IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JENNIFER PABLO, As Guardian Ad Litem for F.C. aka F.W,

Plaintiff,

v.

No. 10-427C
(Judge Firestone)

THE UNITED STATES OF AMERICA,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. The 1868 bad men treaty provision applies to all men regardless and is not applicable to only agents or employees of the United States, or just tribal members.

The position of the United States is that the 1868 bad men treaty provision applies only to agents and employees of the United States. The Government's position also, in its Motion for Summary Judgment, is that since F.C. aka F.W. was not molested in her own Navajo Nation, that she is not entitled to pursue a "bad man" claim. Arguendo, if it is possible that Daniel Kettell was not an agent or employee of the United States, his actions in causing the injury and damages of Plaintiff's minor daughter F.C. aka F.W. are covered by the 1868 bad men treaty provision. Because this claim involves considerations of both the 1868 Sioux Treaty and the 1868 Navajo Treaty, we must construe the general purpose of both, and to how theses treaties operate to protect "Indian" people, as citizens of the United States as well. It is also an unresolved issue as to whether Daniel Kettell was a "federal official" at the time of the July 5, 2008 attack, and

therefore whether or not Daniel Kettell is covered under the auspices and protection of the Federal Tort Claim Act (FTCA). Plaintiff has also, and alternatively, filed a companion claim with the Bureau of Indian Affairs and Department of the Interior under the FTCA claim dated June 30, 2010, against Daniel Kettell, individually, and the Rosebud Sioux Tribe Law Enforcement Services, jointly and severally, for failure to reasonably screen, hire, train and/or supervise Daniel Kettell to avoid this type of harmful and foreseeable conduct. There has been no response from the Government, as of today's date, as to the merits of the FTCA claim.

The Treaty of 1868 was one of nine made in 1868, by and between commissioners representing the United States and chiefs of various previously hostile Indian tribes. *See Tsosie v. United States,* 11 Cl. Ct. 62, 67 n. 1 (1986). The treaties were all duly ratified, proclaimed, and published in volume fifteen of the Statutes at Large. All say that peace is their object and all contain "bad men" articles in similar language. *Tsosie v. United States,* 825 F.2d 393, 395 (Fed. Cir. 1987).

As an example, the Sioux Treaty of 1868 has been previously recognized as an existing obligation of the United States serving as the source of judicially enforceable property and personal rights. *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980) (requiring just compensation for the taking of the Black Hills in South Dakota). A treaty with an Indian tribe is a contract. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

Article I of the Sioux Treaty of 1868, April 29, 1868, 15 Stat 635, ratified February 16, 1869, and proclaimed February 24, 1869, states as follows:

> 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 pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.
>
> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> 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; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Article I of the Navajo Treaty of 1868, (15 Stat. 667, ratified July 25, 1868, proclaimed August 12, 1868), states as follows:

> 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 pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it. (Emphasis Added).
>
> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained. (Emphasis Added).
>
> 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 Navajo tribe agree that they will, on

> 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; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provision of this treaty or the laws of the United States, shall be reimbursed therefor. (Emphasis Added).

In construing the above treaty provisions of both the 1868 Ft. Laramie Treaty (Sioux) and the 1868 Treaty with the Navajo, basic Indian law canons of construction require that the language of the treaties be liberally construed and all ambiguities be resolved in favor of Indians. See, *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943), quoting *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973). It is to be construed as the Indians would have understood it, *Choctaw Indians v. Oklahoma*, 397 U.S. 620, 631 (1970), and all rights therein are to preserved unless Congress's intent to the contrary is clear and unambiguous. *United States v. Dion*, 476 U.S. 734, 739-740 (1986). Any dispute as to meaning should be resolved against the United States, the drafter of the treaty. *Hebah v. United States*, 456 F.2d 696, 704 (Ct. Cl. 1972). These canons of construction apply to rights of Indian people, not just Indian Tribes.

The first significant phrase in both of these treaties (Sioux and Navajo), is "(i)f bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians... ." This phrase defines who the United States must "arrest and punish" and concomitantly stand good for the damages

caused by the wrong committed. First, the above phrase by its very terms does not confine itself to only agents or employees of the United States. "The 'bad men' clause dealing with wrongs to the Navajos is not confined to United States Government employees... ." *Tsosie v. United States*, 825 F.2d 393, 396, 400 (Fed. Cir. 1987). The phrase includes all bad men among the whites, period. Second, nor is the phrase "subject to the authority of the United States" confined by its own terms to only agents or employees of the United States who commit a wrong. Third, the word `or" means that "bad men among the whites" and "other people subject to the authority of the United States" designate different categories of persons for whom the United States was responsible to prosecute and stand good for loss sustained, such as Black soldiers serving in the United States Army who commit any wrong, but were not white. Compare, *Tsosie v. United States*, 825 F.2d 393, 400 (Fed. Cir. 1987) ("The literal text of Article I and the 'legislative history' of the treaty show that any 'white' can be a `bad man' plus any nonwhite subject to the authority of the United States... .") with *Hebah v. United States*, 428 F.2d 1334, 1340, 192 Ct. Cl. 685 (1970) ("Members of the Indian Police Force are... therefore within this provision regardless of their race or color ") Fourth, the phrase "subject to the authority" means persons over whom the United States exercised governmental authority which includes not only its agents and employees but private persons who were present within 1868 treaty lands. *Tsosie v. United States*, 825 F.2d 393, 396, 400 ("The legislative history of the Navajo treaty suggests that the bad man clause relating to wrongs to Navajos applied to such wrongs by all whites and nonwhites subject to United States jurisdiction"). Because the United States in the treaty committed itself to keeping the peace, it was required to prosecute and stand good for loss caused by any person subject to its governmental authority. Fifth, Article I contains a commitment by both the Tribes

and the United States to, under circumstances set out, reimburse certain persons for wrongs committed against them. It is not claimed that the "bad men among Indians" only applies to wrongs committed against government agents or employees. And sixth, at the very least, the term "subject to the authority" is ambiguous and should be construed in favor of Plaintiff's claims in this case. See *Tsosie v. United States*, 825 F.2d 400 (" 'subject to authority of the United States', whatever that means... .").

The United States asserts that all decided cases on the "bad men" provision, involve only acts of agents or employees of the United States, and therefore the 1868 Treaty must be judicially construed as only covering those persons. This argument ignores the clear terms of the Treaty as set forth above, which this Court cannot do. Simply because the few cases decided under the Treaty deal with employees of the United States, does not mean in the least that the Treaty does not cover non-agents or non-employees of the United States as *Tsosie*, *supra*, itself recognizes.

It is claimed by the Government that *Hernandez v. United States*, 93 Fed. CI. 193 (2010), is critical to determine these issues. First, Hernandez involved a claim by a plaintiff who happened to be a non-lawyer inmate incarcerated in a penal institution. Second, there is nothing in the opinion that shows that the pro se plaintiff raised the arguments set forth above or any argument against the government's position that it is also making in the present case. Third, there is no discussion of the basis for any conclusion that the Treaty only covers federal agents or employees. Fourth, *Hernandez* held that the person committing the wrong must be a white man, which is clearly contrary to the clear terms of both of the Sioux and Navajo Treaties and to both *Tsosi*e and *Hebah* discussed above. And fifth, any discussion by *Hernandez* is dicta because the alleged wrong in that case did not occur within the boundaries of Indian Country. See *Herrera v.*

United States, 39 Fed. Cl. 419 (1997). *Herrera* even suggests that the treaties must be liberally construed to the benefit of the "Indians". The language and intent of the Sioux and Navajo treaties respecting the "bad men" provisions, are nearly identical. It then goes to logically follow that both treaties protect all Nations with nearly identical provisions.

There is no requirement in Article I of either the 1868 Sioux Treaty or the 1868 Navajo Treaty that the person committing the wrong be either an agent or employee of the United States, nor that an "Indian person" found within the boundaries of either Treaty reservation is left with no protection under either Treaty in the specific circumstances here. To read the treaty language liberally, as one must, under the canons of construction, the real intended beneficiary of "reimbursement", or the "person injured" shall be reimbursed for his loss from the annuities or other moneys due or to become due to them. Nothing F.C. aka F.W. did, violated either treaty (Sioux or Navajo). She could not, and cannot choose her attacker or where the attack can occur.

II. That The Wrong Committed By A Bad Man Under The Treaty is Covered By The Treaty.

The United States claims that the acts of Daniel Kettell in sexually molesting and harming F.C. aka F.W. is not a wrong covered by Article I of the 1868 Treaty because of her lack of residency in the Navajo Nation. As the United States concedes, Daniel Kettell was charged and convicted of abusive sexual contact as alleged in Plaintiff's complaint and received a significant sentence in a federal penitentiary.

Article I uses the term "wrong." There is no requirement under that literal term that the wrong be purely either intentional or with malice. A wrong is defined by Webster's Unabridged Dictionary of the English Language, 2001, at page 2193 as: "not in accordance with what is morally right or

wrong: a wrong deed" and in the law "an invasion of another's right, to his damage."

Kettell, by pleading guilty to the offense, admitted to the elements of abuse sexual contact. He admittedly knew that his conduct was a threat to the lives or sanctity of others, or it was reasonably foreseeable that defendant's conduct might be a threat to the lives or sanctity of others. The requisite mental state is either intentional or criminal negligence, a far more serious level of culpability than that of ordinary negligence. Kettell admitted to the elements of the offense, so that is a moot point. His crime would have been a crime anywhere in the U.S., on any Reservation.

The Treaty of 1868 "was concluded at the culmination of the Powder River War of 1866-1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier recognized treaty lands from the incursion of white settlers. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). In 1867, various tribal leaders spoke to Congress about the mistreatment of their people by white men.

As stated in *United States v. Kagama*, 118 U.S. 375, 383 (1886), "(t)hese Indian tribes are wards of the Nation. They are communities dependent on the United States.... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. “Protection” is the key-for all that are harmed by bad men within the treaty boundaries.

In the case at hand, unfortunately, F.C. aka F.W., had used alcohol on the date of Daniel Kettell’s offense against her person. Had she not been somewhat incapacitated, she may have had the conscious ability to either flee, fight him off or phone for help. F.C. aka F.W. was unable

to do so, as she only realized that she was being attacked and molested, once it had begun. It has always been Plaintiff's reasonable belief, that Daniel Kettell, as an Indian and Rosebud Sioux Tribal member himself, knew exactly what he was doing. Although, F.C. aka F.W. was not an enrolled member of the Rosebud Sioux Tribe at the time of the attack on July 5th, 2008, she most certainly was an American Indian/Native American person, an "Indian", eligible to be potentially enrolled in either her mother's tribe (Navajo) or her natural father Guy Colombe's Tribe (Three Affiliated Tribes), by virtue of her birth, lineage and descendancy, (See Affidavit of Jennifer Pablo) (F.C. aka F. W. was not formally enrolled in the Navajo Nation, until after the date of attack). F.C. aka F.W., however, on the date of the July 5th, 2008 attack, was due the protections of any Treaty such as the Sioux and Navajo Treaty at the time, as against "bad men"-white, or non white. This is especially true since F.C. aka F.W. was an incapacitated minor child, incapable of giving her own legal and conscious consent to such heinous acts carried out by Daniel Kettell (a "bad man"), upon her person.

The "bad men" provision of Article I includes wrongs committed by white men or any men, while under the influence of alcohol, or just men who harm "Indians". It was not formally established however, if Daniel Kettell himself, was under the influence of drugs or alcohol at the time of the attack. Discovery is needed on that issue.

The Government claims that it cannot be held legally liable for damages under Article I that was not intentional, citing *Tsosie*, *Begay*, *Hebah*, and *Elk*. None of the bad men in any of those cases was charged and convicted of a federal crime such as Daniel Kettell in the present case. Any white man or non white "bad man" convicted of committing any wrong against an Indian under Article I, requires the United States to reimburse the injured person for the loss

sustained. Please note the reference to "injured person". Nothing in the 1868 treaties refer to "injured white person", or "injured non white person" or "injured non member person".

As stated in *Hebah v. United States*, 456 F.2d 696, 704 (Ct. Cl. 1972), "(t)o establish the common or plain meaning of a word or term, this court has long accepted dictionary definitions. Webster's New international Dictionary (3rd ed. 1968) gives, among other definitions, the following definition for the noun "wrong": action or conduct which inflicts harm without due provocation or just cause; serious injury wantonly inflicted or undeservedly sustained; unjust or unmerited treatment... ...To an Indian, or undoubtedly to all men, the purposeful [harming or molesting] of an Indian without just cause or reason would certainly be a wrong within the meaning of the Treaty of 1868." This analysis holds true for all "Indians" or "Indian persons" within the Treaty boundaries of either Treaty Nation (Navajo or Sioux). Clearly, the cases cited by the Government in its motion, do not preclude a Court from interpreting "injured person" and "Indian", to include an innocent, young, minor "Indian" girl. The Treaty's "bad men" provision must be read in that light under the standard of summary judgment.

CONCLUSION

For the above reasons, the motion for summary judgment by the United States must be denied and this case set for trial.

Dated this 9th day of March, 2011.

ABOUREZK & ZEPHIER P.C.

/s/ Robin L. Zephier

This document is electronically filed

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