IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES RICHARD, SR., et al,

Plaintiffs,

v.

No. 10-503C
(Judge Sweeney)

THE UNITED STATES,

Defendant.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

I. The 1868 bad men treaty provision applies to all white men and is not applicable to only agents or employees of the United States.

The position of the United States is that the 1868 bad men treaty provision applies only to agents and employees of the United States. Timothy Hotz was not an agent or employee of the United States, but his actions in causing the deaths of plaintiffs' decedents are covered by the 1868 bad men treaty provision.

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).

The 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 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.

In construing the above treaty provision, basic Indian law canons of construction require that it be liberally construed and all ambiguities resolved in favor of Indians. 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).

The first significant phrase in this treaty 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 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 plaintiffs' 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 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 United States that Hernandez v. United States, 93 Fed. Cl. 193 (2010), is dispositive of the issue. 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 the Treaty and to both Tsosie 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).

There is no requirement in Article I of the Treaty of 1868 that the person committing the wrong be either an agent or employee of the United States.

II. There Is No Requirement That The Wrong Committed By A Bad Man Under The Treaty Be Either Intentional Or With Malice; Manslaughter Is A Wrong Covered By The Treaty.

The United States claims that the act of Timothy Hotz in driving his automobile while intoxicated into the persons of Calonnie Randall and Robert Whirlwind Horse is not a wrong covered by Article I of the 1868 Treaty. As the United States concedes, Hotz was charged and convicted of involuntary manslaughter as alleged in plaintiffs' complaint and received a substantial sentence in a federal penitentiary.

Article I uses the term "wrong." There is no requirement under that literal term that the wrong be 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."

The Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 2009 Edition, sets out the elements of involuntary manslaughter in model instruction 6.18.1112B, attached to this memorandum. The act giving rise to the conviction must be the commission of an unlawful act not amounting to a felony or a lawful act done either in an unlawful manner or with wanton or reckless disregard for human life. It is required that defendant knew that his conduct was a threat to the lives of others or it was reasonably foreseeable that defendant's conduct might be a threat to the lives of others. The requisite mental state is gross or criminal negligence a far more serious level of culpability than that of ordinary negligence, but still short of malice required for murder. United States v. One Star, 979 F.2d 1319, 1321 (8th Cir. 1992).

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. Even preceding the negotiation of the Treaty of 1868, federal control of liquor into Indian Country had a long history because of the havoc it caused to Indian people. The federal control of liquor must be characterized as "one of the most comprehensive (federal) activities in Indian affairs. Cohen, at 307." Rice v. Rehner, 463 U.S. 713, 722 (1983). "The colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early 1802. See Indian Law, at 381. Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances." Id.

States were required as a condition of admission to the Union to enact prohibitions against the sale of liquor to Indians and introduction of liquor into Indian Country. Id. at 723. 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." The Pine Ridge Indian Reservation is dry. That is to say, the Tribe has never permitted the sale of liquor on the Reservation as required by Rice v. Rehner, supra, because of the disastrous effect of alcohol on the very fabric of its people.

The Indian Alcohol and Substance Abuse Prevention And Treatment Act, 25 U.S.C. 2401, et seq., sets forth the epidemic effect of alcohol on Indian people. The Congressional findings at 25 U.S.C. 2401 found and declared that:

> (1) the Federal Government has a historical relationship and unique legal and moral responsibility to Indian tribes and their members,
>
> (2) included in this responsibility is the treaty, statutory, and historical obligation to assist the Indian tribes in meeting the health and social needs of their members,
>
> (3) alcoholism and alcohol and substance abuse is the most severe health and social problem facing Indian tribes and people today and nothing is more costly to Indian people than the consequences of alcohol and substance abuse measured in physical, mental, social, and economic terms,
>
> (4) alcohol and substance abuse is the leading generic risk factor among Indians, and Indians die from alcoholism at over 4 times the age adjusted rates for the United States population and alcohol and substance misuse results in a rate of years of potential life lost nearly 5 times that of the United States,
>
> (5) 4 of the top 10 causes of death among Indians are alcohol and drug related injuries (18 percent of all deaths), chronic liver disease and cirrhosis (5 percent), suicide (3 percent), and homicide (3 percent),

> (6) primarily because deaths from unintentional injuries and violence occur disproportionately among young people, the age specific death rate for Indians is approximately double the United States rate for the 15 to 45 age group,
>
> (7) Indians between the ages of 15 and 24 years of age are more than 2 times as likely to commit suicide as the general population and approximately 80 percent of those suicides are alcohol related,
>
> (8) Indians between the ages of 15 and 24 years of age are twice as likely as the general population to die in automobile accidents, 75 percent of which are alcohol related,
>
> (9) the Indian Health Service, which is charged with treatment and rehabilitation efforts, has directed only 1 percent of its budget for alcohol and substance abuse problems,
>
> (10) The Bureau of Indian Affairs, which has the responsibility for programs in education, social services, law enforcement, and other areas, has assumed little responsibility for coordinating its various effort to focus on the epidemic of alcohol and substance abuse among Indian people,
>
> (11) this lack of emphasis and priority continues despite the fact that Bureau of Indian Affairs and Indian Health Service officials publicly acknowledge that alcohol and substance abuse among Indians is the most serious health and social problem facing the Indian people, and
>
> (12) the Indian tribes have the primary responsibility for protecting and ensuring the well being of their members and the resources made available under this chapter will assist Indian tribes in meeting that responsibility.

The "bad men" provision of Article I includes wrongs committed by white men while under the influence of alcohol. Alcohol was historically and still is the scourge of Indian people. The United States historically has had complete power and control over the enforcement of laws prohibiting introduction of alcohol into Indian Country. There could be no peace in Indian Country with white men selling liquor to Indian people or causing their death while under the influence of alcohol. Indeed, it has always been illegal to possess alcohol on the Pine Ridge Indian Reservation.

The United States claims that there is no case that has held it responsible 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 Hotz in the present case. Any white 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.

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 killing of an Indian without just cause or reason would certainly be a wrong within the meaning of the Treaty of 1868."

CONCLUSION

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

Dated this 17th day of November, 2010.

/s/ Terry L. Pechota
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2010, a true and correct copy of the above and foregoing PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS was filed electronically. I understand that this notice of filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Terry L. Pechota
Terry L. Pechota