

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

4:19-CV-04006-LLP

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Plaintiffs, by and through their undersigned attorneys, respectfully submit this Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

I. PRELIMINARY STATEMENT

Plaintiffs' Motion for Summary Judgment should be granted because there was a complete and absolute failure to train Officer Neuenfeldt pursuant to the federal mandates set forth by federal statute, the Bureau of Indian Affairs Manual, and their Public Law 93-68 contract with the United States. As to the United States' failure, there is no genuine issue of material fact. Thus, Plaintiff's request this Court grant their Motion based on the following:

1. The United States and the Flandreau Santee Sioux Tribe (herein “Tribe”) were mandated by 25 C.F.R. Part 12, the Bureau of Indian Affairs Manual (herein “BIA Manual”), and their contract with the United States pursuant to Public Law 93-638 (herein “638-contract”), to train, supervise, and retain tribal police offices in accordance with federal law;
2. The United States and the Tribe breached their duty to train, supervise and retain tribal police officers in compliance with 25 C.F.R. Part 12, the BIA Manual, and their 638-contract; and,
3. The United States and the Tribe’s breach of their absolute duties under 25 C.F.R. Part 12, the BIA Manual, and their 638-contract were the proximate and legal cause of Plaintiffs’ tragedy, on the morning of June 18, 2017.

Micah Roemen and Morgan Ten Eyck were tragically injured in the early morning hours of June 18, 2017, when Officer Rob Neuenfeldt pushed a vehicle that Roemen and Ten Eyck were passengers in, down a dead-end road. The high-speed chase ended when the vehicle rolled multiple times and all passengers were ejected. Roemen and Ten Eyck were catastrophically injured. Ten Eyck suffered brain and spinal cord injuries, which will confine her to a wheel chair without any ability to speak or walk the rest of her life. Roemen’s back and neck sustained numerous fractures and he has had multiple surgeries on his leg. The driver of the vehicle sustained permanent brain damage.

At the time of the tragedy, Neuenfeldt was a tribal officer for the Tribe. The Tribe was under contract with the United States pursuant to Public Law 93-638 and the Indian Self Determination and Education Assistance Act (herein “ISDEAA”). The term of the 638-contract ran from October 2015 to

September 2018. Under the contract, the United States and the Tribe were bound to each other through a trust relationship that would allow for the tribe to perform federal functions, in exchange for federal funding. The specific federal function at issue in this case is the Tribe's mandatory duty to provide safe and effective law enforcement for their community. As part of this responsibility, the Tribe was required to train, supervise, and retain all of their tribal officers in accordance with federal laws and policies.

The 638-contract binding the Tribe and United States listed at multiple pages the absolute responsibility imparted on the Tribe to provide adequate training under federal law to its tribal officers. At multiple pages, the 638-contract iterated the Tribe's absolute responsibility to uphold the BIA Manual and 25 C.F.R. Part 12 in their supervision and retention of their federal employees, which included Neuenfeldt.

On December 7-9, 2015, just one month before Neuenfeldt was hired as a tribal officer with the Tribe, the Bureau of Indian Affairs (herein "BIA") Office of Justice Services (herein "OJS") sent a team of federal employees to audit the Tribe's compliance with the 638-contract, BIA Manual, and 25 C.F.R. Part 12. The audit unveiled that the Tribe was only 19% compliant and 81% non-compliant with the requirements of the 638-contract. The BIA OJS Agent in charge of the audit notified the Tribe of their lack of compliance with the federal laws and policies they were required to be upholding, like the mandates within their 638-contract, the BIA Manual and 25 C.F.R. Part 12, by submitting a corrective action plan to the Tribe. Then, over the next year and a

half, the BIA OJS Agent notified the Tribe of their noncompliance, repeating his concerns three separate times:

1. On **December 30, 2015**, the BIA OJS Agent notified President Reider that the Tribe must take necessary corrective actions immediately to uphold their federal mandates or the tribal police officers functioning under the 638-contract should cease operating as federal police officers;

2. On **March 30, 2016**, the BIA OJS Agent reported to President Reider, after a follow up site visit with the Tribe, that the Tribe had not taken any of the necessary corrective actions recommended and the deficient tribal police officers were still operating as federal police officers;

2. On **April 18, 2017**, the BIA OJS Agent, again instructed President Reider, after another follow up site visit with the Tribe, that the Tribe still had not taken any of the necessary corrective actions recommended, were not in compliance with the required federal mandates, and were still allowing deficient police officers to operate as federal police officers.

Following the December 7-9, 2015 audit, in January 2016, Neuenfeldt was hired by the Tribe. Neuenfeldt had a history of misconduct relating to high-speed pursuits, jurisdictional failures, and improper use of force. From the date of Neuenfeldt's hire to June 17, 2017, the Tribe failed to train him in any respect, under the federal mandates required under the 638-contract, the BIA Manual and 25 C.F.R. Part 12.

Neuenfeldt's deposition took place in February 2021. During the deposition, Neuenfeldt confirmed that the Tribe and federal government failed to train him under the federal mandates required. Neuenfeldt did not receive his bridge training. Neuenfeldt did not even receive a BIA Manual or the training required of all federal officers under the BIA Manual. Neuenfeldt did not complete the mandatory forty hours of in-service training. In addition, the Tribe continued to allow untrained officers, like Neuenfeldt, to remain

operating as a federal police officers, even after the BIA instructed them not to.

Following Neuenfeldt's deposition, Plaintiffs were granted leave to amend their initial complaint and did so, realleging all causes of action and adding a cause of action for negligent training, supervision and retention. Plaintiffs received supplemental disclosures from the United States on August 11, 2021. Within those disclosures were the Tribe's 638-contract, documents relating to the BIA OJS Agent's audit and the three letters mandating the Tribe's compliance with 25 C.F.R. Part 12 from the BIA OJS Special Agent, which ultimately prompted this Summary Judgement Motion.

It is undisputed that the Tribe, and by virtue of their trust relationship the United States, were mandated to provide training and appropriately supervise their tribal officers, like Neuenfeldt. It is undisputed that the Tribe was not given an option to retain untrained officers as tribal officers operating under a federal badge. Likewise, it is undisputed that the Tribe and the United States failed to train Neuenfeldt under the mandatory federal directives imparted upon them. These realities caused the tragedy on the morning of June 18, 2017. No fact in evidence disputes these propositions. Thus, Plaintiffs respectfully request this Court grant their Motion for Summary Judgement on the issues of negligent training, retention and supervision.

II. STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Wood v. Foremost Ins., Co.*, 477 F.3d 1027, 1028 (8th Cir. 2007) (citing

Fed. R. Civ. P. 56 (c)). “To successfully oppose a motion for summary judgment, the nonmoving party must present evidence of a genuine dispute of material fact.” *American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 110-11 (8th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). A “material” fact is one “that might affect the outcome of the suit under the governing law.” *Johnson v. Crooks*, 326 F.3d 995, 1005 (8th Cir. 2003) (quoting *Liberty Lobby, Inc.*, at 248).

“The mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment.” *GetAway Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992). “Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and ‘by affidavit or otherwise’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir. 1992) (quoting Fed. R. Civ. P. 56 (c)). “The dispute must be outcome determinative under prevailing law.” *Id.* (quoting *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989)).

III. RELEVANT STATUORY AUTHORITY

a. 25 C.F.R. Part 12.32

Law enforcement authority is only entrusted to personnel possessing adequate education and/or experience, training, aptitude, and high moral character. All Indian country law enforcement programs receiving Federal funding and/or authority **must** ensure that **all law enforcement officers** successfully complete a thorough background investigation no less stringent than required of a Federal officer performing

the same duties. The background investigations of applicants and employees **must** be adjudicated by trained and qualified security professionals. All background investigations **must** be documented and available for inspection by the Bureau of Indian Affairs.

Do Minimum Employment Standards Include A Background Investigation, 25 C.F.R. Part 12.32 (2021) (emphasis added).

b. 25 C.F.R. Part 12.35

Law enforcement personnel of any program funded by the Bureau of Indian Affairs **must not** perform law enforcement duties until they have successfully completed a basic law enforcement training course prescribed by the Director. The Director will also prescribe **mandatory** supplemental and in-service training courses.

Do Indian Country Law Enforcement Officers Complete Any Special Training, 25 C.F.R. Part 12.35 (2021) (emphasis added).

c. 25 C.F.R. Part 12.36

All requests for evaluation of equivalent training **must** be submitted to the Indian Police Academy for review, with final determination made by the Director. Requests for a waiver of training requirements to use personnel before completing the required courses of instruction **must** be submitted to the Director and approved or disapproved by the Commissioner of Indian Affairs. In no case will such a waiver allow personnel to be used in any position for more than one year without achieving training standards. **Failure to complete basic training requirements will result in removal from a law enforcement position.**

Does Other Law Enforcement Training Count, 25 C.F.R. Part 12.36 (2021) (emphasis added).

The parameters of the above Federal statutes use mandatory language throughout the description of their mandate. There is no discretion imparted regarding required background checks, required training, or the waiver of such training. (Plaintiff's Statements of Undisputed Material Fact at ¶¶ 8, 10,

and 12.) In this case, and as this brief will establish, these mandates were entirely ignored.

IV. FACTUAL BACKGROUND

a. The United States' 638-Contract With The Flandreau Santee Sioux Tribe

The Tribe began contracting with the United States government under the contractual auspices of Public Law 93-638, pursuant to 25 U.S.C. § 5321, the ISDEAA, in October 2015. The term of the contract ran from October 1, 2015 to September 30, 2018. The Tribe was the “contractor” under the 638-contract and was required to perform all “programs, services, functions and activities as provided in the annual funding agreement” in order to continue to receive funding from the United States government. (Plaintiff’s Statements of Undisputed Material Fact at ¶¶ 1 and 2.)

Included within these 638-contract requirements is the absolute responsibility of the contractor to uphold 25 C.F.R. Part 12 and the BIA Manual. On page three of the 638-contract, it states:

- (3) PROGRAM STANDARD.** The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards:

UNIFORMED POLICE PROGRAM STANDARDS

- Flandreau Santee Sioux Tribal Constitution
- 25 CFR Part 12 (April 1, 2009)
- 25 C.F.R. Part 900, Subpart F, Standards for Tribal or Tribal Organization Management Systems (April 1, 2009)
- 25 C.F.R. Part 63, Indian Child Protection and Family Violence Prevention (April 1, 2009)
- Tribal and federal court decisions, as they relate to the Tribe's criminal and civil jurisdiction
- The Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*
- 40 Indian Affairs Manual
- Bureau of Indian Affairs' Law Enforcement Services Handbook
- Other statutory requirements cited herein

(Plaintiff's Statements of Undisputed Material Fact at ¶ 3.) On page seven of the 638-contract, the Tribe's mandatory duty to uphold these standards is reaffirmed. (Plaintiff's Statements of Undisputed Material Fact at ¶ 1.) On page eight of the 638-contract, the United States' obligations to the contract are stated:

(d) OBLIGATION OF THE UNITED STATES.

(1) TRUST RESPONSIBILITY.

- (A) IN GENERAL.** The United States reaffirms the trust responsibility of the United States to the FLANDREAU SANTEE SIOUX TRIBE Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.
- (B) CONSTRUCTION OF CONTRACT.** Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

(Beardsley Aff., Ex. 1 at USA001314: Flandreau Santee Sioux Tribe PL 93-638

Contract, produced on 8/11/2021.)

Within the annual funding agreement of the 638-contract, the contractor's mandatory responsibilities are thoroughly identified. On page seven of the annual funding agreement, the contract, again, states it "shall" be the mandatory responsibility of the tribe to ensure the programs instituted by the use of federal funding adhere to specific standards, stating:

B. Intent. The Contractor shall conduct programs and services under this Contract to address Tribal priorities and needs as determined by the Tribal Council. The program(s) to be conducted shall include any and all services authorized by law, for which funds have been appropriated to the Bureau of Indian Affairs (BIA) or made available from other agencies through the BIA. Funds made available may be utilized to acquire other resources to further the objectives of this agreement. The Contractor shall operate programs under this contract in accordance with the following standards:

- (1) **Public Safety and Justice Programs.** [25 USC 13; 25 USC 450; 31 USC 63; 25 USC 318(a); 25 USC 2451_2455; 25 USC 3601; 25 CFR 275] Programs which promote social order and provide for the safety of the community.

UNIFORMED POLICE PROGRAM STANDARDS

- Flandreau Santee Sioux Tribal Constitution
- 25 CFR Part 12 (April 1, 2009)
- 25 C.F.R. Part 900, Subpart F, Standards for Tribal or Tribal Organization Management Systems (April 1, 2009)
- 25 C.F.R. Part 63, Indian Child Protection and Family
- Violence Prevention (April 1, 2009)
- Tribal and federal court decisions, as they relate to the Tribe's criminal and civil jurisdiction
- The Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq.
- 40 *Indian Affairs Manual*

- *Bureau of Indian Affairs' Law Enforcement Services Handbook*
- Other statutory requirements cited herein

(Plaintiff's Statements of Undisputed Material Fact at ¶ 4.) The purpose of the 638-contract and these express provisions, is to "ensure that professional, effective and efficient law enforcement police services are provided for the Flandreau Santee Sioux Tribe." (Beardsley Aff., Ex. 2 at USA001327: Flandreau Santee Sioux Tribe's Annual Funding Agreement, produced on 8/11/2021.) Page fourteen of the annual funding agreement further states the mandatory "duties and responsibilities" of the Tribe, stating:

(3) **Duties and Responsibilities.** The Contractor shall ensure that the **Patrol Division of Law Enforcement** (Uniformed Police) performs the following duties and responsibilities. The Contractor:

(a) Shall provide law enforcement services for all lands within the boundaries of Flandreau Santee Sioux Reservation and on all trust lands under the jurisdiction of FSST, said services to include but not necessarily be limited to keeping the peace, enforcing **Tribal laws** and Tribal Ordinances on non-trust land, and enforcing FSST Ordinances on trust land.

...

(d) In addition to the qualifications and training required by the State of South Dakota , all officers shall be given paid time off to attend training in federal and tribal laws and issues and shall meet the minimum requirements of the Bureau of Indian Affairs in order to serve as a federal officer on Tribal lands.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 4.) Additionally, the training requirements outlined in the annual funding agreement also contain numerous mandatory provisions the Tribe is required to follow:

- (4) **Training Requirements:** The Contractor shall ensure that newly employed law enforcement officers successfully complete the approved Basic Police Officer Training Program conducted at the Indian Police Academy (IPA), or equivalent training, as determined by the Indian Police Academy and the Deputy Bureau Director, Law Enforcement Services.
- (a) In addition to the qualifications and training required by the State of South Dakota, all officers shall be given paid time off to attend training in federal and tribal laws and issues and shall meet the minimum requirements of the Bureau of Indian Affairs in order to serve as a federal officer on Tribal lands.
 - (b) Every effort shall be made to provide this training immediately upon entry on duty, but requisite training standards shall be achieved before the end of the first year of employment.
 - (c) An officer who fails to complete the training required by this paragraph shall be removed from the law enforcement position.

Annual Funding Agreement
Law Enforcement Services
Flandreau Santee Sioux Tribe, Contract No.: A16AV00045

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(Plaintiff's Statements of Undisputed Material Fact at ¶ 4.)

To ensure the Tribe's compliance with the 638-contract and Federal requirements, the Bureau of Indian Affairs' Office of Justice Services performs periodic audits, covered on pages three and four of the contract:

(C) RESPONSIBILITIES OF CONTRACTOR. The Contractor shall be

Section 108 (c) Model Contract
Law Enforcement Services
Flandreau Santee Sioux Tribe, Contract No. A16AV0045

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responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the Contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless:

- (i) the Contractor agrees to one or more additional visits; or
- (ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 15.)

b. The BIA Law Enforcement Services Handbook

The 638-contract mandates the Tribe, in addition to complying with 25 C.F.R. Part 12, also comply with the BIA Manual. Under Section 6 of the BIA Manual, “[a]ll individuals hired for the position of law enforcement officer/special agent must successfully complete the approved Basic Law Enforcement Training Program prior to appointment as a law enforcement officer/special agent.” (Plaintiff's Statements of Undisputed Material Fact at ¶ 5.) Individuals who have completed a “non-BIA basic police officer” training program may request a certification by waiver pursuant to 25 C.F.R. Part 12.

(*Id.*) Even if the individual hired for the law enforcement position is granted a certification by waiver pursuant to 25 C.F.R. Part 12, the individual is still required to complete Basic Police Officer training at the Indian Police Academy (herein “IPA”) in Glynco, Georgia. (Plaintiff’s Statements of Undisputed Material Fact at ¶¶ 6 and 12.)

In addition to upfront requirements for training, “[a]ll law enforcement personnel are required to attend a minimum of forty hours of in-service training annually to enhance skills and increase knowledge for their job responsibilities.” (Plaintiff’s Statements of Undisputed Material Fact at ¶¶ 7 and 14.) The Special Agent in Charge “will ensure that staff participates in an on-going training program for law enforcement personnel.” (Beardsley Aff., Ex. 3 at USA000644: BIA Law Enforcement Handbook, produced on 8/14/2020.)

Beyond training and in-service, law enforcement personnel were supposed to familiarize themselves with numerous policies within the BIA Manual. These policies include: high-speed pursuit policies and policies for pursuits beyond the jurisdiction of the reservation. (Beardsley Aff., Ex. 3 at USAA000361-000364, USA000366: BIA Law Enforcement Handbook, produced on 8/14/2020.) As discussed below, Officer Neuenfeldt testified he did not even receive the BIA Manual when the Tribe hired him:

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

47:19 A. No.

47:20 Q. Ever seen it?

47:21 A. I was not given one.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 24.)

c. BIA OJS December 2015 Audit

In December 2015, two months into the term of the Tribe's 638-contract, a BIA monitoring team consisting of Danny Meyer, BIA OJS Captain, Cheryl Sam, BIA OJS Program Analyst, and Joel Chino, BIA OJS Assistant Special Agent, performed a three-day audit of the Tribe's compliance with the 638-contract and the Federal requirements. (Plaintiff's Statements of Undisputed Material Fact at ¶ 16.) At the conclusion of the BIA monitoring team's audit, the Tribe was determined to be 19% in compliance with the 638-contract and Federal requirements. (Plaintiff's Statements of Undisputed Material Fact at ¶ 17.)

The audit "process requires 100% compliance with the mandatory standards identified" in the audit manual. (Plaintiff's Statements of Undisputed Material Fact at ¶ 18.) The audit manual's requirements for training and record-keeping are nearly identical and in-line with the requirements set forth in the 638-contract, required under 25 C.F.R. Parts 12.32, 12.35, and set forth in the BIA Manual:

One Time Requirements and Reoccurring Requirements (Other Than Annual):

1. Background Investigation (when hired and every 5 years);
2. Basic Academy Certification or equivalent (when training program is completed).
3. Indian Police Academy Bridge Certification (when training program is completed).
4. First Aid & CPR (2 years).
5. Certificate of Medical Exam (physical) (2 years);
6. Property Issuance Documentation (as Needed when Equipment Received);
7. Domicile Form (as Needed).
8. Basic Supervisory Training (for supervisors only, when completed).

Annual Policy Acknowledgements and Trainings:

1. Annual Oath of Office.
2. Annual Code of Conduct.
3. Annual Code of Ethics.
4. Domestic Violence Wavier.
5. Employee Performance Appraisal Plans.
6. Motor Vehicle Operators License.
7. Weapons Qualifications & Use of Force (Semi-Annual Requirement).
8. Physical Exercise Battery (PEB).
9. 40 hours In-service/Continuing Education Training Certificates.

Annual Monitoring Visit- FSST

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(Plaintiff's Statements of Undisputed Material Fact at ¶ 19.)

Following the audit, the Tribe was notified of the deficiencies found during the three-day audit:



**BIA OFFICE OF JUSTICE SERVICES
DISTRICT I
SELF-AUDIT REPORT-
Flandreau Santee Sioux Tribal Law Enforcement
"The Honor is to Serve"**



Deficiencies Identified

Based upon Findings during this review the District I office has identified the following deficiencies which must be addressed by the Chief of Police as well as other deficiencies outlined within the Corrective Action Plan:

- All officers of the department do not have completed backgrounds.
- Lack of completed records for firearms qualifications.
- Complete accountability of all firearms and proper securing of firearms within the agency and vehicles.
- Vehicles are not properly equipped with fire extinguisher, trauma bag, etc.
- Communications/dispatch systems need to be updated and made operational. Officers are not able to communicate with dispatch other than cell phone service.
- An incident/report log needs to be developed for proper documentation of all received calls for service and reports.
- Officers are not issued proper fitting ballistic vests or vests are expired.
- Evidence room needs to be updated and brought within policy.
- Personnel files are not in place for employees.



**BIA OFFICE OF JUSTICE SERVICES
DISTRICT I
SELF-AUDIT REPORT-
Flandreau Santee Sioux Tribal Law Enforcement
"The Honor is to Serve"**



Suggested Documents to Maintain in Personnel Files:

1. Credentials (officers were not issued credentials from the tribe).
2. Position Descriptions.
3. Photos of Weapons and Issued Equipment.

Upon review of documentation provided or not provided there were several areas identified for correction.

One Time Requirements and Reoccurring Requirements (Other Than Annual)

1. Background Investigations and/or Security Clearance:

Out of the 4 employees of the law enforcement agency, none contained an adjudicated background investigation.

2. Basic Academy or Equivalent Certification

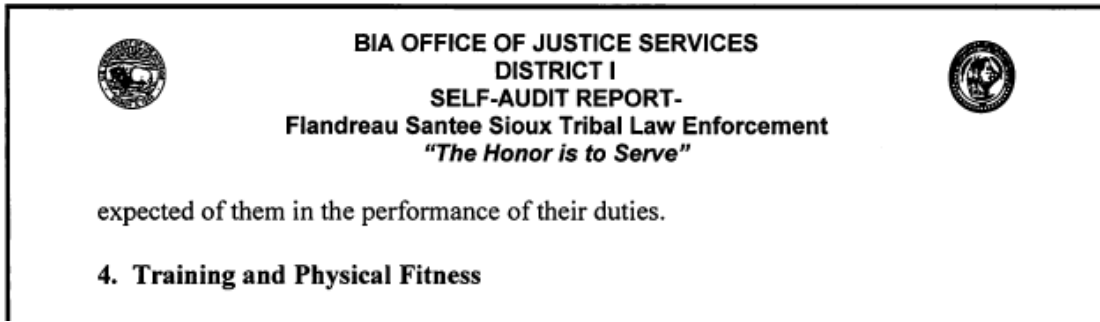
Each Police Officer is required to complete the IPA BPOTP successfully or a program of equal or higher standard. If the Officer attends a program of equal or higher standard to the IPA BPOTP the completion of the IPA Bridge Program is required. The IPA Bridge program was established to "bridge" the gap of training and to provide a higher understanding of the unique laws and circumstances of Law Enforcement work in Indian Country.

All Law Enforcement Personnel have either attended an IPA program or an equal or higher standard to the IPA BPOTP. Personnel who have attended a state academy should be scheduled for a bridge program as soon as possible.

3. Weapons Qualifications and Use of Force Training

Each Officer is required to qualify on each of the weapons they carry on a semi-annual basis. This is to ensure each Officer is capable to use each weapon with accuracy, if ever needed.

Out of the 4 officers 4 have qualified on at least one weapon and received Use of Force Training within the last **six months** but do not have proper documentation



(Beardsley Aff., Ex. 5 at USA001259-001260: BIA Office of Justice Services Self-Audit Report completed on 1/7/15, produced on 8/11/2021.) At the conclusion of December 2015 Audit, the BIA OJS issued a corrective action plan, with deadlines by which the corrections had to be made. (Plaintiff's Statements of Undisputed Material Fact at ¶ 20.) The Special Agent in Charge memorialized the details of the visit in a letter to Anthony Reider, President of the Tribe:



United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Office of Justice Services
115 4th Ave. SE
Aberdeen, SD 57401

IN REPLY REFER TO:

December 30, 2015

Anthony Reider, President
Flandreau Santee Sioux Tribe
P.O. Box 283
Flandreau, SD 57028

Dear President Reider:

During an on-site program monitoring review of the Flandreau Santee Sioux Tribe P.L. 93-638 Law Enforcement program contract that was conducted by BIA Office of Justice Services personnel December 7 – 9, 2015, there were several program contract deficiencies which were shared with the Chief of Police and yourself during an exit meeting. Those findings will be included within the final program monitoring review report to be sent to the tribe at a later date, but we must note that overall the FSST law enforcement program is not in compliance with 81% of the evaluation criteria.

However, there are a couple serious issues which were discovered that must be immediately addressed as the risk the tribe assumes with regard to the high liability issues poses a potential concern for the safety and welfare of tribal members and those in the communities. The issues involve a lack of completed and adjudicated background investigations for all Police Officers, including the Chief of Police. The second issue involves the sub-agreements the tribe has entered into with the Moody County Sheriff's Office and the Flandreau Police Department.

With regard to the Background Investigations (or lack of) issues, it was revealed that there are uniformed Police Officers actively employed who do not have an adjudicated Background Investigation (BI) available for review. Without having a favorable adjudicated background investigation, this also poses liability issues and those officers must cease performance of their duties as a police officer until such time as the tribe is in compliance with the following mandatory federal standard at 25 CFR §12.32 as follows:

“Law Enforcement authority is only entrusted to personnel possessing adequate education and/or experience, training, aptitude, and high moral character. All Indian country law enforcement programs receiving Federal funding and/or authority must ensure that all law enforcement officers successfully complete a thorough background investigation no less stringent than required of a Federal officer performing the same duties. The background investigations of applicants and employees must be adjudicated by trained and qualified security professionals. All

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background investigations must be documented and available for inspection by the Bureau of Indian Affairs.”

Please take the necessary corrective actions immediately and provide written notification and response by COB, January 15, 2016, explaining the tribe’s plan to address the serious issues noted above and indicate what further action is to be taken by the Flandreau Santee Sioux Tribe to be in compliance with the self-determination contract and applicable statutes, laws and regulations related to this matter.

The issue with the sub-agreements the tribe has entered into with Moody County and Flandreau Police Department which we must bring to the attention of the tribe specifies that each entity (e.g Tribal Officers, County Officers, Flandreau Officers) “shall assume liability for any personal injury, death, property damage or loss of any nature attributed to the actions of their perspective law enforcement officers, irrespective of jurisdiction”. While the tribe is not limited by the Indian Self-Determination and Education Assistance Act as to who the tribe can and cannot enter into contractual obligations and agreements with, the level of Federal Tort Claims Act (FTCA) and liability of coverage for police officers employed by the tribe utilizing funding provided to the tribe through a self-determination contract is limited. The self-determination contract agreement provides funding for the tribe to provide “law enforcement services on the reservation”. Therefore, if the tribe enters into sub-agreements to assist and provide law enforcement services outside or off the reservation, FTCA coverage would not follow as it would be outside the scope of the self-determination contract and the tribe (not the federal government) would assume all liability for any unfortunate incident which may occur in the process of providing assistance to those entities.

Should you have questions or need additional assistance, please contact ASAC Joel Chino at (605) 226-7347.

Sincerely,



Special Agent in Charge

CC: Nicholas Cottier, Chief of Police
Awarding Official, BIA-GPRO

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(Plaintiff’s Statements of Undisputed Material Fact at ¶ 21.)

Following the December 2015 audit, the Special Agent in Charge

performed a follow-up site visit on January 7, 2016 and reported that little or no action had been taken by the Tribe to address the aforementioned deficiencies. (Plaintiff's Statements of Undisputed Material Fact at ¶ 22.) On March 30, 2016, the Special Agent, again, formally notified the Tribe of their continuing deficiencies and that the Police Chief, Robert Neuenfeldt, and officers that lacked required background checks and training should not be "performing law enforcement functions":



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Office of Justice Services
115 4th Ave. SE
Aberdeen, SD 57401

March 30, 2016

Anthony Reider, President
Flandreau Santee Sioux Tribe
P.O. Box 283
Flandreau, SD 57028

Dear President Reider:

As follow up to the on-site law enforcement program review BIA-Office of Justice Services (OJS) conducted in late 2015, and continuation of technical assistance and communication with the tribe's law enforcement personnel, we have the following update to provide that indicates very little progress to take the corrective actions necessary for compliance with the contract.

During a follow up site visit on January 7, 2016 with the Chief of Police, we provided a brief update of all the deficiencies, in particular the federally required background investigations that the tribe failed to comply with. Currently, the tribe employs three (3) unformed officers to include the Chief of Police. At this time, one officer is on administrative leave for allegations of misconduct, which leaves the remaining two to provide 24 hour coverage. Neither the Chief of Police nor the other two police officers have provided documentation to verify they have complete adjudicated backgrounds, thus, neither should be performing law enforcement functions. The tribe was notified of these stipulations back in a letter dated December 30, 2015 (copy attached). In addition, there has been little or no action taken to correct the following deficiencies, some of which continue to pose serious liability issues:

- The allegation of misconduct against Officer Cottier has never been reported to the BIA OJS Internal Affairs Division and BIA OJS District 1 Office as is stipulated within the terms and conditions of the P.L. 93-638 self-determination contract which provides the funding to the tribe to perform law enforcement functions on the reservation.
- Communications/Dispatch systems still cease to be updated and operational, thus the police officers are unable to communicate with dispatch other than via cell phone.
- Incident/Report logs continue to be non-existent and must be developed in order to properly document all received calls for service and follow-up reporting.
- Police Officers have not been issued proper fitting ballistic vests and/or they are using expired vests.

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It appears the tribe acknowledges much of these deficiencies remain as the tribe has asked for the assistance from BIA OJS to provide police officers to assist the tribe in the provision of law enforcement services on the reservation via a March 28, 2016 letter to BIA OJS. In response to the tribe's request, we will provide follow-up and response if we are able to identify the resources and manpower to do so.

The BIA OJS will continue communication and to provide technical assistance to the tribe in your endeavor to provide law enforcement services on the reservation. However, in the event the tribe is unable to comply with the terms and conditions of the P.L. 93-638 self-determination contract or continues to be unable to perform law enforcement services on the reservation with the funding provided, the tribe has the option to retrocede the contract and/or in worst case scenario, the bureau may be compelled to proceed with re-assumption of the contract due to continued failure to comply with the terms and conditions of the contract which pose a potential endangerment to the health, safety or welfare of tribal members. The bureau would most certainly step in if the tribe is unable to hire qualified and trained police officers who are able to complete and receive a favorable adjudicated background investigation.

Should you have questions or need additional assistance, please contact ASAC Joel Chino at (605) 226-7347.

Sincerely,



Special Agent in Charge

CC: JayDee Nelson, Chief of Police
Awarding Official, BIA-GPRO

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(Plaintiff's Statements of Undisputed Material Fact at ¶¶ 9 and 23.)

Two months before the horrific crash prompting this case, on April 18,

2017, the Tribe was notified, again, of their unaddressed deficiencies. Special Agent in Charge, again, instructed the police officers not in compliance with the 638-contract and Federal requirements to cease all “law enforcement functions”:



IN REPLY REFER TO:
(605) 226-7347

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Office of Justice Services
115 4th Ave. SE
Aberdeen, SD 57401

April 18, 2017

Anthony Reider, President
Flandreau Santee Sioux Tribe
P.O. Box 283
Flandreau, SD 57028

Dear President Reider,

This is to notify the Tribe of contract non-compliance issues regarding the current status of ‘incomplete’ background investigations of Police Officers employed by the Flandreau Santee Sioux Tribe (FSST), which are hired and paid via P.L. 93-638 self-determination contract no. A16AV00045.

As follow up to the on-site law enforcement program review conducted by BIA-Office of Justice Services (OJS) during the week of April 3rd, 2017, and continuation of technical assistance and communication with the tribe’s law enforcement personnel, we have the following update to provide that indicates serious contract compliance issues related to the lack of complete adjudicated background investigations (BI).

During this second follow up site visit and on-going technical assistance with the Acting Chief of Police, we provided a brief update of all the deficiencies, in particular the federally required background investigations that the tribe failed to comply with during the previous on-site monitoring visit. Currently, the tribe employs three (3) unformed officers to include the Acting Chief of Police. At this time, two of the three police personnel are performing law enforcement functions without complying with mandatory federal background requirements which should have been completed prior to completion of training requirements. Both the Acting Chief of Police and one of the police officers are unable to provide documentation to verify they have complete adjudicated backgrounds which deem them suitable with a favorable BI, thus, neither should be performing law enforcement functions.

The tribe was notified of the seriousness of this non-compliance issue in previous correspondence issued to the tribe dated December 30, 2015 and again on March 30, 2016 (copies attached). Within both prior notifications, the tribe was made aware that there are in fact Police Officers employed by FSST that are patrolling and actively working without a completed and adjudicated background investigation in place. This violates required federal regulatory requirements found at 25 CFR, Part 12, Subpart D § 12.32 which states:

"Law Enforcement authority is only entrusted to personnel possessing adequate education and/or experience, training, aptitude, and high moral character. All Indian country law enforcement programs receiving federal funding and/or authority must

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ensure that all law enforcement officers successfully complete a thorough background investigation no less stringent than required of a Federal officer performing the same duties. The background investigations of applicants and employees must be adjudicated by trained and qualified security professionals. All background investigations must be documented and available for inspection by the Bureau of Indian Affairs".

In addition, with regard to special training requirements mandated at 25 CFR, Part 12, Subpart D § 12.35, stipulates the following:

"Law Enforcement personnel of any program funded by the Bureau of Indian Affairs must not perform law enforcement duties until they have successfully completed a basic law enforcement training course prescribed by the Director..."

As indicated above, for those officers who are currently performing law enforcement functions, without a complete adjudicated background investigation, no less stringent than that of a federal officer, which deems them suitable for employment as a Police Officer (favorable rating), should not be performing law enforcement duties until background requirements are met.

If the Tribe would like for the BIA OJS to assist the tribe with completion of these backgrounds, including investigation and adjudication free of charge, each officer would need to access the background questionnaire at: http://www.opm.gov/forms/pdf_fill/sf86.pdf. If the tribe chooses not to utilize this resource, you will need to provide OJS with all documentation and paperwork to verify each of the officers have completed, adjudicated background investigations no less stringent than required of a federal officer. The results of the BI must deem them suitable for employment in a police officer position with a favorable rating.

Continued failure to comply with this requirement may result in Suspension, withholding, or delay in payment of funds, pursuant to the authority contained in Title I, Section 106(l) [25 USC 5325 (l)], questioned and/or disallowed costs for the program, up to and including the process to begin reassumption of the P.L. 93-638 contract in accordance with 25 CFR § 900.248, and any additional action that may be taken by the Awarding Official.

Should you have any questions concerning the above, please contact this office at (605) 226-7347.

Sincerely,


Special Agent in Charge

Enclosure(s): FSST Previous Issued Letters [December 30, 2015] [March 30, 2016]

(Plaintiff's Statements of Undisputed Material Fact at ¶ 24.)

d. Neuenfeldt's Lack of Training

Robert Neuenfeldt was hired in January 2016 by the Tribe, just one month after BIA OJS' December 2015 audit. Between January 2016 and June 17, 2017, Neuenfeldt, at the time an FSS Tribal Officer, did not receive any of the mandatory training required by 25 C.F.R. Part 12, the BIA Manual, or the 638-contract, which BIA OJS Special Agent made the Tribe aware of on three separate occasions. (Plaintiff's Statements of Undisputed Material Fact at ¶¶ 11 and 26.) Neuenfeldt never certified by waiver his previous "Basic Officer Certification Course" training pursuant to 25 C.F.R. Part 12.36. *See* 25 C.F.R. Part 12.36; *see also* (Plaintiff's Statements of Undisputed Material Fact at ¶ 13.)

Neuenfeldt never underwent bridge training, training at the Federal Indian Police Academy ("IAP"), any sort of equivalent to IAP training, or the 40 hours of required annual in-service training under the BIA Manual. (Plaintiff's Statements of Undisputed Material Fact at ¶¶ 5, 6, 7, 11, 17, 20, and 26.) Only after this tragic accident, which occurred outside of the Tribe's jurisdiction, did Neuenfeldt receive any training on jurisdiction. (Beardsley Aff., Ex. 4 at 113:2-113:7; Deposition of Robert Neuenfeldt, 2/24/2021.)

e. The Pursuit

Two months after BIA OJS Special Agent's third letter to the Tribe regarding tribal officers lacking necessary background checks and federal training, Neuenfeldt showed up to a teenage party outside of the geographic

limits of the Flandreau Santee Reservation. Without jurisdiction and without the necessary federal training, Neuenfeldt would engage in a perilous high-speed chase.

Neuenfeldt converged upon the teenage party, when Deputy Carl Brakke of the Moody County Sheriff's Office radioed for an ambulance for a teenager having a seizure on the property. (Plaintiff's Statements of Undisputed Material Fact at ¶ 33.) While a Law Enforcement Assist Agreement existed between the Tribe and the Moody County Sheriff's Office, the Tribe was only allowed to exercise jurisdiction under that agreement, outside of their reservation boundaries and into Moody County, when there was a "proper request" for assistance:

NOW THEREFORE, it is hereby agreed by and among the parties as follows:

(1) In the event of or the threat of an emergency, disaster, or widespread conflagration which cannot be met with the facilities of one of the parties to this agreement, the other party agrees, upon proper request, to furnish law enforcement assistance to the party requesting the assistance upon either an actual or standby basis. The extent of assistance to be furnished under this agreement shall be determined solely by the party furnishing the assistance, and it is understood that the assistance furnished may be recalled at the sole discretion of the furnishing party.

LAW ENFORCEMENT ASSIST AGREEMENT
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- (a) A proper request for the Tribe shall only be communicated directly, either formally or informally, by the Tribal President or the Chief of Police, or the Chief's designee(s), to the Sheriff's or the Sheriff's designee(s).
 - (b) A proper request for the County shall only be communicated directly, either formally or informally, by the Sheriff's Office or the Sheriff's designee(s), to the Tribal Chief of Police or the Chief's designee.

(Plaintiff's Statements of Undisputed Material Fact at ¶¶ 34 and 35.) However, Neuenfeldt's assistance outside of the jurisdiction of the reservation on the fateful evening of June 17, 2017, was never requested. (Plaintiff's Statements of Undisputed Material Fact at ¶ 36.)

Plaintiffs were passengers in a vehicle driven by Tahlen Bourassa. The Bourassa vehicle was traveling north on 484th avenue when it encountered a southbound highway patrol car driven by Isaac Kurtz. Trooper Kurtz then turned around and activated his patrol car emergency lights. As Bourassa continued north on 484th street, he approached Defendant Neuenfeldt standing on the west side of the road and Moody County Deputy Logan Baldini standing on the east side of the road. Neuenfeldt and Baldini were located at the end of a driveway leading up to where an underage party had taken place. As Bourassa approached Neuenfeldt and Baldini, Bourassa slowed the vehicle then stopped, as requested by law enforcement. (Beardsley Aff., Ex. 4 at 149:3-149:8; Deposition of Robert Neuenfeldt, 2/24/2021.)

At that time, without any violations of law committed by Bourassa, Neuenfeldt pulled his gun and pointed it at Bourassa. (Beardsley Aff., Ex. 4 at 152:9-152:16; Deposition of Robert Neuenfeldt, 2/24/2021.) After a brief stop, the truck accelerated and veered to the left, leaving the scene. (Plaintiff's Statements of Undisputed Material Fact at ¶ 39.) At this time Neuenfeldt ran to his patrol car and Deputy Baldini joined him. It must be noted that Deputy Baldini had no authority to enter the tribal vehicle and was not a certified law

enforcement officer at that time. (Beardsley Aff., Ex. 4 at 120:14-120:17: Deposition of Robert Neuenfeldt, 2/24/2021.)

Shortly after the truck left the scene, Defendant Neuenfeldt can be heard over the radio transmission indicating that the front bumper of the truck struck him in the leg claiming that an assault on law enforcement had taken place. (Beardsley Aff., Ex. 11: Radio Traffic Log, produced on 8/14/2020.) However, the video footage obtained from Trooper Kurtz' dash cam refutes that Neuenfeldt was ever struck the by vehicle. This has been confirmed by forensic videographer, Tim Maher, who has issued an expert report indicating that Neuenfeldt was not struck by the Bourassa vehicle. (*See* Doc. 57, Ex. 6.); (Beardsley Aff., Ex. 12: Maher Report, 10/29/2020.) Neuenfeldt later reported to Avera Flandreau Hospital complaining of left hip, left thigh and left shoulder injuries. During this visit, Neuenfeldt told the medical provider that "a car had hit him going at a speed of about 20 miles an hour." (Beardsley Aff., Ex. 13 at 0001: Neuenfeldt Medical Records, 2/23/2021.) Neuenfeldt further claimed "that his shoulder hit the mirror on the side of the pickup and the bumper of the pickup hit his left thigh." (*Id.*)

During his testimony, Neuenfeldt confirmed that the 7,000-pound truck was traveling between 15 and 25 miles per hour when it allegedly struck him. (Beardsley Aff., Ex. 4 at 294:9-294:12: Deposition of Robert Neuenfeldt, 2/24/2021.) As a result of these claims, Jeffrey S. Fischgrund, M.D., has provided an expert opinion that "the energy due to translational motion of the pickup was over 10 times that necessary to fracture (break) the femur. Based

on the biomechanical considerations, the alleged contact could not have occurred in the manner described by the officer.” (Beardsley Aff., Ex. 14 at Plf.Prod.00331-32: Fischgrund’s Report, 2/26/2021.)

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

73:7 Q And if we have a video that shows him off to the
73:8 side of the vehicle and was never struck by the bumper at all,
73:9 you wouldn't have any knowledge of him being struck by the
73:10 bumper at all, would you? You didn't see it?

73:11 A I did not see it.

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

73:14 A No.

(Beardsley Aff., Ex. 15 at 73:7-73:14: Deposition of Logan Baldini, 1/6/2021.)

Deputy Brakke was located in the driveway at the time of the alleged incident and also indicated that he did not see Neuenfeldt get hit:

79:15 Q And it's also true that you never saw -- personally
79:16 witnessed Officer Neuenfeldt get struck by the front of the
79:17 bumper?

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

(Beardsley Aff., Ex. 9 at 79:15-79:18: Deposition of Carl Brakke, 1/6/2021.)

Officer Kurtz was in his patrol car behind the Bourassa vehicle and confirmed that he did not witness the truck strike Neuenfeldt:

138:15 Q Okay. And you didn't see anything with your naked
138:16 eye that would indicate Neuenfeldt got hit by Tahlen Bourassa?

138:17 A Correct.

(Beardsley Aff., Ex. 16 at 138:15-138:17: Deposition of Isaac Kurtz, 1/7/2021.)

The sole basis for the pursuit, a claimed assault on law enforcement, was simply a fabrication to justify Neuenfeldt's actions that evening.

After Neuenfeldt was allegedly struck, the video shows him running to his tribal vehicle and Deputy Baldini getting in the passenger seat. Officer Kurtz was the primary pursuer until roughly four minutes into the pursuit when he lost sight of the vehicle and terminated his pursuit as primary. (Plaintiff's Statements of Undisputed Material Fact at ¶ 37.) At that time, Neuenfeldt continued to pursue the vehicle for nearly 30 minutes on gravel roads at speeds in excess of 100 mph. (Plaintiff's Statements of Undisputed Material Fact at ¶ 38.) At no time did any part of the pursuit involve tribal lands. (Plaintiff's Statements of Undisputed Material Fact at ¶ 39.) During the entirety of Neuenfeldt's pursuit, he was outside of tribal lands and therefore lacked jurisdiction. (Plaintiff's Statements of Undisputed Material Fact at ¶ 40.)

Eventually, Neuenfeldt pushed the Bourassa vehicle down a gravel road that was a known dead-end. (Plaintiff's Statements of Undisputed Material Fact at ¶ 41.) Neuenfeldt testified that he was aware the road was a dead-end when he deliberately directed the Bourassa vehicle that direction. (Beardsley Aff., Ex. 4 at 308:16-308:18: Deposition of Robert Neuenfeldt, 2/24/2021.) As the

speeding truck approached the dead-end, Bourassa lost control and rolled the vehicle numerous times — all three occupants were ejected from the truck.

All three kids sustained catastrophic injuries. Morgan Ten Eyck suffered brain and spinal cord injuries, which will forever confine her to a wheel chair for the rest of her life without any ability to speak or walk. Micah Roemen sustained numerous fractures to his neck and back. It is believed that Tahlen Bourassa also sustained permanent brain damage. All of these horrific injuries were caused by a complete disregard for nearly every pursuit policy directive as set forth in the BIA Manual, 25 C.F.R. Part 12, and the Tribe's 638-contract.

f. Officer Neuenfeldt's Deposition

i. Neuenfeldt Did Not Receive The BIA Manual

On February 24, 2021, Plaintiffs' counsel took Neuenfeldt's deposition. Astoundingly, Neuenfeldt repeatedly revealed the lack of training and supervision present within FSS Tribal Law Enforcement. First, Neuenfeldt testified that he was never provided with the BIA Manual and had never even seen it until the time of his deposition:

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

47:19 A. No.

47:20 Q. Ever seen it?

47:21 A. I was not given one.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 27.) Neuenfeldt then confirmed that he was not aware of the requirements for high-speed pursuits because he was never given the BIA Manual or trained in the matter:

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

48:16 MS. ROCHE: Objection, form.

48:17 A. THE WITNESS: I was given the law-and-order code manual, not the BIA Manual, which would be the specific tribal manual.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 28.)

In fact, Neuenfeldt had never reviewed any pursuit policy at any time during his law enforcement career. Neuenfeldt started out with the Moody County Sheriff's Office as a deputy. After being terminated for multiple policy violations, Neuenfeldt was hired by the F.S.S.T. Police Department, and is currently employed by the Flandreau City Police Department. (Beardsley Aff., Ex. 17 at 8:4-8:14: Deposition of Troy Wellman, 1/6/2021.) During these three separate jobs in law enforcement, Neuenfeldt did not look at any policy whatsoever regarding pursuits:

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

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

45:5 A. THE WITNESS: Correct.

45:6 BY MR. STEVEN BEARDSLEY:

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

45:10 A. Correct.

45:11 Q. So when you went to Flandreau city police, did you look at any manual or policy or guideline regarding pursuits for the city of Flandreau?

45:14 A. No.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 29.)

ii. Neuenfeldt's Lack of Training

Further, Neuenfeldt testified that he never received bridge training, as required under the 638 contract, 25 C.F.R. Part 12, and the BIA Manual:

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

27:19 A. None.

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

27:23 A. No.

...

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

correct?

112:20 MS. ROCHE: Objection, form.

112:21 A. THE WITNESS: Correct

112:23 Q. And the bridge training is how many weeks?

112:24 MS. ROCHE: Objection, form.

112:25 A. THE WITNESS: That I don't know

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

113:4 A. No, you went to the – that jurisdiction thing in South
Carolina.

113:6 Q. That was November of 2017?

113:7 A. Yep.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 30.) Because Neuenfeldt was never given a BIA Manual he was not aware of the requirements or considerations involved in high-speed pursuits. (Plaintiff's Statements of Undisputed Material Fact at ¶ 28.) Additionally, Neuenfeldt was never aware of vital policies relating to high-speed pursuit and jurisdiction:

85:13 Q. You agree with the fact you shouldn't have your son in
your vehicle when you're doing a high-speed chase?

85:10 MS. ROCHE: Objection, form.

85:11 A. THE WITNESS: Yes and no.

85:13 Q. Okay. So what do you mean no? You've got a 12-year-
old kid in your vehicle going 100 miles an hour. You don't think that's

inappropriate.

85:16 A. It's dangerous to bungee jump too, but I can give him permission. I can give him permission to get a tattoo when he's under 18.

85:19 Q. So you understand that there are certain rules and regulations for police officers, and one of them is you don't have a minor in your vehicle during a high-speed chase, right?

85:22 A. I don't –

85:23 MS. ROCHE: Objection, form.

85:23 A. THE WITNESS: I'm not aware of any written rule like that.

86:2 Q. And you think it's okay to do that?

86:3 MS. ROCHE: Objection, form.

86:4 A. THE WITNESS: My own son.

86:6 Q. For your own son you think it's okay to do that?

86:7 MS. ROCHE: Objection, form.

86:8 A. THE WITNESS: I did at the time, and I still do today.

86:11 Q. Okay. So what if it's 150 miles an hour; is that okay?

86:13 MS. ROCHE: Objection, form, argumentative.

86:14 A. THE WITNESS: I don't see how that's relevant.

86:17 Q. So it doesn't matter if it's 150 miles an hour?

86:18 A. No.

86:19 Q. If it's 200 miles an hour, it doesn't matter?

86:20 MS. ROCHE: Objection, form.

86:21 A. THE WITNESS: I guess not.

86:23 Q. You can risk your son at no matter what the speed; you're telling us that?

86:25 A. I could.

87:1 MICHELLE ROCHE: Objection, form.

87:3 Q. Okay. So we have three instances now in which you at least are accused of taking your vehicle outside the jurisdiction without prior authorization, correct?

87:6 MICHELLE ROCHE: Objection, form.

87:7 A. THE WITNESS: Correct.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 31.)

1. Consequences of Neuenfeldt's Lack of Training

Throughout the deposition Neuenfeldt continued to expose the natural consequences of his lack of training:

164:14 Q. So we've established that you were – did not complete the bridge training. Do you know, did the bridge training include any pursuit training?

164:17 A. I don't know what the –

164:18 Q. Okay. But you agree – and you and Nick talked about it, Nick Cottier, that you had not completed the bridge training at the time of this pursuit, correct?

164:21 MS. ROCHE: Objection, form.

164:22 A. THE WITNESS: I don't recall that conversation either.

164:25 Q. Okay. But you had not completed the bridge training then at the time of this pursuit?

165:2 A. That is correct

165:3 Q. And as a result, do you know whether you had authority to be out and about in your patrol car at all without your bridge training?

165:6 MS. ROCHE: Objection, calls for a legal conclusion.

165:8 A. THE WITNESS: I can't – I don't know. I can't answer that.

165:11 Q. Okay. So you don't – and I'm sorry. It sounds like I'm accusing. I'm just getting the facts. You don't know whether you were properly trained to be out doing your police work because you had not completed your bridge training, you just don't know?

165:16 MS. ROCHE: Objection, form.

165:17 A. THE WITNESS: That is correct.

(Beardsley Aff., Ex. 4 at 164:14-16:17: Deposition of Robert Neuenfeldt, 2/24/2021.) The Tribe and United States did nothing to ensure the consequences of Neuenfeldt's lack of training would never come to fruition:

165:19 Q. Okay. And no one at the BIA told you that you're restricted until you get proper training?

165:21 A. No.

165:22 Q. And no one at the tribe told you, you are restricted until you get the proper training?

165:24 A. No.

165:25 Q. And until you get the proper training, did you have the authority to even pull your gun out of your holster?

166:2 MS. ROCHE: Objection, calls for a legal conclusion, form.

166:4 A. THE WITNESS: I guess it depends.

166:6 Q. Okay. You've heard of bridge training?

166:7 A. Yes.

166:8 Q. And you understand that you need to be trained to be a tribal officer?

166:10 A. Yes.

166:11 Q. And you need to be trained according to the rules set forth by the tribe, correct?

166:13 A. Yes.

166:14 Q. And those are set forth in the handbook. Did you know that?

166:16 MS. ROCHE: Objection, calls for a legal conclusion.

166:18 A. THE WITNESS: No.

166:20 Q. And if the handbook says you've got to have bridge training before you have the authority to do any of your policing, you don't have any reason to dispute that?

166:23 MS. ROCHE: Objection, form.

166:24 A. THE WITNESS: I guess not. I can't testify to the

contents of this.

(Beardsley Aff., Ex. 4 at 165:19-166:24: Deposition of Robert Neuenfeldt, 2/24/2021.)

Neuenfeldt believed if he was citizen, he could have operated in the same capacity, as he did on the night of June 17, 2017:

167:2 Q. As you sit here today, since you did not have the bridge training, you don't know whether you had the authority to carry a gun –

167:5 MS. ROCHE: Objection, form, asked and answered

167:8 Q. Right?

167:9 A. A private citizen can carry a gun.

167:10 Q. Okay. Can carry a gun as a police officer?

167:11 A. As a police officer?

167:12 Q. You don't know?

167:13 A. I don't know.

167:14 Q. Okay. And you don't know if you had authority to pull your gun and point it at somebody?

167:15 A. As stated before, a citizen can do that.

167:17 Q. As a police officer, in this particular instance, you were given certain authorities by the tribe, right?

167:19 A. Correct.

167:20 Q. And you don't know, as you sit here, whether or not, since you did not have proper bridge training, whether you had the

authority to even pull your gun as a police officer at anybody, correct?

167:24 A. I believe I did, but I have no training on the matter.

168:1 Q. And you don't know if you are authorized because you don't know how significant this bridge training is?

168:3 A. Correct.

(Beardsley Aff., Ex. 4 at 167:2-168:3: Deposition of Robert Neuenfeldt, 2/24/2021.)

iii. Neuenfeldt's Hostile History of Violative Use of Force, Jurisdictional Failures, and Rogue Car Chases.

As a law enforcement officer, Neuenfeldt had a history of high-speed pursuits in violation of the mandates and policies he was required to follow:

64:10 Q. I'm going to get to the manual in a minute, but as a Moody County deputy, were you involved in high-speed pursuits?

64:12 A. I believe either one or two. I don't—

64:13 Q. Well, lets – let's talk about the first one. You say either one or two. And before we go to the first one, high-speed pursuits are rare, aren't they?

64:18 A. Lately, no.

64:19 Q. Okay. So how is it that the time you were working for Moody County you don't remember whether you had one or two?

64:22 A. Well, if I'm thinking correctly, the first one was only like a block and it ended up being a foot chase, and the second one was with my son.

...

[REDACTED 64:24-66:17]

...

66:18 Q. Okay. You said there was a second one with your son.

66:20 A. Correct.

66:21 Q. And where did that take place?

66:22 A. In Moody County.

...

[REDACTED 66:23-68-23]

...

68:24 Q. So you said it was in Moody County. And can you tell me approximately when that occurred?

69:1 A. I don't know the dates.

69:2 Q. And can you tell me how it is you had a high-speed pursuit with your son in the vehicle?

69:4 A. He was doing a ride-along. He was going through a rough patch there for a while, and I figured it was better to have him with me than leave him home, and he went to stop a vehicle and it took off on us – or a motorcycle actually.

69:8 Q. And where did it end up?

69:9 A. Just north of Pipestone, Minnesota.

69:10 Q. And Pipestone, obviously, is not in Moody County.

69:11 A. Correct.

69:12 Q. And the chase went from Moody County into

Minnesota?

69:13 A. Correct.

69:14 Q. And do you understand that you do not – did not have jurisdiction in Minnesota when you were a Moody County deputy?

69:17 MS. ROCHE: Objection, form.

69:18 A. THE WITNESS: No.

69:20 Q. Is that correct?

69:21 A. Correct.

69:22 Q. In approximately – you think it was 2015 or 2016?

69:23 A. I think it was the -- I believe '16.

69:24 Q. And –

69:25 A. It was neither '16 or – it was right towards the end of my appointment.

70:2 Q. Okay. And it had something to do with your suspension, correct?

70:4 A. Yes, that was.

70:5 Q. And in spite of the – you knew at the time that you didn't have jurisdiction in Minnesota, correct?

70:7 A. Correct.

70:8 Q. And in spite of not having jurisdiction at the time in Minnesota, you continued to pursue this person?

70:10 MS. ROCHE: Objection, form.

70:11 A. THE WITNESS: Yes, I had notified Pipestone and they

were coming to assist.

70:14 Q. And in fact you drew your gun on this gentleman after it was stopped, correct?

70:16 A. Correct.

70:17 Q. And you knew you didn't have jurisdiction to draw your gun in Minnesota on someone in that state?

70:19 MS. ROCHE: Objection, form.

70:20 A. THE WITNESS: I was not aware that I did not have authorization to do that.

70:23 Q. And this was a motorcyclist?

70:24 A. Yes.

70:25 Q. And what was the violation that you observed on this motorcyclist?

71:2 A. Speeding.

(Plaintiff's Statements of Undisputed Material Fact at ¶ 32.)

g. Procedural History

Following Neuenfeldt's deposition, Plaintiffs' moved to amend their complaint on March 31, 2021. (Doc. 57.) On June 9, 2021, this Court granted Plaintiffs' motion to amend. (Doc. 74.) On June 15, 2021, Plaintiffs filed their Second Amended Complaint. (Doc. 76.) On August 11, 2021, Defendant United States provided their supplemental initial disclosures and production. Within the supplemental disclosures and production, were the Tribe's 638-contract with United States and all documents and correspondence pertaining to the

January 2015 audit performed by the BIA OJS, including Special Agent's letters regarding the numerous unaddressed deficiencies. (Beardsley Aff., Ex. 6 at USA 001143-44, 001148-49, 001154-55: BIA OJS Special Agent's letters to Tribe, produced on 8/11/2021.)

Plaintiffs now move this Court for Summary Judgement based on the unequivocal language in the Tribe's 638-contract, the BIA Manual, and 25 C.F.R. Part 12, requiring the Tribe train, retain, and supervise its tribal officers in accordance with federal law. There are neither facts on record that contradict the Tribe's mandatory duty nor any facts that contradict their failure to do so. Thus, Plaintiff respectfully requests this Court grant their Motion for Summary Judgement.

V. DISCUSSION

The Tribe and United States' failure to train Neuenfeldt, as required by the 638 contract, the BIA Manual, and 25 C.F.R. Part 12, resulted in Neuenfeldt violating his jurisdiction, engaging in an already terminated high-speed pursuit, and pushing a truck full of innocent teenagers to their ultimate peril. The Tribe and United States must be held accountable for this wanton negligence. This Court, in *Necklace v. U.S.*, discussed that when carrying out 638-contracts tribal governments "were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in the self-determination agreements." Civ. No. 06-4274, 2007 WL 3389926, at *4 (D.S.D. Nov. 14, 2007). This Court's rationale stems from the ISDEAA itself, which states in relevant part:

With respect to claims resulting from the performance of functions ... under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any such contract or agreement and its employees are deemed employees of the Bureau ... while acting within the scope of their employment in carrying out the contract or agreement.

25 U.S.C.A. § 5301 (formerly codified at 25 U.S.C.A. § 450). Further, in 2010, Congress passed the Tribal Law and Order Act (herein “TLOA”) reiterating its trust obligation to provide for public safety to Indians and tribes.¹ The Indian Tribal Justice Act (herein “ITJA”), codified almost 20 years prior to the TLOA, also established the United States long-standing trust obligation to tribal entities, in regards to Tribal Law Enforcement:

The Congress finds and declares that ... (1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government ...

25 U.S.C. § 3601(1)-(2).

In conjunction with the United States’ trust obligation, where a 638-contract exists, “the United States may be liable for the negligent acts of tribal employees when the employee in question is acting within the employee’s scope

¹ See Pub. L. 111-211, § 201, July 29, 2010, 124 Stat. 2258. Section 202 of the TLOA reads: “Congress finds that ... (1) the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country ...” See also H.R. Res. 1924, 111th Cong. § 2(a)(1) (2009) (“[T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of tribal communities ...”); 154 Cong. Rec. H8456 (daily ed. Sept. 18, 2008) (Rep. Herseth Sandlin stating “Law enforcement is one of the Federal Government’s trust obligations to tribes.”); 155 Cong. Rec. S4333 (daily ed. Apr. 2, 2009) (Sen. Byron Dorgan stating “[O]ur Government accepted responsibility to police Indian lands, and ... to provide for the public safety of tribal communities.”).

of employment” under the Federal Tort Claims Act (herein after “FTCA”) waiver of sovereign immunity. *Big Crow v. Rattling Leaf*, 296 F.Supp.2d 1067, 1069 (D.S.D. Jan. 2, 2004). Under the FTCA, this Court is to apply “the law of the place where the act or omission occurred.” *Fingers v. United States*, No. 06-5100 RHB, 2008 WL 1905258, at *2 (D.S.D. Apr. 29, 2008) (citing 28 U.S.C. § 1346(b)(1)). The facts alleged in the complaint show that the incidents complained of occurred on and around the Flandreau Sioux Santee Indian Reservation located in the state of South Dakota. As a result, this Court must apply South Dakota law. *Id.*

Under South Dakota law, there are three requirements in a negligence claim: “(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure.” *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 28, 758 N.W.2d 436, 448 (citing *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, ¶ 20, 702 N.W.2d 379, 386). The breach of duty which causes the plaintiff’s injury “need not be the only cause, nor the last or nearest cause,” but rather the breach need only be “a substantial factor in bringing about the harm.” *Kostel v. Schwartz*, 2008 S.D. 85 ¶ 61, 756 N.W.2d 363, 384.

“An employer may be held liable for negligent hiring, retention, training and supervision.” *Id.* at ¶ 30. “A negligent training claim suggests that the manner or circumstances of the employee's training by the employer inadequately or defectively coached, educated, or prepared its employees for the performance of their job duties.” *Id.* at ¶ 45. A “negligent supervision claim

alleges that the employer inadequately or defectively managed, directed or oversaw its employees.” *Id.* A “negligent retention claim alleges that information which the employer came to know, or should have become aware of, after hiring the employee made continued employment of the employee negligent.” *Id.*

To limit possible liabilities and negligence of all federal employees involved in Indian Country Law Enforcement under 638-contracts, 25 Part 12 of the Code of Federal Regulations, codified by the Department of the Interior, serves as binding statutory authority by which 638-contract employees involved in Indian Country Law Enforcement must adhere. *See Indian Country Law Enforcement*, 62 Fed. Reg. 15610-01 (April 2, 1997) (codified at 25 C.F.R. Part 12). Pertinent to the case at bar, the section covers minimum qualifications and training requirements for all employees involved in Indian Country Law enforcement. *Id.* Along with outlining the specific indicia of training, the Tribe’s 638-contract and the BIA Manual itself repeatedly mandate 25 C.F.R. Part 12, giving the two compacts statutory teeth. (Beardsley Aff., Ex. 2 at 001323-24, 001330-32: Flandreau Santee Sioux Tribe’s Annual Funding Agreement, produced on 8/11/2021); (Beardsley Aff., Ex. 3 at USA000632-000633, USA000638, USA000644: BIA Law Enforcement Handbook, produced on 8/14/2020.)

While Congress has exempted liability from the FTCA claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function,” Congress did not intend for the discretionary function to apply where

“law or policy ‘specifically prescribe[ing]’ guidelines for hiring, training, or supervision” exist. *Lins v. United States*, 849 Fed.Appx. 159, 164 (4th Cir. 2021) (citing *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1217 (D.C. Cir. 1997)). It is likely that the United States will continue to assert that providing training to tribal officers is discretionary under the language found in the 638-contract, the BIA Manual, and 25 C.F.R. Part 12. However, this is assertion is false, because while “[t]he design of a course of governmental action” may be shielded “by the discretionary function, the implementation of that course of action is not.” *Indian Towing v. U.S.*, 350 U.S. 61, 69 (1955); *see also Wishnant v. U.S.*, 400 F.3d 1177, 1181 (9th Cir. 2005).

a. The Federal Directives At Issue In This Case Were Mandated By The Secretary Of The Interior, Enforced By The BIA, And Are Binding Under 25 C.F.R. Part 12.

“The Secretary of the Interior, acting through the BIA is ‘responsible for providing, or for assisting in the provision of, law enforcement services in Indian country.’” *Gipp v. Webb*, No.: 1:19-cv-213, 2021 WL 3666276, at *3 (D. N.D. April 28, 2021) (referencing and citing 25 U.S.C. § 2802(a)). “The BIA Office of Justice Services is responsible for ‘carrying out law enforcement functions of the Secretary in Indian Country.’” *Id.* “The Secretary shall establish appropriate standards of *training*.... for law enforcement personnel of the Office of Justice Services who are charged with law enforcement responsibilities[.]” *Id.* at *4.

In conjunction with 25 U.S.C. § 2802, the scope and purpose of 25

C.F.R. Parts 12.32 and 12.35 of the Code of Federal Regulations is to “ensure that law enforcement, crime prevention and recidivism reduction programs” facilitated by the “BIA and tribal law enforcing programs receiving Federal funding” are implemented and maintained in a “constitutionally sound manner” and “comply with federal requirements.” *See Do Minimum Employment Standards Include A Background Investigation*, 25 C.F.R. Part 12.32 (2021).

Part 12.35 outlines whether “Indian Country Law Enforcement Officers Complete Any Special Training.” *See Do Indian Country Law Enforcement Officers Complete Any Special Training*, 25 C.F.R. Part 12.35 (2021). Part 12.32 outlines whether “Minimum Employment Standards Include a Background Investigation.” *See Do Indian Country Law Enforcement Officers Complete Any Special Training*, 25 C.F.R. Part 12.35 (2021).

Title 25 C.F.R. Part 12.35 of the Code of Federal Regulations requires that any law enforcement personnel of any program using federal funds complete a “basic law enforcement training course *prescribed by the Director*”. *Do Indian Country Law Enforcement Officers Complete Any Special Training*, 25 C.F.R. Part 12.35 (2021) (emphasis added). If the law enforcement personnel lacks such training, the personnel “must not perform law enforcement duties until they have successfully completed” the training prescribed by the Secretary of the Interior. *Id.* Title 25 Part 12.32 of the Code of Federal Regulations mandates that “[l]aw enforcement authority is only entrusted to personnel possessing adequate education and/or experience, training, aptitude, and high moral character.” *Do Minimum Employment Standards*

Include A Background Investigation, 25 C.F.R. Part 12.32 (2021). In enacting these regulations, the Department of the Interior was concerned from the beginning about the United States' necessary oversight of federally funded programs bound by this regulation² and the potential of employing law enforcement officers with flawed histories.³

The Tribe's 638-contract and the BIA Manual their 638-contract compels them to follow, outlines the necessary training selected by the Secretary of the Interior, to be supervised under BIA authority, and is required through 25 C.F.R. Part 12. The duties imparted upon the Tribe at issue in this case are straight-forward. Provide training to tribal officers, before they act under the color of a federal badge. Supervise those officers, to ensure they are acting in concert with the federal mandates required. Retain only the officers who are trained and function in accordance with these federal mandates. The evidentiary record before this Court unequivocally demonstrates the United States Government's total failure, warranting summary judgment.

² When finalizing Part 12.35 in 1997, the Department of the Interior and specifically the BIA fielded public comments of concern on whether federally funded law enforcement programs would be held accountable through compliance with federal regulations or performance. See *Indian Country Law Enforcement*, 62 Fed. Reg. 15610-01 (April 2, 1997) (codified at 25 C.F.R. Part 12). The BIA responded both, stating "[i]t would not be reasonable to expect an untrained or otherwise unqualified law enforcement officer to perform his/her duties at an adequate level." *Id.*

³ The BIA stated the purpose of Part 12.32 was to ensure the federally funded programs were not "employing a law enforcement officer with a criminal history or who is otherwise unsuitable as a law enforcement officer." See *Indian Country Law Enforcement*, 62 Fed. Reg. 15610-01 (April 2, 1997) (codified at 25 C.F.R. Part 12). These background checks must be "no less stringent than required of a federal officer performing the same duties." *Id.*

b. The Tribe's Failure To Follow Express Federal Directives Constitutes A Deliberate Breach of Duty That Subjects The United States Government To Direct Liability Under The FTCA.

Where specific statutes, policies, contracts, regulations and rules expressly provide for mandatory training, failure to train 638-contract Tribal Law Enforcement, at all, subjects the United States Government to direct liability under the FTCA. *Gooden v. U.S. Dept. of Interior*, 339 F.Supp.2d 1072, 1079 (D.N.D. Oct. 6, 2004). The “discretionary exception” does not apply if a statute, policy, contract, regulation, or rule specifically prescribes a course of action for an employee to follow where the “employee has no rightful option but to adhere to the directive.” *U.S. v. Gaubert*, 499 U.S. 315, 322 (1991) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). “It is the nature of the action rather than the status of the actor, that governs whether the discretionary function applies in a given case.” *Big Owl v. United States*, 931 F.Supp. 1304, 1308 (D.S.D. Feb. 19, 1997).

The Supreme Court has developed a two-prong test to determine whether a federal employee is required to follow certain federal mandates or has discretion under a given federal mandate that would allow for the “discretionary exception” to apply. *Berkovitz*, at 536. “The first step requires a court to consider whether the action involves ‘an element of judgment or choice.’” *Larson v. United States*, 3:20-CV-03019-RAL, 2021 WL 3634149, at *6 (D.S.D. Aug. 17, 2021) (citing *Metter v. United States*, 785 F.3d 1227, 1230 (8th Cir. 2015)). “To determine whether an action involves an element of judgment or choice, a court should consider whether the relevant statutes and

regulations mandate a specific course of action.” *Id.* (citing *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 795 (8th Cir. 1998)). “If the relevant statutes and regulations mandate a specific course of action, the agency has no discretion and thus the exception does not apply.” *Id.* “On the other hand, an agency has discretion if the relevant statutes or regulations use ‘permissive language, rather than mandatory terms, such as “must” or “shall.””” *Id.* (citing *Metter*, 785 at 1231).

“If the court finds that the action is discretionary—i.e., a product of judgement or choice—it should move to the second step in its analysis,” which “requires a court to consider whether that judgement or choice ‘is of the kind that the discretionary function was designed to shield.” *Larson*, 3:20-CV-03019-RAL, 2021 WL 3634149, at *7 (citing *Metter*, 785 F.3d at 1230-31). “The discretionary function exception is intended to protect decisions ‘grounded in social, economic, and political policy.’” *Id.* (citing *Dykstra*, 140 F.3d at 795). The exception “protects only governmental actions and decision based on considerations of public policy.” *Berkovitz*, 486 U.S., at 537.

The Ninth Circuit has distinguished the “design” of a governmental action as discretionary, whereas the “implementation of that course of action is not.” *Whisnant v. U.S.*, 400 F.3d 1177, 1181 (9th Cir. 2005). In *Whisnant*, the plaintiff worked for a fish products company which contracted to provide seafood products to the United States Navy’s Bangor Submarine Base in Silverdale, Washington. *Id.* at 1179. As part of plaintiff’s duties, she delivered fish to the Navy Base’s meat department. *Id.* The Base was operated and

maintained by the Defense Commissary Agency (herein “DeCA”). *Id.* DeCA regulations required periodic safety inspections, but it was up to DeCA employees to decide “how and when to conduct inspections.” *Id.* Over the course of three years, customers and employees became sick and tests revealed that there was toxic, carcinogenic molds colonizing the meat department at the Navy Base. *Id.* at 1180. The Navy Base was notified for three years of the carcinogenic molds within the meat department, but did nothing to fix the problem. *Id.*

The plaintiff in Whisnant contracted pneumonia and experienced headaches, swollen glands, sore throat, persistent cough and other health problems and brought suit under the FTCA. *Id.* at 1180. The United States moved to dismiss on the basis that the DeCA regulations were discretionary, because under the mandates the government had “discretion to decide how to carry out its responsibility to maintain safe and healthy premises.” *Id.* at 1185. The Ninth Circuit disagreed. *Id.* It found that while the government may be correct regarding its responsibility on *how* to maintain a healthy and safe meat department, the government did not “have discretion to abdicate its responsibility” completely. *Id.*

Similarly in *Gooden*, the question before the District Court of the Northwestern Division in North Dakota, dealt with an issue regarding Tribal Law Enforcement and a mandatory training policy within the BIA Manual. *Gooden*, 339 F.Supp.2d at 1074-1075. The issue regarded the express policies in the BIA Manual on use of force, pre-service, and in-service training of BIA

officers. *Id.* At 1079. The lawsuit alleged that a BIA officer assaulted the plaintiff during a routine traffic stop, when he smashed plaintiff's index finger with his flashlight, then crushed plaintiff's finger with his boot causing it to be severed from the hand. *Id.* At 1074.

Defendants filed a motion for summary judgment on plaintiff's negligent hiring, training, and supervision claims based on the discretionary function exception. *Id.* Plaintiff relied on the mandatory directives in section 6-01 of the BIA Manual arguing that the BIA officer's actions were controlled by regulations or policies and therefore, were non-discretionary. *Id.* At 1078. The court agreed. *Id.* At 1079. The court stated that "[t]he BIA Law Enforcement Manual has an express policy about mandatory use-of-force training, as well as an additional policy about pre-service and in-service training of officers." *Id.* As such, the court held "that the discretionary function exception did not apply to the negligent training claim." *Id.*

Further, under the FTCA, where federal employees are aware of illegal activity and fail to address such activity, the discretionary exception does not apply. *Tonelli v. U.S.*, 60 F.3d 492, 496 (8th Cir. 1995). In *Tonelli*, postal workers were opening first class mail from the plaintiff's mailbox and removing adult photos from the plaintiff's mail. *Id.* at 494. The Eighth Circuit held that while the supervision and retention of federal employees are generally discretionary in nature, failing to act after notice of illegal activities does not represent any iteration of "plausible policy considerations." *Id.* at 496. Thus, the Court held the United States' actions fell outside the purview of the

discretionary exception under the FTCA. *Id.*

i. Under The Tribe's 638-Contract, The BIA Manual, And 12 C.F.R. Part 12, Training, Supervision, And Retention Were Mandatory Duties Imparted Upon The Tribe and The United States.

The Tribe and, by virtue of their trust relationship, the United States were required to institute and oversee numerous training programs of the employees involved in Indian Law Enforcement with the Tribe, under the scope of their 638-contract, which they knowingly failed to do. Under the Tribe's 638-contract, the Tribe is the "contractor." On page seven of the contract, it states "[T]he contractor *shall* perform the programs, services, functions, and activities provided in the annual funding agreement." (Beardsley Aff., Ex. 2 at USA001323: Flandreau Santee Sioux Tribe PL 93-638 Contract, produced on 8/11/2021.) Within the annual funding agreement, it states the contractor "shall" be responsible for the programs instituted under the 638-contract to ensure those programs follow specific federal standards. (Beardsley Aff., Ex. 2 at USA001323: Flandreau Santee Sioux Tribe's Annual Funding Agreement, produced on 8/11/2021.)

Among those standards, as previously stated, are 25 C.F.R. Part 12 and the BIA Manual. (Beardsley Aff., Ex. 1 at USA001309: Flandreau Santee Sioux Tribe PL 93-638 Contract, produced on 8/11/2021); (Beardsley Aff., Ex. 2 at 001323-1324, 001330-1332: Flandreau Santee Sioux Tribe's Annual Funding Agreement, produced on 8/11/2021.) Without mandatory administration of these federal standards, the purpose of the 638-contract is not remotely conceivable. (Beardsley Aff., Ex. 2 at USA001327: Flandreau Santee Sioux

Tribe's Annual Funding Agreement, produced on 8/11/2021, stating "The purpose of this contract is to ensure that professional, effective and efficient law enforcement police services are provided for the Flandreau Santee Sioux Tribe . . . [t]hese services shall provide for the protection of lives and property to all residents of, visitors to, the Flandreau Santee Sioux Tribal Reservation.")

The Tribe was expressly required to ensure that all "newly employed law enforcement officers" complete "Basic Police Officer Training Program conducted at the Indian Police Academy (IPA) or equivalent training" in order to "serve as a federal officer on Tribal lands." (Beardsley Aff., Ex. 2 at USA001331: Flandreau Santee Sioux Tribe's Annual Funding Agreement, produced on 8/11/2021.) If an officer failed to complete such training, the United States "shall" remove the officer "from the law enforcement position." (*Id.*) The BIA Manual further mandates new officers set to be involved in Indian Law Enforcement must complete approved "Basic Law Enforcement Training Program." (Beardsley Aff., Ex. 3 at USA000632: BIA Law Enforcement Handbook, produced on 8/14/2020.) Even where a new officer completed "non-BIA basic police officer" training and their certification is waived in under 25 C.F.R. Part 12.36, they too must complete the required IPA Basic Police Officer Training in Glynco, Georgia. (*Id.* at 550).

The express language throughout these federal directives illustrates the mandatory training the Tribe was required to facilitate, but failed to even attempt. The terms "must," "shall," and "required" are used throughout the federal directives. *See Metter*, 785 F.3d at 1231; *see also Larson*, 3:20-CV-

03019-RAL, 2021 WL 3634149, at *6. Specifically, the annual funding agreement in the 638-contract, section 6-01 of the BIA Manual, and 25 C.F.R. Parts 12.32 and 12.35 all include these explicit articles of language. The federal directives at issue in this case imparted zero discretion on the federal actors they applied to. Rather, the mandatory federal directives are in place to ensure the trust relationship and responsibilities within the context of the 638-contract are clear. In this case, the Tribe's duties in relation to training, supervising and retaining federal officers involved in Tribal Law Enforcement were clear. The Tribe and United States' breach of these known responsibilities were equally clear.

ii. The Tribe's Failure To Train And Supervise And Decision To Retain Neuenfeldt Is Undisputed.

The Tribe did not train Neuenfeldt under the mandatory directives required of them. Neuenfeldt's testimony and training log clearly prove he did not receive the mandatory IPA bridge training or participate in the required 40 hours of in-service training. (Plaintiff's Statements of Undisputed Material Fact at ¶¶ 7, 11, and 30.) Nor did he ever receive the BIA Manual. (Plaintiff's Statements of Undisputed Material Fact at ¶ 27.) Over the course of the 16 months between Neuenfeldt becoming an FSS Tribal officer and the horrific tragedy that he promulgated, he received a total of eleven hours of training. The training consisted of lidar training, radar operating, and firearm qualification. No viable equivalent to IPA training exists on his training log, in his memory, or in the evidentiary record

Additionally, prior to and throughout Neuenfeldt's employment with the

Tribe, BIA OJS Special Agent in Charge continually notified the Tribe of their failure to comply with the mandatory federal directives within 25 C.F.R. Part 12, the 638-contract and the BIA Manual. Special Agent in Charge instructed President Rider of the Tribe they had no option but to adhere to his orders and bring the Tribe into compliance with the federal directives required of it. Those directives included forbidding untrained and unqualified officers to continue participating in law enforcement activities. Yet, the Tribe continued to let major deficiencies go unaddressed by allowing rogue untrained tribal officers, like Neuenfeldt, to continue to operate in the capacity of a federal officer.

Allowing rogue untrained tribal officers to be retained and operate in the capacity of a federal officer, carrying a gun and facilitating high-speed chases, is similar to a hospital allowing a heart surgeon without a medical degree to perform heart surgeries. In both cases, the untrained individuals are responsible for the lives and survival of other human beings. Both situations require tactful skill, a knowledgeable weighing of the risks and benefits of their decisions, and extensive training. If a hospital allowed a doctor without a medical degree to perform a heart surgery, the hospital would be subject to civil liability of an unfathomable degree. The Tribe's dereliction in their duty to the public in this regard is no different. It is arguably more egregious, because federal funding fuels the Tribe's wanton recklessness.

The issue before this Court is not a question of whether the quality or degree of Neuenfeldt's training was satisfactory. Rather, the issue is whether the United States should be allowed to knowingly forego federal officer training

mandated through federal statutes, policies, and contracts, and allow those untrained officers to operate under a badge of federal authority. Plaintiffs' believe there are no facts on record that invite this Court answer yes to this question. No fact exists to contradict the Tribe's blatant failure to train Neuenfeldt. No fact exists to contradict the Tribe's employment and retention of rogue untrained tribal officers, like Neuenfeldt. No fact exists to contradict the Tribe's failure to adequately supervise their employees. Thus, Plaintiff respectfully requests this Court uphold the responsibility the United States has in maintaining adequate and safe law enforcement for Indian communities. Residents of these communities should not have to endure the tragic ends that prompted this lawsuit.

iii. The Tribe Did Not Have Any Discretion In Training, Supervising, And Retaining Officers For Tribal Law Enforcement.

Where specific statutes, policies, contracts, regulations and rules require federal employees to perform specific objectives, the exemption from the United States waiver of sovereign immunity under the FTCA known as the discretionary exception, does not apply. *Gaubert*, 499 U.S. at 322; *Gooden*, 339 F.Supp.2d at 1079. Thus, here, the discretionary exception does not apply.

Throughout the 638-contract, the BIA Manual section 6-01, and 25 C.F.R. Part 12, mandatory language regarding the failed policies at issue in this case indicate no discretion was available for the Tribe to provide training to its tribal officers. *See Metter*, 785 F.3d at 1231. Rather, their duty was absolute. In fact, the common sense "nature" of federal law requiring federally funded

entities to provide basic training for its officers is straight-forward and in-line with why tribal law enforcement exists to begin with: to facilitate safe and effective federal law enforcement to tribal lands. *Big Owl*, 931 F.Supp. at 1308 ; 154 Cong. Rec. H8456 (daily ed. Sept. 18, 2008) (Rep. Herseth Sandlin stating “Law enforcement is one of the Federal Government's trust obligations to tribes.”).

Similar to *Gooden*, this case deals with the mandatory section 6-01 of the BIA Manual. *Gooden*, 339 F.Supp.2d at 1079. The plaintiff in *Gooden* survived the BIA’s summary judgment motion, because the District Court in North Dakota determined the mandatory and express language throughout 6-01 of the BIA Manual took the negligent training cause of action outside of the purview discretionary exception. *Id.* At 1078. Unlike in *Gooden*, this case also deals with the additional mandatory federal directives of the Tribe’s 638-contract, 25 C.F.R. Part 12, and directives from their overseeing federal Agent following the January 2015 audit. There was no discretion for the Tribe to choose to train its officers or not. Like in *Whisnant*, the government cannot simply abdicate its responsibility in this regard. *Whisnant*, 400 F.3d at 1185.

Given *Gooden*, *Whisnant*, and the evidence compiled through discovery thus far in this lawsuit, the Tribe also had no discretion in their retention and supervision of rogue untrained officers, like Neuenfeldt. The focal point of Special Agent’s letters center on the tribe’s failure to follow 25 C.F.R. Parts 12.32 and 12.35. Part 12.32 primarily deals with the Tribe’s responsibility in performing stringent federal background investigations of their hires. *See* 25

C.F.R. Part 12.32. Part 12.35 mandates that all officers must perform training approved by the BIA Director, which includes *ongoing* “mandatory supplemental and in-service training course.” See 25 C.F.R. Part 12.35. The “nature” of the Tribe’s required background checks and *ongoing* training is inherently tied to retaining and continually supervising their tribal officers. *Big Owl*, 931 F.Supp. at 1308. An employer’s retention of an employee depends on the employer’s investigation and supervision of both employees’ past and current work behavior. Parts 12.32 and 12.35 mandate this requirement for federally funded tribes instituting Indian Country Law Enforcement. Thus, the retention and supervision required of the Tribe under this contract imparted no discretion upon the Tribe.

Even if this Court did find discretion in the mandatory directives required of the Tribe, the decision not to train tribal officers prior to the officers being involved in law enforcement duties cannot possibly be grounded in public policy. See *Tonelli*, 60 F.3d at 496 (holding “failure to act after notice of illegal action does not present a choice based on plausible policy considerations”). There is no public policy that advocates for continual retention or failed supervision of untrained rogue federal officers. Contrarily, allowing the Tribe and United States to knowingly operate in this manner will encourage, tragedies, like this one, to continue. Public policy cannot support the continual disregard of responsibility prompting this case.

iv. Neuenfeldt's Lack Of Training And The United States' Failure To Supervise Him And Retention of Him, Were The Proximate And Legal Causes Of Plaintiffs' Tragedies.

Neuenfeldt should have been behind a desk doing paperwork on the night of June 17, 2017. Not only do the federal mandates relevant to this case indicate that, the Special Agent instructed the Tribe on three separate occasions of that very reality. Instead, he was operating as a rogue federal officer. As a result, tragedy ensued.

As evidenced by his deposition, the Tribe's failure to train Neuenfeldt resulted in clear deficiencies that were the proximate and legal causes of Plaintiffs' tragedy. Neuenfeldt was never trained regarding any sort of pursuit. (Beardsley Aff., Ex. 4 at 44:24-45:14, 48:13-48:19: Deposition of Robert Neuenfeldt, 2/24/2021.) Neuenfeldt did not receive bridge training, which would have made him aware of the intricacies involved in Tribal Law Enforcement, like the jurisdictional nuance which has been at issue in this case. (Beardsley Aff., Ex. 4 at 112:17-113:7: Deposition of Robert Neuenfeldt, 2/24/2021); *see also* (Plaintiff's Statements of Undisputed Material Fact at ¶ 30.) Neuenfeldt was never given or explained what the Assist agreement between Moody County and the Tribe entailed; had he, he would never have responded to a call for an ambulance to help with a seizure at a teenage party. (Beardsley Aff., Ex. 4 at 264:11-265:3 Deposition of Robert Neuenfeldt, 2/24/2021); *see also* (Plaintiff's Statements of Undisputed Material Fact at ¶ 36.) Neuenfeldt's lack of training augmented his sense of duty and safety to irrational points of no return. (Beardsley Aff., Ex. 4 at 85:13-87:7: Deposition of

Robert Neuenfeldt, 2/24/2021, where Neuenfeldt states 200 mph high-speed pursuits are appropriate even with a 12-year-old in the cruiser); *see also* (Beardsley Aff., Ex. 4 at 164:14-168:3: Deposition of Robert Neuenfeldt, 2/24/2021, where Neuenfeldt states citizens can pull their guns in the same manner a police officer can.)

But for Neuenfeldt's lack of training regarding jurisdiction, the chase would have never happened. Neuenfeldt would not have reported to the teenage party outside the reservation and outside of his jurisdiction. There was no reason for Neuenfeldt to even be at the scene of this party. But for Neuenfeldt's augmented sense of duty and power, the chase would have never ended in a rollover, ejecting the adolescent passengers at the end of a dead-end road. The chase that Officer Kurtz began was terminated four minutes into the pursuit. (Plaintiff's Statements of Undisputed Material Fact at ¶ 37.) Had Neuenfeldt not internalized an augmented sense of power, because of his lack of training, he would have abided by Officer Kurtz's order. He would have understood that his vehicle in a high-speed pursuit constitutes a dangerous weapon that he is responsible for.

Further, the Tribe's failure to perform background checks resulted in Neuenfeldt being retained as a tribal officer. The BIA OJS Special Agent's instructions to the Tribe were that all law enforcement officers must go through a stringent federal background check pursuant to 12 C.F.R. Part 12.35. (Plaintiff's Statements of Undisputed Material Fact at ¶¶ 21, 23, and 24.) Had the Tribe performed the proper federal background check on Neuenfeldt, it

would not only have been aware of Neuenfeldt's marred history as a law enforcement officer, but they would have also been aware of his lack of required training and historical problems with high-speed pursuit, jurisdictional confusion, and impulsive desire to pull his gun. (Plaintiff's Statements of Undisputed Material Fact at ¶ 11, 26, and 32.) Such actions would have prompted the Tribe to take action and address Neuenfeldt's numerous deficiencies.

Additionally, the Tribe's retention of Neuenfeldt allowed him to continue functioning as a law enforcement officer, in defiance of the BIA OJS Special Agent's instructions to do otherwise. *Id.* The BIA OJS Special Agent instructed the Tribe that any law enforcement officer lacking the required training, should not be on patrol as a federal officer. *Id.* Instead, the Tribe continually defied these orders, leading to Neuenfeldt operating as a federal officer on the night of June 17, 2017. Neuenfeldt should not have been acting as a federal officer on the night of June 17, 2017.

v. The United States' Responsibility For Providing Safe Law Enforcement Is Uniquely Tied To Their Trust Obligation With The Tribe.

The United States has a responsibility to the Tribe to provide safe and effective law enforcement. This Court recognized in *Necklace* the importance of the "unique legal trust relationship" that exists between the Tribe and the United States under the ISDEAA. *Necklace*, Civ. No. 06-4274 at *4. The ISDEAA, TLOA, and ITJA all aim to facilitate this unique relationship. In fact, the 638-contract between the Tribe and the United States reaffirms this

commitment, by ensuring that the 638-contract is to be interpreted to not diminish this responsibility in any way. (Beardsley Aff., Ex. 1 at USA001314: Flandreau Santee Sioux Tribe PL 93-638 Contract, produced on 8/11/2021.) Providing safety for the public includes providing law enforcement within the tribal communities who are capable of functioning as a federal officer should. Because of the United States' failure to maintain their duty under the "unique legal trust relationship" it has with the Tribe, it must be held responsible for the tragedy that constructively ended Micah Roemen and Morgan Ten Eyck's lives.

VI. CONCLUSION

Based upon the foregoing, Plaintiffs submit that they are entitled to summary judgment on their claims against the United States and respectfully asks that this Court enter an order finding as follows:

1. The United States had an absolute duty to ensure the Tribe was training their tribal police officers according to the BIA Manual, their 638-contract and 25 C.F.R. Part 12;
2. The United States had an absolute duty to ensure the Tribe was appropriately supervising and retaining their tribal police officers according to the BIA Manual, their 638-contract and 25 C.F.R. Part 12;
3. The United States breached their absolute duty as to training, because the Tribe failed to train their tribal police officers regarding jurisdiction, use of force, and high-speed pursuit,

- including Neuenfeldt, in violation of the relevant federal directives;
4. The United States breached their absolute duty as to supervision, because the Tribe failed to adequately supervise their tribal police officers, including Neuenfeldt, in violation of the relevant federal directives;
 5. The United States breached their duty as to retention, because the Tribe chose to retain rogue untrained officers as tribal police officers, including Neuenfeldt, in violation of the relevant federal directives;
 6. Neuenfeldt's inadequate training and the United States' failed supervision of his deliberate insufficiencies and their retention of him, were the proximate and legal causes of the Plaintiffs tragedies; and,
 7. The United States is directly liable for the tragedies that Plaintiffs sustained as a result of its negligence.

Dated this 25th day of October, 2021.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2021, a true and correct copy of the foregoing has been served on the following by the following means:

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

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

/s/ Michael S. Beardsley
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