IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES RICHARD, SR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 10-503C
	)	(Judge Sweeney)
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

/s/ Bryant Snee
BRYANT SNEE
Deputy Director

/s / J. Hunter Bennett
J. HUNTER BENNETT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
Attn: Classification Unit, 8th Floor
1100 L Street, NW
Washington, DC 20530
Phone: (202) 616-2279
Fax: (202) 514-8624

Attorneys for Defendant

OF COUNSEL

ALICE PETERSON
Attorney-Adviser
U.S. Department of the Interior
Twin Cities Field Solicitor's Office
Bishop Henry Whipple Fed. Bldg
1 Federal Drive, Room 686
Fort Snelling, MN 55111-4030

October 4, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND TREATIES

RULES

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JAMES RICHARD, SR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 10-503C
	)	(Judge Sweeney)
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that the Court dismiss for lack of subject matter jurisdiction plaintiffs' sole claim, which is based upon the alleged wrongful actions of Timothy Hotz, a private citizen. The United States is not liable for the actions of non-federal parties who are not agents of the United States. Therefore, this Court does not possess jurisdiction to entertain plaintiffs' complaint.

Alternatively, defendant respectfully requests that this Court dismiss plaintiffs' complaint pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs are seeking relief pursuant to the "bad men" provision of the April 29, 1868 Treaty with the Sioux Indians ("Sioux Treaty"), 15 Stat. 635. That provision is inapplicable to cases like the instant one, where the alleged "bad man" acted unintentionally and without malice.

In support of this motion, defendant relies upon plaintiffs' complaint and the instant motion.

QUESTIONS PRESENTED

1. Whether plaintiffs may maintain a suit against the United States based upon the actions of a private citizen even though the Tucker Act requires that a complaint allege a violation of a

federal statute, regulation or the Constitution committed by the Federal Government, and it is well-established that the United States is not liable for the actions of non-federal parties who are not agents of the United States.

2. Whether plaintiffs, purportedly serving as personal representatives of the estates of their deceased children ("decedents"), may recover damages pursuant to the "bad men" provision of the Sioux Treaty for decedents' deaths, which were allegedly caused by Timothy Hotz even though there is no allegation that Mr. Hotz intentionally killed decedents or acted with malice in bringing about their deaths, and the "bad men" provision does not apply to crimes committed without intent or malice.

STATEMENT OF THE CASE

I. Nature Of The Case

Proceeding pursuant to the "bad men" provision of the Sioux Treaty, plaintiffs James Richard, Sr. and Jon Whirlwind Horse, purportedly serving as the personal representatives of the estates of their deceased children ("decedents"), each seek $1.5 million in compensatory damages from the United States for the death of their respective decedent, which they allege was caused by Timothy Hotz, a private citizen. They also seek to recover costs and attorney fees, as well as any other damages permitted by the Sioux Treaty, and such further relief as this Court deems proper.

II. Statement Of Facts[1]

Calonnie D. Randall and Robert J. Whirlwind Horse ("decedents") were members of the Oglala Sioux Tribe. Complaint at ¶ 16. On or about August 27, 2008, they were walking along the highway on the Pine Ridge Indian Reservation in South Dakota when they were struck and

[1] For purposes of this motion only, defendant will treat as true the factual allegations contained in plaintiffs' complaint.

killed by a vehicle driven by Timothy Hotz. Complaint at ¶¶ 6, 10. Mr. Hotz, who was intoxicated, fled the scene and was later arrested. Complaint at ¶ 8. He pled guilty to involuntary manslaughter in the United States District Court for the District of South Dakota and was sentenced to 51 months of incarceration. Complaint at ¶ 9. Plaintiffs do not allege that Mr. Hotz was an employee or agent of the United States. Nor do they allege that he intentionally killed decedents or acted with malice in causing their deaths.

ARGUMENT

I. Standard Of Review

A. Standard of Review Under Rule 12(b)(1)

Subject matter jurisdiction may be challenged at any time by the parties, by the Court sua sponte, or upon appeal. Booth v. United States, 990 F.2d 617, 620 (Fed. Cir. 1993). Once jurisdiction is challenged by the Court or the opposing party, the plaintiff bears the burden of establishing jurisdiction. McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936). A plaintiff must establish jurisdiction by a preponderance of the evidence. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); Alaska v. United States, 32 Fed. Cl. 689, 695 (1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996).

When deciding a motion to dismiss based upon lack of subject matter jurisdiction, this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Hamlet v. United States, 873 F.2d 1414, 1416 (Fed. Cir. 1989). If a defendant challenges the jurisdiction of the Court, however, the plaintiff cannot rely merely upon allegations in the complaint, but must, instead, bring forth relevant, competent proof to establish jurisdiction. McNutt, 298 U.S. at 189.

B. Standard Of Review Under Rule 12(b)(6)

RCFC 12(b)(6) "authorizes dismissal of a complaint if, assuming the truth of all allegations, the complaint fails to state a claim upon which relief may be granted as a matter of law." Gavin v. United States, 47 Fed. Cl. 486, 489 (2000). A plaintiff's complaint must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed. Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir. 1997). To survive a motion to dismiss for failure to state a claim under RCF 12(b)(6), the complaint must have sufficient "facial plausibility" to "allow [] the court to draw the reasonable inference that the defendant is liable." Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009). The plaintiff's factual allegations must "raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In ruling upon a RCFC 12(b)(6) motion to dismiss, the Court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiff. Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991). However, "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." Blaze Constr., Inc. v. United States, 27 Fed. Cl. 646, 650 (1993).

II. This Court Does Not Possess Jurisdiction To Entertain Plaintiffs' Sole Claim Because The United States Is Not Liable For The Actions Of Non-Federal Parties Who Are Neither Agents Nor Employees Of The United States

Plaintiffs, purportedly serving as the personal representatives of decedents' estates, have filed suit pursuant to the "bad men" provision of the Sioux Treaty, which was signed April 29, 1868 and ratified and proclaimed the following February. That provision states:

> 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,[2] 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.
>
> [I]f 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.

15 Stat. 635 at Article I. Plaintiffs raise a single claim in which they seek to recover damages that allegedly resulted from the actions of Timothy Hotz, a private citizen, who hit and killed decedents with an automobile that he was operating while intoxicated. Because plaintiffs fail to allege that Mr. Hotz was an employee or agent of the United States at the time of the accident, this Court does not possess jurisdiction to entertain their complaint.

To set forth a claim cognizable in the Court of Federal Claims, a complaint must allege a violation of a federal statute, regulation, or the Constitution, committed by the Federal Government. Agee v. United States, 72 Fed. Cl. 284, 288 (2006), citing 28 U.S.C. § 1491(a)(1). The United States is not liable for the actions of non-federal parties who are not agents of the United States. Id., quoting Brazos Elec. Power Coop. v. U.S. Dep't of Agriculture, 144 F.3d 784, 787 (Fed. Cir. 1998).

As noted above, plaintiffs do not allege that Mr. Hotz was an employee or agent of the United States at the time of the accident. Therefore, they have failed to set forth a cognizable claim and this Court should dismiss the complaint pursuant to RCFC 12(b)(1).

---

[2] Plaintiffs allege that they filed an administrative claim with the Department of the Interior prior to commencing this lawsuit, and that the claim remains pending.

While they do not allege that Mr. Hotz was an employee or agent of the United States, plaintiffs do quote the "bad men" provision and allege that Mr. Hotz was "subject to the authority of the United States . . . at all material times hereto." Complaint at ¶ 18. This allegation is insufficient to establish jurisdiction for this Court to entertain plaintiffs' claim.

There is no published decision in which a court has held the United States liable pursuant to the "bad men" provision of the Sioux Treaty (or any of its sister treaties[3]) for the wrongful actions of an individual who was neither an employee nor an agent of the United States. Indeed, the only published "bad men" cases that have survived a motion to dismiss for lack of jurisdiction are those in which the alleged "bad man" was a Federal agent or employee. See Elk v. United States, 70 Fed. Cl. 405, 406 (2006) (alleged "bad man" was United States Army recruiter); Tsosie v. United States, 11 Ct. Cl. 62, 63 (1986) (alleged "bad man" was employee of the United States Public Health Service Hospital); Begay v. United States, 219 Ct. Cl. 599 (1979) (alleged "bad men" were employees of Bureau of Indian Affairs-administered boarding school); Hebah v. United States, 428 F.2d 1334, 1336, n. 2 (Ct. Cl. 1970) (alleged "bad man" was a reservation police officer employed by the Bureau of Indian Affairs).

Although a Federal Circuit panel suggested that the "bad men" provision of the Treaty with the Navajo, 15 Stat. 667 (June 1, 1868), which is substantially similar to the one contained in the Sioux Treaty, "is not confined to 'wrongs' by government employees," that statement was mere dicta, because the alleged "bad man" in that case was an employee of the United States Public Health Service Hospital. Tsosie v. United States, 825 F.2d 393, 397 and 400 (Fed. Cir. 1987). Tellingly, it appears that no court has followed this dicta in the nearly quarter century

[3] As explained in section III, B of this brief, the United States signed eight other treaties with different tribes of Indians at approximately the same time that it signed the Sioux Treaty. Each of these treaties contains a "bad men provision" that is substantially similar to the one at issue here.

since Tsosie was decided. Indeed, this Court has squarely rejected Tsosie's suggestion that the "bad men" provision could apply to wrongs committed by those who are not Federal agents or employees. Hernandez v. United States, 93 Fed. Cl. 193, 200 (2010). Hernandez concluded that the Western Intelligence Narcotics Group ("WING") did not qualify as a federal agency and, consequently, the court held that it did not possess jurisdiction to entertain the plaintiff's "bad man" claim against a WING agent. Id.

Thus, case law clearly establishes that this Court does not possess jurisdiction to entertain plaintiffs' "bad men" claim, which is based upon the actions of a private citizen rather than an employee or agent of the United States. Id.; compare Elk, 70 Fed. Cl. at 406 (2006); Tsosie, 11 Ct. Cl. at 63; Begay, 219 Ct. Cl. at 599; Hebah v. United States, 428 F.2d at 1336, n. 2.

III. Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted Because The "Bad Men" Provision Of The Sioux Treaty Does Not Apply To Situations Like This One, Where The Alleged "Wrong" Was Neither Intentional Nor Committed With Malice

This Court should also dismiss plaintiffs' complaint pursuant to RCFC 12(b)(6) because it fails to state a claim upon which relief can be granted. The "bad men" provision was intended to curb intentional acts of aggression that frequently led to the outbreak of hostilities between the United States and the Sioux. The legislative history of the provision and case law establish that it is inapplicable to situations like this one, where the alleged "wrong" committed by Mr. Hotz was neither intentional nor committed with malice. See 18 U.S.C. § 1112(a) (the involuntary manslaughter provision to which Mr Hotz pled guilty); see also Complaint (failing to allege that Mr. Hotz intentionally killed the victims or that he acted with malice in causing their deaths.)

A. Treaty Interpretation

"A treaty with an Indian tribe is a contract and should be interpreted to give effect to the intent of the signatories." Elk v. United States, 87 Fed.Cl. 70, 78 (2009) (Allegra, J.) quoting

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); Tsosie v. United States, 825 F.2d 393, 397 (Fed. Cir. 1987). "[T]he Supreme Court has made clear that while the court should look to the parties' 'choice of words,' it should also consider the 'larger context that frames the Treaty,' including its 'history, purpose and negotiations.'" Elk, 87 Fed.Cl. at 79, quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196-203 (1999). Treaties are construed "to give effect to the terms as the Indians themselves would have understood them." Minnesota, 526 U.S. at 196; Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970). Although treaties are liberally construed in favor of Indians, this canon of construction "is not a license to disregard clear expressions of tribal and congressional intent." Herrera v. United States, 39 Fed.Cl. 419, 420-21 (1997) (Hodges, J.); DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179 (1947) ("[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean."). Similarly, courts may not "extend[] [a] treaty beyond its bounds in order to meet varying alleged injustices. Hernandez, 93 Fed. Cl. at 199.

B. Historical Background

The Sioux Treaty is one of nine treaties that were negotiated in 1867 and 1868, and were intended to resolve ongoing conflict between the United States and thirteen tribes representing "the great and warlike and dominant powers" among the Indians, consisting of the Kiowa and Comanche, 15 Stat. 581 (October 21, 1867), the Apaches, id. at 589 (October 21, 1867), the

Cheyenne and Arapahoe, id. at 593 (October 28, 1867), the Ute, id. at 619 (March 2, 1868), various bands of the Sioux, id. at 635 (April 29, 1868), the Crows, id. at 649 (May 7, 1868), the Northern Cheyenne and Arapahoe, id. at 655 (May 10, 1868), the Navajo, id. at 667 (June 1, 1868), and the Eastern Shoshone and Bannack, id. at 673 (July 3, 1868). Brown v. United States, 32 Ct. Cl. 432, 435 (1897). Each treaty contains a "bad men" provision that is substantially similar to the one at issue here. Tsosie, 825 F.2d at 395.

The Sioux Treaty was intended to be a comprehensive and lasting peace treaty between the United States and the Sioux tribes. See 15 Stat. at 640 (renouncing all previous treaties); 15 Stat. at 635 ("From this day forward all war between the parties . . . shall forever cease."). It "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 the earlier-recognized treaty lands from the incursion of white settlers." United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).

In Elk v. United States, 87 Fed. Cl. 70 (2009), the court examined the legislative history of the "bad men" provision of the Sioux Treaty. The court explained that the 1867 Congressional testimony of various Sioux tribal leaders offers valuable insight into the purpose of the "bad men" provision. Elk, 87 Fed. Cl. at 80. The Sioux leaders described how white men killed and mutilated Sioux women and coerced them into prostitution and other sexual relationships with United States soldiers. Id. These coercive sexual relationships resulted in the rampant spread of syphilis throughout the Sioux tribe, causing many deaths. Id. The testimony of the Sioux tribal leaders was amply documented in the Doolittle Commission Report, which opined that a "large majority of cases [of] Indian wars are to be traced to the aggressions of lawless white men," and urged the Government to take steps "to preserve amity" and "save the

government from unnecessary and expensive Indian wars." Id., quoting Conditions of the Indian Tribes: Report of the Joint Special Committee Appointed Under Joint Resolution of March 3, 1865, S. Rep. 39-156 (1867).

These sentiments were echoed in the Report to the President by the Indian Peace Commission, January 7, 1868, which was co-authored by Lieutenant General William Tecumseh Sherman, a principal negotiator of the Sioux Treaty as well as the other treaties of 1867 and 1868. The Report stated that the breaking out of hostilities between the United States and the Sioux was often attributable to the actions of "bad men" among the whites. Elk, 87 Fed. Cl. at 80. The Report further indicated that, "[i]n making treaties it was enjoined on us to remove, if possible, the cause of complaints on the part of the Indians[.]" Id., quoting Report to the President by the Indian Peace Commission, January 7, 1868.

This legislative history is consistent with the plain language of Article I of the Sioux Treaty -- the article that contains the "bad men" provision. It states, "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."

Thus, it is clear that the "bad men" provision was designed to maintain the peace between the United States and the Sioux by curbing the heinous acts of aggression perpetrated against the tribe by white men. These acts of aggression comprised intentional crimes like murder, assault, rape and other sexual offenses, which frequently led to war between the Sioux and the United States.[4] The act at issue here – accidentally killing two people while driving drunk – is of a

[4] The "bad men" provision was also designed to curb such acts of aggression by Indians against whites, as demonstrated by the "bad men among the Indians" portion of Article I. Sioux Treaty, 15 Stat. 635 at Article I.

fundamentally different character. It was an unintentional killing committed without malice. It is not the kind of intentional act of "aggression" that the Sioux Tribal leaders described to Congress or that the Doolittle Commission Report warned could lead to war between the Sioux and the United States. Indeed, it is not the type of act that the parties intended the "bad men" provision to combat. The "bad men" cases bolster this conclusion, as they strongly suggest that the "bad men" provision was intended to apply only to intentional crimes.

It appears that no court has held, in any published decision at least, that a crime committed without malice or intent constitutes a "wrong" pursuant to the "bad men" provision of the Sioux Treaty or any of its sister treaties. Indeed, the only published decisions in which courts have held that a plaintiff has a viable "bad men" claim are those involving an intentional crime. For example, in Tsosie, the "bad man" allegedly impersonated a doctor and performed a vaginal examination upon the victim. Tsosie, 825 F.2d at 397. The "bad men" in Begay were teachers at an Indian boarding school who allegedly sexually abused and assaulted their students. Begay, 219 Ct. Cl. at 599. The "bad man" in Hebah v. United States, 456 F.2d 696, 705 (Ct. Cl. 1972) was an Indian Police Officer who "inten[tionally]" shot the decedent during an arrest. And in Elk, the alleged "bad man" was accused of sexually assaulting a woman in his car after driving to a remote area. Elk, 87 Fed. Cl. at 74-75. Thus, it appears from the published decisions that a viable "bad men" claim must include an allegation that the "bad man" committed an intentional crime. That is lacking here.

Thus, the legislative history of the "bad men" provision, coupled with the case law interpreting that provision, establishes that the act that Mr. Hotz committed—an unintentional killing without malice – does not constitute a "wrong" within the meaning of the "bad men" provision. Accordingly, plaintiffs have failed to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Court dismiss plaintiffs' complaint for lack of jurisdiction.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

/s/ Bryant Snee
BRYANT SNEE
Deputy Director

/s / J. Hunter Bennett
J. HUNTER BENNETT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
Attn: Classification Unit, 8th Floor
1100 L Street, NW
Washington, DC 20530
Phone: (202) 616-2279
Fax: (202) 514-8624

Attorneys for Defendant

OF COUNSEL

ALICE PETERSON
Attorney-Adviser
U.S. Department of the Interior
Twin Cities Field Solicitor's Office
Bishop Henry Whipple Fed. Bldg
1 Federal Drive, Room 686
Fort Snelling, MN 55111-4030

October 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2010, a copy of the foregoing DEFENDANT'S MOTION TO DISMISS was filed electronically. I understand that notice of this 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/ J. Hunter Bennett