IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. United States of America, Defendant.	Case No. 1:19-cv-00150

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF DECISION

[¶1] THIS MATTER comes before the Court on a Motion for Partial Summary Judgment filed by the United States on February 12, 2021. Doc. No. 63. The State of North Dakota filed a Response on March 26, 2021. Doc. No. 78. The United States filed a Reply on April 9, 2021.

[¶2] North Dakota brought a five-count Complaint against the United States under the Federal Tort Claims Act ("FTCA"), seeking to recover more than $38 million dollars in damages to the State resulting from and arising out of more than seven months of protests to the construction of the Dakota Access Pipeline ("DAPL"). The Complaint alleges claims for public nuisance, negligence, Good Samaritan negligence, gross negligence, and civil trespass. On August 19, 2020, the Court granted, in part, the United States' Motion to Dismiss and dismissed Claim Three (Negligence – Good Samaritan). Doc. No. 38.

[¶3] The United States' Motion for Partial Summary Judgment challenges this Court's subject matter jurisdiction. The United States asserts approximately $37 million of North Dakota's claimed damages of roughly $38 million are jurisdictionally barred because they do not constitute "injury or loss of property" within the meaning of the waiver of sovereign immunity found at 28

U.S.C. § 1346(b)(1). The United States also asks the Court to offset the damages amount by $10 million based on a federal grant North Dakota received for emergency response costs. Finally, the United States asks the Court to exclude North Dakota's claim for interest on a Bank of North Dakota loan it secured for the emergency response to the DAPL protests. North Dakota disputes these contentions.

[¶4] As discussed in more detail below, the Court concludes North Dakota's emergency response costs are "money damages . . . for injury or loss of property" under 28 U.S.C. § 1346(b)(1). The damages are also permissible as damages under North Dakota law. See N.D.C.C. § 32-03-20. Under North Dakota law, reducing an award of damages from any collateral source must occur only after the damages have been actually awarded. See N.D.C.C. § 32-03.2-06. Finally, because of the unique nature of the Bank of North Dakota, more information is needed regarding the State-owned Bank and the contractual arraignment providing for the interest payment. Accordingly, the United States' Motion for Partial Summary Judgment is **DENIED**.

FACTUAL BACKGROUND

[¶5] The facts necessary to resolve this dispute are minimal as the questions presented by the United States are strictly legal in nature.[1]

[¶6] From August 2016 to March 2017 a significant and often unlawful and contentious protest of the Dakota Access Pipeline occurred near the Backwater Bridge near Lake Oahe and the Oahe Dam in Morton County, North Dakota. In response to the protest, North Dakota dedicated substantial law enforcement services to the protest sites.

[1] North Dakota claims to dispute numerous facts that ultimately are irrelevant for the Court's consideration at this time. See Doc. No. 78, pp. 2-6.

[¶7] North Dakota's Complaint seeks to recover damages incurred from the emergency response costs related to the Dakota Access Pipeline (DAPL) protests. Included in its claims for damages is a claim for damage to state property, including law enforcement vehicles and repair work for damage to the Backwater Bridge that occurred from the protests. The Complaint seeks a sum certain amount of $38,005,071.66.

[¶8] Upon application by North Dakota, the Emergency Federal Law Enforcement Assistance ("EFLEA") program awarded the State a $10 million grant to "assist with reimbursement for law enforcement activities in response to the protests of the Dakota Access Pipeline." Doc. No. 64-4.

[¶9] To help pay for law enforcement activities at the DAPL protests, North Dakota secured a loan from the State-owned Bank of North Dakota in the amount of $37,173,578.74. Doc. No. 78-2, ¶ 5. At the time North Dakota filed its Notice of FTCA Claim, interest on the loan amounted to approximately $801,950.71. Id.

[¶10] The United States filed a Motion for Partial Summary Judgment on February 12, 2021, seeking to exclude these damages. The matter is currently set for a bench trial on May 1, 2023.

STANDARD OF REVIEW

[¶11] The Court will grant summary judgment "if the movant 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); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue is 'genuine' if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party." Schilf v. Eli Lilly & Co., 687 F.3d 947, 948 (8th Cir. 2012) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "A fact is material if it 'might affect the outcome of the suit.'" Dick v. Dickinson State Univ., 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting Anderson, 477 U.S. at 248). Courts must afford "the nonmoving party the benefit of all reasonable inferences

which may be drawn without resorting to speculation." TCF Nat'l Bank v. Mkt. Intelligence, Inc., 812 F.3d 701, 707 (8th Cir. 2016) (quoting Johnson v. Securitas Sec. Servs. USA, Inc., 769 F.3d 605, 611 (8th Cir. 2014)). "At summary judgment, the court's function is not to weigh the evidence and determine the truth of the matter itself, but to determine whether there is a genuine issue for trial." Nunn v. Noodles & Co., 674 F.3d 910, 914 (8th Cir. 2012) (citing Anderson, 477 U.S. at 249).

[¶12] If the movant demonstrates the absence of a genuine issue of material fact, "[t]he nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.'" Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Id.

ANALYSIS AND DISCUSSION

I. Emergency Response Costs

[¶13] The first issue raised by the United States is whether North Dakota's claims for emergency response expenses against the United States constitute "money damages" for "injury or loss of property" under 28 U.S.C. § 1346(b)(1).

[¶14] The United States, as a sovereign entity, is immune from suit except to the extent that it has waived sovereign immunity. Pursuant to the FTCA, 28 U.S.C. § 1346(b)(1), the United States has waived

> claims against the United States for money damages…for injury or loss of property…caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be

> liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. "The FTCA serves as a limited waiver of sovereign immunity, opening the door to state-law liability claims against the federal government for harm caused by government employees." Buckler v. United States, 919 F.3d 1038, 1044 (8th Cir. 2019). To proceed, North Dakota's claims must come within section 1346(b)(1)'s waiver requirements, otherwise such claims are barred by sovereign immunity.

[¶15] The Supreme Court has recognized Section 1346(b)(1) provides a six-part test for determining whether any given claim is actionable under the FTCA. Id. at 575. Each claim arising under the FTCA must be

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death, [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC v. Meyer, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b))).

i. Emergency Response Costs as Injury or Loss of Property

[¶16] The United States first contends the Court should grant summary judgment in its favor as it relates to North Dakota's response costs for the incidents alleged in the Complaint. The United States argues the federal common law governs the definition of "for money damages . . . for injury or loss of property, or personal injury or death" as found in 28 U.S.C. § 1346(b)(1)'s waiver of sovereign immunity. The United States contends North Dakota seeks two types of damages: for emergency response costs and reimbursement for property damage. The United States claims the emergency response expenses are not "money damages" for "injury or loss of property."

[¶17] North Dakota, on the other hand, contends North Dakota law should be used to interpret what damages are recoverable. According to the State, North Dakota tort law allows for recovery of abatement damages, similar to the actions taken by North Dakota to clear out the demonstrators at the protest sites. North Dakota disputes the United States' characterization of its claim for damages. North Dakota posits it seeks damages for the injury to property caused in part by the United States allowing the protesters to continue their destructive activities, which necessitated abatement response action from North Dakota. In North Dakota's view, the damages are singular.

[¶18] The issue of whether State or Federal law defines "injury or loss of property" has not been decided by the Eighth Circuit.[2] The Court does not need to resolve the question of whether Federal or North Dakota law governs to interpret the meaning of "money damages . . . for injury or loss of property" under 28 U.S.C. § 1346(b)(1) because, even assuming the United States is correct that a federal interpretation of Section 1346(b)(1) is required, Section 1346(b)(1)'s plain language dictates the outcome of this dispute: North Dakota is not prohibited from seeking damages for the emergency response costs.

[¶19] The only issue raised by the United States is whether North Dakota's emergency response costs are cognizable under 28 U.S.C § 1346(b)(1) as "money damages . . . for injury or loss of property." The United States relies on a spate of holdings from the Ninth Circuit, People of California v. United States, 307 F.2d 941 (9th Cir. 1962), Oregon v. United States, 308 F.2d 568

[2] The Second Circuit, in Devlin v. United States, 352 F.3d 525 (2d Cir. 2003) touched on this issue, but ultimately declined to take a definitive stance: "Although we are inclined to agree with the state-incorporation approach over the uniformity approach—and indeed may well be bound by Birnbaum v. United States to adopt the former—we need not conclusively determine the issue, because we conclude that, under either approach, Plaintiff's claim is one for 'injury or loss of property.'" 352 F.3d at 534. As discussed below, the Court does not need to resolve this dispute because even applying a federal interpretation, the result is that North Dakota's damages are permissible under 28 U.S.C. § 1346(b)(1). See Tri-State Hospital Supply Corp. v. United States, 341 F.3d 571 (D.C. Cir. 2003).

(9th Cir. 1962), Idaho ex rel. Trombley v. U.S. Dep't of Army, Corps of Eng'rs, 666 F.2d 444 (9th Cir. 1982), and City of Imperial v. Dep't of the Navy, 2016 WL 3419220 (S.D. Cal. June 22, 2016), to argue North Dakota's claim for emergency response costs are barred by 28 U.S.C. § 1346(b)(1). As discussed below, this Court rejects the reasoning expounded by the Ninth Circuit because the conclusions have no basis in the actual text of 28 U.S.C. § 1346(b)(1).

[¶20] In California v. United States, Plaintiff People of California filed a complaint under the Federal Tort Claims Act, seeking "to recover expenses incurred by the State of California in suppressing an uncontrolled fire on land within the State in the sum of $11,128.76." 307 F.2d at 942. California alleged United States Forest Service employees negligently started a fire on land owned and controlled by the United States. Id. California claimed the United States' negligence resulted in emergency response costs as damages under the FTCA. Id. The Ninth Circuit affirmed the district court's dismissal of the complaint because the injury claimed was for expenses resulting from fighting the fire. Id. at 944. In explaining its reasoning, the court stated, "In fact, we are unable to find a single instance in the history of litigation involving the Tort Claims Act where recovery was permitted in the absence of injury to person or property." Id.

[¶21] Similarly, in Oregon, the State of Oregon filed a complaint under the Federal Tort Claims Act alleging "agents and employees of the Forest Service, Department of Agriculture, United States of America, while acting within the scope of their employment, negligently and carelessly set a forest fire on lands of the United States." 308 F.2d at 568. Oregon further claimed that these federal employees also negligently allowed the fire to burn "into the State and District of Oregon" causing emergency response costs in the amount of $26,999.41. Id. The complaint was dismissed by the district court because Oregon did not claim an injury or loss of property. Id. at 568-69. The Ninth Circuit again affirmed dismissal of the action for lack of jurisdiction because, among other

reasons, Oregon failed to claim damages for an injury to property. Id. The only claim at issue was for response costs, which the Court of Appeals determined does not constitute an injury or loss of Oregon's property. Id.

[¶22] In Idaho, the United States Army Corps of Engineers agreed to pay the State of Idaho an annual fee for Idaho "to provide a system of fire protection for specified federal land in Idaho." 666 F.2d at 445. On the federal land in Idaho subject to the agreement, campers started a fire that resulted in emergency fire response from the State of Idaho. Id. The fire suppression efforts cost Idaho over $150,000. Id. The court, relying on the Ninth Circuit's holding in Oregon, held "the FTCA did not confer jurisdiction on the district court for expenses incurred by a state or other agency in fighting a forest fire." Id. at 446.

[¶23] Finally, in City of Imperial, a Marine Corps jet crashed in the City of Imperial. 2016 WL 3419220 at *1. The City's fire and police departments responded to the emergency. Id. The City sought emergency response costs of $28,223.84. The complaint noted the final improvements to the damaged street were underway but only sought recovery of the emergency response. The court dismissed the action, in part, for lack of jurisdiction under the FTCA. Id. at *2. In reaching this conclusion, the court relied on the Ninth Circuit's holdings in California, Oregon, and Idaho, finding emergency response "expenses do not constitute damagers for injury or loss of property under the FTCA." Id. (quotation marks omitted). Absent from the City's complaint was a claim for actual damages to City of Imperial's property.

[¶24] North Dakota claims the present dispute is dissimilar to those cases arising out of the Ninth Circuit in part because the emergency response damages claimed here were not associated with a claim for physical damages. The Court agrees. The Court previously found the United States' improper conduct, in part, the property damage at the DAPL protest sites. This necessitated North

Dakota's emergency response, which included taking out the loan from the State-owned Bank of North Dakota. The connection of the emergency response costs to the property damage is precisely the missing fact from California, Oregon, Idaho, and City of Imperial. Accordingly, those cases are inapplicable to the present action.

[¶25] The Parties dispute whether the damages are singular or bifurcated between "emergency response costs" and "property damage" is immaterial because even assuming North Dakota has two separate damages claims not related to one another, the Court concludes the result is the same because 28 U.S.C. § 1346(b)(1) has no physical harm requirement for "injury or loss of property." In this respect, the Court disagrees with the Ninth Circuit's inclusion of a physical harm requirement into 28 U.S.C. § 1346(b)(1). The "first step in interpreting a statute is determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). If the language of the statute is clear, "the inquiry ceases." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002).

[¶26] Section 1346(b)(1) allows individuals to recover "money damages . . . for injury or loss of property" arising out of the United States' negligence. Nowhere in this provision or elsewhere does "for injury or loss of property" require the injured person suffer only a physical injury. This is bolstered by the fact that Congress has exempted some but not all intangible torts. See 28 U.S.C. § 2680 (the waiver of sovereign immunity at 28 U.S.C. § 1346(b) does not apply to "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."). Congress also specifically exempted awards of both punitive damages and prejudgment interest. 28 U.S.C. § 2674. The inclusion of these exemptions show that if Congress wished to exempt claims for emergency response damages such as those at issue, it could have chosen to include those claims under 28 U.S.C. §§ 2674 or 2680. Because Congress created a list

of specific exceptions to claims and damages allowed under the FTCA, this Court declines to insert one onto the general waiver of sovereign immunity at 28 U.S.C. § 1346(b)(1). See Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 109 (1980) (declining to create an exception to the Freedom of Information Act when "§6(a)(1) specifically incorporated by reference the nine exemptions of the FOIA, 5 U.S.C. § 552(b)."). The language of 28 U.S.C. § 1346(b)(1) is clear. Money damages for any injury or any loss of property are permissible unless they are specifically exempted by another provision of the FTCA. There is no specific exemption for claims for emergency response costs as damages for injury or loss of property.

[¶27] Furthermore, the plain language of "injury" and "loss of property" allow North Dakota to pursue its damages under the FTCA. Black's Law Dictionary defines "injury" as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." Black's Law Dictionary (11th ed. 2019). The emergency response cost is clearly an injury. North Dakota suffered economic losses due to having to expend significant financial resources responding to the DAPL protest sites because the United States failed to follow its own rules and regulations relating to the use of Corps land. North Dakota has the right to use its resources, including money, as it sees fit. By refusing to follow its own rules and regulations, the United States caused North Dakota to suffer economic loss due to the United States' negligence. Therefore, North Dakota's expenditure of money to pay for the emergency response costs is an "injury."

[¶28] North Dakota also suffered a "loss of property" through its economic expenditures. Black's Law Dictionary defines "property" as "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised." Black's Law Dictionary (11th ed. 2019). The emergency response costs fit this definition. The money, while intangible (that is, not concrete), is a thing over which North Dakota had the right of possession to use. It took out a loan from the State-owned

Bank of North Dakota to use it for the specific purpose of responding to the DAPL demonstration sites. The United States' negligence forced North Dakota to use that money to pay for the emergency response costs, thereby causing North Dakota to lose that property. North Dakota, therefore, has suffered a loss of property under the plain meaning of 28 U.S.C. § 1346(b)(1).

[¶29] This approach is supported by Tri-State Hospital Supply Corp. v. United States, 341 F.3d 571 (D.C. Cir. 2003). In Tri-State, the D.C. Circuit Court of Appeals carefully analyzed the nature of the damages allowed under 28 U.S.C. §1346(b)(1). 341 F.3d at 572, 575-580. In that case, Tri-State Hospital Supply Corp. ("Tri-State") was the subject of a criminal investigation by the United States. Tri-State eventually sued the United States for malicious prosecution seeking to recover $3.2 million in damages as injury or loss of property it had to pay in attorneys fees over the course of the six-year criminal investigation. Id. at 572. The district court held such fees were not recoverable as injury or loss of property. Id. The D.C. Circuit disagreed, holding "attorney's fees *qua* damages are recoverable against the United States for abuse of process and malicious prosecution if 'the law of the place' where the tort occurred so provides." Id. (quoting § 1346(b)(1)). This was a case of purely economic damages without any reference to property damage.

[¶30] In Tri-State, only the third (injury or loss of property) and sixth (law of the place) elements in Section 1346(b)(1) were disputed. Id. at 575-76. In determining whether the expenses Tri-States spent on attorneys' fees defending itself was "for injury or loss of property," the D.C. Circuit explained such expenses "may properly be characterized as damages 'for injury or loss of property' within the meaning of the third statutory element of section 1346(b)(1)." Id. at 576. In making this determination, the D.C. Circuit bifurcated "for injury or loss of property." Id. The D.C. Circuit found the attorneys fees could be "considered as damages for 'injury'—actionable injury other

than 'personal injury' (here, for example, being subjected to indictment, trial, penalties, etc.)." Id. Alternatively, the D.C. Circuit noted the claims could be "viewed as damages for 'loss of property' (that is, of the funds necessarily expended to defend against the wrongful legal proceeding)." Id. Under either provision, the D.C. Circuit found the loss of money paid out to another in response to the United States' negligence constitutes damages "for injury or loss of property." Id. The D.C. Circuit further reasoned that "[w]hen the Congress wished to except a class of damages from the FTC, it had no difficulty doing so specifically and unambiguously." Id.

[¶31] Furthermore, the D.C. Circuit was unpersuaded by the Ninth Circuit's analysis in Idaho, California, and Oregon. The court held, "[t]o the extent that the Ninth Circuit's firefighting expenses decisions require a physical injury to recover "money damages" under the FTCA, we decline to follow them." Tri-State, 341 F.3d at 580. This is because "[n]o such requirement appears on the face of section 1346(b)(1) and we decline to engraft one." Id.

[¶32] The takeaway from this discussion of Tri-State is that this Court does not need to resolve whether Federal common law or State law defines "for injury or loss of property" under 28 U.S.C. § 1346(b)(1). The statutory language is plain on its face. What the FTCA requires is the money damages be for an "injury" or "loss of property." This, as the D.C. Circuit concluded, includes economic damages without any requirement in the statute calling for corresponding physical damages.

[¶33] Here, as for whether the damages are "for injury or loss of property," the United States essentially asks the Court to find Section 1346(b)(1) mandates a physical injury requirement for claiming damages. The Court rejects this argument for the same reasons set forth in Tri-State. The plain language of Section 1346(b)(1) allows North Dakota to claim its response costs to the DAPL protests as money damages for an "injury" and a "loss of property." As the D.C Circuit held in

Tri-State, there is no requirement on the face of Section 1346(b)(1) that requires a physical injury to have occurred. Loss of money is clearly an injury and a loss of property. See Tri-State, 341 F.3d at 576 ("[T]he money damages sought—compensation for the roughly $3.2 million Tri-State expended defending itself in the prior proceeding may be properly characterized as damages "for injury or loss of property" within the meaning of the third statutory element of section 1346(b)(1)—whether they be considered as damages for 'injury'—actionable injury other than 'personal injury' (here, for example, being subjected to indictment, trial, penalties, etc.)—or viewed as damages for 'loss of property' (that is, of the funds necessarily expended to defend against the wrongful legal proceedings."). North Dakota's emergency response costs are "money damages for . . . injury or loss of property." See 28 U.S.C. § 1346(b)(1).

[¶34] The United States suggests because Section 1346(b)(1) does not explicitly allow damages claims for emergency responses—that is, the FTCA does not contain an explicit waiver as to these specific damages—then North Dakota is jurisdictionally barred from claiming them. In Tri-State, the D.C. Circuit rejected this exact argument for two reasons. Id. at 577. "First, the FTCA expressly precludes the recovery of prejudgment interest and punitive damages only." Id. (citing 28 U.S.C. § 2674). Because Congress included this specific provision, the D.C. Circuit reasoned, "other categories of damages should **not** be precluded." Id. (emphasis added) (citing Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C.Cir. 1995) ("[A]n item which is omitted from a list of exclusions is presumed not to be excluded.") and Detweiler v. Pena, 38 F.3d 591, 594 (D.C.Cir. 1994) ("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions.")). Second, if a damage-specific waiver was required, this would "preclude the recovery of *any* category of damages, including pain and suffering, lost wages and medical expenses." Id. (emphasis in original). This is because § 1346(b)(1)'s waiver of sovereign immunity

only contains a general waiver as to damages. "By adhering to the ordinary meaning of section 1346(b)(1), however, we avoid such an illogical result." Id.

[¶35] The damages allowed in Tri-State are analogous to the damages alleged here. In that case, Tri-State incurred significant costs to defend itself in a wrongful prosecution lawsuit. In other words, in response to a tortious action by the United States, Tri-State had to spend a substantial amount of money to hire attorneys to represent it throughout the course of a six-year investigation. In its Complaint, North Dakota claims significant costs to respond to a public nuisance caused in part by the United States' failure to follow its own requirements. A harm was done to North Dakota. North Dakota had to expend a significant amount of money responding to the failure of the United States to insist on safeguards required in its own rules.

[¶36] This conclusion is consistent with New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985). In New York, the State of New York sued the United States under the Federal Tort Claims Act for clean-up costs of a chemical contamination of groundwater at an Air Force base in New York. Id. at 375. The contamination occurred over the course of decades and "[i]n 1982, 'significant concentrations' of JP4 jet fuel were discovered in groundwater monitoring wells located south and downgradient from the airport." Id. This resulted in significant issues to the local residential community and the "Suffolk County Health Department advised residents in this area to cease using their private wells." Id.

[¶37] The United States challenged the Federal court's jurisdiction under the FTCA arguing the money damages are impermissible under 28 U.S.C. § 1346(b). Id. at 378. The court in New York reasoned "that the cost of removing the contaminants is simply the suggested measure of damages to its property." Id. In reaching this conclusion, the court relied on Rayonier Inc. v. United States, 352 U.S. 315 (1957), in which the Supreme Court "held that negligence by the Forest Service

permitting a fire to destroy timber, buildings, and other property of the plaintiff's was actionable under the FTCA." New York, 620 F.Supp. at 378. Distinguishing the Idaho and California cases, the New York trial court found "[d]ecisions which have disallowed recovery under the FTCA when plaintiffs seek merely to recover firefighting *expenses* and not *property damage* in connection with the government's alleged negligence in extinguishing fires are therefore inapposite." Id. (internal citations omitted) (emphasis in original).

[¶38] Here, the emergency response costs are "simply the suggested measure of damages to [North Dakota's] property." See id. Much like in Tri-State, the D.C. Circuit agreed with Tri-State's reading of New York, "[s]imilarly, Tri-State argues here that the attorney's fees it incurred defending itself represent the measure of the damage to its property, *i.e.*, its financial assets." 341 F.3d at 579-80. North Dakota's claimed damages are similar to those in New York because (1) they have alleged actual property damage, and (2) the emergency response costs are connected to the property damage caused by the United States' negligence. Even absent the property damage to which North Dakota was responding, the State still suffered an injury or loss of property because it lost its financial assets amounting to approximately $38 million. See Tri-State, 341 F.3d at 579-80.

[¶39] In the present Motion, the United States essentially seeks to avoid almost all of North Dakota's claims for damages. The Complaint alleges the United States' negligence related to the DAPL protests caused North Dakota to use significant financial resources to respond to the protests. Had the United States simply enforced its own rules against regarding the use of Corps land, these events would have been authorized with an appropriate bond or other safeguards. Accordingly, the damages against the United States claimed by North Dakota are permissible under 28 U.S.C. § 1346(b)(1).

ii. Emergency Response Costs Allowed Under North Dakota Law

[¶40] Turning to the sixth statutory element ("law of the place"), "the alleged wrong [must] have been done 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Tri-State, 341 F.3d at 576 (quoting 28 U.S.C. § 1346(b)(1)). As the Supreme Court has noted, this provision is "the source of substantive liability under the FTCA." Id. (quoting Myer, 510 U.S. at 478). In Tri-State, the D.C. Circuit concluded that attorneys fees *qua* damages in a malicious prosecution claim under the law of the District of Columbia is entirely permissible and therefore can be claimed under 28 U.S.C. § 1346(b)(1). Section 1346(b)(1) mandates the Court look to the law of the state in which this action arises to determine whether the damages are permissible under North Dakota law.[3]

[¶41] The remaining claims in the Complaint are Claim One (Public Nuisance), Claim Two (Negligence), Claim Four (Gross Negligence), and Claim Five (Civil Trespass). Doc. No. 38, p. 32. North Dakota argues State law allows for recovery of abatement costs. The United States contends North Dakota law does not allow for the purely economic damages claims asserted here.

[¶42] The Court has already determined the remaining claims generally satisfy the sixth statutory element ("law of the place") under 28 U.S.C § 1346(b)(1) because the United States conceded some of the damages constitute injury or loss of property. Doc. No. 38, p. 28-29. As to the specific damages alleged here, the standard for damages for tort claims in North Dakota "is the amount which will compensate for all the detriment proximately caused thereby, whether it could have

[3] The Supreme Court appears to agree with this interpretation. In Hatahley v. United States, the Supreme Court held, "[u]nder the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed, 28 U.S.C. § 1346(b), subject to the limitations that the United States shall not be liable for 'interest prior to judgment or for punitive damages.'" 351 U.S. 173, 182 (1956).

been anticipated or not." N.D.C.C. § 32-03-20. In North Dakota, the overarching policy for damages is, "[e]very person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefrom in money, which is called damages." N.D.C.C. § 32-03-01. Detriment is defined as "a loss or harm suffered in person or property." N.D.C.C. § 32-03-02.

[¶43] Under the sixth element, the question is whether N.D.C.C. § 32-03-20 permits the recovery of the emergency response costs here.[4] The Court concludes it does. A detriment occurred to North Dakota in the amount of approximately $38 million for having to send emergency responders and clean-up crews to the demonstration site. The claims are permissible under North Dakota law but are subject to the fact-finder's determination that the United States proximately caused the emergency response when it allowed and encouraged protestors on federal land without requiring the requisite permit. On the facts as they currently stand, the Court concludes North Dakota law allows the State to claim the emergency response damages. A fact-finder could reasonably conclude the expenditure of approximately $38 million in response to the unlawful activity caused in part by the United States' negligence was a "loss or harm suffered in person or property" proximately caused by the United States. See N.D.C.C. §§ 32-03-02, 32-03-20.

[¶44] Accordingly, the United States' Motion for Partial Summary Judgment seeking to prevent North Dakota from claiming emergency response damages is **DENIED**.

[4] This is approach not uncommon in North Dakota in different contexts. For example, in criminal law, if a person calls a 911 emergency line with the intent to annoy or harass another person or a public safety agency, that person can be held "liable for all costs incurred by any unnecessary emergency response." N.D.C.C. § 12.1-17-07.

II. $10,000,000 EFLEA Grant

[¶45] The United States argues the Court should offset North Dakota's damages claim by the $10 million North Dakota was awarded as an EFLEA grant. The United States specifically contends it should not be forced to pay twice. North Dakota argues, among other things, this motion is premature because a reduction in damages for a collateral source payment should occur after a damages amount is awarded.

[¶46] Section 32-03.2-06 of the North Dakota Century Code allows the Court to reduce the damages amount "to the extent that the economic losses presented to the trier of fact are covered by payment from a collateral source." In North Dakota, however, such a reduction in damages occurs "after an award of economic damages." Id. The United States asks the Court to predetermine this calculation now because North Dakota does not dispute it received a $10 million EFLEA grant and claims the Court can make the collateral source reduction before the trier of facts is allowed to hear the evidence at the end of trial.

[¶47] The United States relies on Anderson v. United States, 731 F. Supp. 391 (D.N.D. 1990). The issue of a collateral source reduction in damages in Anderson, however, arose in the context of a bench trial on claims under the FTCA. Id. at 392, 401-02. Judge Bruce Van Sickle of the District of North Dakota did not rule on the issue of collateral source payments during a summary judgment proceeding, such as here. He considered the collateral source payments at issue there in the context of a bench trial on the merits of the complaint. The Court will follow this procedure here.

[¶48] Based on the limited record before the Court, it appears the $10 million EFLEA grant may be a collateral source, subjecting North Dakota's claims to a damages reduction under N.D.C.C. § 32-03.2-06. However, the plain language of the statute requires the reduction to occur only after

the trier of fact has awarded economic damages. Id. At this stage in the litigation, with the limited record before the Court, the Court concludes it will consider a request for reduction in damages only after a damages amount has been determined.

[¶49] The United States will be allowed to present evidence and argument at trial for this reduction, which the Court will consider. Accordingly, the United States' Motion is **DENIED without prejudice.**

III. Bank of North Dakota Loan Interest

[¶50] The United States argues the interest on the Bank of North Dakota loan constitutes impermissible prejudgment interest under 28 U.S.C. § 2674, which prohibits liability "for interest prior to judgment." North Dakota argues it is entitled to claim this interest as a mitigation cost in its emergency response activities.

[¶51] "Prejudgment interest is normally taken to refer to an award imposed by law to compensate someone for the loss of use of money that he or she would have had but for the defendant's wrongdoing." Manko v. United States, 830 F.2d 831, 837 (8th Cir. 1987). In Manko, the Eighth Circuit explained, "[t]his remedial incident does not depend on contract, either on a contract between the plaintiff and the defendant, or on a contract between the plaintiff and someone else, with which defendant's wrongdoing has interfered." Id. Typically, "prejudgment interest" is an award on top of the economic damages that looks back over the course of the litigation. See id. The Circuit has already rejected the argument that any interest prior to judgment is impermissible prejudgment interest under 28 U.S.C. § 2674. See id. ("Since the award of lost pension earnings here covers the time before judgment, the government argues that the award is, literally, 'interest prior to judgment.' We disagree with this characterization.").

[¶52] At this stage in the litigation, the Court cannot make the determination whether the interest on the Bank of North Dakota loan is "interest prior to judgment." The interest claimed by North Dakota is, in a literal sense, "interest prior to judgment," which is prohibited by 28 U.S.C. § 2674. However, it does not appear to be "prejudgment interest" in the traditional sense. The interest North Dakota claims on the State-owned Bank of North Dakota loan is not remedial in nature. It is born of an agreement between North Dakota and its Bank. In North Dakota, a prejudgment interest is determined by the fact-finder or the Court and is awarded as a matter of discretion. See N.D.C.C. § 32-03-05; Roise v. Kurtz, 1998 ND 228, ¶ 8, 587 N.W.2d 573 ("Prejudgment interest in tort cases is governed by N.D.C.C. § 32-03-05, which gives the fact finder discretion to award interest."). The interest at issue here would not be a matter of discretion for the Court to award. It would be a sum certain amount of damages arising from the agreement between North Dakota and its Bank. In other words, it could be an actual loss by North Dakota due to the United States' negligence, not an interest rate awarded by the fact-finder under N.D.C.C. § 32-03-05. Then, it may be part of North Dakota's claim for actual damages.

[¶53] The issue is colored by the unique nature of the Bank of North Dakota. Section 6-09-01 of the North Dakota Century Code establishes the Bank of North Dakota as a State-owned bank "[f]or the purpose of encouraging and promoting agriculture, commerce, and industry." Section 6-09-07 further requires that "All state funds . . . must be deposited in the Bank of North Dakota." It appears the loan in this case was issued pursuant to Section 6-09-15.1. This Section permits the State Treasurer and Director of the Office of Management and Budget to borrow from the Bank of North Dakota in an amount not to exceed $50 million when legislative appropriations are insufficient to meet the needs of the State. Id. This provision allows the Bank to charge interest on the loan taken by the State. Id. No other state government in the United States has its own bank. The question of

whether the Court should consider the loan interest as "interest prior to judgment" based on the nature of the relationship between North Dakota and the Bank of North Dakota requires further factual development of this issue at the bench trial.

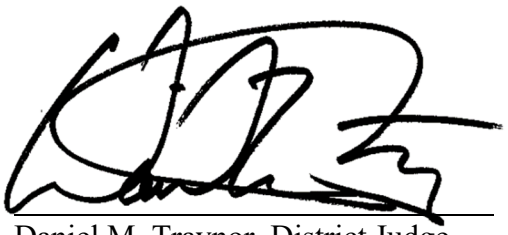
[¶54] Accordingly, the United States' Motion for Partial Summary Judgment on North Dakota's Bank of North Dakota loan interest claim is **DENIED without prejudice**. The United States may provide additional evidence and argument at trial on the merits of North Dakota's claims.

CONCLUSION

[¶55] Accordingly, the United States Motion for Partial Summary Judgment is **DENIED**. At trial, the United States may reraise the issues of the collateral source payment and the loan interest as prejudgment interest under 28 U.S.C. § 2674.

[¶56] **IT IS SO ORDERED**.

DATED October 19, 2021



Daniel M. Traynor, District Judge
United States District Court