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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-3913

UNITED STATES OF AMERICA,

Appellee,

v.

PATRICK WHITE MOUNTAIN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
HONORABLE KAREN E. SCHREIER
CHIEF UNITED STATES DISTRICT JUDGE

APPELLANT'S BRIEF

Jana Miner, Acting Federal Public Defender
Gary G. Colbath, Jr., Assistant Federal Public Defender
On the Brief: Scott D. McGregor
703 Main Street, 2nd Floor
Rapid City, SD 57701
Telephone: (605) 343-5110
Facsimile: (605) 343-1498

ATTORNEYS FOR APPELLANT

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SUMMARY OF THE CASE

White Mountain was arrested in Indian country by Oglala Sioux Tribal authorities and promptly turned over to federal law enforcement officials for prosecution. This procedure violated the requirement in the April 29, 1868, Fort Laramie Treaty of 1868 mandating on its face that before any Indian covered by the Treaty may be prosecuted by the United States that wrongdoer's tribe shall first be provided with "proof made to their agent" and only upon notice by him will the tribe then "deliver up the wrongdoer to the United States, to be tried and punished according to its laws." The United States has authority under 18 U.S.C. § 1153 to prosecute an Indian entitled to the protections of the Treaty only after compliance by the United States with this process.

White Mountain is an Indian covered by the Treaty and entitled to its protections. He was unlawfully prosecuted in this case because the United States failed in the first instance to comply with the Treaty before proceeding with its prosecution of White Mountain and, therefore, lacked jurisdiction over him under the explicit, unabrogated terms of the Fort Laramie Treaty.

REQUEST FOR ORAL ARGUMENT

White Mountain requests fifteen (15) minutes for oral argument because of the critical jurisdictional issue presented by this appeal involving fundamental treaty rights.

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PRELIMINARY STATEMENT

Throughout this brief the Appellant, Patrick White Mountain, will be referred to as "White Mountain." The Appellee, United States, will be referred to as "the prosecution" or the "United States." References to the transcript of White Mountain's July 24, 2009, change of plea hearing will be prefaced with the designation "PH" (plea hearing) followed by the appropriate page number(s) of the transcript. References to the transcript of White Mountain's November 30, 2009, sentencing hearing will be prefaced with the designation "ST" (sentencing transcript) again followed by the appropriate page number(s) of the transcript.

References to docket entries in the Clerk's Record below in the district court will be designated as "CR," followed by the appropriate entry number. References to the September 23, 2009, revised presentence report prepared for White Mountain's sentencing will be prefaced with the designation "PSR" followed by the appropriate paragraph (¶) number of the report.

JURISDICTIONAL STATEMENT

The Decision Appealed: White Mountain appeals from his sentence of 24 months imposed on November 30, 2009, by the Honorable Karen E. Schreier, Chief United States District Judge for the District of South Dakota, upon White Mountain's guilty plea, (CR 60), to one count of assault on a federal officer. (CR

67). The district court's written judgment and commitment was filed the next day, December 1, 2009. (CR 68).

District Court Jurisdiction: White Mountain contends the United States district court for the district of South Dakota lacked jurisdiction over him in this case. The court's purported jurisdiction over White Mountain's criminal prosecution and sentencing was premised on 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States") and 18 U.S.C. § 1153 (offenses committed within Indian country).

Jurisdiction of this Court: This Court has jurisdiction over White Mountain's appeal pursuant to 28 U.S.C. § 1291 ("The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States") and 18 U.S.C. § 3742(a) (Review of a sentence - Appeal by a defendant).

Notice of Appeal: White Mountain timely filed his Notice of Appeal on December 9, 2009. (CR 69). His appeal was docketed in this Court on December 18, 2009.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

THE UNITED STATES LACKED JURISDICTION TO PROSECUTE WHITE MOUNTAIN BECAUSE IT FAILED TO COMPLY WITH THE APPLICABLE "BAD MEN" PROVISION OF THE FORT LARAMIE TREATY OF 1868.

Authorities

1. Fort Laramie Treaty of April 29, 1868, 15 Stat. 635.
2. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).
3. *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987)
4. *Elk v. United States*, 87 Fed. Cl. 70 (2009)

STATEMENT OF THE CASE

Nature of the Case: White Mountain was arrested by tribal officers and turned over to federal authorities who charged him under 18 U.S.C. §§ 111(a) and 1153 with assaulting a federal officer, a United States park ranger, among other offenses. The United States did not first afford White Mountain's tribe the opportunity to turn White Mountain over to federal custody for prosecution. Instead, rushing to indict White Mountain, the United States, engaging in a kind of self-help extradition, violated the applicable "bad men" provision of the Fort Laramie Treaty of 1868 which requires the United States agent to first provide proof and notice to a tribe of the wrongdoing of one of its members. Only upon proof and notice is a tribe obligated to deliver the alleged wrongdoer to the United States for prosecution.

Procedural History: On May 22, 2008, White Mountain was charged in a six count indictment with being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (count I); possession of a firearm by a fugitive from justice, 18 U.S.C. §§ 922(g)(2) and 924(a)(2) (count II); assault on a federal officer, 18 U.S.C. § 111(a)(1) and (b) (counts III and IV); possession with intent to distribute a controlled substance, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D) (count V); and possession of a firearm during a drug trafficking crime, 18 U.S.C. § 924 (c)(1)(A)(i) (count VI). (CR 1). White Mountain initially appeared before the magistrate in the central division of the district of South Dakota on September 29, 2008. (CR 4). He again appeared and was arraigned in the western division on October 2, 2008. (CR 8).

White Mountain was released from detention on December 18, 2008, to attend substance abuse treatment. (PSR ¶ 7). On February 27, 2009, he was conditionally released pending trial. (CR 31). An order revising the conditions of his release to include a third party custodian was entered on April 1, 2009. (CR 36). On May 7, 2009, White Mountain's release was modified with his consent to provide that he reside at a halfway house in Rapid City. (CR 44). With his consent, White Mountain's release was again modified on June 30, 2009, (CR 49), to provide that he reside at a residence approved of in advance by pretrial services.

On July 21, 2009, White Mountain entered into a plea agreement with the prosecution, (CR 54), and executed a supporting factual basis statement. (CR 55). An amended plea agreement was filed on July 24, 2009. (CR 59). As provided by this agreement, White Mountain pled guilty on July 24, 2009, to count III of his indictment charging he assaulted United States Park Ranger Vincent Littlewhiteman. (CR 60).

A presentence report was prepared. Prior to sentencing, White Mountain filed a sentencing memorandum. (CR 65). On November 30, 2009, White Mountain was sentenced pursuant to his guilty plea to 24 months of imprisonment and three years of supervised release. He was also ordered to pay a special victims' assistance assessment of $100. (CR 67). The court's written judgment and commitment was filed the next day, December 1, 2009. (CR 68).

White Mountain timely appealed a week later on December 9, 2009. (CR 69). His appeal was docketed in this Court on December 18, 2009, and White Mountain's initial brief was ordered to be filed by January 21, 2010.

On January 12, 2010, however, the prosecution filed a motion to dismiss. White Mountain's appeal. White Mountain filed his response in opposition on January 19, 2010. On January 26, 2010, the Court entered a judgment dismissing this appeal but stating "the appeal is hereby dismissed without prejudice to the motion being renewed after the appellant has filed a brief identifying the issues."

Thereafter, this judgment was vacated, and the Court on its own motion ordered "Appellee's motion to dismiss case is hereby denied without prejudice. The motion to dismiss the appeal may be renewed after appellant has filed a brief identifying the jurisdictional issues." The Court ordered White Mountain to file his brief by February 17, 2010.

STATEMENT OF FACTS

In support of his guilty plea, White Mountain signed a factual basis statement, (CR 55), in which he admitted:

> . . . Patrick White Mountain, is a resident of McLaughlin, South Dakota. On October 1, 2007, the defendant was a passenger in a van that was stopped in the Badlands National Park as a result of not having a valid state license plate. During the course of the stop, the occupants of the vehicle were asked to leave the vehicle and officers noted that there were a number of dogs in the vehicle. Among the officers responding in the course of their official duties was United States Park Ranger Chad Coles, a federal law enforcement officer. Coles was providing assistance to the officer who had originally made the stop, also a United States Park Ranger.
>
> During the course of the stop, officers learned that one of the occupants had a warrant for his arrest. Shortly after officers asked if there were any drugs or guns in the vehicle, as it was going to be searched, the defendant moved into the driver's seat of the vehicle and attempted to place it in gear, but it stalled out. A trooper who was assisting gained access to the vehicle and removed the keys, throwing the gear lever into park.
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> After the trooper was out of the vehicle, Ranger Vincent Littlewhiteman ordered the defendant to get the dogs under control and leashed and then to get out of the van. The defendant leashed the dogs and exited the vehicle. The dogs were clearly straining at their leashes. The defendant then attempted to leave the scene. Ranger Littlewhiterman attempted to

> restrain defendant, grabbing at a bag in Defendant's hand. At that point, Defendant opened his hands, dropping the leashes. One dog immediately attacked Ranger Littlewhiteman, biting his arm and forearm. The defendant fled into the Badlands with Ranger Coles in pursuit.
>
> White Mountain was not immediately apprehended. Approximately four hours later, he was arrested without incident by two officers from the Oglala Sioux Tribe Department of Public Safety, who found a small bag of marijuana on his person and a .38 caliber revolver bearing serial number S929230 in a bag White Mountain had been carrying.

Additional facts disclosed by the presentence report revealed:

On October 1, 2007, United States Park Ranger Chad Coles saw a van with no state license plates pulled over and parked in a parking lot in the Badlands National Park in western South Dakota. Coles approached the driver, identified later as Robert White Mountain, Sr., and told him of his observation and asked him for identification, his vehicle registration, and proof of insurance. During this conversation, Coles noticed four dogs in the van exhibit aggression when he approached. Robert told Coles he did not have a driver's license. He did, however, show Coles his Standing Rock tribal enrollment card. (PSR ¶10).

Robert told Coles he was immune from the laws of the United States and Coles should contact the United States Attorney General if he had any questions. While Coles was speaking to Robert, the rear passenger, later identified as White Mountain, was video recording the incident. Coles questioned White Mountain about the recording. White Mountain told him they were recording acts of police

misconduct and harassment for court purposes. At this point, Coles instructed the occupants of the vehicle to remain in the van while he ran Robert's personal and vehicle information. *Id*.

Coles was advised Robert had an active warrant for his arrest in Pennington County. When Coles told Robert this, Robert again stated the laws did not apply to him. He said the warrant was resolved. Coles returned to his vehicle and requested assistance. Park Rangers Vincent Littlewhiteman and Mark Gorman, along with South Dakota Highway Patrol Trooper Dan Bender, responded. (PSR ¶11).

Once the additional officers arrived, it was determined the other passenger in the van, Robert White Mountain, Jr., also had an active arrest warrant for his arrest. The dogs in the van were very agitated. White Mountain moved to the back of the van and started to open the door. Littlewhiteman held the door closed telling White Mountain to get the dogs under control and on their leashes before getting out of the van. White Mountain leashed the dogs and started to get out of the van. The dogs were straining at their leashes. Littlewhiteman attempted to restrain White Mountain who dropped the leashes. One of the dogs immediately attacked Littlewhiteman, biting at his hand and forearm. White Mountain grabbed a black bag from the van and ran into the Badlands, followed by one of the dogs, with Officers Bender and Coles in pursuit. *Id*.

Another dog chased Coles who fell to the ground. Coles regained his stance and shot the dog. Robert Sr. and his son, Robert Jr., began yelling at the officers. Ranger Gorman informed them two officers had been hurt and the situation was very dangerous. He again asked them if there were any weapons in the van. They told him there was a .22 caliber pistol behind the front seat. Littlewhiteman searched the van but did not find a pistol. (PSR ¶13).

By this time, Trooper Bender had given up pursuit of White Mountain. The remaining two dogs were secured. A subsequent search of the van uncovered two .22 caliber rifles, .38 caliber and 9 mm ammunition, and other items of contraband. Rangers also found a brown bag with 421 grams of marijuana stuck between two rocks just below the area where White Mountain had descended into the canyon. Robert Sr. told the officers White Mountain may have had a "peashooter" firearm on him. (PSR ¶14).

Approximately four hours later, following a request for additional law enforcement assistance, Oglala Sioux Tribal Police Officers Floyd Wilcox and Eric Pitman located White Mountain east of the Badlands Park boundary carrying a black camera-type bag. These tribal officers arrested him without incident. When they asked him for his name, he stated, "You already know my name." A search of White Mountain and the bag revealed a small bag of marijuana in his pocket and a .38 caliber revolver in the black bag. As the officers removed the firearm, White

Mountain stated the shells for the pistol were in the bag. The bag also contained some rolling papers. (PSR ¶15).

White Mountain was arrested and placed on a federal hold. He was transferred to the Pennington County Jail in Rapid City, South Dakota, but was thereafter released pursuant to a state hold and taken to Walworth County, South Dakota, October 11, 2007, on a probation violation. White Mountain's father, Robert Sr., and brother, Robert Jr., were each cited for possession of a firearm and fined $250. (PSR ¶16). Rangers Littlewhiteman and Coles were treated for the dog bites. Littlewhiteman sustained bites to his hand and arm. Coles had been bitten on various areas of his body. (PSR ¶17).

In the plea agreement, White Mountain and the prosecution agreed White Mountain's total offense level was 15. The presentence report concurred, (PSR ¶ 32), finding White Mountain to have 5 criminal history points placing him in criminal history Category III, (PSR ¶ 42), resulting in an advisory sentencing range of 24 to 30 months. (PSR ¶ 69).

The district court adopted the findings of the presentence report. (ST 3). It sentenced White Mountain to 24 months of imprisonment to be followed by three years of supervised release. (CR 67, 68). White Mountain appeals.

SUMMARY OF THE ARGUMENT

Article I, Paragraph 3, of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, sets forth in detail the means and manner by which Indians committing offenses on reservations covered by the Treaty may be turned over to the United States for federal prosecution. The Treaty requires that the tribe itself first be given notice by the United States agent to the tribe and an opportunity to surrender an offender to proper federal authorities for prosecution under the laws of the United States.

The process established by the Treaty does not prohibit prosecution under the laws of the United States of Indians alleged to have engaged in wrongdoing. It simply requires an initial step up front – a quasi-extradition procedure – designed to protect tribal sovereignty and maintain the peace. Once the United States has complied with this non-burdensome, treaty required process, the United States has jurisdiction to prosecute the alleged offender as in any other criminal action.

White Mountain's prosecution by the United States for violation of a federal criminal statute does not, however, comport with the requirements of the Treaty. The United States failed to comply with the Treaty's express requirements for enabling the United States to obtain jurisdiction over White Mountain.

White Mountain's conviction and sentence should, therefore, be vacated and his case dismissed. Failure to do so renders a key provision of the Treaty null and

void by judicial decree contrary to the long settled law that only Congress, by explicit action, has the power to alter or abrogate an established treaty right. To date, Congress has taken no explicit action to do so.

No act of Congress states that the bad men provisions of the Fort Laramie Treaty have been abolished or annulled. In the civil context, the United States Court of Claims recently reaffirmed the bad men clause of the Fort Laramie Treaty in *Elk v. United States*, 87 Fed. Cl. 70 (2009), holding the provision created third-party contractual rights for an individual to directly pursue a claim against the United States. No rational reason exists to deal differently with the Treaty's corresponding bad men provision in the criminal context.

ARGUMENT

I.

THE UNITED STATES LACKED JURISDICTION TO PROSECUTE WHITE MOUNTAIN BECAUSE IT FAILED TO COMPLY WITH THE APPLICABLE "BAD MEN" PROVISION OF THE FORT LARAMIE TREATY OF 1868.

A. Standard of Review. This Court reviews questions of jurisdiction *de novo*. *United States v. Hacker*, 450 F.3d 808, 814 (8th Cir. 2006) ("Jurisdiction is a question of law subject to *de novo* review."), quoting *United States v. Barton*, 26 F.3d 490, 491 (4th Cir. 1994). *De novo* review is appropriate where subject matter jurisdiction is at issue. *United States v. Lawrence*, 51 F.3d 150, 152 (8th

Cir. S.D. 1995), rehearing denied, 1995 U.S. App. LEXIS 15148. Purely legal determinations are reviewed *de novo*. *In re Am. Milling Co.*, 2005 U.S. App. LEXIS 8717, *41 (8th Cir., May 17, 2005). Appellate courts review questions of law *de novo*. *United States v. Cash* , 378 F.3d 745 (8th Cir. 2004), rehearing denied, rehearing en banc denied, by *United States v. Cash*, 2004 U.S. App. LEXIS 19226 (8th Cir., Sept. 13, 2004), cert. denied, *Cash v. United States*, 125 S. Ct. 1727 (2005).

B. Merits. In its January 12, 2010, motion to dismiss this appeal, the prosecution argued White Mountain's plea agreement contained an appeal waiver provision prohibiting this appeal. This waiver, set out in paragraph "Q" of White Mountain's plea agreement provides:

> **Q. WAIVER OF DEFENSES AND APPEAL RIGHTS:** The Defendant hereby waives all defenses and his right to appeal any non-jurisdictional issues. The parties agree that excluded from this waiver is the Defendant's right to appeal any decision by the Court to depart upward pursuant to the sentencing guidelines as well as the length of his sentence for a determination of its substantive reasonableness should the Court impose an upward departure or an upward variance pursuant 18 U.S.C. § 3553(a).

Id. By the express terms of the waiver, White Mountain is only prohibited from appealing non-jurisdictional issues and any sentence imposed, absent an upward departure, within the advisory guideline range found by the district court to be applicable to White Mountain. The appeal waiver does not prohibit an appeal of a

jurisdictional question. Indeed, at his change of plea hearing, the district court specifically informed White Mountain in discussing his appeal waiver that he had "given up [his] right to appeal with regard to everything except if you believe the Court doesn't have jurisdiction over you, you can appeal whether the Court has jurisdiction." (PH 9).

In this appeal, White Mountain does not challenge the procedural correctness or substantive reasonableness of his low-end Guideline sentence. White Mountain challenges the jurisdiction of the district court for want of compliance by the United States with the applicable "bad men" provision of the Fort Laramie Treaty of 1868, 15 Stat. 635. An appeal premised on this jurisdictional issue is expressly permitted by both the appeal waiver provision in White Mountain's plea agreement and his advisement by the district court upon which he entered his guilty plea pursuant to the plea agreement.[1]

Article I of the Fort Laramie Treaty of 1868, (see Addendum 2), contains two "bad men" provisions imposing mutual obligations on the signatories – the United States and the tribes of the Great Sioux Nation, including the Standing Rock Sioux Tribe of which White Mountain is a part. Inherent in these mutual

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[1]This jurisdictional question is, in part, currently pending before the Court in *United States v. Donroy Ghost Bear* and *Shane Tyon*, Nos. 09-1481 and 09-1642, submitted on the briefs without oral argument on December 15, 2009, before Judges Bye, Beam, and Colloton.

obligations is the reserved right of each signatory sovereign to be afforded the opportunity in the first instance to correct transgressions, as a matter of honor, and as a means to preserve the integrity, safety, and welfare of the citizens of each sovereign. These provisions, never having been explicitly revoked or amended by statute, remain viable and enforceable. *See, Elk v. United States*, 87 Fed. Cl. 70, 80-81 (2009).[2]

Of particular relevance to White Mountain is the provision in Article I, paragraph 3, of the Treaty which provides in part:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, *upon proof made to their agent, and notice by him*, deliver up the wrongdoer to the United States, to be tried and punished according to its laws . . .

(emphasis added). This provision does not prohibit federal criminal prosecution of Indians entitled to the protections and benefits of the Treaty. Rather, it simply establishes particular procedural requirements to perfect federal jurisdiction over "bad man among the Indians [who] shall commit a wrong." The Treaty explicitly requires that the United States, through its Indian agent, first submit proof of the

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[2]In *Elk*, the United States was held to be liable under the "bad men" clause in the Fort Laramie Treaty for damages upon its admission that an Army recruiter sexually assaulted a member of the Oglala Sioux Tribe on the Pine Ridge reservation.

alleged wrong and, upon notice to the tribe of that proof, the wrongdoer is then to be delivered by the tribe to the authority of the United States for prosecution.

White Mountain's prosecution did not comply with these procedural requirements of the Treaty. The record in his case is devoid of any effort by the United States to comply with the Treaty's proof and notice requirements. As a result, not only was the Standing Rock Tribe, and the Great Sioux Nation as a whole, denied the opportunity to deal with an alleged bad man among the Indians whose conduct threatened the safety and welfare of all members of the Tribe, but White Mountain, individually, was denied the right to be judged in the first instance by his tribal sovereign upon proof and notice presented by the United States that he was a wrongdoer as unequivocally required by the Treaty.

In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the United States Supreme Court deemed the "bad men" treaty provision to be essentially an extradition agreement between the United States and the tribe. *Id*. at 568. Rather than follow the required treaty process, however, the United States in White Mountain's case simply availed itself of a form of self-help. It simply took White Mountain out of Indian country and into federal custody with his tribe being none the wiser.

Crow Dog determined the United States did not have jurisdiction to try one Indian for the murder of another, the then existing 1834 statute exempting

offenses committed by one Indian against another from federal jurisdiction being held, not having been repealed by the 1868 Treaty. Implicit in *Crow Dog* is recognition that the Fort Laramie Treaty of 1868 was not a general concession by the signatory tribes of United States' jurisdiction over criminal offenses committed by Indians on Indian land.

If the United States is to obtain jurisdiction to prosecute White Mountain, it must in the first instance be because there is not a conflict with the criminal jurisdiction provisions, the "bad men" provisions, of the 1868 Treaty. However, in White Mountain's case, there is a conflict. Just as *Crow Dog* found the Treaty did not amend the statute exempting prosecution of Indian against Indian offenses, the Treaty is also not a grant of general criminal jurisdiction to the United States, absent compliance with the Treaty on the front end, to extract Indians covered by the Treaty and prosecute them for offenses in violation of the general criminal laws of the United States.

This does not mean an Indian can never be prosecuted by the United States for violating federal criminal laws. It simply means that in order to do so the government must follow the *de facto* extradition process spelled out in the 1868 Fort Laramie Treaty recognized long ago by *Crow Dog*. Compliance with the Treaty simply reaffirms recognized tribal sovereignty and that in all things the United States continues to be a nation of laws, not men.

In *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983), this Court rejected subject matter jurisdictional arguments premised on 18 U.S.C. §§ 1152 and 1153. Blue was a Chippewa Indian to whom the terms of the 1868 Fort Laramie Treaty did not apply. Not having addressed the jurisdictional issues in light of the Fort Laramie Treaty of 1868, *Blue* does not control resolution of White Mountain's treaty based jurisdictional claim. Further, Blue was a prosecution brought under the general drug laws of the United States, not an offense, like that with which White Mountain was charged, requiring special territorial jurisdiction.

For the same reason, this Court's decision in *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998), based on the general statutory application of federal criminal law, is inapplicable to White Mountain's situation. *Wadena*, like *Blue*, primarily dealt with statutory, not treaty claims. Additionally, the *Blue* and *Wadena* defendants belonged to Chippewa bands to which the 1868 Fort Laramie Treaty did not apply. The particular Sioux treaty provisions on which White Mountain relies were not at issue in either *Blue* or *Wadena*.

Even so, *Blue* recognized that "if a particular Indian right or policy is infringed by a general federal criminal law, that law will be held not to apply to Indians on the reservation unless specifically so provided." 722 F.2d at 385. This, of course, is the circumstance presented by White Mountain's case. White Mountain's particular rights under Article I of the 1868 Fort Laramie Treaty are

infringed by the United States' criminal prosecution of him without compliance with the Treaty. The general criminal laws of the United States pertaining to the prosecution of Indians on the reservation do not specifically abrogate rights established by the 1868 Treaty.

To prosecute the federal criminal law against White Mountain, therefore, the United States was first required to comply with the Treaty predicates. In White Mountain's case, that means giving notice and availing the tribe of the opportunity to "deliver up the wrongdoer" to the United States rather than the United States in the first instance exercising self-help jurisdiction and removing White Mountain on its own initiative from Indian country.

For Indians like White Mountain covered by and entitled to the benefits of the 1868 Treaty, their prosecution for violating the criminal laws of the United States may be commenced only as specified by the Treaty itself, that is "upon proof made to their agent, and noticed by him," to the tribe after which the Treaty Indians are then obligated by the Treaty to deliver up the named alleged Indian wrongdoer to the United States "to be tried and punished according to its laws" as the Treaty also requires. Since the 1868 Fort Laramie Treaty has not been expressly abrogated and set aside by the Congress, compliance with its mandates are still required. As the Court of Claims found in *Elk*, *supra*, the bad men provisions of the 1868 Fort Laramie Treaty remain valid.

The Supreme Court has declared a treaty with an Indian tribe is a contract. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 676 (1979) (A "treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."). Only Congress may constitutionally change the provisions of a treaty abrogating Indian treaty rights, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903), and it must do so by explicit statutory language. *Washington,* 443 U.S. at 690 (in the absence of explicit statutory language the Supreme Court has "been extremely reluctant to find congressional abrogation of treaty rights"). An "intention to abrogate or modify a treaty right is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

In *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235, 243 (D. Neb. and S.D. 1975), the district court decreed:

> Even if the Treaty of 1868 were interpreted to vest jurisdiction over such crimes (18 U.S.C.§ 231(a)(2) &(3)) in the Sioux people, the Congress of the United States in granting citizenship to all Indians has transferred such jurisdiction to the courts of the United States. The grant of citizenship was by Act of June 2, 1924, 43 Stat. 253, and is now contained in Title 8, U.S.C. 1401(a)(2).

This Court approved of *Consolidated Wounded Knee Cases* in *United States v. Kane*, 537 F.2d 310, 311 (8th Cir. 1976)(per curiam); *See*, *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005).

The statute cited and relied upon by the *Consolidated* court now simply states that a person born in the United States to a member of an Indian tribe shall be a national and citizen of the United States. It says nothing whatsoever about the explicit abrogation of Indian rights under the 1868 Fort Laramie Treaty. To deem the statute to be a repudiation of the bad men clause of the Treaty violates the Supreme Court's pronouncements in *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* and *Menominee Tribe of Indians v. United States*, *supra*, requiring any Congressional abrogation of a treaty to be explicit and not lightly implied. This Court should reexamine *Kane*'s embracement of *Consolidated Wounded Knee Cases*. *Consolidated* is clearly contrary to established Supreme Court authority including the Court's post-*Consolidated* decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc*. *See, United States v. Zuniga*, 579 F.3d 845, 848 (8th Cir. 2009)(one panel of this Court may overrule another when there has been intervening Supreme Court authority inconsistent with th earlier decision).

Furthermore, White Mountain does not argue as in *Consolidated*, 389 F. Supp. at 243, the Treaty vested criminal jurisdiction in the tribes not the federal

government. He asserts only the Treaty establishes predicate ground work the United States must complete before acquiring criminal jurisdiction. The issue is not who has jurisdiction but rather how the United States properly perfects its jurisdiction. White Mountain's argument is not, therefore, in conflict with the premises that were before the district court in *Consolidated Wounded Knee Cases*.

Although the extradition requirement of the 1868 Treaty has seemingly not been widely recognized or diligently enforced since *Crow Dog*, a period of prolonged nonenforcement of treaty rights does not for that reason alone extinguish those rights. *Tsosie v. United States*, 825 F.2d 393, 399 (Fed. Cir. 1987).

Although the treaty provision may be dormant and infrequently invoked, it has not thereby been rendered obsolete or unenforceable nor has it been abandoned. It remains in effect, a viable contractual obligation between the United States and the Sioux Tribes, and must be honored.

The *Tsosie* decision is instructive. At issue was the Navajo Treaty of June 1, 1868, 15 Stat. 667. The Treaty contains nearly the same enforcement of wrongs language (the "bad men" article) as the 1868 Fort Laramie Treaty. *Tsosie*, 825 F.2d at 395. The Federal Circuit held that though infrequently invoked, the treaty provision had not become obsolete, abandoned, or preempted. *Id*. at 394. This

includes the "bad men" clause, dealing with wrongs by Indians, requiring notice to the Indians and an opportunity for them to deliver up the alleged offender for punishment according to the laws of the United States. *Tsosie* was followed by the Court of Claims in *Elk*. 87 Fed. Cl. at 78-7982.

Though *Tsosie* deals with civil rather than criminal wrongs, its underlying reasoning is equally applicable to prosecution of the federal criminal laws. Article I of the 1868 Treaty has neither been abrogated by explicit congressional action nor abandoned. It still requires the United States, before it achieves jurisdiction to prosecute an Indian for criminal acts committed on the reservation under the general laws of the United States, give proof and notice to the tribe through its agent, affording the tribe the opportunity to "deliver up the wrongdoer" to the United States for prosecution. As that did not occur in White Mountain's case, the United States never lawfully obtained prosecution authority over him. The United States prosecution of White Mountain in these circumstances violated his long established and unabrogated treaty rights.

"Indian treaties are to be interpreted liberally in favor of the Indians" and "any ambiguities . . . resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)(provisions of an Indian treaty must be interpreted in favor of the Indians, and in such a way as to protect their interests).

The Treaty's goal of preserving the integrity of Tribal sovereignty is no mere empty gesture. It encompasses the protection of the rights of individual Indian defendants as members of an Indian sovereign nation party to a treaty with the United States.

White Mountain was arrested by Oglala Sioux tribal officers and promptly turned over to federal agents. No notice was given to his Tribe nor proof provided to the Tribe prior to White Mountain's arrest and conveyance to federal authorities that he was a "bad man" within the meaning of the 1868 Treaty whom the Tribe was obligated to turn over to the United States. The failure to provide notice and proof to the Tribe infringed upon the integrity and sovereignty of the Tribe and its component members.

The United States' failure to give notice and proof to the Tribe in accordance with the Treaty deprived the district court of jurisdiction over White Mountain. Because no attempt was made by the United States to honor the bad men mandate of the Fort Laramie Treaty before taking White Mountain into federal custody, the criminal proceedings in White Mountain's case, including his November 30, 2010, sentencing, are necessarily void for want of jurisdiction.

White Mountain assumes the prosecution will assert this Court's decision in *Drapeau*, *supra*, as dispositive of his claims. *Drapeau,* however, did not specifically addressed White Mountain's claim that federal jurisdiction is not

perfected under the Fort Laramie Treaty unless and until a tribe has been given the opportunity to meet its own obligations under the "bad men" provision of Article I of the Treaty to "deliver up the wrongdoer to the United States." The language of *Drapeau* does not reject that portion of the Treaty which defines the procedural requirements for the assumption of federal jurisdiction over a covered Indian.

In fact, *Drapeau* recognized the Treaty's bad men clause established an obligation on the part of a tribe to "'deliver up the wrong-doer to the United States,' upon proof and notice to the tribe." 414 F.3d at 878. Obviously, therefore, absent notice, there is no tribal obligation. Although recognizing the Treaty's notice requirement, and despite the clear language of the Treaty, *Drapeau* declines to say just who is responsible for giving the tribe notice. Its conclusion that the Treaty "does not say that the United States must give notice" fails to give effect to the bad men clause effectively rendering it a nullity contrary to *Crow Dog*'s conclusion, *supra.* The treaty provision basically establishes an extradition agreement between the United States and the tribe and contrary to the rule of construction that all words must be given meaning. *United States v. Menasche*, 348 U.S. 528 (1955).

This Court should avail itself of the opportunity presented by this appeal to reaffirm the validity of the "bad men"clause in Article I of the Fort Laramie Treaty of 1868. As applied to White Mountain, because his prosecution was undertaken

without perfection of federal jurisdiction as required by the Treaty, his ensuing conviction and sentence must be vacated and his prosecution dismissed.

CONCLUSION

For these reasons, and upon the above and foregoing arguments and authorities, the Appellee United States of America lacked authority to prosecute White Mountain. White Mountain's plea, conviction, and sentence for assault on a federal officer should, therefore, be vacated and his prosecution dismissed.

Dated this ___ day of February, 2010.

Respectfully submitted,

Jana Miner
Acting Federal Public Defender
By:

_____
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Patrick White Mountain
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, 2nd Floor
Rapid City, SD 57701
Tele.: (605)343-5110; Fax: (605)343-1498
filinguser_SDND@fd.org

CERTIFICATE OF SERVICE

I certify that I hand delivered two copies of this brief to Assistant United States Attorney Mark A. Vargo, Attorney for Appellee, United States Courthouse, 515 Ninth Street, Room 201, Rapid City, South Dakota 57701, on the ____ day of February, 2010.

In addition, I certify that I mailed a copy of this brief to Appellant Patrick White Mountain, #06900-059, c/o FCI Big Spring, Federal Correctional Institution, 1900 Simler Avenue, Big Spring, TX 79720, also on the ____ day of February, 2010.

_____
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Patrick White Mountain

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect Version X3 was used in the preparation of the foregoing Appellant's Brief and that the word count done pursuant to that word processing system shows that there are 6,097 words in the foregoing Appellant's Brief.

Dated this ____ day of February, 2010.

_____

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Patrick White Mountain

CERTIFICATE OF FILING

I certify that I filed an original and nine copies of this brief and a computer disc containing the full document to the Clerk of the United States Court of Appeals, Thomas F. Eagleton Court House, Room 24.329, 111 South 10th Street, St. Louis, Missouri 63102, by sending it via Federal Express on the ___ day of February, 2010. The disc has been scanned for viruses using Norton Anti Virus Version 5.0, and that scan showed the disc is virus-free.

_____

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Patrick White Mountain

ADDENDUM