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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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Largely repeating the same arguments she made in her opening brief, Plaintiff insists the federal government had the power and responsibility to limit the Crow Tribe's exercise of tribal sovereign immunity. Just as in her opening brief, she provides no authority supporting this demonstrably incorrect position. The fact is the Crow Tribe, acting through its elected officials, formed the Crow Tribal Police Department on its own—purposefully[1]—and there was no basis in law for the United States to intervene. None of the points raised in Plaintiff's combined response and reply changes this conclusion, and none of the purported issues of fact[2] she raises prevent judgment in the government's favor. The Court should grant the United States' motion for summary judgment and dismiss this case.

ARGUMENT

A. Undisputedly, Plaintiff neither presented her failure to intervene theory to the BIA, nor pled her breach of trust theory prior to summary judgment.

[1] *See* Doc. 32-1 (describing the tribal chairman's belief that "the Crow People and residents of the Crow Indian Reservation deserve better" than what they had been receiving with respect to law enforcement).

[2] Plaintiff did not file a statement of disputed facts in response to the government's statement of undisputed facts, Doc. 37. This failure is "deemed an admission that no material facts are in dispute" with respect to the government's motion. D. Mont. L.R. Civ. 56.1(d).

Ostensibly to combat the government's argument that her breach of fiduciary/trust theory has never been presented to the agency or raised in this litigation, Plaintiff cites instances in her pleadings where she alleged "negligent failure to intervene." Doc. 39 at 2–3. She misses the point. First, Plaintiff never alleged anything to do with intervening in the operations of the Crow Tribal Police in her administrative claim—she alleged Braven Glenn died because BIA police "pursued him and then failed to provide medical attention to him after the crash." *See* Doc. 37, ¶ 1. It is the content of the administrative claim that bears on whether an FTCA plaintiff adequately presented the claim to the subject agency, not the content of the pleadings. *D.L. by and through Junio v. Vassilev*, 858 F.3d 1242, 1245 (9th Cir. 2017) ("the FTCA's exhaustion requirement demands that a plaintiff exhaust his administrative remedies before he files an FTCA claim in federal court"). Thus, absent any mention of her intervention theory, Plaintiff failed to administratively exhaust that theory with the BIA.

Second, while Plaintiff did reference negligent failure to intervene in her pleadings, she alleged for the first time at summary judgment that the BIA's purported failure in this regard violated a trust or fiduciary obligation. This is not a mere distinction without a difference—the FTCA borrows state tort law with respect to negligence claims, *see Bennett v. U.S.*, 44 F.4th 929, 933 (9th Cir. 2022),

while the United States' trust obligations vis-à-vis Indian nations derive from statutes and regulations, i.e., federal law, *see U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("the applicable statutes and regulations establish the fiduciary relationship and define the contours of the United States' fiduciary responsibilities," and "the Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute") (cleaned up). In other words, alleging breach of a common-law duty of reasonable care (negligence) does not sweep in breach of a federal statutory duty (trust obligation)—they are completely different causes of action founded on different principles and bodies of law. Plaintiff pled negligence, but raised breach of trust as a theory of recovery for the first time at summary judgment. The law prohibits this sort of tactic, *see Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010), and the Court should reject Plaintiff's claims to the extent predicated on this theory.

B. The public duty doctrine does not apply to this case.

Like an Escherian staircase, Plaintiff argues a *private* person analog exists under Montana law because an exception to the *public* duty doctrine applies. Doc. 39 at 4–5. This argument makes no sense. The government has never argued in this case (nor, it would seem, in any FTCA case in Montana) that the public duty

doctrine forecloses its liability. This is precisely because the FTCA requires a plaintiff to identify a state law duty attaching to private persons, *see, e.g., U.S. v. Olson*, 546 U.S. 43, 46 (2005), *Am. Cargo Transport, Inc. v. U.S.*, 625 F.3d 1176, 1181–82 (9th Cir. 2010), and the public duty doctrine applies exclusively to public entities, *see Gregory v. Montana*, 2022 WL 358056, at *4 (D. Mont. Feb. 7, 2022). The public duty doctrine simply has not and does not come into play in this case, and Plaintiff's attempt to muddy the waters with it should be rejected.

Moreover, even assuming the doctrine could apply in this suit, Plaintiff undercuts her own argument about why it shouldn't apply. She claims "an exception to the public duty doctrine's immunity provision arises when a 'special relationship' between the victim and officer has been created," and that "BIA officers have a special relationship with Native Americans they police." Doc. 39 at 5. This statement ignores what constitutes a "special relationship" according to the Montana Supreme Court—the "special relationship" exception only applies "when the alleged duty breached is not owed to 'all,' but rather owed to an individual." *Bassett v. Lamantia*, 417 P.3d 299, ¶ 18 (Mont. 2018); *see also Todd v. Baker*, 2012 WL 1999529, at *12 (D. Mont. June 4, 2012) (public duty doctrine barred negligence claim because plaintiff failed to demonstrate breach of a duty owed to him individually). Here, Plaintiff alleges "members of the [Crow] tribe"

relied "on the BIA's promise of providing law enforcement." Doc. 39 at 5. By her own admission, Plaintiff references a duty (a "promise of providing law enforcement") purportedly owed to all tribal members, not specifically to her or to Glenn, meaning a special relationship could not have materialized according to *Bassett*.

The bottom line is that the public duty doctrine has no place in this suit, and neither entitles Plaintiff to judgment nor precludes judgment in favor of the government.

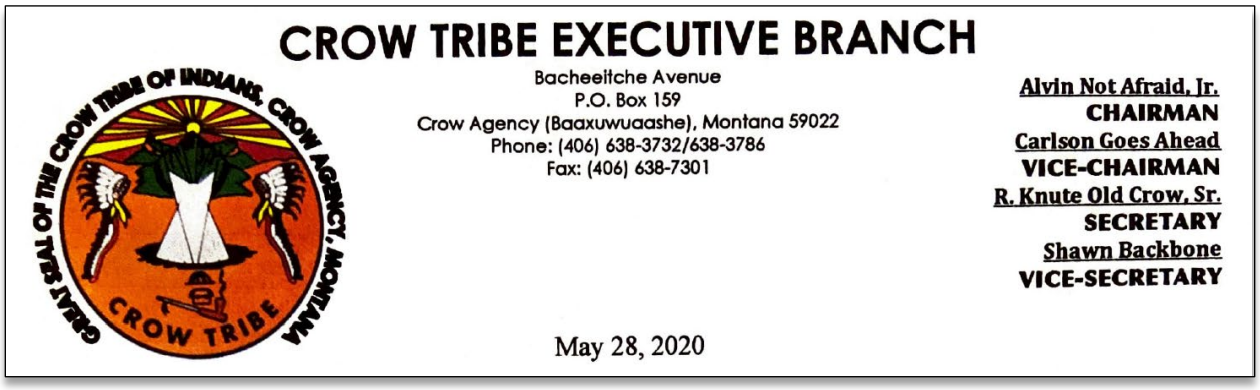
C. According to tribal law, the Crow Tribe Executive Branch had the power to form the Crow Tribal Police Department in 2020.

Plaintiff claims the Crow Tribal Police Department was "a rogue force" and "a personal vigilante group assembled by the tribal chairmen [sic] without any authority under tribal code." Doc. 39 at 6. Neither the record developed in this case nor the Constitution and By-Laws of the Crow Tribe of Indians (2001)[3] support this hyperbolic assertion.

Documents filed in support of the instant motions for summary judgment belie the claim that no official tribal action created the police department. Tribal Chairman Alvin Not Afraid, Jr. sent a letter to the BIA in May 2020 announcing

[3] Attached as Ex. 1 and available at http://www.crow-nsn.gov/uploads/1/5/6/0/15609006/2001-constitution.pdf (Accessed April 18, 2024).

the imminent creation of the police department and severing any authority the tribe may have delegated to the BIA to enforce tribal law. Doc. 32-13. The letter was sent on Crow Tribe Executive Branch letterhead:



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CHAIRMAN
Carlson Goes Ahead
VICE-CHAIRMAN
R. Knute Old Crow, Sr.
SECRETARY
Shawn Backbone
VICE-SECRETARY

May 28, 2020

Id. The subsequent June 26, 2020 press release announcing the formation of the Crow Tribal Police Department was likewise issued on Executive Branch letterhead, as was the December 9, 2020 letter informing the BIA that the police department was being disbanded. Docs. 32-1, 32-15.

The Crow Tribe Executive Branch, comprised of the chairman and three lesser officers listed on the letterhead, is a creation of the Crow Tribal General Council. *See* Ex. 1 at 3–4. The enumerated powers and general duties incumbent on the Executive Branch include:

- represent the Crow Tribe of Indians in negotiation with Federal, State and local governments and other agencies, corporations, associations, or individuals in matters of welfare, education, recreation, social services and economic development affecting the Crow Tribe of Indians;

- administer and oversee all functions of the Executive Branch of the Crow Tribal Government including the hiring, firing, and staffing of all agencies, departments, and instrumentalities of the Executive Branch in accordance with established written policy;

- administer any funds within the control of the Tribe and make expenditures from available funds for tribal purposes, including salaries and expenses of Tribal Officials or employees . . . ;

- to implement all laws, resolutions, codes and policies duly adopted by the Legislative Branch.

Id. at 5–6. "The Executive Branch, or Executive Officials, are elected from the General Council to act on behalf of Crow Nation [and,] through their executive powers, develop policies, create the annual budget of the Crow Nation, and administer the daily operations of the Administration." *See* http://www.crow-nsn.gov/crow-tribe.html (Accessed April 17, 2024).

Plainly, based on the foregoing, the Crow Tribe Executive Branch speaks for the Crow Tribe in general, and specifically with respect to matters of health and welfare, law enforcement, personnel, and intergovernmental affairs. Nothing in the Constitution and By-Laws of the Crow Tribe of Indians mandated "approv[al] by the tribal council pursuant to tribal code" before forming the police department—on the contrary, tribal code makes clear that the Executive Branch acted with the delegated authority of the Crow Tribal General Council in that endeavor. Doc. 39 at 4; Ex. 1 at 3. Plaintiff's assertion that "there was no legal

authority under tribal law or federal law for the existence of Crow tribal police" ignores the very sources she cites. Doc. 39 at 4. Tribal law gave the Executive Branch the power to constitute the tribal police, and federal law left enforcement of tribal laws within the bounds of the reservation to the Crow Tribe. *See U.S. v. Wheeler*, 435 U.S. 313, 328 (1978). By extension, the BIA had neither the power to disband the Crow Tribal Police nor the authority to enforce tribal law at the time of Glenn's accident.

D. The Court should disregard the declaration of Maurice Mountain Sheep.

Apart from a passing comment in the introduction of her opening brief (with no citation to any evidence), Plaintiff made no mention of any specific negligent acts by BIA police officers in responding to the scene of Glenn's accident. Doc. 31, passim. The government pointed out this conspicuous absence in its response brief, presenting affirmative, unrebutted evidence that: (1) the nature of Glenn's injuries was such that he died instantly or within seconds of his collision with the BNSF train; and, (2) BIA officers arrived at the scene well after the collision and, thus, well after Glenn's death. Doc. 35 at 16–19. Now, in a last-ditch effort to create a genuine issue of material fact, Plaintiff presents the declaration of Maurice

Mountain Sheep[4], who under penalty of perjury claims he witnessed what the government's expert witness, Dr. Amber Wang, opines was medically impossible—that despite the severity of Glenn's skull base fracture, despite the fact that autopsy findings indicated Glenn didn't take a breath after the collision fractured his skull, Glenn was nevertheless lying in the grass near his burning vehicle shouting for help while "BIA police officers" refused to assist him. Doc. 40 at 2.

Setting aside the outrageous, inflammatory nature of these allegations, this sort of "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007); *see also Tolan v. Yellowstone Cnty.*, 2022 WL 17103933, at *2 (D. Mont. Nov. 22, 2022) (regarding the sham affidavit rule, the intention is "to preserve the value of summary judgment by preventing parties from fabricating issues of material fact"). Nor do

[4] The United States attempted to contact Mountain Sheep in September 2023 to arrange a deposition. Counsel for the government contacted Plaintiff's counsel to coordinate dates for the deposition; counsel was thus aware of the government's intention to depose Mountain Sheep. Counsel for the government attempted to contact Mountain Sheep numerous times, to no avail. In light of Mountain Sheep's recently acquired declaration, *see* Doc. 40 at 2 (dated March 27, 2024), it would appear Plaintiff was in a position to communicate the government's intent to Mountain Sheep all along.

Mountain Sheep's dubious observations render the issue of the timing of Glenn's death "genuine" because, in light of the United States' unrebutted expert's opinion, no "reasonable trier of fact could resolve" the issue in Plaintiff's favor. *Freyd v. U. of Oregon*, 990 F.3d 1211, 1219 (9th Cir. 2021). This is particularly so given that former Crow Tribal Police Officer Pamela Klier—the officer involved in the pursuit and the first person at the scene following the crash—witnessed no signs of life from Glenn. *See* Ex. 2, Decl. Pamela Klier, ¶¶ 3–6 (Apr. 15, 2024). Finally, as Plaintiff is the movant on these cross-motions for summary judgment and bears the burden of proving Glenn survived the train collision for an appreciable amount of time, the Court must resolve all inferences and view all evidence pertaining to this issue in a manner most favorable to the government. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Doing so compels rejection of Mountain Sheep's declaration.

Nevertheless, even assuming the validity of Mountain Sheep's claims, his declaration does not resolve in Plaintiff's favor any fact regarding BIA officers' response to Glenn's accident. First, his statement regarding officers refusing to allow him to approach Glenn is inadmissible hearsay—it describes purported out-of-court statements offered to prove the assertion that officers denied Glenn care after the collision. Fed. R. Evid. 801(c), 802. Second, numerous authorities

responded to the scene of the accident and Mountain Sheep provides no basis for stating that the officers who allegedly withheld or prevented assistance to Glenn were employed by the BIA. Doc. 40, ¶ 7. In fact, no BIA officer arrived on scene until approximately 28 minutes after the crash, so if Mountain Sheep interacted with officers before then they necessarily were not employed by the BIA. Doc. 37, ¶¶ 16–17; *see also* Doc. 38-1 at 3 (indicating Crow Tribal Police were on scene immediately and Bighorn County Sheriff's Deputies arrived before BIA officers). Third, even assuming officers from any of the involved agencies did prohibit Mountain Sheep from approaching Glenn, *see* Doc. 40, ¶¶ 6–7, this would be entirely consistent with first responders' interests in controlling the scene. *See, e.g., Alford v. Humboldt Cnty.*, 785 F. Supp. 2d 867, 879–81 (N.D. Cal. 2011) (discussing permissibility of first responders ensuring personal and public safety prior to rendering medical aid). First responders would be justified in not allowing a member of the public to approach an injured suspect in close proximity to a car engulfed in flames. In any event, Mountain Sheep's assertions do not address or establish that first responders failed to render timely, competent aid to Glenn, assuming (improbably) that Glenn survived the collision.

CONCLUSION

Based on the foregoing and the points raised in the government's opening brief, the Court should enter judgment as a matter of law in favor of the United States. No doubt Braven Glenn's death was a tragedy, but it is one for which the United States bears no legal responsibility.

DATED this 19th day of April, 2024.

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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 2,531 words, excluding the caption and certificate of compliance.

DATED this 19th day of April, 2024.

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