

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CELESTE PRETENDS EAGLE, Individually
and as Special Administrator/Personal
Representative of the ESTATE OF JAYLENE
PRETENDS EAGLE and W.R.E, Jr., and ANNIE
RED ELK, Individually and as Special
Administrator/Personal Representative of the
ESTATE OF WAYLON RED ELK, SR.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

5:22-cv-05083-RAL

**DEFENDANT’S REPLY IN SUPPORT
OF ITS MOTION TO DISMISS
PLAINTIFFS’ COMPLAINT**

Pursuant to LR 7.1, Defendant United States submits this reply to Plaintiffs’ response to United States’ Brief in Support of Motion to Dismiss, Doc. 20.

The United States raised three grounds for dismissal in its motion to dismiss: (1) a Rule 12(b)(1) jurisdictional facial challenge based on the complaint; (2) a Rule 12(b)(1) jurisdictional factual challenge based on presentment; and (3) a 12(b)(6) challenge for failure to state a claim.

In response to the United States’ Rule 12(b)(1) jurisdictional facial challenge based on the complaint that Plaintiffs fail to show this Court has jurisdiction based on an unsupported conclusory statement in paragraph 7 of Plaintiffs’ Complaint that “[t]he Oglala Sioux Department of Public Safety Corrections is an agency of the United States, Makes Him First’s supervisors are supervisors for the United States, and that Makes Him First is a federal official”, Doc. 11 at page 4, Plaintiffs argue that FTCA actions are proper against tribal entities / employees acting pursuant to an ISDEA contract. Plaintiffs cite to several cases to show that an

Indian Self Determination contract (“ISDEA”) may provide for FTCA jurisdiction. But this point is not disputed. The United States agrees that an ISDEA contract *may* form the basis of a FTCA claim if the facts support it and it is properly pleaded. However, what is lacking in Plaintiffs’ Complaint is any allegation whatsoever that the Oglala Sioux Tribe Department of Public Safety (“OST”) was operating under an ISDEA contract and that Tyler Makes Him First, as an employee of the department, was acting within the scope of a duty contemplated in the unalleged ISDEA contract.

Plaintiffs allege no facts that the OST operated corrections under an ISDEA contract, what the terms of the contract required employees to do, and no facts that, if proven, would show that Makes Him First was acting within the scope of an ISDEA contract when the accident occurred. Thus Plaintiffs have failed to carry their burden to show that jurisdiction exists. See VS Ltd. P'ship v. Dep't of Hous. & Urb. Dev., 235 F.3d 1109, 1112 (8th Cir. 2000). In response to Defendant’s second argument that Plaintiffs failed to properly present their argument to the agency, Plaintiffs claim they substantially complied with the presentment requirement relying on Farmers State Sav. Bank v. Farmers Home Admin., a Div. of the U.S. Dep't of Agric., 866 F.2d 276, 276–77 (8th Cir. 1989).

The plaintiffs in Mader v. United States, 654 F.3d 794, 796 (8th Cir. 2011) argued the same thing. However, in applying 28 C.F.R. § 14.2(a) and 28 U.S.C. § 2675(a), as the en banc Court in Mader explained, the Court in Farmers State Sav. Bank got it wrong. The Court in Mader held “that a properly ‘presented’ claim under § 2675(a) must include evidence of a representative's authority to act on behalf of the claim's beneficiaries under state law.” Mader, 654 F.3d at 803. Furthermore, the Court explained that 28 C.F.R. § 14.2(a) is “a paraphrase of the inherent requirements of §§ 2675(a).” Id. at 804; see also Runs After v. United States, No.

CIV 10-3019-RAL, 2012 WL 2951556, at *3 (D.S.D. July 19, 2012), aff'd sub nom. Runs After v. United States, 511 F. App'x 596 (8th Cir. 2013) (discussing the Mader decision and its implicit overruling of Farmers State Sav. Bank.)

Plaintiffs also rely on Dykes v. United States, 794 F. Supp. 334 (D.S.D. 1992). However, that case is unpersuasive too. In Dykes, the court found that the presentment requirement in “28 U.S.C. § 2675, is essentially one of notice,” id. at 336, which is a finding expressly rejected in Mader at 803-804.

Regarding the United States’ Rule 12(b)(6) argument, Plaintiffs do not appear to expressly address those grounds, however, admittedly, there is overlap between the United States’ facial attack and the Rule 12(b)(6) claim. Nonetheless, as pointed out in the United States’ initial brief, Plaintiffs’ complaint fails to plead sufficient facts that, if proven true, would allow the Court to provide the Plaintiffs with the relief sought.

For these reasons and the reasons discussed in the United States’ initial brief in support of its motion to dismiss, Plaintiffs’ case should be dismissed.

Dated this 3rd day of May, 2023.

ALISON J. RAMSDELL
United States Attorney

/s/ Aron Hogden
Aron Hogden
Assistant United States Attorney
325 S. First Avenue, Suite 300
Sioux Falls, SD 57104
Phone: (605) 330-4400
Aron.Hogden@usdoj.gov