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 REPLY IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rules 12(b)(1), 12(b)(6), and 7.2(b) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits the following reply to plaintiffs' opposition to its motion to dismiss.

The United States' statement of facts appears in full in its motion to dismiss. Briefly, Calonnie D. Randall and Robert J. Whirlwind Horse ("decedents") were walking along the highway on the Pine Ridge Indian Reservation when they were struck and killed by a vehicle driven by Timothy Hotz, who was intoxicated. Mr. Hotz, who was not an agent or employee of the United States at the time of the accident, was subsequently convicted of involuntary manslaughter. Plaintiffs, who purport to serve as the personal representatives of the estates of decedents, each seek $1.5 million in compensatory damages from defendant, plus other relief.

I. This Court Does Not Possess Subject Matter Jurisdiction to Entertain Plaintiff's Complaint

In its motion to dismiss, the United States demonstrated that this Court did not possess jurisdiction to entertain plaintiffs' complaint pursuant to RCFC 12(b)(1) because Mr. Hotz was not an employee or agent of the United States at the time of the accident. Motion at 5, citing Agee v. United States, 72 Fed. Cl. 284, 288 (2006), citing Brazos Elec. Power Coop. v. U.S. Dep't of Agriculture, 144 F.3d 784, 787 (Fed. Cir. 1998) (United States not liable for the actions

of non-federal parties who are not agents of the United States). The United States explained that plaintiffs' reliance upon the "bad men" provision of the Sioux Treaty to establish jurisdiction was misplaced because there is no published decision in which any court has held the United States liable pursuant to this provision (or any similar provision from one of the eight sister treaties) for the wrongful actions of an individual who was neither an employee nor an agent of the United States. Motion at 6. As the United States pointed out, the only published "bad men" cases that have survived past the motion to dismiss stage are those in which the alleged bad man was a Federal agent or employee. Motion at 6, citing 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).

Plaintiffs argue that the plain language of the Treaty makes clear that the United States is liable for Mr. Hotz's actions. They are incorrect.

The relevant portion of the "bad men" provision of the Sioux Treaty 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, 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.

15 Stat. 635 at Article I. This provision is rife with ambiguity. First, it is not clear what constitutes a "bad m[a]n." The provision does not explain whether all who commit "wrongs" are

automatically "bad men" or whether it is possible to commit a wrong without being a "bad m[a]n." Nor does the Sioux Treaty define a "wrong." The provision does not explain who "the whites" are, either. Because the phrase "bad men among the whites" is immediately followed by "or among other people subject to the authority of the United States,[[1]]" the treaty seems to assume that "the whites" are subject to the authority of the United States as well. This assumption lends credence to the interpretation that the "bad men" must be Government agents and/or employees. This interpretation is, of course, consistent with the case law applying the "bad men" provisions of the Sioux Treaty and its sister treaties.

Plaintiffs argue that, "[s]imply 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." Opposition at 4. Plaintiffs' reliance upon Tsosie v. United States, 825 F.2d 393, 400 (Fed. Cir. 1987) is misplaced. As the United States explained in its motion, Tsosie's suggestion that the "bad men" provision could render the United States liable for the acts of non-agents and non-employees is dicta because the "bad man" in that case was, in fact, a United States employee. Motion at 6. No court has followed this dicta in the nearly quarter century since Tsosie was decided. In fact, as discussed below, this court very recently rejected Tsosie's dicta, holding that it did not possess jurisdiction to entertain the plaintiff's "bad man" claim because the alleged bad man worked for the Western Intelligence Narcotics Group ("WING"), which did not qualify as a federal agency. Hernandez v. United States, 93 Fed. Cl. 193, 200 (2010). In any event, plaintiffs' argument that

[1] Plaintiffs assert that the phrase "other people subject to the authority of the United States" is not "confined by its own terms to only agents or employees of the United States who commit a wrong." Opposition at 3. Tellingly, however, when they proffer an example of people who would fit within this definition, plaintiffs cite "Black soldiers serving in the United States Army who commit any wrong but were not white." Opposition at 3. These soldiers would, of course, be employees or agents of the United States.

this Court should infer nothing from the dearth of cases holding that the "bad men provisions" impose liability upon the United States for the actions of private citizens is unconvincing.

Plaintiffs concede that the Sioux Treaty "is to be construed as the Indians would have understood it." Opposition at 2. Nevertheless, they completely discount the possibility that there is anything to be gleaned from the absence of a single published decision, in any court, holding the United States liable for the actions of a "bad man" who is not a United States agent or employee in the 142 years since the Sioux Treaty and its sister treaties were signed. Indeed, Hernandez and Herrera v. United States, 39 Fed. Cl. 419 (1997)[2] appear to be the only published decisions in which a plaintiff has attempted to recover from the United States for the actions of a "bad man" who was not employed by, or an agent of, the United States. The logical inference is that the Indian signatories to the treaties, and subsequent generations of Indians, understood the "bad men" provisions to apply only to agents and employees of the United States.

As noted above, Hernandez recently held that this Court does not possess jurisdiction to entertain claims against non-federal agents or employees pursuant to the "bad men" provision of the Sioux Treaty. Hernandez, 93 Fed. Cl. at 200. Plaintiffs' attempts to distinguish Hernandez from the instant case are not compelling.

Plaintiffs note that Hernandez involved a claim by a non-lawyer inmate incarcerated in a penal institution, and complain that there is nothing in the record to demonstrate that the plaintiff in that case raised the arguments that they are making here. Opposition at 4-5. There is no requirement that, in order to follow precedent, a court must determine that the plaintiff in the

[2] In Herrera, the plaintiff filed suit against the United States pursuant to the "bad men" provision of the Navajo tribe for injuries sustained at the hands of a fellow Indian from another tribe. It appears that that fellow Indian was not an employee or agent of the United States. The court dismissed the case without addressing the non-agent/non-employee issue because the Navajo Treaty provides that Indians who leave the reservation forfeit all rights conferred by the treaty, and plaintiff conceded that he did not live on the Navajo Reservation and the attack did not occur on that reservation. Herrera, 39 Fed. Cl. at 420.

other case was represented by equally learned counsel and made the exact same arguments as the plaintiff in the case before the court. Such a requirement would render the concept of precedent virtually obsolete.

Plaintiffs also complain that "there is no discussion of the basis for any conclusion that the Treaty only covers federal agents or employees." Opposition at 5. Though Hernandez may not have explicitly set forth the basis for this conclusion, it cited numerous other "bad men" cases including Elk, Hebah, and Garreaux v. United States, 77 Fed.Cl. 726 (2007). The court was undoubtedly aware of "bad man" jurisprudence and that no court, in the 142 years that the Sioux Treaty and its sister treaties have been in effect, has issued a published decision holding the United States liable pursuant to a "bad men" provision for the actions of a private citizen.

Plaintiffs claim that "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 . . . ." Opposition at 5. This is incorrect. In addressing Mr. Hernandez's "bad man" claim against the United States District Court for the District of Nebraska, the court stated, "[i]n order to bring action under the Fort Laramie treaty a Native American must be a victim of an affirmative criminal act, and the person committing the act must be a specific white man or men." Hernandez, 93 Fed. Cl. at 200. The import of this statement was not that plaintiff's claim failed because the "bad man" was not white. Rather, the court held that plaintiff's "bad man" claim against the District Court failed because the District Court was not a specific person.[3] Id. Thus, Hernandez did not "hold" that only white men could be "bad men" pursuant to the Treaty. Indeed, elsewhere in the opinion, Hernandez stated, "[t]he wrong must be committed by a non-Native American against a Native American . . . ." Hernandez, 93 Fed. Cl. at 199.

[3] Hernandez also held that plaintiff's "bad men" claims failed because he had failed to establish that he suffered a "wrong" within the meaning of the Sioux Treaty. Hernandez, 93 Fed. Cl. at 199.

Finally, plaintiffs assert that "any discussion by Hernandez is dicta because the alleged wrong in that case did not occur within the boundaries of Indian Country." Opposition at 5. Again, plaintiffs are incorrect. Hernandez made clear that Mr. Hernandez's "bad men" claim against the WING agent was not viable because WING is not a federal agency. Hernandez, 93 Fed. Cl. at 200. That the alleged wrong took place outside of tribal lands did not factor into the court's analysis at all.

Thus, this Court should follow Hernandez and dismiss plaintiffs' complaint for lack of jurisdiction pursuant to RCFC 12(b)(1).

II. 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

The United States established in its motion that plaintiffs have failed to state a claim upon which relief could be granted pursuant to RCFC 12(b)(6) because the "bad men" provision was intended to curb intentional acts of aggression that threatened the peace between the United States and the Sioux, and the alleged "wrong" committed in this case was neither intentional, nor committed with malice and, thus, was not the type of act that would have threatened the peace. Motion at 7-11. The United States also explained that there is no published decision, from any court, holding that a crime committed without malice or intent constitutes a "wrong" pursuant to the "bad men" provisions of the Sioux Treaty or any of its sister treaties. Id.

Plaintiffs argue in their opposition that the plain language of the "bad men" provision does not require that the "wrong" be committed intentionally or with malice. Opposition at 5. But the Sioux Treaty does not define "wrong," which is a somewhat ambiguous term. Furthermore, the Treaty provides that the "wrong" must be committed by a "bad m[a]n," another term that the Treaty does not define. The use of the adjective "bad" indicates that the man must

be possessed of an evil character.[4] It can be inferred that one who intentionally or maliciously inflicts harm upon an Indian has an evil character. The same cannot be said for someone like Mr. Hotz, who acted without intent or malice.

In response to the United States' assertion that Mr. Hotz's act of accidentally killing two people while driving drunk is not the sort of act that the "bad men" provision was aimed at preventing, plaintiffs provide a lengthy discussion of the history of the United States' regulation of liquor trading with Indian tribes. Opposition at 6-8. Nowhere in this discussion, however, do plaintiffs point to any evidence demonstrating that the "bad men" provision of the Sioux Treaty (or any other treaty) was aimed at curbing unintentional acts committed without malice by non-Indians who were intoxicated.

Plaintiffs claim that "[a]ny 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." Opposition at 9. They do not cite any case to support this sweeping assertion. In fact, they implicitly concede that there exists no published decision in which any court has held that the United States is liable pursuant to the "bad men" provision for an act that was committed unintentionally and without malice. Opposition at 8-9.

Finally, plaintiffs quote Hebah v. United States, 456 F.2d 696, 704 (Ct. Cl. 1972) in support of their position. Hebah opined, "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." Id. Hebah involved a fundamentally different situation than the one at issue here. In Hebah, the alleged "bad man" was an Indian police officer who was accused by the plaintiff of intentionally killing the decedent during an arrest. Hebah, 456 F.2d at 705. Here,

[4] Indeed, The American Heritage Dictionary, Second College Edition defines "bad" as "2. [e]vil or wicked." The American Heritage Dictionary, Second College Edition, Houghton Mifflin Company, Boston, MA, 1982

plaintiffs do not contend that Mr. Hotz intentionally killed decedents or even that he acted with malice in doing so. Mr. Hotz's actions were not of the sort of intentional acts of aggression that would have threatened the peace between the United States and the Indians, and that the "bad men" provisions were intended to curb.

Consistent with "bad men" case law, this Court should dismiss plaintiffs' complaint pursuant to RCFC 12(b)(6) for failure 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,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2010, a copy of the foregoing DEFENDANT'S REPLY IN SUPPORT OF 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