==========

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-2705

UNITED STATES OF AMERICA,

Appellee,

v.

WESLEY CHUCK JACOBS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
THE HONORABLE JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE

APPELLANT'S BRIEF

Neil Fulton, Federal Public Defender
Gary G. Colbath, Jr., Assistant Federal Public Defender
On the Brief: Mark S. Falk
703 Main Street, 2nd Floor
Rapid City, SD 57701
Telephone: (605) 343-5110
Facsimile: (605) 343-1498

ATTORNEYS FOR APPELLANT

==========

SUMMARY OF THE CASE

This case involves the jurisdictional prerequisites set out in the Fort Laramie Treaty of 1868 for prosecutions under the Major Crimes Act of 1885. Appellant is a member of the Oglala Sioux Tribe and resides with his spouse on the Pine Ridge Indian Reservation in South Dakota. The district court erred by accepting Appellant's guilty plea to a Major Crimes Act offense even though the United States did not offer any evidence of compliance with the applicable provisions of the Fort Laramie Treaty.

The Treaty promises to protect the Tribe and its members against arbitrary prosecutions by white men. The United States expressly promised to take several steps to assure no tribal member was wrongfully seized and prosecuted. Article V of the Treaty requires the United States to provide an agent to receive complaints against tribal members. Upon receipt of a complaint, the agent is required to conduct an investigation, "cause the evidence to be taken in writing," make findings, and forward this information to the Commissioner of Indian Affairs for a final decision. Unless these terms are satisfied, the Oglala Sioux Tribe has no obligation to turn a tribal member over to the United States for prosecution. Thus, without complying with these express Treaty requirements, the United States does not obtain federal criminal jurisdiction.

This is a case of first impression in this Court. Prior decisions have rejected arguments that the 1868 Fort Laramie Treaty completely deprived the federal courts from exercising federal jurisdiction over tribal members. In addition, prior decisions have rejected an argument that Article I of the Treaty requires notice to the Tribe before prosecuting a tribal member for violating a general law, such as distribution of a controlled substance. This Court has never addressed the Article V promises, in conjunction with Article I, in the context of an alleged Major Crimes Act violation involving only tribal members. The Treaty limits the power of the federal courts to exercise jurisdiction in such cases by explicitly requiring the United States to take specific steps whenever such a complaint is presented. Here, the United States presented no evidence of compliance; hence, jurisdiction did not vest in the district court. Since the record contains no evidence of compliance by the United States, the conviction in this case must be reversed.

REQUEST FOR ORAL ARGUMENT

Appellant requests twenty minutes for oral argument because of the critical jurisdictional issue implicating the rights of Appellant and the Oglala Sioux Tribe under the April 29, 1868, Fort Laramie Treaty.

TABLE OF CONTENTS

Addendum

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Throughout this brief the Appellant, Wesley Jacobs, will be referred to by name. The Appellee, United States, will be referred to as "the prosecution." 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 transcript of the April 27, 2010, change of plea hearing will be prefaced with the designation "PH," followed by the appropriate page number(s) of the transcript. References to the transcript of the July 19, 2010, sentencing hearing will be prefaced with the designation "ST," followed by the appropriate page number(s) of the transcript. References to the revised presentence report will be prefaced with the designation "PSR," followed by the appropriate page or paragraph (¶) number of the report.

JURISDICTIONAL STATEMENT

The Decision Appealed:

Mr. Jacobs appeals from the conviction and sentence imposed by written judgment dated July 20, 2010, by the Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota, upon his plea of guilty on April 27, 2010, to Assault with a Dangerous Weapon in Indian Country in violation of 18 U.S.C. §§ 113(a)(3) and 1153. (CR 60; Add. 1).

District Court Jurisdiction:

Mr. Jacobs contends the United States District Court for the District of South Dakota did not obtain jurisdiction because the record shows no compliance with the requirements of Articles I and V of the Fort Laramie Treaty of 1868. The district court's purported jurisdiction, however, is premised on 18 U.S.C. §§ 1153 and 3231.

Jurisdiction of this Court:

This Court has jurisdiction 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.").

Notice of Appeal:

Mr. Jacobs timely filed his Notice of Appeal July 30, 2010. (CR 61).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I.

The Fort Laramie Treaty of 1868 requires an investigation and written findings whenever someone accuses a tribal member of wrongdoing. These materials are to be forwarded to the Commissioner of Indian Affairs who then must issue a decision whether the Tribe will be required to deliver the tribal member to the United States for federal prosecution. Must the United States comply with these Treaty provisions?

Authorities

1. Fort Laramie Treaty of April 29, 1868, 15 Stat. 635; (Add. 2).
2. *United States v. Kagama*, 118 U.S. 375 (1886).
3. *United States v. Lara*, 541 U.S. 193 (2004).
4. *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005)

STATEMENT OF THE CASE

Nature of the Case:

This case involves the interplay between the Fort Laramie Treaty of 1868 and the Major Crimes Act. The Treaty places several obligations upon the United States before it can exercise federal criminal jurisdiction over a tribal member for an alleged offense against another tribal member under the Major Crimes Act. In this case, the record does not show compliance with these Treaty requirements. Therefore, the district court did not obtain jurisdiction.

Procedural History:

An Indictment filed in November 2009 charged Mr. Jacobs with two counts: (1) Assault Resulting in Serious Bodily Injury, contrary to 18 U.S.C. § 113(a)(6) and (2) Assault With a Dangerous Weapon (a belt), contrary to 18 U.S.C. § 113(a)(3). The Indictment premised jurisdiction on 18 U.S.C. § 1153, alleging that Mr. Jacobs is Indian and that the offense occurred in Indian Country. (CR 1).

On April 21, 2010, Mr. Jacobs accepted a plea agreement with the prosecution according to which he agreed to plead guilty to Count II of his indictment, assault with a dangerous weapon, in exchange for the prosecution's dismissal of Count I. (CR 48, 49). Mr. Jacobs pled guilty to Count II in accordance with his plea agreement on April 27, 2010. (CR 55).

The district court held a sentencing hearing on July 19, 2010. Seventeen individuals submitted letters in support of Mr. Jacobs. (ST 4-5). Twelve individuals spoke to the district court on Mr Jacobs' behalf, including the victim of the crime who asked for leniency. (ST 67-95). The prosecution called one domestic abuse expert witness to challenge the victim's credibility and undermine her request for leniency. (ST 21-53). The district court sentenced Mr. Jacobs to 36 months in prison followed by three years of supervised release. (CR 58, 59).

Mr. Jacobs filed his notice of appeal on July 30, 2010. (CR 61).

STATEMENT OF THE FACTS

Mr. Jacobs is an American Indian and an enrolled member of the Oglala Sioux Tribe. (PSR, p. 2) He is married to Jennifer Jacobs, the victim. They have one biological child and one adopted child. Mr. Jacobs also has an older child from a prior marriage. Mr. and Mrs. Jacobs lived with their children "near Sharps Corner and the Rockyford school on the Pine Ridge Indian Reservation." (PSR ¶ 43).

Mr. Jacobs is well educated, with a Bachelor of Science in Commercial Economics and a Master of Arts degree in Regional Planning from the University of Massachusetts at Amhurst, Massachusetts. (PSR ¶ 50). He is a tribal leader and served as a tribal counsel member (2004-2006), Treasurer (1998-2000), Executive Director (1994-1996), and Director of the Oglala Sioux Tribe Safety of Dams program (1989-1994). (PSR ¶¶ 52-55). He is well liked and respected in the Oglala Sioux Tribal community as reflected by many individuals who wrote letters on his behalf and spoke in his favor at sentencing. (ST 4-5, 67-95).

The factual basis for Mr. Jacobs' offense reads as follows:

> On September 21, 2009, Wesley Chuck Jacobs confronted his wife, Jennifer Jacobs, inside their home near Sharps Corner, South Dakota. Wesley Jacobs then repeatedly struck Jennifer Jacobs about her body with a leather belt. Jennifer Jacobs was unable to resist. The beatings occurred over the course of several hours and consisted of numerous strikes upon Jennifer Jacob's body. As a result, Jennifer Jacobs

> suffered widespread physical pain about her body necessitating an examination at the Indian Health Services hospital.

(PSR ¶ 7; CR 49).

The Oglala Sioux Tribe prosecuted Mr. Jacobs for this offense. Mr. Jacobs entered a plea of guilty, was sentenced to six months in jail, anger management treatment, domestic violence classes, and two years of supervised probation. (CR 57, attachment 2).

In the federal sentencing proceedings, Jennifer Jacobs addressed the district court at sentencing. She described her background with Mr. Jacobs. "Chuck and I have been together for 19 years. We have been through everything. We're best friends. We love each other. We always will. We have kids together. That will never -- you know, we will always be connected." (ST 94). She described Mr. Jacobs as an intelligent, good person and asked that he not be sent to prison. "I don't want you to send Chuck to prison. He's a very intelligent man. Whenever I first got with him, I was 18. And yes, he is 17 years older than me and in a way that was really good. I learned a lot from him and I continue to learn. My son -- I want him with my children. He's a good person." (ST 94)

She told the district court that she was not an abused woman: "what Chuck did to me that day, I am not this abused woman that's always -- you know, that's never happened before. I just think Chuck has a lot of issues with his family that

needs to be dealt with. I was his best friend for years, I mean, years." (ST 95). She repeated her request to the district court for mercy. "I don't want you to put Chuck in jail. We both have forgiven each other. I forgave him. He forgave me. We just need to -- we just need closure. We need to move forward. Our kids, they need both of us. And that's basically what I have to say." (ST 95).

Although the offense was alleged to have occurred in Indian Country, on the Pine Ridge Indian Reservation, and although Mr. Jacobs is a member of the Oglala Sioux Tribe, there is nothing in the record to establish the pre-requisites set forth in the Fort Laramie Treaty of 1868[1] to the exercise of federal criminal jurisdiction. In particular, there is no record of a complaint made to a United States agent, an investigation, or findings by the agent, nor a decision of the Commissioner of Indian Affairs. Similarly, there is no evidence in the record of a demand to the Tribe for Mr. Jacobs, nor any opportunity for the Tribe to address the agent or the Commissioner.

Additional facts will be set forth in the argument as necessary.

---

[1] The full text of the Treaty, along with the signature page for the Oglala Sioux Tribe, is attached as Addendum 2. Signature pages for other tribes are omitted.

SUMMARY OF THE ARGUMENT

Reversal for want of jurisdiction is required because the United States has not shown compliance with the Fort Laramie Treaty of April 29, 1868. 15 Stat. 635. This Treaty constitutes both the law of the land and a binding agreement between the United States and the Oglala Sioux Tribe. Neither Congress nor the President of the United States have withdrawn from the Treaty or attempted to expressly abrogate this Treaty. Therefore, the Treaty and the promises made by the parties to the Treaty are equally enforceable as federal statutes.

Article I of the Treaty identifies the purpose of the Treaty. The promises made by each party are intended to insure a peaceful co-existence between the people of the United States and the people of the Oglala Sioux Tribe. To that end, Article XI relates that the Oglala promised to: relinquish certain land; permit the construction of railroads; refrain from attacking the people and friends of the United States; refrain from capturing or carrying off white women and children; refrain from killing, scalping, or attempting to do harm to white men; and withdraw opposition to military posts.

In exchange for the Tribe's promises to end violence and warfare against the settlers and non-Indian people, the United States made several promises, including a promise to protect the members of the Oglala Sioux Tribe by assigning an agent

to the Tribe. Article V sets forth the agent's obligations, which include, investigating complaints by and against tribal members. In all cases alleging depredation by tribal members against another's person or property, the agent is to take evidence in writing, make findings, and forward the findings to the Commissioner of Indian Affairs. The Commissioner then makes a decision concerning the complaint, which is subject to revision by Secretary of the Interior. The agreement provides that the Commissioner's decision shall be binding on the parties to the Treaty.

Article I sets forth the Tribe's promises when notified of the Commissioner's findings. Article I provides that "upon proof made to their agent and notice by him," the Tribe shall deliver the member to the United States to be tried and punished. Article I also provides an alternative remedy if the Tribe willfully declines to deliver the member to the United States upon the demand. That remedy allows the President, upon the advice of the Commissioner of Indian Affairs, to determine the damages of the injured party, and reimburse him using "the annuities or other moneys due or to become due" to the Tribe.

In this case, however, there is no written report or findings of the agent in the record. There is no indication of a decision by the Commissioner. There is no record of either notice or demand to the Tribe. Thus, the United States did not

comply with the Treaty, which necessarily deprives the federal court of jurisdiction over Mr. Jacobs. His conviction must be vacated and he must be released from custody until such time as the United States complies with the terms of the Treaty.

The Treaty process to obtain federal criminal jurisdiction does not prohibit prosecution of tribal members alleged to have engaged in wrongdoing under the laws of the United States. Rather, the Treaty recognizes that tribal members are subject the jurisdiction of the sovereign Tribe. The Tribe promises to deliver the tribal member to the United States for federal prosecution only after the agent investigates, makes written findings, and the Commissioner of Indian Affairs makes the appropriate decision based on the agency's findings. Only then does the Treaty require the Tribe to relinquish a tribal member to federal criminal jurisdiction under the Major Crimes Act. This Treaty obligation assures a meaningful role for the Tribe itself consistent with the Tribe's inherent authority over tribal land and the Tribe's own members. Enforcement of these Treaty provisions is also consistent with the current Congressional policies that seek to assure Tribes "greater tribal autonomy within the framework of a 'government-to-government relationship' with federal agencies." *United States v. Lara*, 541 U.S. 193, 202 (2004).

Since the record contains no showing of compliance by the United States with its obligations under the Treaty, including the requirement of an investigation and findings by the agent of the United States and a final decision by the Commissioner of Indian Affairs, federal criminal jurisdiction under the Major Crimes Act cannot be asserted without violating both the Treaty and the inherent power of the Oglala Sioux Tribe over its land and tribal members. The United States is required to comply with treaty obligations in the same manner as statutes. Under the Fort Laramie Treaty, the United States is required to take the proper steps before requiring the Tribe to submit a tribal member to federal criminal jurisdiction. Without such compliance, there is no jurisdiction.

Mr. Jacobs' 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 provisions of the Fort Laramie Treaty have been abolished or annulled. In the civil context, the United States Court of Claims has reaffirmed the requirements of the Fort Laramie Treaty in *Elk v. United States*, 87 Fed. Cl. 70 (2009), appeal by the United States withdrawn, 2010 U.S. App.

LEXIS 4376 (Fed. Cir., Jan. 25, 2010), holding the provision created third-party contractual rights for a tribal member to directly pursue a claim against the United States. In addition, Congress has adopted a current policy of extending inherent tribal authority to deal with criminal matters, which the Supreme Court upheld in *United States v. Lara*, *supra*. The Court acknowledged that Tribes have the inherent authority to control events that occur upon the Tribe's own land, and possess attributes of sovereignty over both their members and their territory. Thus, current federal policies weigh heavily against a judicial construction of the Treaty that undermines tribal sovereignty. Instead, the promises of protection to the Tribe and its members made by the United States in the Treaty must be honored until such time as the political branches of the federal government determine otherwise.

ARGUMENT

I.

The failure to establish compliance with Article V of the Fort Laramie Treaty of 1868, which requires an investigation, written findings, and a decision by the Commissioner of Indian Affairs before a tribal member accused of wrongdoing must be surrendered for federal criminal prosecution, deprives the district court of jurisdiction.

A. Standard of Review.

When determining whether the record establishes subject matter jurisdiction for a prosecution under the Major Crimes Act this Court conducts *de novo* review. *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995), rehearing denied, 1995 U.S. App. LEXIS 15148.

Although Mr. Jacobs did not raise this claim below, a claim premised on a court's "statutory or constitutional power to adjudicate the case" can never be forfeited or waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). "Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Id.*, citing e.g., *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

B. Merits.

Article VI, Clause 2 of the United States Constitution provides that ratified treaties are to be regarded as the law of the land.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The Fort Laramie Treaty of 1868 is just such a Treaty and constitutes the law of the land.

Since our Constitution declares a ratified treaty to be the law of the land it is equivalent to a federal statute and Congress has the power to impose pre-requisites to the exercise of the judicial power in such treaties. As this Court recently observed, "the Supreme Court reiterated the 'jurisdictional distinction between court-promulgated rules and limits enacted by Congress.' . . . The Court held that the time limits set forth in Federal Rule of Appellate Procedure 4(a) are jurisdictional because the limits are derived from statute . . . ." *United States v. Watson*, 09-3606, 2010 U.S. App. LEXIS 21369, at 6 (8th Cir. Oct. 18, 2010), quoting from *Bowles v. Russell*, 551 U.S. 205, 211-12 (2007).

Similarly, the prerequisites to a federal criminal prosecution of Oglala Sioux Tribal members set forth in the Fort Laramie Treaty are jurisdictional because the limits are derived from the ratified Treaty. In the case at bar, there is nothing in the record to show that the steps required by the Treaty to obtain jurisdiction over tribal members were followed; hence, the prosecution did not establish district

court jurisdiction to accept a guilty plea and impose sentence upon Mr. Jacobs, a member of the Oglala Sioux Tribe, for an alleged offense against a tribal member occurring on Oglala Sioux tribal land.

The content and history of the Fort Laramie Treaty of 1868

Article I of the Fort Laramie Treaty establishes that the parties intended the Treaty insure a peaceful co-existence between the people of the United States and the people of the Oglala Sioux Tribe. "From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it." (Add. 2, Art. I). To that end, the Oglala Sioux Tribe agreed to relinquish any claim to certain lands, and further expressly agreed,

> 1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.
>
> 2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.
>
> 3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.
>
> 4th. They will never capture, or carry off from the settlements, white women or children.

> 5th. They will never kill or scalp white men, nor attempt to do them harm.
>
> 6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward . . .
>
> 7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte river, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

(Add. 2 at Art. XI)

In exchange for these promises, the United States agreed, *inter alia*, to provide protection of the Oglala Sioux Tribe and its members. The United States promised to supply the Oglala Sioux Tribe with an agent who "shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations . . . ." (Add. 2 at Art. V).

One of these Treaty stipulations provides, "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 . . . ." (Add. 2 at Art. I). The

Treaty explicitly set forth the prerequisites to such criminal prosecution of tribal members.

"In all cases of depredation on person or property [the agent] shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty." (Add. 2 at Art. V). The Treaty also provided an explicit remedy if the Tribe declined to turn over one of its members pursuant to this procedure: "the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to [the Indians] under this or other treaties made with the United States." (Add. 2 at Art. I).

In 1871, Congress adopted the Indian Appropriation Act, which provided that the United States would enter into no further treaties with Indian Tribes, "but without invalidating or impairing the obligation of subsisting treaties," including the Fort Laramie Treaty of 1868. *Ex parte Crow Dog*, 109 U.S. 556, 565 (1883). In 1876, "Congress appropriated one million dollars for the subsistence of the Sioux Indians, in accordance with the treaty of 1868 . . . ." *Id*. at 564. In 1877, Congress ratified one of the provisions of the Treaty changed by the 1876 legislation. Article 8 of the ratification provided:

> "The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

Id. at 566.

The Treaty provided a means for the United States to obtain federal criminal jurisdiction over tribal members. It constituted an "agreement with the Sioux Indians, ratified by an act of Congress, [that] was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes . . . ." *United States v. Kagama*, 118 U.S. 375, 382-383 (1886).

The Treaty's process to obtain jurisdiction was premised upon the General Crimes Act, which extended the laws of the United States into Indian Country. Section 2142 provided for jurisdiction to punish Indians for assaults upon white persons, Section 2143 covered arson, Section 2144 covered forgery, and Section 2145 provided that "the general laws of the United States as to punishment of crimes . . . shall extend to the Indian country." *Ex parte Crow Dog*, 109 U.S. at 558. Congress, however, had overlooked the next section of the Act, which modified the statute's extension of the general laws of the United States into Indian country. Section 2146 provided "The preceding section shall not be construed to

extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offence in the Indian country who has been punished by the local law of the tribe . . . ." *Ex parte Crow Dog*, 109 U.S. at 558 (brackets by the Court).

The Supreme Court ruled that the provisions of the Fort Laramie Treaty of 1868 and subsequent legislation ratifying the Treaty did not expressly or impliedly repeal the Section 2146 exclusion. The "question before us is whether the express letter of § 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed." *Id*. at 570. "The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words." *Id*. The Court examined the specific terms of the Treaty and concluded from the context that the Treaty did not impliedly repeal section 2146. In particular, the provision of a monetary remedy for willfully refusing to deliver over a bad man suggested the Treaty did not cover "an alleged wrong committed by one Indian upon the person of another of the same tribe." *Id*. at 567.

In 1885, Congress enacted the Seven Major Crimes Act, now codified at 18 U.S.C. § 1153, to correct the oversight. *Kagama*, 118 U.S. at 383. There was no

need for the Major Crimes Act, however, to change the steps set forth in the Article V of the Treaty necessary to assert the grant of federal criminal jurisdiction over a tribal member. Thus, the new legislation did not affect that part of the Treaty. Congress again ratified the terms of the Fort Laramie Treaty of 1868 four years later.

On March 2, 1889, Congress divided Indian Country in the Dakota Territory into reservations. Agreement of 1889, 25 Stat. 888. Along with dividing the land, this legislation ratified certain prior acts and modified other provisions of the Fort Laramie Treaty of 1868.[2] Nothing in the legislation, however, modifies either Article I or Article V of the Treaty requiring the United States to provide an agent to receive complaints against tribal members, make written findings, and submit the findings to the Commissioner of Indian Affairs for a final decision. Instead, the 1889 enactment explicitly reaffirms these and other unmentioned provisions of the Treaty:

> That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force

---

[2] *See e.g.*, Section 15 ratifying certain allotments, Section 16 releasing land title in exchange for rations, and Section 17 addressing education. 25 Stat. 888 at Sections 15-17.

> according to their tenor and limitation, anything in this act to the contrary notwithstanding.

25 Stat. 888 at Section 19.

Articles I and V are provisions of the "said Treaty," and they do not conflict with anything in the 1889 Act, nor the 1885 Major Crimes Act. To date, these Articles have not been repealed, and enforcement of these Treaty provisions as the law of the land is explicitly required by our Constitution. U.S. Const. art. VI, cl. 2. *See Elk v. United States*, 87 Fed. Cl. 70, 80-81 (2009), appeal by the United States withdrawn, 2010 U.S. App. LEXIS 4376 (Fed. Cir. Jan. 25, 2010) (Awarding $590,755.06 pursuant to the damages provision of Article I of the Treaty).

Modern Federal Indian policy

Requiring compliance with these Treaty provisions is not only a Constitutional obligation, it is also consistent with modern federal policies encouraging the exercise of Native American sovereignty. Current Congressional policy "seeks greater tribal autonomy within the framework of a 'government-to-government relationship' with federal agencies." *United States v. Lara*, 541 U.S. 193, 202 (2004). Articles I and V of the Treaty are fully consistent with this policy by guaranteeing the Tribe its sovereign right to participate with United States agent and Commissioner of Indian Affairs as a precondition to federal criminal jurisdiction over a tribal member.

In 2008, the Supreme Court confirmed, "the 'sovereignty that the Indian tribes retain is of a unique and limited character.' . . . It centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008). Further, "tribes retain authority to govern 'both their members and their territory,'subject ultimately to Congress. . . . 'Tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe.' " *Id.* (citations and internal brackets omitted).

Articles I and V of the Treaty comport with the tribal interest and authority concerning the events on tribal land, as well as what happens to tribal members. The Treaty's promises of protection for tribal members through an investigation by the agent, a review and decision of the Commissioner of Indian Affairs, with notice and an opportunity to be heard to the Tribe before federal courts obtain criminal jurisdiction over a tribal member are consistent with the recognized sovereign interests of the Tribe.

Congress has taken steps in recent years to expand tribal sovereignty by returning some of the various Tribes' inherent authority to enforce tribal criminal laws. In 1990, the Supreme Court held that the retained sovereignty of a Tribe as a political and social organization to govern its own affairs did not include the

authority to impose criminal sanctions against a member of a different Native American Tribe. *Duro v. Reina*, 495 U.S. 676 (1990). Congress responded by amending the Indian Civil Rights Act to return this inherent power to the prosecuting Tribe.

In deciding whether this legislation constituted delegated power to a Tribe or a return of the Tribe's inherent power, *Lara* examined both the language of the statute and current congressional policies toward Native American Tribes. The statute, "recognizes and affirms in each tribe the inherent tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors." *Lara*, 541 U.S. at 199 (brackets and internal quotes omitted). "The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." *Id.* (citations omitted). A Senate report describes the bill as "recognizing and reaffirming the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians." *Id.* (citations and internal brackets omitted). Representative Miller, House manager of the bill, explained "the statute is not a delegation of authority but an affirmation that Tribes retain all rights not expressly taken away and the bill recognizes an inherent tribal right which always existed." *Id.* (citations and internal quotation marks omitted). Enforcing the tribal rights

guaranteed by Articles I and V of the Fort Laramie Treaty constitutes an affirmation that the Oglala Sioux Tribe retains all rights not expressly taken away.

The Supreme Court also recognized the historical federal role of "creating departments of Indian affairs, appointing Indian commissioners," and "the great importance of securing and preserving the friendship of the Indian Nations." *Id*. at 201-02 (citations and internal quotes omitted). The Court described the legislation as reauthorizing "a power similar in some respects to the power to prosecute a tribe's own members – a power that this Court has called 'inherent.' " *Id*. at 204 (citations omitted). This is considered inherent because, "it concerns a tribe's authority to control events that occur upon the tribe's own land," and "the tribes' possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations.' " *Id*. Some of these same concepts are reflected in the Tribal Law and Order Act of 2010, Title II of P.L. 111-211, which, consistent with the Treaty of 1868, recognizes the need for the participation of various Indian Tribes in the decisions involving the prosecution of tribal members.

Thus, the provisions of the Fort Laramie Treaty of 1868 requiring a United States' agent to investigate allegations of wrongdoing and issue a written report, and requiring a determination by the Commissioner of Indian Affairs before

permitting a federal court to assert criminal jurisdiction over a tribal member are consistent with current federal polices and remain good law. Since " 'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress," *Lara*, 541 U.S. at 206, and since the Fort Laramie Treaty remains good law, the provisions of Articles I and V control in this case.

This is a case of first impression in the Eighth Circuit

Although this Court has addressed some issues related to the Fort Laramie Treaty in the past, it has not fully considered the interplay of the Treaty with the Major Crimes Act, nor addressed the requirements of Article V for an investigation by the United States' agent with written findings, and a decision by the Commissioner of Indian Affairs. Therefore, this case is a case of first impression.

This Court first addressed treaty issues in reviewing the decision in *United States v. Consolidated Wounded Knee Cases*, 389 F. Supp. 235 (D. Neb. 1975). The district court considered arguments from 65 defendants charged with various offenses arising out of an occupation of Wounded Knee, South Dakota in 1973. In contrast to the case at bar, the defendants argued that "the Courts of the United States do not have the power and jurisdiction to judge the guilt or innocence of individuals who are citizens of other Nations for alleged crimes committed on the

soil of other Nations. . . ." *Id.* at 236. The defendants also acknowledged "the developed law is squarely in opposition to their legal position" and asked that the district court "repudiate that law." *Id.* at 238. In the case at bar, Mr. Jacobs recognizes that the Treaty allows for federal criminal jurisdiction and only seeks to enforce, rather than challenge, existing law

Recognizing that existing law controlled, the district court rejected the argument that the United States did not have and could not obtain jurisdiction over a tribal member. The Court explained "a judge must hold government to the standards of the nation's conscience once declared, but he cannot create the conscience or declare the standards." *Id*. at 239.

The district court recognized, as does Mr. Jacobs, that before entering into the 1868 Treaty, the General Crimes Act already authorized federal criminal jurisdiction over tribal members committing an offense against a non-tribal member, while in 1885 the Major Crimes Act did the same for offenses against tribal members. *Id*. at 242-43. The district court also resolved another issue not raised in the case bar, holding that the federal courts also have criminal jurisdiction "to try Indians accused of violating general federal criminal laws," under the 1868

Treaty.[3] The district court's interpretation of the 1868 Treaty is consistent with its plain language and the holding of both *Ex parte Crow Dog, supra,* and *Kagama, supra*. The district court, however, did not discuss, consider, or rule on the requirements imposed by Articles I and V (an investigation, written findings, and a decision by the Commissioner of Indian Affairs) to obtain federal court criminal jurisdiction over a tribal member alleged to have committed a wrong against another tribal member.

This Court affirmed the district court in *United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976), adopting the district court's reasoning and rejecting the argument, "that the United States District Court lacked jurisdiction to try them on the charges for which they were convicted because jurisdiction over the offenses committed on the Pine Ridge Reservation was reserved to the Sioux Nation under the Fort Laramie Treaty . . . ." *Id*. at 774. This Court likewise did not discuss the requirements of Articles I and V of the Treaty.

In *United States v. Kane*, 537 F.2d 310 (8th Cir. 1976), this Court rejected an argument of non-compliance with Article I. The defendant contended "that this provision requires the United States to request 'delivery' of the suspect from the

---

[3] In the alternative, the district court concluded the general laws of the United States applied to tribal members as United States citizens "subject to all restrictions to which any other American citizen is subject, in any state." *Id*. at 243.

Tribe," and sought dismissal because the government did not request delivery. *Id.* at 310. Citing *Dodge* and *Consolidated Wounded Knee Cases*, this Court held that "The request procedure which defendant seeks to impose would clearly be inconsistent with . . . congressional intent." *Id.* This Court did not address the requirements of Article V as required prerequisites to invoking federal criminal jurisdiction against a tribal member; thus, this case is not controlling.

That said, *dicta* in *Kane* suggests the panel misunderstood the effect of the Major Crimes Act on the Fort Laramie Treaty. *Id.* at 310. Nothing in the Major Crimes Act nor its legislative history[4] explicitly repudiates the requirements of either Article I or V. Rather, as explained in *Kagama*, Congress merely intended to correct the oversight identified by the Supreme Court in *Ex parte Crow Dog, supra*. Although Congress originally intended the Treaty to create federal criminal jurisdiction over tribal members without regard to the status of the injured party, Congress overlooked section 2146 of the General Crimes Act, which countermanded that intent by expressly excluding offenses committed by tribal members against each other. The Supreme Court explained that the Major Crimes

---

[4] For extensive discussions of this legislative history *see e.g.*, *United States v. John*, 437 U.S. 634, 652 n. 22 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n. 14, 204 (1978); *Keeble v. United States*, 412 U.S. 205, 209-212 (1973); *United States v. Maloney*, 607 F.2d 222, 227-28 (9th Cir. 1979); and *United States v. Gilbert*, 378 F. Supp. 82, 92-94 (D.S.D. 1974).

Act of 1885 "was designed to remove that objection, and to go further by including such crimes on reservations lying within a State." *Kagama*, 118 U.S. at 383.

Thus, the plain language of the Major Crimes Act, as well as the Supreme Court's historical explanation in *Kagama*, establishes and clarifies that Congress did not intend to repudiate the requirements set forth in Articles I and V necessary for federal criminal jurisdiction over tribal members. The Treaty's requirement for an investigation by the United States agent, written findings, and a decision by the Commissioner of Indian Affairs remained in full force. Indeed, any doubt on this point is put to rest by the action of Congress in 1889 reaffirming "That all the provisions of the [Fort Laramie Treaty of 1868] . . . not in conflict with the provisions and requirements of this act, are hereby continued in force . . . ." 25 Stat. 888 at section 19.

This Court next considered the Treaty in *United States v. Drapeau*, 414 F.3d 869 (8th Cir. 2005), in response to *pro se* arguments submitted by Mr. Drapeau challenging his drug distribution conviction under a general federal criminal statute. In his *pro se* submission, Mr. Drapeau argued "the statutory jurisdiction provisions of 18 U.S.C. § 1152 do not comply with the 'jurisdictional prerequisites of the 1868 Fort Laramie Treaty.' " *Id*. at 877. This Court agreed to address this

pro se argument recognizing that it "potentially implicates [this Court's] subject matter jurisdiction . . . ." *Id.*

Mr. Drapeau focused on 18 U.S.C. §§ 1152 and 1153 and argued "jurisdiction of the federal courts under 18 U.S.C. § 1152 and 1153 is valid only if, in a given case, that statutory jurisdiction complies with the jurisdictional prerequisites of the 1868 Fort Laramie Treaty." *Id.* at 877-78. This Court rejected Mr. Drapeau's theory, holding that neither Sections 1152 nor 1153 applied to him because his prosecution was brought under the general drug laws of the United States. In contrast to *Drapeau*, 18 U.S.C. § 1153 is directly involved in Mr. Jacobs' assault case.

In *dicta*, this Court addressed Mr. Drapeau's *pro se* argument that Article I required the United States to provide the Tribe with notice prior to a prosecution. Without discussing the express requirements of Article V, this Court stated,

> The plain language of the treaty, moreover, does not create the sort of "notice" requirement that Drapeau envisions. The treaty does not say that the United States must give notice to an Indian tribe before the government may arrest and prosecute a tribal member who has violated the federal drug trafficking laws. Rather, the treaty imposes *an obligation on the tribe* to "deliver up the wrong-doer to the United States," upon proof and notice to the tribe.

Id. at 878 (emphasis in original). In Article V, however, the plain language of the Treaty required the United States to provide an agent "for the purpose of prompt

and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations . . . ." (Add. 2 at Art. V).

The plain language of Article V also required that agent to take "evidence . . . in writing," make "findings," and forward these "to the Commissioner of Indian Affairs" for a decision "subject to the revision of the Secretary of the Interior." (Add. 2 at Art. V). Even assuming the plain language of Article I does not establish the notice requirement Mr. Drapeau asserted, the plain language of Article V identifies specific steps required by the Treaty before the United States can assert federal criminal jurisdiction over a tribal member under both the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153.[5]

In contrast to *Drapeau*, this prosecution under the Major Crimes Act directly affects the Oglala Sioux Tribe's retained sovereign authority under the 1868

---

[5] As an alternative rationale in *Drapeau*, this Court confirmed its opinion that no notice or request is required under the general law covering Mr. Drapeau's conviction for distribution of a controlled substance because he is a citizen. *Id*. at 878.

This Court rejected identical arguments in two recent appeals from controlled substances conviction, citing *Drapeau* as binding authority. *Lebeaux v. United States*, 165 Fed. Appx. 496, 05-2037 (8th Cir. 2006) (unpublished), and *United States v. Ghost Bear*, 09-1481 and 09-1642, 2010 U.S. App. LEXIS 15015 (8th Cir. 2010) (unpublished). As in *Drapeau*, neither of these cases discussed the requirements of Article V.

Treaty. The plain language of Articles I and V of the Treaty, read together, evidences the Congressional intent to provide protection for the Tribe and establish a process by which the United States may obtain federal criminal jurisdiction over tribal members.

Article V places the United States' agent, the Commissioner of Indian Affairs, and the Secretary of the Interior as buffers between federal criminal prosecution of tribal members. Through these Treaty provisions, the United States promised to protect the Tribe and its members from arbitrarily being taken away and punished by white men. Under the Treaty, jurisdiction to prosecute a tribal member is dependent upon an independent investigation with tribal input, findings, and a decision from the Commissioner of Indian Affairs.

By entering into this Treaty, the United States explicitly promised these specific protections to the Tribe and its members before it may request delivery of a tribal member to be prosecuted by a federal court. If the United States does not provide the promised protections, then the Tribe would not have "an obligation on the tribe to 'deliver up the wrong-doer to the United States,' upon proof and notice to the tribe." *Drapeau*, 414 F.3d at 878. In short, compliance with Articles I and V of the Treaty is a prerequisite to the exercise federal criminal subject matter

jurisdiction over a member of the Oglala Sioux Tribe premised on an allegation of wrongdoing against another tribal member.

Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005), held that where the United States fails to follow the identical procedure set forth in the 1868 Navajo Treaty, the Navajo Tribe had no obligation to deliver Mr. Means, a member of a different Tribe, to the United States for prosecution. "Under the treaty, Indian offenders are to be delivered to the United States for prosecution under federal law on request. This provision, however, is conditioned on a request from the United States's agent. The treaty conditions have not been fulfilled in this case, so the rendition provision in the treaty does not apply." *Id*. at 936-37. The Court further held, "The United States has not demanded that the Navajo turn Means over for federal prosecution, and the Navajo have chosen to prosecute Means themselves in tribal court, which the 1990 Amendments to the Indian Civil Rights Act recognize they have the power to do." *Id*. at 937. The holding in *Means* recognized and enforced a Navajo Treaty entered into in 1868 that uses identical language as the Fort Laramie Treaty uses in Articles I and V.[6]

---

[6] The Navajo Treaty of 1868 places the provision setting forth the agent's duties in Article IV rather than Article V as in the Fort Laramie Treaty of 1868. Navajo Treaty of June 1, 1868, Arts. I and IV, 15 Stat. 667-68.

"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, as well as the inherent authority of the Tribe to protect its members and participate in the policing of matters that take place on tribal land.

Only Congress constitutionally can 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 v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979) (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). Thus, in *United States v. Blue*, 722 F.2d 383 (8th Cir. 1983), this Court 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." *Id*. at 385. Articles I and V of the 1868 Treaty have neither been abrogated by explicit congressional action nor abandoned.

Since the United States made no showing of compliance with Articles I and V of the 1868 Treaty, the record in this case cannot support the exercise of federal criminal jurisdiction over a tribal member for an alleged offense against another member. Mr. Jacobs and his spouse[7] are both members of the Oglala Sioux Tribe, and their domestic troubles occurred at their own home on the Pine Ridge Indian Reservation. Under these circumstances, and absent compliance with the Treaty obligations, Mr. Jacobs' conviction must be vacated. "*The best thing a man can do is when he makes a promise to stick to it.*" *Elk*, 87 Fed. Cl. at 72 (italics by the Court).[8]

---

[7] Although, Mr. Jacobs' spouse is the victim in this case, she implored the district court to refrain from imprisoning Mr. Jacobs and allow the family to reunite and heal their wounds. (ST 94-95)

[8] The Court is quoting Chief Swift Bear, Council with the Brule Sioux at Fort Laramie, Dakota Territory, Apr. 28, 1868, as recorded in The Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867-68 at 110 (1976).

CONCLUSION

In Articles I and V of the Fort Laramie Treaty, the United States promised to take specific steps to protect the Tribe and its members from arbitrary prosecutions by white men, in exchange for the Tribe's promise to have its members refrain from attacking whites, railroads, and military forts. These promises created obligations that must be followed to obtain federal criminal jurisdiction of tribal members for prosecutions under the Major Crimes Act. Here, the record does not show compliance; hence, jurisdiction did not vest in the federal court to accept Mr. Jacobs' guilty plea. Therefore, Mr. Jacobs respectfully requests that this Court vacate the conviction and prison sentence.

Dated this 10th day of November, 2010.

Respectfully submitted,

Neil Fulton
Federal Public Defender

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, Second Floor
Rapid City, SD 57701
(605)343-5110; Fax: (605)343-1498
filinguser_SDND@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs

I further certify that the electronic version of the foregoing has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that the scan showed the foregoing is virus free.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs

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 8,084 words in the foregoing Appellant's Brief.

Dated this 10th day of November, 2010.

By: */s/ Gary G. Colbath, Jr.*
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Wesley Chuck Jacobs

ADDENDUM