JOHN M. NEWMAN
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
101 E Front Street, Suite 401
Missoula, MT 59802
Phone: (406) 829-3336
Fax: (406) 542-1476
Email: john.newman@usdoj.gov

ABBIE J.N. CZIOK
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
Phone: (406) 457-5268
Fax: (406) 457-5130
Email: abbie.cziok@usdoj.gov

Attorneys for Defendant
United States of America

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

BLOSSOM OLD BULL, Personal Representative of the Estate of Braven Glenn, Plaintiff, vs. UNITED STATES OF AMERICA, and DOES 1-9, Defendants.	CV 22-109-BLG-KLD UNITED STATES' COMBINED BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On the evening of November 24, 2020, 17 year-old Braven Glenn passed Crow Tribal Police Officer Pamela Klier going 90 mph in a 65 mph zone along Highway 451 between Crow Agency and Lodge Grass, Montana. Approximately 2 minutes later, Glenn turned his vehicle lights off, left the road, traveled across a grassy median, and onto railroad tracks. Within seconds, a BNSF train headed in the opposite direction struck Glenn's vehicle. Glenn was killed instantly, and his body was thrown from the vehicle. A subsequent autopsy revealed he suffered a hinge-type skull base fracture. Glenn had a BAC of at least 0.142 and THC in his system.

This lawsuit resulted, but at this point in the case Plaintiff takes issue not with federal law enforcement officers' response to the accident, but with their alleged failure to prevent Officer Klier and the Crow Tribal Police Department from enforcing tribal law on the reservation in the first place. This claim has no merit—not only did Plaintiff impermissibly raise this theory for the first time on summary judgment, but she cannot articulate a state law duty applicable to the United States under the Federal Tort Claims Act ("FTCA"), nor can she demonstrate the government's obligation to act in light of inherent tribal sovereignty. Furthermore, assuming Plaintiff did take issue with Bureau of Indian

Affairs ("BIA") officers' response, the evidence illustrates there is no genuine factual dispute that officers did not act in the manner Plaintiff claims they did. The government is entitled to summary judgment, and Plaintiff's cross motion should be denied.

BACKGROUND

The general facts of the above-described accident, including its location and Officer Klier's involvement in it, are not in dispute. The government will recite facts as necessary in the Argument section below and in its statements of undisputed and disputed facts.

LEGAL STANDARD

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." *In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will

bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ARGUMENT

I. Plaintiff's claims fail to the extent they allege failure to control the Crow Tribal Police Department.

Plaintiff attempts to revise her Second Amended Complaint on the fly at summary judgment, now arguing that "the BIA breached its fiduciary duty to the individual Native Americans on the Crow reservation by failing to intervene to control the rogue tribal police force" assembled by the Crow Tribe. Doc. 31 at 13. The claim is defective for at least four reasons: (A) Plaintiff failed to present or plead this theory; (B) there is no analogous private-person liability under Montana law; (C) the BIA has no authority to "control" a tribal entity; and (D) the Court lacks jurisdiction over a breach of trust claim.

A. Plaintiff failed to present her case theory to the BIA or plead it in her Second Amended Complaint.

The crux of Plaintiff's motion for summary judgment is that the government breached a fiduciary duty to protect members of the Crow Tribe by not stopping the tribal police department from operating. Doc. 31 at 13. This theory of liability appears nowhere in Plaintiff's administrative claim to the BIA or in her Second Amended Complaint. Her case must be dismissed as a result.

In her administrative claim, after describing the facts of the November 24, 2020 accident, Plaintiff stated the following with respect to the "basis of the claim":

> Blossom Old Bull
> Form 95 addenda
> #10
>
> Braven Glenn's vehicle crashed into a train and he endured pain and suffering prior to his wrongful death. Braven Glenn's death was caused by a "state-created danger" when BIA law enforcement pursued him and then failed to provide medical attention to him after the crash. Moreover, BIA law enforcement prevented other people from providing medical attention to Braven after the crash.

SUF, ¶ 1. The description makes no mention of breach of the government's fiduciary duty to enforce the law, nor any mention of BIA officers' supposed failure to intervene to stop the pursuit or to disband the Crow Tribal Police Department.

Likewise, the word "fiduciary" does not appear in either Plaintiff's original Complaint of October 3, 2022, her Amended Complaint of December 13, 2022, or her Second Amended Complaint of February 24, 2023. *See* Docs. 1, 9, 17. The pleadings claim BIA officers "were aware of the pursuit" and "did not intervene to stop the pursuit" (untrue—*see* Section II *infra*), and that officers "negligently failed to provide necessary and timely medical aid." Doc. 17, ¶¶ 13, 61. However, Plaintiff does not allege this conduct evinced a breach of the United

States' trust obligations, nor that the government had an obligation to stop the Crow Tribal Police.

Plaintiff's failure to present this claim to the BIA or plead it in any iteration of her Complaint is fatal. Before filing suit in federal court, an FTCA plaintiff must first present their claim to the appropriate federal agency. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2. The purpose of the presentment requirement is to provide the agency with sufficient information to investigate the claims. *See, e.g., Goss v. U.S.*, 353 F. Supp. 3d 878, 885 (D. Ariz. 2018). Failure to do so divests the court of jurisdiction, *D.L. by & through Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017), and the burden of proving the claim was properly presented rests with the plaintiff, *Munns v. Kerry*, 782 F.3d 402, 413 (9th Cir. 2015).

Likewise, "summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (cleaned up). A plaintiff may not "effectively amend his Complaint by raising a new theory on a motion for summary judgment." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010) (cleaned up).

Here, the above excerpt from Plaintiff's administrative claim and the contents of her various pleadings plainly demonstrate that her now-prevailing

breach of fiduciary/trust theory has never been presented to the agency or raised in this litigation. Her failure "to do so deprives the government of the right and opportunity to conduct discovery on the claim or to make pretrial motions regarding the theory of liability." *Harry A. v. Duncan*, 351 F. Supp. 2d 1060, 1067 (D. Mont. 2005) (cleaned up), *aff'd*, 234 Fed. Appx. 463 (9th Cir. 2007) (unpublished). The Court should deny Plaintiff's motion for summary judgment on this basis and, because this is the only theory she now advances in this case, grant summary judgment in favor of the United States.

B. There is no analogous private-person liability under Montana law for the BIA's alleged failure to control the Crow Tribal Police.

The United States' liability under the FTCA is concomitant with that of "a private individual under like circumstances" according to the law of the state where the alleged tort occurred. 28 U.S.C. § 2674. To be in "like circumstances" to those of a private party, a federal employee need not be in "identical" circumstances. *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995). Nevertheless, an FTCA plaintiff must present a "persuasive analogy with private conduct" in order to invoke an applicable state law duty. *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 543 (9th Cir. 1987).

Furthermore, the FTCA "requires a court to look to the state-law liability of private entities, not to that of public entities," even when assessing liability "in the

performance of activities which private persons do not perform." *U.S. v. Olson*, 546 U.S. 43, 46 (2005); *see Xue Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010) (declining to rely on or consider liability based on "the unique authority vested in police officers").

Federal law or regulation cannot supply the operative legal duty in an FTCA case—the duty must arise under state law. *See, e.g., Lutz v. U.S.*, 685 F.2d 1178, 1184 (9th Cir. 1982); *Am. Cargo Transport, Inc. v. U.S.*, 625 F.3d 1176, 1181–82 (9th Cir. 2010); *Martinez-Pineda v. U.S.*, 2022 WL 17844680, at *2 (9th Cir. Dec. 22, 2022) (unpublished).

Here, Plaintiff provides no authority whatsoever that a private person in Montana has a recognized legal duty to prevent a governmental entity like a police department (especially one formed under authority of sovereign tribal law) from operating, on the hunch that entity might cause harm to the public. Indeed, Plaintiff cites only the government's alleged "treaty and statutory responsibility to provide law enforcement on the Crow reservation"—i.e., federal law—which cannot form the basis for an FTCA claim. Doc. 31 at 3–7, 10.

Absent a relevant, analogous state law duty applicable to private persons, Plaintiff cannot prove the duty element of a negligence claim. *Peterson v. Eichhorn*, 189 P.3d 615, ¶ 23 (Mont. 2008) (stating elements of a negligence

claim). The Court must therefore grant summary judgment in favor of the United States. *Celotex Corp.*, 477 U.S. at 322.

C. The BIA had no authority to "control" the Crow Tribal Police.

Plaintiff acknowledges in her brief that "tribes have inherent authority to police tribal members." Doc. 31 at 10 (citations omitted). True, and a necessary corollary to that statement is that the federal government generally *lacks* the authority to enforce tribal laws against tribal members. This fundamental aspect of tribal sovereignty means there is no basis to allege the BIA should have prevented Crow Tribal Police operations, and Plaintiff's claims fail.

"The power to punish offenses against tribal law committed by tribe members, which is part of a tribe's primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority." *U.S. v. Wheeler*, 435 U.S. 313, 328 (1978) (cleaned up). "It follows that when a tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government." *Id*. (cleaned up); *Natl. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) (Indian tribes "retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first

settled in North America"); *see also U.S. v. Lara*, 541 U.S. 193 (2004) (noting "tribes' inherent prosecutorial power").

Federal statutes and regulations track with the above concept of inherent tribal law enforcement authority. For example, the Indian Law Enforcement Reform Act ("ILERA"), 25 U.S.C §§ 2803(2)(B), (5), and (8), provide that BIA police officers may exercise police functions pursuant to tribal law only if "an Indian tribe has authorized the employee to enforce or carry out tribal laws." (cleaned up). Likewise, § 2806 confers upon the BIA "investigative jurisdiction over offenses against criminal laws of the United States in Indian country," but makes clear that jurisdiction "alters neither the civil or criminal jurisdiction of the Indian tribes, nor the law enforcement, investigative, or judicial authority of any Indian tribe." (cleaned up). Thus, while ILERA provides that the BIA "shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country," the agency may only enforce tribal law "with the consent of the Indian Tribe." 25 U.S.C. § 2802(a), (c)(1).

The 1975 Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. 93-638, authorizes the United States, "upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs," including law

enforcement, on a reservation. However, BIA regulations make clear that the legislation should not be interpreted as "mandating an Indian tribe to apply for a contract or grant as described in" the ISDEAA. 25 C.F.R. § 900.4. Contracts arising under the ISDEAA ("638 contracts") do not abrogate a tribe's inherent authority to enforce tribal law—the operational requirements imposed on tribes by 638 contracts are merely performance standards conditioning the federal government's funding and assumption of tort liability. *See* 25 C.F.R. § 900.3; Pub. L. 101-512, Title III, § 314; *see also, e.g., Buxton v. U.S.*, 2011 WL 4528337 (D.S.D. Apr. 1, 2011). After entering a 638 contract with the United States, a tribe can choose to return the contracted service to the BIA, or the BIA can under very limited circumstances resume the service unilaterally, but only if the tribe consented to the BIA performing the service in the first place. 25 C.F.R. §§ 900.240–900.256.

Taken together, the above authorities paint a clear picture—tribes retain the power and responsibility to enforce tribal law on tribal lands, subject only to an affirmative request to, and agreement with, the BIA for the agency to perform the service on the tribe's behalf.

The Crow Tribe had a limited agreement with the BIA related to law enforcement, but the agreement expired in June 2015. SUF, ¶ 2. As BIA-Office

of Justice Services ("OJS") Special Agent in Charge Douglas Noseep noted in a letter dated February 2018, the agency had been working with the Crow Tribe to renew this agreement in the intervening 3 years, with no progress. SUF, ¶ 3. In the meantime, the tribe hired a police chief and publicized the hiring. SUF, ¶ 4. Ultimately, the Crow Tribe expressed its interest in entering a 638 contract with the BIA by letter dated September 2018. SUF, ¶ 5.

The tribe submitted a contract proposal in January 2020, but the BIA identified a number of revisions and issues requiring additional information. SUF, ¶ 6. By March and April 2020, the BIA noted issues that could result in declination of the contract proposal, understanding that the tribe might be unable to provide requested information due to the emerging COVID-19 pandemic. SUF, ¶ 7. The parties continued to negotiate through the end of May 2020, when Crow Tribal Chairman Alvin Not Afraid Jr. informed the BIA that the tribe intended to assume full control of law enforcement operations by July 1, 2020, and expressly stated "law enforcement services will cease to be performed by BIA-OJS Uniform, Patrol and Chief of Police" by that date. SUF, ¶ 8.

On June 26, 2020, Chairman Not Afraid Jr. issued a press release indicating the tribe terminated its agreement with the BIA (though it had expired) and would begin operating its "very own police department" the following day. SUF, ¶ 9.

The press release also noted the tribe's pending 638 contract proposal, but the message from the tribe was clear—it would begin operating its police department regardless of a contract. SUF, ¶ 10. As of the end of August 2020, the tribe had not satisfied the BIA's outstanding requests for information and clarification regarding the contract proposal, yet was providing tribal law enforcement on the reservation with police officers it claimed "meet all federal background and training requirements." SUF, ¶ 11. The BIA therefore declined the Crow Tribe's proposal. SUF, ¶ 12.

Less than a week later, the tribe resubmitted its proposal, which included an implementation plan, departmental position descriptions, and a policy and procedure manual. SUF, ¶ 13. As with the first proposal, the parties negotiated the contract in the months that followed; as of November 10, 2020, the BIA was awaiting supplemental information to complete its review of the proposal and provide a final decision. SUF, ¶ 14.

On November 24, two weeks after the last correspondence between the tribe and the BIA regarding the pending 638 contract proposal, Glenn's accident occurred. At the time of the incident, the status of Crow tribal law enforcement was as follows: (1) the tribe had assembled its own police force using non-BIA, non-ISDEAA funds; (2) the tribe rescinded any authority conferred on the BIA to

enforce tribal laws on the reservation (assuming it had conferred that authority in the first instance); (3) the tribe was engaged with the BIA in developing a 638 contract for law enforcement services, but had yet to execute a contract; and (4) the tribe at all times retained inherent authority to police tribal members on the reservation. SUF, ¶ 15.

Principles of tribal sovereignty, affirmed time and again by the Supreme Court in decisions like *Wheeler* and *Lara* and enshrined in federal statutes and regulations limiting the federal government's authority to enforce tribal law on tribal lands, dictate that the BIA had neither the obligation nor the authority to "intervene" to stop the tribe's supposed "rogue" police force prior to November 24, 2020. Doc. 31 at 13. Contrary to Plaintiff's argument, the Crow Tribal Police Department did not "usurp" the BIA's law enforcement authority—that authority belonged to the tribe all along, and as of the date of Glenn's accident, the tribe chose to retain that power rather than delegate it to the BIA. *Id*. at 3. Absent the legal authority to take the actions Plaintiff alleges the BIA was obligated to take, there can be no duty to take those actions and no breach of a duty. Plaintiff's claim that the BIA "failed to intervene to control the rogue tribal police force" must be dismissed, and the United States is entitled to summary judgment.

D. This Court lacks jurisdiction over a claim alleging the government breached its fiduciary or trust obligations to "any tribe, band, or other identifiable group of American Indians."

Plaintiff's topline argument is that "the federal government has a longstanding, specific fiduciary duty to provide effective and adequate law enforcement services to tribal members within the Crow Reservation," and that the government breached this duty. Doc. 31 at 3. As a "claim against the United States in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States arising under the laws or treaties of the United States," the claim falls under the exclusive jurisdiction of the Court of Federal Claims pursuant to the Indian Tucker Act, 28 U.S.C. § 1505. *See, e.g., In re Klamath Irrigation Dist.*, 69 F.4th 934, 949 n.10 (9th Cir. 2023), *cert. denied sub nom. Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 144 S. Ct. 552 (2024) (claims alleging "the government's breach of its trust obligations" belong in the Court of Federal Claims); *Busby Sch. of N. Cheyenne Tribe v. U.S.*, 8 Cl. Ct. 596 (1985). Assuming all of the above defects do not result in summary judgment, the Court lacks jurisdiction over the case and should dismiss it.

II. Plaintiff cannot demonstrate that BIA police officers acted negligently with respect to the accident.

Without citing any materials in the record, Plaintiff claims in her brief that BIA officers were aware of the Glenn pursuit with sufficient time to "intervene to stop" it, arrived at the scene of the accident before Glenn died, and neither provided medical care themselves nor allowed an ambulance to access the site to provide care. Doc. 31 at 2. Not only are these allegations outrageous—the notion that a sworn federal law enforcement officer would purposefully withhold medical care to a gravely injured teenager—but they are directly contradicted by the record Plaintiff chooses not to cite. Moreover, even if the accident happened across the street from a Level 1 trauma center, Glenn would not have survived. The unrebutted opinion of the United States's expert medical witness, Dr. Amber Wang, is that the type of injury Glenn sustained—a hinge-type skull fracture—caused instantaneous or near-instantaneous death. To the extent Plaintiff argues the BIA was negligent with respect to the pursuit, the United States is entitled to summary judgment.

A. Plaintiff's unsupported factual allegations are demonstrably false, and the true timeline of events supports summary judgment in favor of the government.

To demonstrate a fact is not genuinely disputed at summary judgment, the movant must "cite to particular parts of materials in the record," not conclusory

statements. Fed. R. Civ. P. 56(c)(1)(A). Plaintiff fails to do so with respect to her allegations regarding the conduct of BIA officers on the day of Glenn's accident. Doc. 31 at 2. Such unsupported factual assertions cannot serve as the basis for granting summary judgment, the Court must deny Plaintiff's motion, and, because the United States does not bear the burden of proof at trial, grant the government's motion. Fed. R. Civ. P. 56(c)(1)(B); *In re Oracle Corp. Securities Litig.*, 627 F.3d at 387.

Nevertheless, the record demonstrates the inaccuracy of Plaintiff's allegations. While BIA officers were generally "aware" of the pursuit, it was only because BIA dispatch incidentally overheard Crow Tribal Police radio transmissions. BIA radio logs indicate dispatcher Luther Yellowrobe heard Officer Klier report the pursuit at 5:39 p.m. on November 24, then heard her report that Glenn's car had been struck by a train and was on fire at 5:40 p.m.[1] SUF, ¶ 16. The pursuit lasted approximately two minutes. Moreover, BIA officers on duty, including Officers Athalia Rock Above-Morrison and B. Tabbee and Special Agent Jose Figueroa, were not in the vicinity of the accident—Rock Above-Morrison was the first to arrive at 6:09 p.m. SUF, ¶ 17. Thus, the suggestion that

[1] The initial time noted in BIA dispatch logs is one hour fast—the accident occurred at 5:39 p.m.

BIA officers knew of the pursuit and were somehow positioned to prevent it (notwithstanding the lack of duty) is false.[2]

Likewise, the evidence disproves the allegation that BIA officers were at the scene of the accident prior to Glenn's death. As noted above, the first BIA officer to arrive on scene was Rock Above-Morrison approximately 28 minutes after the crash. There is no evidence that Glenn survived for this amount of time. Rather, the Montana Highway Patrol's crash report noted Glenn suffered fatal injuries, which the subsequent autopsy identified in part as a skull base hinge-type fracture. SUF, ¶ 19. To address this injury, the United States disclosed Dr. Amber Wang, a forensic pathologist, as an expert witness. SUF, ¶ 20. Dr. Wang's unrebutted opinion is that "given the presence and severity of the head injuries described, death would have occurred immediately or within seconds." SUF, ¶ 21. In particular, Dr. Wang noted that the absence of blood in Glenn's lungs means he "did not take any significant breaths following the collision." SUF, ¶ 22. Thus, the allegations that BIA officers arrived on scene before Glenn died, or that they obstructed *necessary* medical aid, are also false.

---

[2] Plaintiff's police practices expert agrees and takes no issue with any BIA officer's conduct. SUF, ¶ 18.

Based on her opening brief, Plaintiff appears to no longer argue that BIA officers acted negligently with respect to their response to Glenn's accident. However, if she does continue to press that theory, there is no genuine dispute as to the facts underlying the accident and the United States is entitled to summary judgment.

B. Even assuming the truth of Plaintiff's allegations regarding BIA officers' response, she cannot prove causation.

Dr. Wang's opinion described above makes clear that Glenn died instantaneously or within seconds of the impact with the train. Even assuming BIA officers knew of the pursuit and arrived on scene the moment the accident occurred, there is no amount of medical aid that could have saved Glenn's life. Thus, BIA officers' alleged failure to render aid was not a proximate cause of Glenn's death and Plaintiff cannot prove this requisite element of a negligence claim. *Peterson*, ¶ 23. Again, in the event Plaintiff continues to assert negligence with respect to the accident response, the United States is entitled to summary judgment.

CONCLUSION

Based on the foregoing, the Court should deny Plaintiff's motion for summary judgment and enter judgment as a matter of law in favor of the United States. The BIA lacked the legal duty and authority to stop the Crow Tribal Police

from operating, and BIA officers were not negligent in any way with respect to Glenn's accident.

DATED this 8th day of March, 2024.

JESSE A. LASLOVICH
United States Attorney

/s/ John M. Newman
Assistant U.S. Attorney
Attorney for United States

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 3,994 words, excluding the caption and certificate of compliance.

DATED this 8th day of March, 2024.

/s/ John M. Newman
Assistant U.S. Attorney
Attorney for United States