota law or Federal Rule of Civil Procedure 8. Docket 109 at 45-46. The United States does not dispute that South Dakota law may generally allow for dually pleading negligence and an intentional tort, but South Dakota procedural law does not apply to this federal action. *See North Star mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 912 (S.D. 1992) ("The South Dakota Rules of Civil Procedure allow a party to set forth two or more statements of a claim alternatively or hypothetically in separate counts.") (emphasis added) (citing SDCL 15-6-8). Furthermore, Federal Rule of Civil Procedure 8 generally allows claims for relief that "may" include alternative requests

for relief.

Both general rights to plead relief in the alternative do not survive this specific review of the FTCA and its sovereign immunity parameters. While the Federal Tort Claims Act borrows South Dakota state substantive law, the FTCA provides the procedural limitations of the United States' waiver of sovereign immunity. *See Molzof v. United States*, 502 U.S. 301, 305 (1992) (stating that "liability under the FTCA is generally determined by reference to state law," the meaning of terms employed in the statute "is by definition of a federal question"); *United States v. Neustadt*, 366 U.S. 696, 705-06 (1961) (concluding that whether a claim falls "outside the intended scope of the [FTCA] depends solely upon what Congress meant by the language it used in § 2680(h)" and looking to "the traditional and commonly understood legal definition" of the tort to be considered); *Leleux v. United States*, 178 F.3d 750, 755, n.2 (5th 1999) ("It is a matter of federal law, not state law, whether the [FTCA] exception for battery applies.").

Pursuant to the intentional tort exception to the FTCA, subject matter jurisdiction is not waived for the intentional torts enumerated in § 2680(h), which includes assault and battery, and not merely for assault or battery, but any claim arising out of assault and battery. Plaintiffs' allegations that identical conduct equates to either negligence or assault and battery is fatal to both claims, which are precluded by § 2680(h). Courts have rejected a plaintiff's reliance on dual-pleading to save their other claims when section 2680(h) claims are at issue. *See Iverson v. United States*, Civ. 18-323, 2018 WL 3637530, at *3 (D. Minn. 2018), *reversed on other grounds*, (rejecting plaintiff's argument that he could plead his claims for negligence and intentional tort in the alternative because it was allowed under Minnesota law because "application of the FTCA's waiver of immunity is a question of federal, not state, law."); *McCabe v. United States*, Civ. 11-652, 2012 WL 13076549, at *2-3 (D.N.M. April 4, 2012) (rejecting plaintiff's argument that

officer's actions in arresting plaintiff could "be both negligent and intentional at the same time").

Plaintiffs argue that the Court should ignore the Supreme Court and the Eighth Circuit's expansive view of the "arising out of" language because their negligence claim is somehow severable from their assault and battery claim. But Plaintiffs are alleging the same facts (discussed *supra*) and same damages for both the negligence and intentional tort claim. *Compare* Docket 76 ¶ ¶ 45-36 with Docket 76 ¶ ¶ 69-70. The two claims are bound and barred because the negligence claim is simply a recasting or "backup claim" to the intentional tort claim, which is barred by the intentional tort exception. *See Pablo*, 2008 WL 11347937, at *3 (dismissing plaintiff's negligence claim because she alleged officer was negligent in use of force, thus, the negligence claim was "a cause of action for battery or excessive force couched in negligence terms.").

2. Both Negligence Claims Arise Out of Assault and Battery.

Plaintiffs attempt to use circular logic to confuse the issues. Plaintiffs argue that the United States' employment relationship with Neuenfeldt is what caused the assault or battery here, which is exactly the type of conduct that is deemed to "arise out of" an assault or battery. When examining the law enforcement proviso in § 2680(h), the Supreme Court instead directs that to allege a claim of negligence that <u>does not</u> arise out of an assault or battery, the alleged act must be "entirely independent of [the employee's] employment status" and the employment status "has nothing to do with the basis for imposing liability on the Government." *Sheridan v. United States*, 487 U.S. 392, 401-02 (1988). Plaintiffs cannot meet this high hurdle for either Counts I or V.

Plaintiffs argue that the independent, antecedent duty[9] that is unrelated to Neuenfeldt's

[9] Plaintiffs make a passing argument that the United States had a duty similar to the Eighth Circuit's hypothetical situation in *Billingsley* where the Court said "[f]or example, the government would be liable if the Job Corps employee responsible for the enrollees knew that [employee] acted violently in public prior to his commission of the battery." *Billingsley*, 251 F.3d at 698; *see also* Docket 109 at 39. Plaintiffs have failed to make any showing that any individual at the FSST or

employment with the United States stems from the United States' alleged regulatory duty to "ensure" training to tribal police officers serving pursuant to a 638 contract. The regulation provides:

> The regulations in this part are not intended to discourage contracting of Indian country law enforcement programs under the Indian Self-determination and Education Assistance Act. The Deputy Commissioner of Indian Affairs will ensure minimum standards are maintained in high risk activities where the Federal government retains liability and the responsibility for settling tort claims arising from contracted law enforcement programs. It is not fair to law abiding citizens of Indian country to have anything less than a professional law enforcement program in their community. Indian country law enforcement programs that receive Federal funding and/or commissioning will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies.

25 C.F.R. § 12.12.

First, as the United States has extensively argued in resistance to Plaintiffs' Motion to amend the Complaint (Docket 65 at 14-16) and in cross-moving for summary judgment, Plaintiffs can only state a claim against the United States under the FTCA for the breach of a state law duty. Docket 99 at 18 (citing cases). An antecedent duty cannot be found in a federal regulation rather than from South Dakota state law. *Sorace v. United States*, 788 F.3d 758, 765 (8th Cir. 2015) (affirming district court's finding that federal regulations and Handbook were not applicable because they were not the substantive law of South Dakota and only South Dakota law was relevant for an FTCA analysis). Furthermore, sovereign immunity is only waived if a private person would also be liable for the same conduct under South Dakota law. *United States v. Olson*, 546 U.S. 43,

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the BIA had knowledge pertaining to Neuenfeldt's prior conduct. Moreover, Plaintiffs singularly argue that the government failed to obtain a background check prior to Neuenfeldt's hiring or negligently retained Neuenfeldt once the government learned he did not have an adjudicated background check on file. These allegations are negligent hiring or negligent retention claims, over which the Court lacks jurisdiction. *See infra* section IV; Docket 97 at 42-44.

45-46 (2005) (reiterating the importance of the plain words of 28 U.S.C. § 1346(b), which waives sovereign immunity only "under circumstances where the United States, if a private person" would be liable); *see also Sheridan*, 487 U.S. at 401 (assuming that plaintiffs could state a viable claim under Maryland law "if the naval hospital had been owned and operated by a private person"). A private person does not have a duty to ensure proper training of tribal law enforcement officers.

And Plaintiffs have not identified a relevant state law[10] analogue. Instead, Plaintiffs pull at the threads of phrases like self-determination and "trust responsibility" only where convenient. Plaintiffs frequently argue that the United States has a "trust responsibility" in certain instances, but fail to define the contours of that trust responsibility and ignore that a trust responsibility is uniquely federal, is not grounded in South Dakota law, and cannot be imputed to a private person under the FTCA. They also ignore that any trust responsibility only applies, if at all, to residents or visitors of the Flandreau Santee Sioux Reservation. For these reasons, 25 C.F.R. § 12.21 cannot provide an antecedent duty that would save Plaintiffs' negligence claims from dismissal.

In the majority of cases that have found an antecedent duty that is distinct from the employment relationship, the plaintiffs clearly expressed a state law duty that was distinguishable from the employment relationship with the employee who engaged in the assault or battery. For instance, in *Sheridan*, the "other duty" was grounded in Maryland's Good Samaritan concept, finding that servicemen had assumed responsibility to perform its Good Samaritan task in a careful

[10] To the extent Plaintiffs or the Court would argue that breach of contract is a relevant state analogue, a breach of contract claim is not cognizable under the FTCA. *Larson v. United States*, Civ. 20-3019-RAL, 2021 WL 3634149, at *5 (D.S.D. Aug. 17, 2021) ("A breach of contract claim against the United States is not actionable under the FTCA."). In *Larson*, Judge Lange reiterated that the United States did not have a duty to prevent a third-party's trespass when the alleged obligation stemmed from a contract and federal trespass regulations because "the Eighth Circuit has made clear that the United States's failure to fulfill a federally imposed obligation is not actionable under the FTCA." *Id.* (citing *Klett v. Pim*, 965 F.2d 587, 589 (8th Cir. 1992)).

manner when they found a drunk and armed soldier on a naval base, but employees left him there to later injure others. *Sheridan v. United States*, 108 S. Ct. 2449, 2455-56 (1988). Other courts have found premises liability and hospital-patient relationships as other types of antecedent state law duties. *Garner v. United States Dep't of Health & Human Servs.*, 21-5037-JLV, 2022 WL 103663, at *5 (D.S.D. Jan. 11, 2022).

Here, the federal regulation regarding ensuring minimum standards cannot be "entirely independent" of Neuenfeldt's employment relationship because the regulation itself is only relevant because Neuenfeldt, a tribal employee, is considered a federal employee pursuant to the 638 contract for law enforcement services. A key question here is absent the 638 contract, could a general member of the public outside of this reservation, bring an action against the United States for breach of a federal regulatory duty to train a tribal police officer under the FTCA. *See Glade ex rel. Lundskow v. United States*, 831 F. Supp.2d 1055, 1059 n. 3 (N.D. Ill. 2011) (discussing that "*Sheridan's* 'entirely independent' language means the claim against the United States must exist regardless of the tortfeasor's employment status. In other words, the United States is equally on the hook whether the tortfeasor is an employee or just some random person off of the street."). The answer is clearly no. The government does not have an actionable duty to the general public to train tribal police officers.

Instead, § 12.12 discusses the relationship among the United States and 638 contract tribes and, somewhat, the United States and "law abiding citizens of Indian country." The BIA would have no potential liability at all if not for the fact that the person responsible for the alleged assault and battery on Plaintiffs was a 638 contract tribal employee rather than a private citizen. "Indeed, claims of negligent training – as well as negligent supervision, hiring, or retention—are by their very nature dependent upon the existence of an employment relationship; the government's

liability arises, if at all, only because the assailant happens to be a federal employee." *Olson v. U.S. Postal Service*, 2015 WL 4488438, at *4 (D. Minn. 2015).

Third, Plaintiffs cannot quantify how the United States breached its allegedly antecedent duty under 25 C.F.R. § 12.12. Plaintiffs argue the United States disregarded its "actual duty . . . to enforce the Tribe's compliance with the 638-contract." Docket 109 at 41. Even if this regulation could create an actionable duty under the FTCA, the plain language of the regulation describes the parameters of how the agency is to "ensure minimum standards are maintained." Later on in the regulation, the plain language provides that 638 programs "will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards[.]" 25 C.F.R. § 12.12. This language discusses the exact process that OJS provided to the FSST; technical assistance and monitoring, including periodic inspection of the program.

A statutory reminder is necessary. Congress enacted the ISDEAA, Pub. L. No. 93-638, 88 Stat. 2203, 2203-04 (1975), 25 U.S.C. §§ 5301-5423, "to help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 753 (2016); *see also* 25 U.S.C. § 5302. Before the ISDEAA, most federal programs and services for Indians, such as health, educational, and law enforcement services, were administered directly by the federal government. *See* S. Rep. No. 100-274, at 2-3 (1987). The ISDEAA permits tribal organizations to administer such federal programs and services themselves. Under the Act, at the request of an Indian tribe, a tribal organization may enter into a "self-determination contract[]"— colloquially known as a "638 contract[]," after the Public Law that created them—with the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to assume operation of federally funded programs and services that the Secretary would otherwise have provided directly. 25 U.S.C. § 5321(a). The Secretary must accept a tribe's

request for an ISDEAA contract except in specified circumstances. *See id.* § 5321(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); *id.* § 5321(a)(2)(A)-(E) (permitted grounds for declination).

The Act thus generally permits an Indian tribe, at its initiative, to step into the shoes of a federal agency and administer federally funded services, including, as relevant here, law enforcement services. Here, once the FSST's 638 contract was in place on October 1, 2015 through September 30, 2018, it became the Tribe's responsibility to manage the hiring, supervision, retention, and training of Tribal police officers who provided services under the Contract. Those decisions belonged solely to the FSST as the contractor. That is the very purpose of self-determination – to allow Tribes the discretion to run the program in the manner that it deems is appropriate for its member population.

Once a 638 contract has been transferred to a tribe, OJS only provides limited oversight of the tribe's program. The general concept of this oversight is set forth in 25 C.F.R. § 12.12, which states: "Indian country law enforcement programs that receive Federal funding and/or commissioning will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies." Furthermore, the 638 contract affirms the only supervisory obligation[11] that the BIA retained with respect to the FSST: "[t]he Government, through the Bureau of Indian Affairs, shall . . . [p]rovide technical assistance and guidance, as

[11] It is the obligation of the Contractor to perform the "programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract." Docket 93-1 at USA001378. The United States retains those programs, services, functions, and activities" that "are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2)." *Id.* at USA001379.

needed, to the Contractor[,]" and "monitor Contractor performance under this contract[,]" which included "[p]eriodic on-site technical assistance visits, as needed and/or requested by the Contractor." Docket 93-1 at USA001397.

OJS does not have supervisory authority over the manner in which the Tribe conducts its programs, except as explained herein. For instance, even if program deficiencies are found through the discretionary, periodic inspections of the relevant Tribe as discussed above, OJS has no authority to hire or fire employees, to retain or not retain employees, to supervise employees, or to ensure training of employees. These are uniquely Tribal/contractor functions. Docket 93-1 at USA001395-96 (noting the Contractor provides law enforcement services); Docket 93-1 at USA001393 ("Contractor shall obtain all necessary licenses, permits, training, certification, insurance and approvals required by local, state, and federal statutes to perform all programs under this contract."); *see also Layton v. United States*, 984 F.2d 1496, 1503 (8th Cir. 1993) (shielding a claim against the Forest Service that it negligently or wrongfully failed to provide or require its contractor to provide workers' compensation coverage when Forest Service delegated that responsibility to its contractor). Instead, if OJS learns of program deficiencies, which deficiencies are not addressed after OJS guidance and technical assistance is provided, its recourse is to begin the regulatory reassumption process. *See* 25 C.F.R. § 900.246 (defining reassumption, both emergency and non-emergency); *see also* 25 C.F.R. § 12.13 (noting that if law enforcement entities do not follow the rules in these regulations that "[y]our BIA law enforcement commission may be revoked, your law enforcement contract may be cancelled, and you may no longer be eligible for tribal shares allocated from the law enforcement budget.").

Given the very purpose of self-determination, this reassumption process is guided by regulations and allows the Tribe opportunities to cure program deficiencies and to request technical

assistance of OJS, and also involves notice and opportunity to be heard rights. *See* 25 C.F.R. § 900.248 (defining what steps OJS must take in a non-emergency reassumption situation). Although reassumption is the BIA's final recourse when program deficiencies are found and not corrected after guidance and technical assistance, there is no mandatory directive that would have required BIA to pursue reassumption under the facts alleged here. Both the manner in which the BIA monitors 638 contractors and its decision whether to pursue reassumption is left to the discretion of the BIA employees with the specific knowledge and expertise raised by the contracts at issue. This is particularly relevant when the purpose of ISDEAA is to afford Tribes the decision-making powers related to how they conduct their programs. *See Val-U Constr. Co. of S.D. v. United States*, 905 F. Supp. 728 (D.S.D. 1995) (finding Congress intended "to grant the Tribe discretion in all areas of contracting – from planning to supervision"). Based on all of the information discussed above, the United States could not "ensure compliance with minimum Federal standards" other than reassuming the contract, which is a discretionary decision shielded from review by the discretionary function exception to the FTCA.

Furthermore, even if the Court finds that there is an antecedent duty in 25 C.F.R. § 12.12, pursuant to the regulation's own terms, that duty only would apply to the "law abiding citizens of Indian country" as stated in the regulation. Plaintiffs are non-members of the Flandreau Santee Sioux Tribe, they are non-Indians, and they were not visitors or guests to the Flandreau Santee Sioux Reservation. Their only tangible nexus to the federal government is through Neuenfeldt and his 638 contract relationship with the United States. Accordingly, their negligence claims arise out of their assault and battery claim, and the bar of sovereign immunity remains.

II. Plaintiffs' Negligence Claim in Count I Is Entirely Barred by the Discretionary Function Exception to the FTCA.

In the introduction to their brief in response to the United States' Motion to Dismiss,

Plaintiffs argue that "[i]f this Court finds that Neuenfeldt was acting as a federal officer, the remaining arguments set forth by the Government do not require consideration as they are moot." However, Plaintiffs' direct negligence claim (Count I) also is barred by the discretionary function exception. Plaintiffs completely failed to respond this argument.

Plaintiffs understood that they failed to allege that Neuenfeldt breached a duty of reasonable care in his conduct on June 17-18, 2017, and chose to focus on Neuenfeldt's alleged "evil intent" and deliberate and intentional conduct. Now, for the first time, Plaintiffs specifically argue that Neuenfeldt was negligent in responding to Moody County's request for assistance and for allegedly restarting a pursuit. Both decisions are shielded from review by the discretionary function exception.

In its Brief in Support of Its Motion to Dismiss, the United States explained the extensive circumstances of Deputy Brakke's testimony that he made an "all available units" request for assistance, that Neuenfeldt shared a dispatcher and radio channel with Brakke and heard his transmissions and request, and Neuenfeldt's earnest belief that he was responding to the scene of the house party pursuant to the mutual assist agreement due to the threat of an emergency.

As discussed in detail in the United States' opening brief, the FTCA provides a waiver of sovereign immunity in certain instances for personal injury negligence claims filed against the United States for the conduct of government employees, 28 U.S.C. § 1346(b), subject to 13 statutory exceptions. 28 U.S.C. § 2680. *Kosak v. United States*, 465 U.S. 848, 852 (1984). If an exception applies, there is no waiver of sovereign immunity, the government is immune from suit, and the court has no subject matter jurisdiction to hear the case. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Green Acres Enterprises, Inc. v. United States*, 418 F.3d 852, 857 (8th Cir. 2005); *Dykstra v. United States*, 140 F.3d 791, 795 (8th Cir. 1998).

Pursuant to the discretionary function exception outlined in 28 U.S.C. § 2680(a), the United States cannot be sued for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." To determine whether the discretionary function exception applies, the Court applies the following two-part test:

> First, the conduct at issue must be discretionary, involving an element of judgment or choice. The second requirement is that the judgment at issue be of the kind that the discretionary function exception was designed to shield.

Hart v. United States, 630 F.3d 1085, 1088 (8th Cir. 2011). Under the first prong, a court should consider whether a "federal statute, regulation, or policy *specifically prescribes a course of action* for an employee to follow." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (emphasis added).

Plaintiffs have not identified a federal statute, regulation, or policy that specifically stated that Neuenfeldt could not respond to the scene of the house party. Quite to the contrary, instead, the undisputed evidence is that the 638 contract considers that "the contractor may be required to leave or operate outside of Indian country" and yet still be operating "within the scope of this contract." Docket 93-1 at USA001393. The mutual assist agreement, which was an attachment to the 638 contract, also presumed that the Chief of Police could provide mutual aid to a Moody County deputy upon a direct request, whether informal or formal, due to the threat of an emergency. That is what Deputy Brakke, Sheriff Wellman, and Chief Neuenfeldt concluded occurred. Even if Neuenfeldt's conduct was not a reasonable interpretation of these contractual provisions, the United States retains immunity. *See Schmitt v. United States*, Civ. 13-5066-JLV, 2015 WL 13732659, at *4 (D.S.D. Aug. 31, 2015) ("The [discretionary function] exception covers all discretionary acts, even if the act is negligently performed or involves an abuse of discretion.") (citation omitted), *report and recommendation adopted in full*, 2016WL 117516; *see also* 28

U.S.C. § 2680(a) (providing immunity for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused*.") (emphasis added).

Judge Lange noted in *Uses Many* that traditional law enforcement decisions like how to effectuate an arrest, are those involving an element of judgment or choice and that are grounded in policy pursuant to the discretionary function test. *Uses Many v. United States*, Civ. 15-03004-RAL, 2017 WL 2937596, at *4-5 (D.S.D. July 7, 2017). Allowing a police officer to determine whether he or she may respond to a call for assistance is similar in kind to other discretionary law enforcement decisions that must be left up to the good judgment of an individual officer. *Deuser v. Vecera*, 139 F.3d 1190, 1195 (8th Cir. 1998) ("Law Enforcement decisions of the kind involved in making or terminating an arrest must be within the discretion and judgment of enforcing officers.").

Next, Plaintiffs broadly challenge Chief Neuenfeldt's decision to "re-start" a pursuit. Here, the facts establish that Neuenfeldt continued a pursuit when Trooper Kurtz lost sight, but immediately worked to get back in front of Bourassa's vehicle. In any event, courts in this district have previously found that "[h]igh-speed chases usually require the exercise of discretion, including decisions about whether to embark on such a chase, what speed to go, what route to take, whether to call for back-up, and when to curtail the chase." *Uses Many*, 2017 WL 2937596, at *4 (quoting *Hurtado v. United States*, No. H-94-2483, 1996 WL 65115, at *10-11 (S.D. Tex. Feb. 8, 1996)). This finding would encompass Neuenfeldt's decision to join the pursuit and to continue it.

Plaintiffs seem to argue via footnote that the discretionary function exception would not apply because Chief Neuenfeldt was outside his traditional jurisdiction. Docket 109 at 37, n. 9. In theory, a complete sovereign immunity defense should warrant more than a responsive footnote.

However, Plaintiffs do not establish what mandatory statute, regulation, or policy defines what constitutes "[i]n all areas of the jurisdiction." As noted above, the 638 contract terms and the mutual assist agreement expressly provide that once Chief Neuenfeldt responded to the mutual assist request he had the same authority that a Moody County Deputy would possess. Docket 97 at 37; Docket 93-1 at USA001451 ¶ 2 (responding agency "shall temporarily have the same powers and authority conferred by law on the members of the law enforcement of the party to which the assistance is rendered."). Thus, he would have been exercising his discretionary decision-making in all areas of his jurisdiction during the entirety of the pursuit even if the BIA Law Enforcement Handbook (hereafter "Handbook") provisions were mandatory. *See* Docket 97 at 34-39 (establishing pursuant to the BIA Law Enforcement Handbook's own terms and South Dakota caselaw that the Handbook contains guidelines in relation to pursuits rather than mandates for discretionary function purposes).

Next, even if the Court were to find that Neuenfeldt was engaged in a pursuit outside of his area of jurisdiction, Docket 91-11 at 21 (Handbook page 281), the relevant Handbook provision still affords for discretion. *Id.* ("A pursuit may extend beyond the reservation line, but primary control of the pursuit must be relinquished *as soon as practical* to police personnel of the entered jurisdiction if their policy allows them to enter the pursuit.") (emphasis added). This Handbook provision leaves it to the officer's judgment to determine when it is "practical" to relinquish control of the pursuit. Furthermore, an officer has the discretion to determine whether officer safety is an issue, as it is not defined in this section. Chief Neuenfeldt's testimony is that he joined Trooper Kurtz's pursuit due to his concerns for officer safety. Docket 91-2 at 281-82; Docket 110-5 at p.7. Deputy Baldini stated he joined Chief Neuenfeldt in Neuenfeldt's tribal police cruiser because he also feared for Neuenfeldt's safety. Docket 91-5 at 99, 213 (Baldini Deposition). Termination of

the pursuit when "conditions pose a safety hazard" are also not defined and leave discretion to the officer. Both Chief Neuenfeldt and Deputy Baldini testified that they did not believe that conditions were becoming unsafe during the pursuit. Docket 91-5 at 156; Docket 91-2 at 250. For these reasons, and the other factors that the police officers experienced in real time, Neuenfeldt was given discretion to join a pursuit initiated by another jurisdiction when officer safety was at issue.

Because the only policies at issue in this case are discretionary, regardless of whether they were complied with or not by the officers, the discretionary function exception to the FTCA applies and the Plaintiffs' Amended Complaint should be dismissed. *See Colombe v. United States*, Civ. 16-05094-JLV, 2019 WL 7629237, at *14 (D.S.D. July 30, 2019) (report and recommendation), *adopted in full,* 2019 WL 7628982 (Viken, J., Oct. 21, 2019) (finding "[t]hough some portions of the pursuit policy are phrased in mandatory terms, the ultimate decisions of whether to initiate and whether to continue a pursuit are left to the sound discretion of the officers.").

III. Employment Claims (Count V) Against United States Must Be Dismissed Because Plaintiffs Did Not Establish Actionable Tort Against Neuenfeldt.

Even if the Court found that Count V is not barred by the intentional tort exception, Plaintiffs' claim still is not cognizable because there has been no actionable tort committed by the employee, Neuenfeldt. *See* Docket 97 (citing *Gatling*, 2016 WL 147920, at *5 (finding "[f]or an employer to be held liable for the negligent hiring, retention, or supervision of an employee, a court must first find that the employee committed a tort."); *Total Auctions & Real Estate, LLC v. S.D. Dep't of Rev & Reg.*, 888 N.W. 2d 577, 581 (S.D. 2016) (concluding "a negligent supervision claim requires that an employee commit an underlying tort.")). Plaintiffs did not respond to this argument at all in their briefing, thus, any arguments they have on this line of authority has been waived.

IV. Jurisdictional Defense of Presentment Was Ignored, and Negligent Hiring and Retention Claims Must Be Dismissed.

Plaintiffs further failed to respond to the jurisdictional argument that they failed to present and exhaust their claims of negligent hiring or negligent retention; thus, the Court must dismiss those actions and not consider evidence pertaining to either claim. While Plaintiffs do not make a negligent hiring claim in their Amended Complaint, their continued factual assertion is that the United States breached a state law duty to conduct a background check related to Neuenfeldt prior to his hire. Under South Dakota law, this claim amounts to a negligent hiring claim, which was neither alleged in this action nor presented at the administrative level. Docket 97 at 43 (citing *Kirlin v. Halverson* to define negligent hiring as "at the time an employee was hired, it was negligent for an employer to engage the employee's services based on what the employer knew or should have known about the employee."); Dockets 66-1 and 66-2. For both reasons, dismissal is appropriate.

As to negligent retention, Plaintiffs did include this allegation in Count V of their Amended Complaint in concert with allegations of negligent training and supervision. However, Plaintiffs did not raise negligent retention in their administrative claim. There is no dispute that negligent retention is a distinct tort under South Dakota law from negligent training or supervision and must be separately presented. Docket 97 at 43 (citing *Kirlin* to define negligent retention as "alleges that information which the employee came to know or should have become aware of, after hiring the employee made continued employment of the employee negligent."). As presentment is a jurisdiction hurdle that must be surpassed for the Court to maintain jurisdiction, this allegation must be dismissed from Count V, and Plaintiffs should only be able to advance factual allegations that are grounded in negligent supervision or training claims, should any claim against the United States survive motion practice.

V. Plaintiffs Cannot Play Both Sides of the Fence on Scope of Employment.

Plaintiffs incorrectly argue that Neuenfeldt can be both a "rogue agent" without any law enforcement authority as of June 17-18, 2017, and the Court can also maintain jurisdiction over the United States under the FTCA. Docket 109 at 45 n.15 (asking the Court to "endorse Neuenfeldt as a rogue citizen"). Plaintiffs misrepresent the holding of *Shirk v. United States*. *Shirk* expressly holds that when analyzing the scope of employment analysis for a 638 contract, there is a two-step test. The first step (prior to analyzing scope of employment under state law), requires the plaintiff to "identify which [638] contractual provisions the alleged tortfeasor was carrying out at the time of the tort." 773 F.3d 999 (9th Cir. 2014).

Plaintiffs' position in this lawsuit is that Neuenfeldt was not carrying out any function of the 638 contract and could not be acting within the scope of his employment. If Neuenfeldt did not have any authority to assist Moody County, then that would necessitate a finding that the 638 Contract did not transfer the function to the tribe of providing this assistance to Moody County. If that is the finding of the Court, then Neuenfeldt could not be a federal employee for FTCA purposes because he could not have been performing activities under a 638 Contract during his mutual aid assistance. Thus, Plaintiffs' litigation position is such that they cannot establish their burden of showing the United States has waived its sovereign immunity under the FTCA.

CONCLUSION

For all of the reasons stated above, and in the United States' Brief in Support of its Motion to Dismiss (Docket 97), the Court should dismiss all counts against the United States.

Dated this 29th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of D.S.D. Civ. LR 7.1(B)(1) because it contains 11,180 words.

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