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 REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant Patrick White Mountain ("White Mountain") submits this reply brief pursuant to FED. R. APP. P. 28(c) and 31(a). White Mountain incorporates by reference the facts, arguments, and authorities set forth in his opening brief dated February 16, 2010, and filed February 17, 2010.

In this reply brief, the Appellee United States will be referred to as "the prosecution." References to White Mountain's opening brief will be prefaced with the designation "AOB." References to the prosecution's responding brief, dated April 1, 2010, and filed April 2, 2010, will be prefaced by the designation "GB."

Throughout this reply brief, the following references will be used:

1. "ST" – transcript of White Mountain's November 30, 2009, sentencing hearing;
2. "CR" – docket entries in the Clerk's Record below in the district court; and
3. "PSR" – September 23, 2009, revised presentence report prepared for White Mountain's sentencing.

REPLY TO STATEMENT OF CASE AND FACTUAL STATEMENT

The prosecution's statement of facts generally concurs with that set forth by White Mountain in his opening brief. (AOB at 6-10). White Mountain's offense occurred in the Badlands National Park which is situated both within and without the Pine Ridge Indian Reservation in southwest South Dakota. The record does not establish, however, whether the conduct for which White Mountain was charged took place on the reservation or in that part of the park that is outside the reservation. *See* PSR ¶¶ 8-10.

The prosecution submits "White Mountain's offense occurred entirely outside of Indian Country, in the Badlands National Park." (GB at 5, citing PSR ¶¶ 12, 13). The presentence report paragraphs cited by the prosecution offer nothing to establish where in the Badlands White Mountain's conduct occurred. In fact, these paragraphs, describing portions of the offense conduct, do not mention the Badlands National Park at all. Paragraph 10 states a park ranger "observed a vehicle with no license plate pulled over and parked in a parking lot

in the Badlands National Park" but says nothing about where in the park this lot was located.[1]

According to ¶ 15 of the presentence report, however, White Mountain was arrested by Oglala Sioux tribal officers east of the Badlands Park boundary. This would indicate the offense occurred in that portion of the park that is located on the reservation as the area east of that part of the park located off the reservation lies north of the reservation boundary. Tribal officers would, of course, have no authority to arrest White Mountain off of the reservation.

MOTION TO DISMISS

Though denying the prosecution's initial motion to dismiss White Mountain's appeal, this Court, with an order entered January 27, 2010, said, "The motion to dismiss the appeal may be renewed after appellant has filed a brief identifying the jurisdictional issues." White Mountain filed his "brief identifying the jurisdictional issues" on February 17, 2010. The prosecution elected thereafter not to renew its motion to dismiss but to prepare a formal responding brief which

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[1]Indian vehicles operated on the reservation are not generally required to have South Dakota license plates. *See United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1559 (8th Cir. 1997) (state motor vehicle registration fee for the issuance of state license plates is not collected from owners of motor vehicles driven exclusively within the boundaries of an Indian reservation).

it filed on April 2, 2010. Under these circumstances, the prosecution has waived pursuit of its previous motion to dismiss this appeal. *Kroeplin Farms Gen. P'ship v. Heartland Crop Ins.*, 430 F.3d 906, 910 (8th Cir. 2005) ("waiver occurs when 'one in possession of any right, whether conferred by law or by contract, and with full knowledge of the material facts, does or forbears the doing of something inconsistent with the exercise of the right.' ") (citation omitted). White Mountain's appeal should, therefore, be decided by this Court on the merits.

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. White Mountain and the prosecution agree that *de novo* review applies to the issue raised in this appeal. (AOB at 11-12; GB at 5).

B. Merits. The applicable "bad men" provision of the Fort Laramie Treaty of 1868, Article I, 15 Stat. 635, states:

> 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 wrong-doer to the United States, to be tried and punished according to its laws . . .

(Italics added). Absent compliance with this treaty mandate the prosecution lacked the power to try White Mountain.

Jurisdiction today means "the courts' statutory or constitutional power to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002), citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998). The "bad men" clause of the Fort Laramie Treaty is an integral component of this power. When the treaty has not been honored, a prosecution is not properly brought before the court.

The applicability of the "bad men" provision is not dependent upon any particular jurisdictional statute. The prosecution argues that because the United States has criminal jurisdiction over the offenses for which White Mountain was indicted the "bad men" provision does not come into play. (GB at 5-6). This contention is belied by the language of the treaty provision itself which expressly recognizes it applies to anyone over whom the United States otherwise has jurisdiction – in the language of the treaty, over anyone "subject to the authority of the United States."

By its express terms, the treaty applies regardless of the statutory basis for federal jurisdiction whether that be 18 U.S.C. §§ 3231, 1291, 3742(a), (GB at 1), 18 U.S.C. §§ 1152 or 1153, or some other statute. All that is required is that there

be persons "subject to the authority of the United States," however obtained. This Court in *United States v. Drapeau*, 414 F.3d 869, 877 (8th Cir. 2005), recognized that the defendant's bad men clause argument, arising there under 18 U.S.C. § 1152, "potentially implicates our subject matter jurisdiction."

The prosecution almost singularly relies on *Drapeau.* (GB at 6-8). The prosecution does not respond to White Mountain's peremptory distinguishing of the *Drapeau* decision as applied to his situation. (AOB at 24-25). Nor does the prosecution address the post-*Drapeau* decision of the Court of Claims in *Elk v. United States*, 87 Fed. Cl. 70 (2009), holding the United States liable in civil damages under the bad men clause and noting that its provisions, never having been explicitly revoked or amended by statute, remain viable and enforceable. *Id*. at 80-81. *See* AOB at 15, 19.

Relying on *Drapeau*, the prosecution submits the "bad men" provision of the Fort Laramie Treaty does not require the United States, as the designated entity, to give notice to the tribe. (GB at 6 citing *Drapeau*, 414 F.3d at 878). This contention, however, is contrary to the United States Supreme Court's conclusion in *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883), that the "bad men" treaty provision is essentially an extradition agreement between the United States and the tribe. (*See* AOB at 16). As such, to commence the extradition process, it is the

United States that is indeed required to give notice to the tribe under the treaty provision. To the extent *Drapeau* contradicts *Crow Dog* on this point, this Court is not bound by *Drapeau* with respect to White Mountain's appeal. *Crow Dog*, a decision of the United States Supreme Court, is the superior authority to *Drapeau*. The prosecution's brief fails to discuss the *Crow Dog* decision.

This Court, in considering White Mountain's appeal, need not overrule *Drapeau* in contravention of the "one panel rule." (GB at 7 citing *United States v. Betcher*, 534 F.3d 820, 823-824 (8th Cir. 2008)). Rather, it may simply choose to follow the alterative line of Supreme Court authorities. *See Mack v. Caspari*, 92 F.3d 637, 641 n. 6 (8th Cir. 1996) (a panel of this Court is powerless to resolve conflicts in the Court's decisions, "as one panel of this Court is not at liberty to overrule an opinion filed by another panel. Only the Court *en banc* may take such a step. . . . We are, however, free to choose which line of cases to follow.") (Citations omitted).

With respect to the notice provision, the prosecution notes "the *Drapeau* decision 'declines to say just who is responsible for giving the tribe notice.' " (GB at 7). The answer to this question, however, is found in the language of the treaty itself. The bad men clause states the tribe will deliver up an Indian wrongdoer for prosecution by the United States "upon proof made to their agent, *and notice by*

him . . . ." Fort Laramie Treaty of 1868, Article I, 15 Stat. 635 (italics added). The Indian agent is, of course, an official of the United States.

True, as *Drapeau* holds, there is no mandatory obligation under this provision that notice must be given. Neither, however, is there an obligation on the part of the tribe to give up a wrongdoer in the absence of notice. The giving of notice is the critical first step. As *Crow Dog* recognizes, there can be no "extradition" of an Indian wrongdoer into United States custody absent notice to the tribe by the designated United States official unless the tribe, at its election, would choose to waive the notice requirement. *Drapeau*'s holding that the United States is not obligated by the treaty provision to give notice is not, therefore, the end of the matter.

When notice has not been given, there is no corresponding obligation by a tribe to give up an alleged wrongdoer for criminal prosecution by the United States and, therefore, under the terms of the treaty there can be no federal prosecution of an alleged Indian wrongdoer. The choice thus resides with the United States; give notice and prosecute, or not give notice and forego the treaty benefit of obtaining custody of an alleged wrongdoer off of tribal lands and the power to prosecute the person.

Consequently, the question remains – notwithstanding subject matter jurisdiction to prosecute for violation of a federal criminal law, how does the United States obtain custody of a defendant covered by the treaty? The treaty's "bad men clause" provides the clear, concise answer. In White Mountain's case, however, the United States chose not to comply with the treaty. It chose not to have its agent give notice to the tribe. It chose to put its lawful ability to actually prosecute White Mountain on hold. It matters not that the United States alternatively decided to follow a path of self-help contrary to the clear requirements of the treaty.

For the same reason, the prosecution's reliance on *Drapeau*, (GB at 8 citing 414 F.3d at 869), for the notion that 8 U.S.C. § 1401(a)(2) [now § 1401(b)], a statute granting citizenship to Indians, abrogated the bad men provision of the Fort Laramie Treaty is misplaced. The statute did not explicitly abrogate the treaty provision.

There is no doubt Congress may abrogate an Indian Treaty. It may even do so unilaterally. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). This, however, does not mean that every statute which is seemingly inconsistent with a treaty provision constitutes an abrogation of the treaty. For a statute to have an abrogating effect:

> What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

United States v. Dion, 476 U.S. 734, 739-740 (1986). *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*., 443 U.S. 658, 690 (1979) (intent of Congress to abrogate an Indian treaty must be clearly expressed). Indeed, prior to *Dion*, the Supreme Court generally followed a *per se* rule requiring Congress to expressly abrogate a treaty. *Frost v. Wenie*, 157 U.S. 46 (1895).

In determining Congressional intent, Indian treaties are to be interpreted liberally in favor of the Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*., 443 U.S. 658, 675-676 (1979); *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943). Any ambiguities must be resolved in their favor. *Winters v. United States*, 207 U.S. 564, 576-577 (1908). *See also County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") (citation omitted). Congressional intent to abrogate a treaty is not to be lightly implied. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968).

Nothing in 8 U.S.C. § 1401(b) evidences a clear intent by Congress to abrogate Fort Laramie's "bad men" provisions through the enactment of the statute. Prevailing Supreme Court authority, therefore, compels the conclusion that the statute did not result in an abrogation of the treaty. The statute simply declares "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe" is a citizen of the United States. The statute extends a benefit. It does not take anything away.

Drapeau's assertion, 414 F.3d at 787, the statute's grant of citizenship abrogated the "bad men" provisions cannot be deemed controlling because it is in clear conflict with the abundance of prior, superior Supreme Court authority controlling the question. *Drapeau* relied on a 1975 Nebraska district court ruling, earlier approved by this court, *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (D. Neb. 1975). (*See* AOB at 20-21). The *Consolidated Wounded Knee* (1975) decision, however, predates the Supreme Court's rulings in *Washington State Commercial Passenger Fishing Vessel Ass'n*. (1979) and *Dion* (1986). In the face of these subsequent decisions of the Supreme Court, continued reliance on *Consolidated Wounded Knee Cases* is unwarranted.

Furthermore, *Consolidated Wounded Knee Cases* does not address the issued raised by White Mountain. He is not contesting the general applicability

of the federal criminal laws of the United States to Indians on a reservation, the question before the district court in *Consolidated Wounded Knee Cases*, 389 F. Supp. at 243-244. White Mountain asserts only that to prosecute him for violation of a federal criminal law the United States must first obtain custody of him by compliance with the bad men provision of the treaty. (AOB at 21-22). The prosecution admits the United States did not comply with this treaty provision.

White Mountain's contention is not in conflict with the ability of the United States to prosecute him. The United States, as intended, could have easily complied with the treaty, obtained custody of White Mountain from the tribe as contemplated by the treaty and commenced a prosecution. This approach avoids any question of abrogation of treaty rights and honors compliance with the Supreme Court's determinations that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). It simply chose not to do so.

CONCLUSION

For these reasons, and upon the above and foregoing arguments and authorities, as well as those set forth in White Mountain's February 16, 2010, opening brief, White Mountain's plea, conviction, and sentence for assault on a federal officer should be vacated. His case should be remanded to the district court with instruction to dismiss White Mountain's indictment for want of

compliance by the United States with the bad men provision of the Fort Laramie Treaty of 1868.

Dated this 15th day of April, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I hand delivered two copies of this Reply Brief to Assistant United States Attorney Mark A. Vargo, Attorney for Appellee, at the United States Courthouse, 515 Ninth Street, Room 201, Rapid City, South Dakota 57701, on the 15th day of April, 2010.

In addition, I certify that I mailed a copy of this Reply Brief to the Appellant Patrick White Mountain, #06900-059, c/o FCI Big Spring, Federal Correctional Institution, 1900 Simler Avenue, Big Spring, Texas 79720, also on the 15th day of April, 2010.

/s/ Scott D.McGregor for
Gary G. Colbath, Jr.
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect Version X3 was used in the preparation of the foregoing Appellant's Reply Brief and that the word count done pursuant to that word processing system shows that there are 2,633 words in the foregoing Appellant's Reply Brief.

Dated this 15th day of April, 2010.

/s/ Scott D. McGregor for
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 reply 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 15th day of April, 2010. The disc has been scanned for viruses using Norton Anti Virus Version 5.0, and that scan showed the disc is virus-free.

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