2011-5083

United States Court of Appeals

for the

Federal Circuit

JAMES RICHARD, SR., (Personal Representative of the Estate of Calonnie D. Randall, Deceased), and JON WHIRLWIND HORSE, (Personal Representative of the Estate of Robert J. Whirlwind Horse, Deceased),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Case No. 10-CV-503, Judge Margaret M. Sweeney.

BRIEF OF PLAINTIFFS-APPELLANTS

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James Richard, Sr, etc. v. United States

No. 2011-5083

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellants James Richard, Sr, et al certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

James Richard, Sr. (Personal Rep. of the Estate of Calonnie D. Randall, Deceased), and Jon Whirlwind Horse (Personal Representative of the Estate of Robert J. Whirlwind Horse, Deceased)

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The parties named in the caption are the real parties in interest

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

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4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

In the trial court, the parties were represented by Terry L. Pechota of the Pechota Law Office.

5/3/11
Date

James D. Leach
Signature of counsel

JAMES D. LEACH
Printed name of counsel

Please Note: All questions must be answered

cc: J. Bennett Hunter (US Dept. of Justice)

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Statement of Related Cases

No other appeal in or from the same civil action or proceeding in the lower court was previously before this or any other appellate court.

Counsel knows of no case pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

Jurisdictional Statement

The jurisdiction of the Court of Federal Claims was invoked under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the "bad men among the whites" provision of the Fort Laramie Treaty of 1868 between the Great Sioux Nation and the United States, 15 Stat. 635, after two members of the Oglala Sioux Tribe were killed on the Pine Ridge Indian Reservation by a drunk driver.

The judgment appealed from is final. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3). Judgment was entered on March 31, 2011. This appeal was filed on April 22.

Statement of the Issues

1. In the phrase "bad men among the whites" in the Fort Laramie Treaty of 1868, does "whites" mean "whites who are officers, agents, or employees of the federal government"?

2. Should this Court overrule *Tsosie v. United States*, 825 F.2d 393, 400 (Fed. Cir. 1987), which recognizes that the same language used in the Navajo Treaty of 1868 means that "any 'white' can be a 'bad man'"?

Statement of the Case

Because the drunk driver who killed Calonnie Randall and Robert Whirlwind Horse was not an officer, agent, or employee of the federal government, the Court of

Federal Claims dismissed this case for lack of jurisdiction pursuant to Rule 12(b)(1). The decision is reported at 2011 U.S. Claims LEXIS 513.

Statement of the Facts

Timothy Hotz drove while intoxicated on the Pine Ridge Indian Reservation, killed Oglala Sioux Tribal members Calonnie Randall and Robert Whirlwind Horse, and fled the scene of his crime. He was convicted of involuntary manslaughter and sentenced to federal prison for 51 months. Complaint ¶¶ 5 to 10, A22-23. The lower court dismissed for lack of jurisdiction, so all facts alleged in the complaint are taken as true and viewed in the light most favorable to plaintiffs. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Summary of the Argument

The 1868 Fort Laramie Treaty sought to establish peace between whites and Sioux Indians. The Treaty establishes reciprocal obligations between the two sides to remedy wrongs done by members of each side toward members of the other. Specifically, the Sioux agreed to deliver to the United States for punishment "bad men among the Indians" who commit a wrong against any person who is "subject to the authority of the United States, and at peace therewith." Correspondingly, the United States agreed that if "bad men among the whites, or among other people subject to the authority of the United States" commit a wrong against the Indians, the United States

would punish the offender and reimburse the injured person for the loss. Addendum B, p. 1.

The Fort Laramie Treaty "is one of nine made in 1868, by and between commissioners representing the United States and chiefs of various previously hostile Indian tribes. 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).

Tsosie interpreted the language "bad men among the whites, or among other people subject to the authority of the United States" that appears in both the 1868 Fort Laramie Treaty and the 1868 Navajo Treaty. In *Tsosie*, the government contended that the "bad men among the whites" provision of the Navajo Treaty was obsolete, which this Court took to mean that it was preempted by events since 1868, including the passage of the Federal Tort Claims Act in 1946. 825 F.2d at 400. This Court rejected the government's argument, because the "bad men among the whites" language reaches all whites, whereas the FTCA reaches only government employees. This Court explained: "any 'white' can be a 'bad man.'" *Id.* Because this explanation was necessary to rejecting the government's argument, it was not dictum.

The word "whites," as used in "bad men among the whites," is unambiguous. Every interpretative aid—the Fort Laramie Treaty's text, its structure, its purpose, the historical record including particularly the Indian Peace Commission Report of 1868, two cases decided in the same era in which the Treaty was enacted, and the canons of construction of Indian treaties—confirms that *Tsosie* was correct that any "white" can be a "bad man."

The lower court relied on the language: "If bad men among the whites, *or among other people subject to the authority of the United States*, ..." (emphasis added), and ruled that the only whites whose conduct can justify a "bad men" claim are officers, agents, or employees of the federal government. But the lower court was incorrect:

- This Court explained in *Tsosie* that the words "other people subject to the authority of the United States" most likely refer to non-whites such as Indians of other tribes, and in a footnote suggested that it may also refer to Mexicans. 825 F.2d at 400 and n.2.
- The comma that separates "bad men among the whites" from "or among other people subject to the United States" means that a "bad men" claim may be brought under either provision. *Terry v.*

Principi, 367 F.3d 1291, 1294-95 (Fed. Cir. 2004) (comma "effects [a] separation" between two phrases, so that benefits may be paid under either phrase).

- Article 2 of the Treaty proves that when its drafters meant "officers, agents, or employees of the federal government," they knew how to say so. Article 2 says that only "officers, agents, and employees of the Government" may enter the Sioux reservation. Addendum B, p. 2.
- The words "subject to the authority of the United States" also appear in the "bad men among the Indians" paragraph that follows the "bad men among the whites" paragraph. Addendum B, p. 1. Those words, being the same, and having been used in successive paragraphs, must mean the same in both paragraphs. In the "bad men among the Indians" paragraph, "subject to the authority of the United States" cannot be limited to whites who are officers, agents, or employees of the federal government, because then the Treaty would provide no remedies at all to the United States when Indians massacred white settlers, including women and

children—a highly implausible conclusion at odds with the purpose of the Treaty.

- The "bad men among the Indians" paragraph limits itself to persons "subject to the authority of the United States, *and at peace therewith.*" Addendum B, p. 1 (emphasis added). If "subject to the authority of the United States" means the officers, agents, or employees of the federal government, the drafters of the Treaty must have believed that there were rogue federal officers, agents, or employees who were at war with their own government.

Two cases in the years after the Treaty was enacted, *Ex Parte Crow Dog*, 109 U.S. 556 (1883), and *Janis v. United States*, 32 Ct. Cl. 407 (1897), read "bad men among the whites" as referring broadly to "whites," not limited to federal officers, agents, or employees. Both cases read the Treaty as placing "whites" in one group and "Indians" in another. Both cases contradict the lower court's view that "whites" means "whites who are officers, agents, or employees of the federal government."

Finally, the district court ruled that reading "whites" as "whites" was "absurd." But in the times in which the Fort Laramie Treaty was made, it was reasonable for the makers of the Treaty to do exactly what they did: to attempt to maintain peace by

providing remedies for wrongs committed by Indians against whites, and remedies for wrongs committed by whites against Indians.

Standard of Review

Subject matter jurisdiction is a question of law, which is reviewed de novo. *Rick's Mushroom Service v. United States*, 521 F.3d 1338, 1342-43 (Fed. Cir. 2008).

Argument

I. *Tsosie v. United States*, 825 F.2d 393, 400 (Fed. Cir. 1987), says—and not in dictum—that "any 'white' can be a 'bad man'"

The Fort Laramie Treaty of 1868 between the Sioux and the United States, like the Navajo Treaty of 1868, contains the language "bad men among the whites, or among other people subject to the authority of the United States" that is at issue in this appeal. *Tsosie v. United States*, 825 F.2d 393, 395 (Fed. Cir. 1987) holds that the "bad men among the whites" provision in the Navajo Treaty is enforceable under the Tucker Act.

In *Tsosie*, the government argued that the "bad men" provision no longer needed because of changes since 1868, including the adoption of the Federal Tort Claims Act in 1946. This Court rejected that argument, observing that the "bad men" provision is broader than the FTCA: "*the 'bad men' provision is not confined to 'wrongs' by government employees. 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,' whatever that means, but most likely Indian nonmembers of the Navajo tribe but subject to United States law. This difference in the breadth of the Tort Claims Act and the 'bad man' clause of the Navajo treaty is further evidence that the Tort Claims Act, which addresses certain acts of government employees, is of a different nature and has not preempted the treaty, *which concerns wrongs to Navajos by others than government employees also.*" 825 F.2d at 400 (emphasis added, footnote omitted).

The lower court viewed this language as dictum by which it was not bound. A10. Plaintiffs disagree. Dictum is a statement by a court that is "unnecessary to the decision in the case." *Co-Steel Raritan, Inc. v. International Trade Commission*, 357 F.3d 1294, 1307, quoting *Black's Law Dictionary* 1100 (7th ed. 1999). Dictum includes "a remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument." *King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996), quoting *Black's Law Dictionary* 1072 (6th ed. 1990).

Under these standards, *Tsosie's* construction of the "bad men" clause is not dictum, because it was necessary to respond to the government's contention that the Navajo Treaty was obsolete because of the Federal Tort Claims Act and other changes since 1868, which this Court took as an argument that the Treaty was preempted. *Tsosie* ruled—in the course of deciding the case—that the government's argument failed because the "bad men" provision extends to non-government employees. 825 F.2d at 400. This ruling was neither incidental nor collateral, nor was it illustration, analogy, or argument.

The lower court cited the "essential to the disposition of the case" language from *Co-Steel Raritan, Inc.* as its definition of "dictum." A10. If "essential to the disposition" is a stricter test than "unnecessary to its decision" or "incidental" or "collateral," *Tsosie's* rejection of the government's argument meets the "essential to the disposition" test. *Tsosie's* explanation of why "bad men among the whites" is broader than the Federal Torts Claim Act was essential to respond to the government's argument that the "bad men" provision was obsolete. The court's explanation was exactly the point on which the present case turns—that "bad men among the whites" is not limited to whites who are officers, agents, or employees of the federal government.

II. The text, structure, and purpose of the Treaty, as well as the historical record and the canons of construction of Indian treaties, support *Tsosie* and contradict the lower court

a. The text, structure, and purpose of the Treaty

Article I of the Fort Laramie Treaty, in its opening paragraph, states its purpose:

> 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.

Immediately thereafter comes the "bad men among the whites" paragraph:

> 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 re-imburse the injured person for the loss sustained.

The "bad men among the whites" paragraph is followed by the "bad men among the Indians" paragraph:

> 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 re-imbursed 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 rule and regulations for ascertaining damages under the 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 re-imbursed therefor.

15 Stat. 635, Addendum B, p. 1-2 (emphasis added).

"Whites" in "bad men among the whites" is unambiguous. It should be given its plain meaning. When the Treaty was signed, "white" meant "white." *United States v. Perryman*, 100 U.S. 235, 237-38 (1880) (statute enacted in 1834 providing that the United States would reimburse "friendly Indian" for property damage committed by a "white person" in Indian country does not apply to damage committed by a "negro"; Congress "meant just what the language ["white person"] conveys to the popular mind.") Today, "white" still means "persons whose racial heritage is Caucasian." *Webster's Unabridged Dictionary of the English Language* 2167 (Random House 2001).

The structure of the Treaty confirms the plain meaning of its text. The words "subject to the authority of the United States" appear in both the "bad men among the whites" paragraph and the "bad men among the Indians" paragraph that follows it. Addendum B, p. 1. Those two paragraphs must be construed together. *Ex Parte Crow Dog*, 109 U.S. 556, 567 (1883) ("The provision ["bad men among the Indians"] must be construed with its counterpart, just preceding it, which provides for the punishment by the United States of any bad men among the whites, or among other people subject

to their authority, who shall commit any wrong upon the person or property of the Indians.")

In the "bad men among the Indians" paragraph, "subject to the authority of the United States" cannot refer only to whites who are officers, agents, or employees of the federal government—because then the Treaty would provide no remedies when Indians massacred white women, children, or civilians. The Treaty did not seek merely to end hostilities between Indians and federal officers, agents, or employees. It sought to end "all war between the parties," and to establish and maintain "peace." Addendum B, p. 1.

"[S]imilar language contained within the same section of a statute must be accorded a consistent meaning." *NCUA v. First Nat'l Bank and Trust Co.*, 522 U.S. 479, 501 (1998). So "subject to the authority of the United States" in the "bad men among the whites" paragraph likewise cannot be read to mean only federal officers, agents, or employees.

The purpose of an Indian treaty is considered in determining its meaning. *Washington v. Washington States Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979). As this Court recognized in *Tsosie*, referring to the 1868 treaty with the Navajo: "The treaty was between two nations, and each one promised redress for wrongs committed by its nationals against those of the other nation." 825 F.2d at

400 n.2. So the Treaty sought to protect whites against Indians, and Indians against whites, not just to protect federal officers, agents, or employees against Indians, and not just to protect Indians against federal officers, agents, or employees.

The Treaty fulfilled its purpose, at least for a time. "The years following the treaty brought relative peace to the Dakotas," until this "era of tranquility" was "disturbed . . . by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 376 (1980) (footnote omitted). The lower court's reading of "bad men among the whites" severely restricts both "bad men" clauses, contrary to the purpose of the 1868 treaties to create and preserve peace between Indians and whites by establishing an alternative to war to remedy wrongs done by one side against the other.

b. The historical record

The expansion of the United States to the west in the nineteenth century was resisted, at times violently, by the people who already lived there. Indians engaged in "acts of general hostility to settlers," and the government sent the military to subdue them. *Montoya v. United States*, 180 U.S. 261, 267 (1901). After the Sioux defeated Lieutenant Colonel William Fetterman in 1866—termed by the Sioux the Battle of the Hundred Slain, and by the whites the Fetterman Massacre—Congress in 1867

authorized an Indian Peace Commission. Edward Lazarus, *Black Hills White Justice* 38-39, 44-45 (Harper Collins 1991).

The purpose of the Indian Peace Commission was to attempt to end the Indian wars being waged against the United States and its people. The Commission was charged to "remove all just cause of complaint" by the Indians, and to "establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites." 15 Stat. 17 § 1.

The Indian Peace Commission presented its Report to the President on January 7, 1868. The Report appears to be the origin of the words "bad men among the whites" that appeared shortly thereafter in the 1868 treaties. The Report states: "Many *bad men are found among the whites*; they commit outrages despite all social restraints; they frequently, too, escape punishment." http://eweb.furman.edu/~benson/docs/peace.htm (last visited June 16, 2011), at 49 (emphasis added). The Report directly ties war by Indians to "wrongs" (another critical word in the Fort Laramie Treaty) done to them: "That he [the Indian] goes to war is not astonishing; he is often compelled to do so. *Wrongs* are borne by him in silence that never fail to drive civilized men to deeds of violence." *Id.* at 50 (emphasis added). Providing a

system of redress for those wrongs was believed essential to preserving the lives of United States citizens: "When he [the Indian] is our friend he will sometimes sacrifice himself in your defense. When he is your enemy he pushes his enmity to the excess of barbarity." *Id.*

The Report identifies the purpose of treaties with the Indians: to remove the causes of their grievances. "In making treaties it was enjoined on us to remove, is [sic] possible, the causes of complaints on the part of the Indians." *Id.* at 79. The Report was co-authored by Lieutenant General William Tecumseh Sherman, who in the ensuing months of 1868 was "a principal negotiator" of the 1868 treaties. *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009).

In short, the historical record discloses that the phrase "bad men among the whites" apparently originates in the Indian Peace Commission Report; explains that Indians should be provided with redress for "wrongs" done to them to prevent them from making war; and confirms the interest of the United States and its people in establishing peace with the Indians, namely to preserve their lives and open the West. And the historical record establishes Lieutenant General Sherman as the direct human link between the Report, which he co-authored, and the language "bad men among the whites" and "wrong" in the Treaty that he negotiated with the Sioux less than four months later.

This history proves that "bad men among the whites" should not be read as "bad men among the whites who also are officers, agents, or employees of the federal government." No historical evidence supports the lower court's view that the Treaty used the word "whites" to mean only those whites who were officers, agents, or employees of the federal government.

c. The canons of construction of Indian treaties

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians [citation omitted], with ambiguous provisions interpreted to their benefit, ..." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). *Accord, Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 (1999).

"[T]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Washington v. Washington States Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979). Consequently, a treaty must be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be

understood by the Indians." *Id.* at 676, quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

Each of these canons favors the plaintiffs. If "bad men among the whites" in the phrase "bad men among the whites, or among other people subject to the authority of the United States" is ambiguous, the ambiguity must be construed in favor of the Indians. The words "bad men among the whites" would naturally be understood by Indians in 1868 to mean "bad men among the whites."

d. The sole text cited by the lower court to justify its conclusion—the post-comma words "or among other people subject to the authority of the United States"—neither supports nor justifies the court's restrictive reading of "bad men among the whites"

The sole text that the lower court cited to support its conclusion is the language "or among other people subject to the authority of the United States," in the phrase "bad men among the whites, or among other people subject to the authority of the United States." A15 ("the United States assumed a limited obligation when it negotiated the Fort Laramie Treaty: to ensure that an identifiable class of individuals who acted as agents, employees, representatives, or in any other capacity for or on behalf of the United States, viz., 'people *subject to the authority of the United States*,' maintained the peace between the United States and the Sioux Nation, ...") (emphasis by Court of Federal Claims, citation omitted).

But *Tsosie* contradicts the lower court's reading of "people subject to the authority of the United States." According to *Tsosie*, "other persons subject to the authority of the United States" in the corresponding 1868 Navajo Treaty likely refers to Indians who were not members of the Navajo tribe. *Tsosie* quotes Lt. General Sherman's statement promising the Navajo: "If you will live in peace with your neighbors, we will see that your neighbors will be at peace with you—The government will stand between you and other Indians and Mexicans." 825 F.3d at 400 n.2.

Tsosie's common-sense reading of "other persons subject to the authority of the United States" in the Navajo Treaty applies to the same language in the Fort Laramie Treaty. The Sioux promised to end their war with the United States; reservations were established; the Sioux would deliver "bad men among the Indians" to the United States; and the United States would punish "bad men among the whites, or among other people subject to the authority of the United States"—blacks, other Indians, Mexicans, and everyone else—who committed wrongs against the Sioux, as well as reimburse the injured person for the loss.

Three additional reasons confirm that the lower court erred in reading "other people subject to the authority of the United States" as limiting "bad men among the whites" to "officers, agents, or employees of the federal government." First, the

comma after "bad men among the whites" prevents it from being modified by "or among other people subject to the authority of the United States." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 80 (1991) (drafters of statute would have used comma before phrase "or any agency thereof" had they wanted to describe a separate category of entities). The meaning of a statute, or in this case a treaty, "will typically heed the commands of its punctuation." *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 454 (1993). The Fort Laramie Treaty's use of a comma, followed by "or" in the phrase "bad men among the whites, or among other people subject to the authority of the United States" separates two categories of people. *Terry v. Principi*, 367 F.3d 1291, 1294-95 (Fed. Cir. 2004) (comma between two clauses "effects [a] separation" between them, so that benefits may be paid either under the clause that precedes the comma, or under the clause that follows it).

Second, the text of the Treaty establishes that when its drafters wanted to say "officers, agents, or employees of the federal government," they knew how to do so. Article 2 of the Treaty promises that only authorized "officers, agents, and employees of the Government" will be allowed to pass over, settle on, or reside on the reservation. Addendum B, p. 2. Had the drafters wanted to limit Article 1's "bad men

among the whites" to "officers, agents, and employees of the Government," they would have used the same language as in Article 2.

Third, the government's position is contradicted by the words "and at peace therewith" that follow "subject to the authority of the United States" in the "bad men among the Indians" paragraph. Addendum B, p. 1. If "subject to the authority of the United States" means only officers, agents, and employees of the government, then "and at peace therewith" means that the drafters of the Treaty sought to protect only those government agents, employees, and representatives who were "at peace" with the United States. Or in other words, the drafters of the Treaty believed that there were outlaw government agents, employees, and representatives, who were at war with the United States, and who should not be protected by the Treaty. This historical impossibility again shows that "subject to the authority of the United States" does not mean "officers, agents, and employees of the government."

III. Prolonged nonenforcement does not extinguish Indian treaty rights

The lower court relied on the absence of "bad men" cases brought against defendants who were not officers, agents, or employees of the federal government. A10-14. But *Tsosie* rejected the argument that nonenforcement renders a treaty ineffective: "Prolonged nonenforcement, without preemption, does not extinguish Indian rights." 825 F.2d at 399. *Tsosie* rejected the government's argument that the

lack of even a single claim under the "bad men among the whites" clause of any treaty from 1868 to 1970 meant that the clause was a "dead letter." *Id.*

Tsosie gives as an example *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), in which rights created in 1795 were successfully enforced in a suit brought in 1970, a longer time span than from 1868 to 2011. More recently, *Virginia v. Stewart*, 131 S. Ct. 1632, 1641-42 (2011), rejects the idea that a lawsuit is inappropriate simply because it is novel.

In addition, the text of the Fort Laramie Treaty demonstrates that there is no time limit on a "bad men among the whites" claim. Several provisions are explicitly time-limited or dollar-limited. Article 4 is dollar-limited—it requires the United States to construct buildings and equipment not to exceed specified dollar amounts. Addendum B, p. 2. Article 7 is time-limited—it makes the schooling provisions effective for 20 years. Addendum B, p. 3-4. Articles 8 and 14 are time-limited and dollar-limited. Addendum B, p. 4 and 6. But the "bad men among the whites" clause contains no time or dollar limitation.

IV. *Ex Parte Crow Dog*, 109 U.S. 556 (1883), and *Janis v. United States*, 32 Ct. Cl. 407 (1897), support *Tsosie*

Cases from the era after the 1868 treaties were signed support *Tsosie*. *Ex Parte Crow Dog*, 109 U.S. 556 (1883) reads "bad men among the whites" as referring to

the "party of whites and their allies," not just to government officers, agents, or employees. The issue was whether the "bad men among the Indians" clause of the 1868 Fort Laramie Treaty allows the federal government to try an Indian for the murder of another Indian of the same tribe committed on an Indian reservation. In ruling that no federal jurisdiction existed, the Court explained: "Here are two parties, among whom, respectively, there may be individuals guilty of a wrong against one of the other—*one is the party of whites and their allies*, the other is the tribe of Indians with whom the treaty is made." 109 U.S. at 567-68 (emphasis added). *Crow Dog's* reading of "bad men among the whites" as the "party of whites and their allies" contradicts the lower court's reading of the phrase as limited to whites who are officers, agents, or employees of the federal government.

Janis v. United States, 32 Ct. Cl. 407 (1897), reads "bad men among the whites" the same way. A "squaw man"—a United States citizen who married a Sioux woman, lived on an Indian reservation, and claimed to be adopted into the tribe—sought damages under the "bad men among the Indians" provision of the 1868 Fort Laramie Treaty after he lost property on the reservation. The court held that he had no such claim, because he was subject "to the risks of a natural-born Indian, and to that extent must be considered as one of the tribe." 32 Cl. Ct. at 411.

Janis, like *Crow Dog*, reads the "bad men" provisions logically and in accordance with their purpose: "The general purpose of the Indian indemnity acts, it has been said frequently, was to keep the peace. *They contemplate that the Indians shall be responsible for what Indians do within the white man's territory and that the Government will be responsible for what white men do within the Indian's territory.*" (emphasis added). According to *Janis*, "bad men among the whites" means what it says: "It provides against depredations both by whites and by 'other persons subject to the authority of the United States' . . . ." 32 Ct. Cl. at 410-11. So *Janis*, like *Crow Dog*, contradicts the lower court's restriction of "bad men among the whites" to whites who are officers, agents, and employees of the government.

In addition, *Janis* provides a logical reading of "other persons subject to the authority of the United States." According to *Janis*, the phrase simply distinguishes a person who is "subject to the authority of the Sioux Nation" from a person who is "subject to the authority of the United States." 32 Ct. Cl. at 410. This distinction makes sense. The United States promised to reimburse Indians for damages caused by whites, or by non-whites who were subject to its authority, but not to reimburse Indians for damages caused by people over whom it had no authority, namely Indians residing on the same reservation.

V. *Tsosie* is not "absurd"

Although the government did not argue in the lower court that plaintiff's position led to an absurd result, the lower court concluded that it did. "Plaintiffs' interpretation yields an absurd result and imposes upon the federal government an impossible task: to guarantee the safety and tranquility of all Native Americans on reservations during any and all of their interactions with anyone." A15.

But plaintiffs never contended that the government must "guarantee" the "safety" or "tranquility" of Indians on reservations. Plaintiffs merely asked that the government honor its Treaty, and "reimburse the injured person for the loss sustained" by a "bad man among the whites" who committed a "wrong" against an Indian. According to the government, "wrong" is strictly limited: it means "heinous acts of aggression perpetrated against the tribe by white men," such as "murder, assault, rape and other sexual offenses." The government says that not even the drunk driving deaths of Calonnie Randall and Robert Whirlwind Horse are a "wrong" because they were "unintentional killing[s] committed without malice." And the government asserts that "the only published decisions in which courts have held that a plaintiff has a viable 'bad men' claim are those involving an intentional crime." Defendant's Motion to Dismiss, A40-41. The lower court did not reach this issue. A16 n.11.

Whatever the precise contours of "wrong" may be, the requirement of a "wrong" limits the scope of "bad men" claims. In addition, such claims are limited geographically, because "wrongs" of any kind against Indians who are not on their own reservations are not covered. *Herrera v. United States*, 39 Fed. Cl. 419 (1997), *aff'd* 168 F.3d 1319 (Fed. Cir. 1998) (no "bad men" claim for Indian off reservation); *Pablo v. United States*, 2011 U.S. Claims LEXIS 614 (no "bad men" claim for Indian on a reservation not her own).

The lower court did not state what it meant by "absurd." According to *Black's Law Dictionary* 10 (9th ed. 2009), "absurdity" means "being grossly unreasonable; esp., an interpretation that would lead to an unconscionable result, esp. one that the parties or (esp. for a statute) the drafters could not have intended and probably never considered." In 1868, the United States sought peace with the Indian tribes, in order to preserve the lives of United States citizens, and to open the West to the extraordinary political, economic, social, and cultural development that soon followed. In seeking peace, the United States and the tribes agreed to the "bad men" clauses to provide remedies for wrongs done by Indians and whites to each other, as an alternative to resolving those disputes through war. This arrangement was logical and sensible. It was not unreasonable, unwise, or absurd. If the United States had to decide today whether it should reimburse Indians for "wrongs" committed against

them on reservations, the answer undoubtedly would be "no." But life was different in 1868.

The Fort Laramie Treaty "was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as 'the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return.'" *United States v. Sioux Nation*, 448 U.S. 371, 376 n.4 (1980). Plaintiffs ask only that the United States live up to its end of the bargain.

Conclusion and Statement of Relief Sought

"Bad men among the whites" means "bad men among the whites," not "bad men among the whites who are officers, agents, or employees of the federal government." The judgment should be reversed and the case remanded for further proceedings.

Dated: June 20, 2011

Respectfully submitted,

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ADDENDUM A

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REQUIRED MATERIAL

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In the United States Court of Federal Claims

No. 10-503 C
(Filed: March 31, 2011)

JAMES RICHARD, SR., et al.,	*	
	*	Motion to Dismiss; RCFC 12(b)(1);
Plaintiffs,	*	Fort Laramie Treaty of April 29, 1868;
	*	"Bad Men" Clause; Peace Commission;
v.	*	"Wrong" Committed by an Individual Not
	*	Affiliated With the United States; Treaty
THE UNITED STATES,	*	Interpretation; Hebah; Begay; Tsosie; Elk;
	*	Zephier; Hernandez; Slattery; Jan's
Defendant.	*	Helicopter Service, Inc.
	*	

Terry L. Pechota, Rapid City, SD, for plaintiffs.

J. Hunter Bennett, United States Department of Justice, Washington, DC, for defendant. Alice Peterson, United States Department of the Interior, of counsel.

OPINION AND ORDER

SWEENEY, Judge

Before the court is defendant's motion to dismiss. In this case, plaintiffs, the purported personal representatives of the estates of Calonnie D. Randall and Robert J. Whirlwind Horse, invoke the relevant "bad men" clause contained in Article I of the Fort Laramie Treaty of April 29, 1868 ("Fort Laramie Treaty") and seek money damages stemming from the deaths of their adult children. Defendant moves to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"), contending that plaintiffs have failed to allege that the individual responsible for their children's deaths was an agent or employee of the United States. Alternatively, defendant moves to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6) because, it argues, the "wrong" that occurred in this case falls outside the type of "wrong" contemplated by the "bad men" clause. For the reasons set forth below, the court lacks subject matter jurisdiction over the complaint and grants defendant's motion to dismiss pursuant to RCFC 12(b)(1).

I. BACKGROUND

Ms. Randall and Mr. Whirlwind Horse were members of the Oglala Sioux Tribe. Compl. ¶ 16. On August 27, 2008, they were struck and killed by a vehicle while walking along a highway within the Pine Ridge Indian Reservation in Shannon County, South Dakota. Id. ¶ 6. The driver of the vehicle, a "non-Indian" named Timothy Hotz, was intoxicated at the time of the incident. Id. ¶¶ 7-8. After the incident, Mr. Hotz fled the scene but was eventually arrested. Id. ¶ 8. He pled guilty to involuntary manslaughter in the United States District Court for the District of South Dakota and has been serving a fifty-one month prison sentence.[1] Id. ¶ 9.

Plaintiffs filed an administrative claim with the United States Department of the Interior ("Interior"). Id. ¶ 14; see also id. ¶ 21 (alleging that plaintiffs submitted a claim for damages to the Assistant Secretary of Indian Affairs in Washington, DC). As of August 2, 2010, the date on which they filed a complaint in the United States Court of Federal Claims ("Court of Federal Claims"), plaintiffs' administrative claim was neither granted nor denied. Id. ¶¶ 14, 21. In their complaint, plaintiffs allege that Ms. Randall and Mr. Whirlwind Horse, as members of the Oglala Sioux Tribe, were beneficiaries under the Fort Laramie Treaty. Id. ¶ 16. The relevant "bad men" provision in the Fort Laramie Treaty, plaintiffs assert, requires that the United States, among other things, reimburse an injured person for losses sustained as a result of the acts of "bad men." Id. ¶ 17. Plaintiffs allege that Mr. Hotz's conduct, which caused the deaths of Ms. Randall and Mr. Whirlwind Horse, constituted a "wrong" committed against Native Americans and therefore rendered Mr. Hotz a "bad man" under the Fort Laramie Treaty. Id. ¶¶ 19-20. Plaintiffs claim that they suffered losses of, among other things, income, companionship, and love, and incurred medical expenses, burial expenses, and other damages as a result of the deaths of Ms. Randall and Mr. Whirlwind Horse. Id. ¶ 13. Plaintiffs seek an award of $3,000,000 for both estates, plus costs, attorney's fees, and any other relief permitted under the Fort Laramie Treaty. Id. Prayer for Relief.

II. LEGAL STANDARDS

A. Subject Matter Jurisdiction

Whether the court possesses jurisdiction to decide the merits of a case is a threshold matter. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); see also Matthews v. United States, 72 Fed. Cl. 274, 278 (2006) (stating that subject matter jurisdiction is "an inflexible matter that must be considered before proceeding to evaluate the merits of a case"). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power

[1] Mr. Hotz is also subject to three years of supervised release. See United States v. Hotz, No. 5:08-CR-50094-001 (D.S.D. Mar. 31, 2009) (order entering judgment in a criminal case). He must pay restitution in the amount of $1,700 to the Department of Social Services Victims Compensation Services and amounts to be determined to the families of Ms. Randall and Mr. Whirlwind Horse. Id.

to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). The parties or the court sua sponte may challenge the court's subject matter jurisdiction at any time. Arbaugh v. Y & H Corp., 546 U.S. 500, 506 (2006).

The ability of the Court of Federal Claims to entertain suits against the United States is limited. "The United States, as sovereign, is immune from suit save as it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941). A waiver of immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969).

The Tucker Act waives sovereign immunity "for any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[2] 28 U.S.C. § 1491(a)(1). Not every claim is cognizable under the Tucker Act because the claim must be for money damages against the United States. King, 395 U.S. at 2-3. Furthermore, the Tucker Act "is not available when the breaching entity is not part of the federal government or not acting as its agent, or when jurisdiction has been explicitly disclaimed." Slattery v. United States, Nos. 2007-5063, -5064, -5089, 2011 WL 257841, at *9 n.3 (Fed. Cir. Jan. 28, 2011) (en banc); see also Agee v. United States, 72 Fed. Cl. 284, 288 (2006) ("The United States is not liable for the actions of non-federal parties who are not agents of the United States." (citing Brazos Elec. Power Coop. v. U.S. Dep't of Agric., 144 F.3d 784, 787 (Fed. Cir. 1998))).

As a jurisdictional statute, the Tucker Act "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S.

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[2] A separate statute, the Indian Tucker Act, confers jurisdiction upon the Court of Federal Claims to hear claims by Native American tribes pursuant to a treaty:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (2006). The Indian Tucker Act, however, applies only to tribal plaintiffs and not individual tribal members. See Fields v. United States, 423 F.2d 380, 383 (Ct. Cl. 1970) ("[S]ince the instant case is one brought by individual Indians and not a tribe, band, or identifiable group of Indians, we feel that defendant is correct in asserting that section 1505 does not apply to the present case."). Therefore, the Indian Tucker Act cannot serve as a basis for jurisdiction in this case.

392, 398 (1976). Therefore, a plaintiff must identify a separate money-mandating source that, if violated, provides for a claim for damages against the United States. James v. Caldera, 159 F.3d 573, 580 (Fed. Cir. 1998); see also Harvest Inst. Freedman Fed'n v. United States, 80 Fed. Cl. 197, 200 (2008) ("To be money-mandating, a statute, regulation, or treaty must impose a specific obligation on the party of the Government."). Furthermore, a "grant of a right of action must be made with specificity." Testan, 424 U.S. at 400.

The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has explained:

> In determining whether the Court of Federal Claims has jurisdiction, all that is required is a determination that the claim is founded upon a money-mandating source and the plaintiff has made a nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source. There is no further jurisdictional requirement that the court determine whether the additional allegations of the complaint state a nonfrivolous claim on the merits.

Jan's Helicopter Serv., Inc. v. FAA, 525 F.3d 1299, 1309 (Fed. Cir. 2008); see also Ralston Steel Corp. v. United States, 340 F.2d 663, 667-68 (Ct. Cl. 1965) (holding that "a claimant who says he is entitled to money from the United States because a statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous, but arguable"). A treaty with a Native American tribe is a contract. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979). The Federal Circuit and its predecessor court, the United States Court of Claims ("Court of Claims"), have found Tucker Act jurisdiction over certain claims brought under Article I "bad men" clauses in treaties similar to the Fort Laramie Treaty. See Tsosie v. United States, 825 F.2d 393 (Fed. Cir. 1987); Begay v. United States, 219 Ct. Cl. 599 (1979); Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970).

B. Motion to Dismiss

Defendant moves to dismiss the complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) or, in the alternative, for failure to state a claim upon which relief can be granted under RCFC 12(b)(6). When deciding a motion to dismiss based upon either ground, the court assumes all factual allegations are true and draws all reasonable inferences in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982); United Pac. Ins. Co. v. United States, 464 F.3d 1325, 1327-28 (Fed. Cir. 2006). The court's "general power to adjudicate in specific areas of substantive law . . . is properly raised by a [Rule] 12(b)(1) motion." Palmer v. United States, 168 F.3d 1310, 1313 (Fed. Cir. 1999). The burden of establishing the court's subject matter jurisdiction resides with the party seeking to invoke it. See McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); see also Reynolds v. Army & Air Force Exch. Serv.,

846 F.2d 746, 748 (Fed. Cir. 1988) (providing that jurisdiction must be established by a preponderance of the evidence). If the defendant or the court questions jurisdiction, the plaintiff cannot rely solely on allegations in the complaint but must bring forth relevant, adequate proof to establish jurisdiction. See McNutt, 298 U.S. at 189. When ruling upon a motion to dismiss for lack of subject matter jurisdiction, the court may examine relevant evidence in order to decide any factual disputes. See Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999); Reynolds, 846 F.2d at 747. If the court finds that it lacks subject matter jurisdiction, then it must dismiss the claim. Matthews, 72 Fed. Cl. at 278; see also RCFC 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

C. The "Bad Men" Clause of the Fort Laramie Treaty

Armed conflict between Native Americans and settlers moving westward across the North American continent is well-documented throughout the annals of American history. These so-called Indian Wars, which were conducted with no formal declaration of war by Congress against Native American tribes, required the use of military force and "sufficient[ly] . . . constitute[d] a state of war." Montoya v. United States, 180 U.S. 261, 267 (1901) (citing Marks v. United States, 161 U.S. 297 (1896)). Although the United States and Native American tribes executed numerous treaties, hostilities persisted. Resentment among Native Americans toward the United States intensified in the 1860s when the military increased its presence across the Great Plains. Starley Talbott, Fort Laramie 8 (2010). Consequently, the state of war between tribes and American settlers and soldiers intensified. See id.

The Fort Laramie Treaty, "one of nine [treaties] made in 1868[] by and between commissioners representing the United States and chiefs of various previously hostile Indian tribes,"[3] Tsosie, 825 F.2d at 395, has been described as "the foundational document of today's Sioux nations," William P. Zuger, A Baedeker to the Tribal Court, 83 N.D. L. Rev. 55, 61 (2007). "[C]oncluded 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, 394 (1980), the Fort Laramie Treaty was

[3] Congress established a Peace Commission comprised of civilians and military officers "to investigate the cause of the war and to arrange for peace . . . ." Report of the Commissioner of Indian Affairs, in Annual Report of the Commissioner of Indian Affairs for the Year 1868 ("1868 Annual Report") 1, 4 (1868). The Peace Commission "call[ed] together the chiefs and headmen of such bands of Indians as were then waging war, for the purpose of ascertaining their reasons for hostility, and, if thought advisable, to make treaties with them . . . ." Report to the President by the Indian Peace Commission, January 7, 1868, in 1868 Annual Report, supra, at 26, 26.

"comprehensive both in terms and purpose,"[4] Brown v. United States, 32 Ct. Cl. 411, 414 (1897). Article I of the Fort Laramie Treaty provides:

> 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.
>
> 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 wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do so, 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 the 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.

15 Stat. at 635-36. The Fort Laramie Treaty, like the other treaties entered into with Native American tribes in 1868, contains two "bad men" clauses. Article I, as indicated above,

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[4] For example, Article II of the treaty established what was known as the Great Sioux Reservation, which consisted of approximately sixty-million acres in portions of present-day South Dakota and North Dakota, see Treaty Between the United States of America and Different Tribes of Sioux Indians, 15 Stat. 635, 636 (1868); Brian Sawers, Tribal Land Corporations: Using Incorporation to Combat Fractionation, 88 Neb. L. Rev. 385, 413 (2009), and Article VI established an English education system for Native American children, see 15 Stat. at 637-38; see also Sioux Nation of Indians, 448 U.S. at 374-76 (recounting several agreements included in the Fort Laramie Treaty); Report of the Commissioner of Indian Affairs, supra note 3, at 4 (explaining that the "main features of these several treaties are: the binding the Indians, parties thereto, to keep the peace, the providing for the several tribes a suitable reservation, and the means for their education and civilization").

"provid[es] on the one hand for wrongs committed by white persons against Indians, and on the other hand, by Indians against white men . . . ." Brown, 32 Ct. Cl. at 414. One "bad men" clause "deals with liability of the treaty tribe for depredation by its members, and purports to improve the tribe's position by giving it an escape hatch from its liability as it would otherwise be," while the other "bad men" clause "deals with an entirely separate matter, wrongs by the white side's 'bad men' against a treaty tribe, and purports to give the tribe or a wronged member reimbursement from the federal treasury." Tsosie, 825 F.3d at 398. "Together, the purpose served by the two 'bad men' provisions working in concert was to keep the peace between the white men and the Indians." Garreaux v. United States, 77 Fed. Cl. 726, 736 (2007) (citing Janis v. United States, 32 Ct. Cl. 407, 410 (1897)). Indeed, one of the primary objectives of the Fort Laramie Treaty was to encourage Native Americans to "treat[] crime as crime . . . ." Brown, 32 Ct. Cl. at 415. Although the Fort Laramie Treaty was negotiated between and ratified by the United States and the Sioux Nation, individual Native Americans are third-party contractual beneficiaries who have "legal rights to vindicate and enforce the Federal Government's promise." Hebah, 428 F.2d at 1338.

The first "bad men" clause of the Fort Laramie Treaty "contains a number of requisites which plaintiff has the burden of proving." Hebah v. United States, 456 F.2d 696, 704 (Ct. Cl. 1972). First, the plaintiff must show that "bad men among the whites, or among other people subject to the authority of the United States" committed a "wrong upon the person or property of the Indians." 15 Stat. at 635. Second, the plaintiff must show the amount needed to "reimburse" for any "loss sustained." Id.

III. DISCUSSION

Plaintiffs assert that the Court of Federal Claims possesses jurisdiction over their complaint based upon the first "bad men" clause contained in Article I of the Fort Laramie Treaty. In order to bring an action against the United States 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 v. United States, 93 Fed. Cl. 193, 200 (2010) (citing Ex parte Kan-gi-shun-ca, 109 U.S. 556, 567 (1883)). Defendant asserts that the court lacks jurisdiction over plaintiffs' claim because plaintiffs fail to allege that Mr. Hotz, a private citizen, was an employee or agent of the United States at the time of the incident involving Ms. Randall and Mr. Whirlwind Horse. Mot. 5. Plaintiffs acknowledge that Mr. Hotz "was not an agent or employee of the United States," Opp'n 1, but nevertheless maintain that the United States is liable under the Fort Laramie Treaty for Mr. Hotz's actions.

This case requires the court to determine the meaning of the phrase "subject to the authority of the United States" contained in the first "bad men" clause of Article I of the Fort Laramie Treaty. The primary jurisdictional question presented is whether a "non-Indian," Compl. ¶ 7, individual who is not an agent, employee, representative, or otherwise acting in any other capacity for or on behalf of the United States is a "bad man" "among the whites, or among other people subject to the authority of the United States" under the Fort Laramie Treaty, 15 Stat.

at 635, such that plaintiffs present a claim based upon a money-mandating source under which the government must compensate them for the losses they sustained. Whether a Native American can bring an action under the Fort Laramie Treaty for money damages against the United States based upon a "wrong" committed solely by persons who possess no connection to or affiliation with the government (other than citizenship) appears to be an issue of first impression. As explained below, the Fort Laramie Treaty does not confer upon the Court of Federal Claims jurisdiction to entertain plaintiffs' claim because Mr. Hotz, who had no connection to the federal government (other than citizenship) at the time of the tragic incident, was not "subject to the authority of the United States" within the meaning of the first "bad men" clause contained in Article I of the Fort Laramie Treaty such that the United States can be held liable for plaintiffs' losses.

A. The Fort Laramie Treaty Represents an Effort to End Armed Conflict Between Native Americans and the United States

In 1867, Native American tribal leaders, as well as members of the United States military and other officials, testified before a joint special committee chaired by Senator James R. Doolittle of Wisconsin ("Doolittle Commission") that was charged with inquiring into the condition of Native American tribes. The Doolittle Commission ultimately issued a report, Condition of the Indian Tribes, containing statements and testimony that, among other things, (1) indicated the extent to which government officials deemed Native Americans inferior, see, e.g., S. Rep. No. 39-156, at 15 (1867) (critiquing the nature of Native American society), 134 (opining that educating Native Americans would facilitate coexistence with "whites"), 427 (recommending that the War Department manage Native American affairs because Native Americans both feared and respected the military), and (2) described the extent to which interactions between United States soldiers and Native Americans adversely affected tribes, see, e.g., id. at 5 (describing the spread of measles, small pox, and other diseases), 7 (noting that "military posts among the Indians have frequently become centers of demoralization and destruction to the Indian tribes"), 426 (documenting the spread of alcoholism among tribes), 469 (opining that, through interactions with the "white man," Native Americans were exposed to vice).

The Doolittle Commission observed that "useless wars with the Indians," id. at 10, could "be traced to the aggressions of lawless white men, always to be found upon the frontier," id. at 5. The "lawless white men" to which The Condition of the Indians referred were apparently United States soldiers, who engaged in the "indiscriminate slaughter of men, women, and children . . . ." Id.; see also id. at 5-6 (noting that soldiers embarked upon a "wholesale massacre" of Native Americans while they "believed themselves to be under the protection of our flag"), 29 (noting that "officers . . . killed and butchered all they came to"), 53 (describing a massacre by soldiers of a Native American village comprised predominately of women and children), 57 (describing in graphic detail the murder and mutilation by soldiers of Native American women and children), 59 (noting that a battle erupted after several Native Americans "were suddenly confronted by a party of United States soldiers"), 93 (recounting an incident

between a Native American and a soldier, the latter of whom "pulled out his revolver, fired and broke the Indian's arm"), 96 (recalling that soldiers shot and killed a six year-old girl who presented a "white flag on a stick" during a battle), 371 ("The soldiers are very drunken and come to our place . . . they run after our women and fire into our houses and lodges . . . ."). Consequently, the Doolittle Commission recommended that Congress establish five boards of inspection of Native American affairs that would, among other things, inquire into conduct of the military toward tribes in order to "preserve peace and amity." Id. at 8.

In its report, the Peace Commission observed:

> In making treaties it was enjoined on us to remove, if possible, the causes of complaints on the part of the Indians. This would be no easy task. We have done the best we could under the circumstances . . . . The best possible way then to avoid war is to do no act of injustice. When we learn that the same rule holds good with Indians, the chief difficulty is removed. But it is said our wars with them have been almost constant.

Report to the President by the Indian Peace Commission, January 7, 1868, supra note 3, at 42. The Peace Commission acknowledged that "[m]any bad men are found among the whites," id. at 36, an observation also expressed by the Doolittle Commission, which noted that it was "difficult if not impossible to restrain white men, especially white men upon the frontiers from adopting [savage] warfare against the Indians," S. Rep. No. 39-156, at 5. Ultimately, the Fort Laramie Treaty was intended to address the myriad problems documented by the Doolittle Commission. See Elk v. United States, 87 Fed. Cl. 70, 80 (2009).

B. The First "Bad Men" Clause in the Fort Laramie Treaty Addresses "Wrongs" Committed by Individuals Affiliated With the United States

Neither the Fort Laramie Treaty nor any "legislative history" related thereto defined the meaning of "whites, or among other people subject to the authority of the United States." As discussed above, The Condition of the Indians documented numerous instances of humiliation, abuse, and murder of Native Americans by United States soldiers, and it suggested that this conduct was responsible for armed conflict: "[T]he blunders and want of discretion of inexperienced officers in command have brought on long and expensive wars . . . ." S. Rep. No. 39-156, at 7. Nevertheless, the Federal Circuit opined that

> the "bad men" provision is not confined to "wrongs" by government employees. 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," whatever that means, but most likely Indian non-members of the . . . tribe but subject to United States law.

Tsosie, 825 F.2d at 400. Plaintiffs invoke this language to support their argument that the federal

government is liable for Mr. Hotz's conduct without regard to his status.

Reliance upon this language as the basis for the court to assert jurisdiction over a Fort Laramie Treaty-based claim seeking damages for a "wrong" committed by an individual who lacks a connection to or affiliation with the United States, however, is problematic. First, the individual who committed the alleged "wrong" in Tsosie, as discussed below, was an employee of a United States hospital facility located within the boundaries of a Navajo reservation. Id. at 397. In light of that fact, the Federal Circuit opined that liability was "not confined" to an employer-employee relationship between the United States and the alleged "bad man." Id. at 400. Here, no relationship, whether employer-employee or otherwise, existed between Mr. Hotz, the alleged "bad man," and the United States. Second, as discussed below, the Federal Circuit's observation was not essential to its analysis of the narrow issue presented before it on appeal, thereby rendering it dictum. Co-Steel Raritan, Inc. v. Int'l Trade Comm'n, 357 F.3d 1294, 1307 (Fed. Cir. 2004). Third, the Federal Circuit never explicated the meaning or scope of the clause. To the contrary, the Federal Circuit expressly noted ambiguity: "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,' whatever that means . . . ." Tsosie, 825 F.2d at 400 (emphasis added) (quoting 15 Stat. at 635). As such, the court cannot conclude that it possesses jurisdiction in this case based solely upon the Federal Circuit's observation. Instead, the court examines other decisions involving the "bad men" clause in order to ascertain the factual backgrounds and nature of claims brought thereunder, and how those claims have been adjudicated.

1. Courts Have Reached the Merits of Claims Alleging That "Wrongs" Were Committed by "Bad Men" Who Were Subject to the Authority of the United States

Cases involving "bad men" clauses in various 1868 treaties with Native American tribes can be traced to the late nineteenth century. Yet, these early cases did not involve claims by Native Americans seeking damages based upon alleged wrongs committed by non-Native Americans. See, e.g., Janis, 32 Ct. Cl. at 407 (involving a claim by a "squaw man," a citizen of the United States who had been adopted into a Native American tribe, alleging that members of the tribe stole his property); Friend v. United States, 29 Ct. Cl. 425 (1894) (involving a claim by a non-Native American for destruction of property by a Native American); Ex parte Kan-gi-shun-ca, 109 U.S. at 557 (concerning the murder of a Native American member of the Brule Sioux by a member of the same tribe). It was not until 1970 that a case was brought in federal court by a Native American invoking the first "bad men" clause of an 1868 treaty. See Hebah, 428 F.2d at 1334.

In Hebah, the administratrix of her husband's estate brought suit seeking to recover damages after her husband, a member of the Shoshone tribe, was allegedly killed in his residence on the reservation by an Indian Police Force officer. Id. at 1336. In its initial ruling, the Court of Claims denied the government's motion to dismiss, holding that Article I of an 1868 treaty with the Eastern Band of Shoshonees and Bannack Tribe of Indians conferred upon individual Native

Americans the right to sue as third-party beneficiaries. Id. at 1340. Although it noted that the officer and alleged "bad man" was a Native American, the Court of Claims explained that the treaty applied to both "whites" and "other people subject to the authority of the United States." Id. Since "[m]embers of the Indian Police Force [we]re appointed by and subject to the Department of the Interior," id. (citing 25 C.F.R. §§ 11.301-.306 (1968)), the officer was subject to the authority of the United States and the plaintiff could invoke the treaty's relevant "bad men" clause. Id. The Court of Claims then remanded the case for a merits ruling by a trial commissioner, id. at 1334, who ultimately denied the plaintiff relief.[5] On appeal from that determination, the Court of Claims adopted both the findings and opinion of the trial commissioner. Hebah, 456 F.2d at 698.

The Court of Claims addressed another 1868 treaty claim in Begay, 219 Ct. Cl. at 599, and Begay v. United States, 224 Ct. Cl. 712 (1980). In that case, eleven female minors and members of the Navajo Nation brought a claim seeking damages for alleged sexual misconduct perpetrated by male teachers and other employees at a school administered by Interior's Bureau of Indian Affairs ("BIA"). Begay, 219 Ct. Cl. at 600. Most of the allegations involved a "white, non-Indian" counselor, though "two Navajos on the school faculty [were] also said to have been involved in some of the incidents." Id. at 600 n.1. Since the alleged "bad men" were employees of the school, no issue was raised as to whether they were subject to the authority of the United States. Indeed, the Court of Claims "assume[d], without deciding, that the treaty g[ave] plaintiffs a cause of action . . . ." Begay, 224 Ct. Cl. at 714.

In its first ruling, the Court of Claims denied the government's motion to dismiss for failure to exhaust administrative remedies and stayed proceedings in order to permit Interior to render a decision on plaintiffs' applications for relief filed pursuant to Article I of the treaty. Begay, 219 Ct. Cl. at 602-03. Thereafter, an administrative hearing was convened, the hearing officer recommended denying the claims due to lack of proof, and Interior adopted that recommendation. Begay, 224 Ct. Cl. at 714. In its second ruling, the Court of Claims determined that the plaintiffs provided no basis upon which to find that Interior's denial of their Article I treaty claim was arbitrary and capricious, unsupported by substantial evidence, or contrary to law.[6] Id. at 716.

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[5] The trial commissioner never reached the question of whether the officer was a "bad man," determining instead that the officer's use of force was, under the circumstances, within reason and did not constitute a "wrong" under the treaty. Hebah, 456 F.2d at 710.

[6] The Court of Claims also explained that the plaintiffs failed to exhaust their administrative remedies, Begay, 224 Ct. Cl. at 715, noting that the plaintiffs' counsel did not (1) properly raise or preserve objections, (2) submit proposed findings, (3) provide comments to the decision for transmission to Interior, or (4) request additional time to prepare for the hearing, id. at 716. It explained: "All told, these multiple derelictions amount to a virtual failure to prosecute, particularly when plaintiffs' are demanding over 10 million dollars of the taxpayers' funds." Id.

The Federal Circuit, in Tsosie, addressed a narrow issue certified to it by the United States Claims Court ("Claims Court"): whether the relevant "bad men" clause in an 1868 treaty had been rendered obsolete. 825 F.2d at 394-95. The plaintiff, a Navajo patient at the United States Public Health Service Hospital located within the Navajo reservation, alleged that a hospital employee posed as a physician and conducted an unauthorized medical examination on her body. Id. at 397. The plaintiff filed a claim under the relevant "bad men" clause of the 1868 treaty with Interior, which adopted the position that Article I of the treaty was obsolete. Id. Consequently, Interior denied the plaintiff's claim without reaching the merits. Id. The plaintiff sued in the Claims Court, and the government moved to dismiss plaintiff's complaint for failure to state a cause of action or, in the alternative, for summary judgment based upon an obsolescence theory. Id. The Claims Court denied the motion and certified the question of obsolescence to the Federal Circuit, id., which construed the government's theory as a merits-based defense and not a jurisdictional challenge:

> The theory, incidentally, is we believe a matter of defense to be asserted by the government, not a matter of subject-matter jurisdiction. If, e.g., an allegation that a government contract supports a claim suffices for section 1491 jurisdiction, if the contract expired before the claim under it accrued, that is not a matter of subject-matter jurisdiction, but of the merits. Thus the Court of Claims was under no duty to consider sua sponte the alleged obsolescence of article I.

Id. at 398. The Federal Circuit ultimately held that the relevant "bad men" clause, "even if infrequently invoked, has not become obsolete or been abandoned or preempted in any sense that affects its enforceability by suit . . . under the Tucker Act." Id. at 394 (citation omitted); see also id. at 399 ("Prolonged nonenforcement, without preemption, does not extinguish Indian rights."). Accordingly, the Federal Circuit affirmed the Claims Court's ruling and remanded for further proceedings on the merits. Id. at 403.

In Elk v. United States, the plaintiff, a female living on the Pine Ridge Indian Reservation, alleged that a staff sergeant in the Army Recruiting Command, a United States Army ("Army") employee, sexually assaulted her during her recruitment process.[7] 70 Fed. Cl. at 405. The plaintiff submitted two claims to Interior, an administrative claim and a treaty claim. Id. at 406. Interior transferred the administrative claim to the Army, which denied the claim, but the treaty claim remained pending at the time she filed suit in the Court of Federal Claims. Id. The government moved to dismiss for lack of subject matter jurisdiction, asserting that the plaintiff failed to exhaust her administrative remedies. Id. The court, explaining that "nothing in the Sioux Treaty indicates that a claimant must await a decision from Interior before filing suit,"

[7] The United States Department of Justice declined to prosecute the staff sergeant. Elk, 70 Fed. Cl. 405, 406 (2006).

denied the motion.[8] Id. at 407. Following a trial on the merits, the court awarded money damages to the plaintiff. See Elk, 87 Fed. Cl. at 70.

2. Courts Have Dismissed Claims Failing to Allege That "Wrongs" Were Committed by Individual "Bad Men" Who Were Subject to the Authority of the United States

Courts have also encountered–and dismissed–several claims brought by plaintiffs alleging that federal entities committed wrongful acts and were therefore "bad men" under Native American treaties. In Garreaux, an elderly Native American woman sought damages for breach of a lease agreement by the Cheyenne River Housing Authority ("CRHA"), which had entered into a twenty-five year lease agreement with Native American heirs to land held in trust for them by the federal government. 77 Fed. Cl. at 727-28. The lease agreement was approved by the BIA, and the land was to be used to build a home using financial assistance provided by the United States Department of Housing and Urban Development. Id. at 728. The CRHA entered into a Mutual Help and Occupancy Agreement ("MHOA") with the plaintiff, who believed that she would own the house upon the completion of the MHOA. Id. Although the plaintiff fulfilled her obligations under the MHOA, the BIA informed her that the lease was terminated and that she would be required to vacate her home. Id.

The court acknowledged that "there is little doubt that [it] has jurisdiction of a proper claim brought under the 'bad men' provision of Article 1 of the Fort Laramie Treaty of April 29, 1868, between the United States and the Great Sioux Nation." Id. at 735 (emphasis added). Nevertheless, it determined that "the primary intent of both 'bad men' provisions was to guard against affirmative criminal acts, primarily murder, assault, and theft of property." Id. at 736. Because cases involving the "bad men" clause "have similarly been criminal in nature," the court dismissed the complaint for lack of jurisdiction because the plaintiff asserted a breach of contract or negligence claim against a federal agency, not a claim against an individual affiliated with the United States for a wrongful criminal act. See id. at 737.

The Court of Federal Claims also dismissed for lack of jurisdiction a complaint alleging that the United States District Court for the District of Nebraska and a member of a non federal

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[8] Citing precedent indicating that individual interests could outweigh countervailing institutional interests favoring exhaustion, the Elk court noted that Interior "failed to prescribe procedures for considering 'Bad Men' claims, but, most importantly, has not established any fixed time within which to consider those claims." 70 Fed. Cl. at 409. The Elk court ultimately reached the opposite conclusion set forth in Zephier v. United States, No. 03-768 (Fed. Cl. Oct. 29, 2004) (unpublished decision). In Zephier, the Court of Federal Claims granted the government's motion to dismiss for failure to exhaust administrative remedies. Id. at 4. Exhausting administrative remedies, the court reasoned, "would contribute to judicial efficiency by allowing the responsible agency to make a factual record, apply its expertise, and correct its own errors so as to moot judicial controversies." Id. at 14 (citing Parisi v. Davidson, 405 U.S. 34, 37 (1972)).

agency conspired to, among other things, violate the plaintiff's civil rights during the course of criminal proceedings that resulted in his conviction and incarceration. Hernandez, 93 Fed. Cl. at 195-96. According to the plaintiff, the United States breached the Fort Laramie Treaty by failing to arrest purported wrongdoers, including a federal district court and a Western Intelligence Narcotics Group ("WING") officer who allegedly bribed a witness. Id. at 198. Granting the government's RCFC 12(b)(1) motion, the court noted that the plaintiff "allege[d] no acts that would have threatened the peace that the Fort Laramie Treaty was intended to protect." Id. at 199. A federal district court, the Court of Federal Claims explained, was "not a specified white man," id., and the claims against that entity did not qualify as "wrongful acts" under the Fort Laramie Treaty, id. at 200 n.7. Moreover, the court noted that WING was not a federal agency. Id. at 200 (citing G-Lam Corp. v. United States, 227 Ct. Cl. 764, 764 (1981)). Thus, the court explained, even if the WING officer had committed a wrongful act, he was "not an agent of the United States, and thus the Court of Federal Claims [could] not assert jurisdiction over plaintiff's claims under the 'Bad Men' clause." Id.

C. Plaintiffs' Claim Does Not Fall Within the Scope of the Fort Laramie Treaty

The primary purpose of the Fort Laramie Treaty was to end armed conflict and preserve amity between Native American tribes and the United States. See supra Part III.A; see also Janis, 32 Ct. Cl. at 409 (explaining that the "general purpose of the Indian indemnity acts . . . was to keep the peace"); Hernandez, 93 Fed. Cl. at 199 (noting that the Fort Laramie Treaty was intended to preserve peace). Here, plaintiffs allege that Mr. Hotz was prosecuted and is currently incarcerated, but they do not allege that Mr. Hotz's conduct was of the nature that constituted a breach by the United States of its obligation to maintain peace with the Oglala Sioux Tribe. Moreover, plaintiffs do not allege that Mr. Hotz, a "non-Indian," Compl. ¶ 7, was "subject to the authority of the United States," 15 Stat. at 635, i.e., that Mr. Hotz was an agent, employee, representative, or otherwise acting in any other capacity for or on behalf of the United States at the time of the accident that resulted in the deaths of Ms. Randall and Mr. Whirlwind Horse.[9] See Slattery, 2011 WL 257841, at *9 n.3 (requiring that a breaching entity be "part of the federal government" or "acting as its agent" in order to assert Tucker Act jurisdiction); cf. Compl. ¶ 7 (alleging that Mr. Hotz was the "former operator of a retail grocery store at White Clay, Nebraska").

A common thread is discernible from Hebah, Begay, Tsosie, Elk, and Hernandez: the court possesses jurisdiction over Article I "bad men" clause claims where there exists a nexus between the individual committing the alleged "wrong" and the United States. See also Zephier, slip. op. at 9 ("The Sioux Treaty, like others, clearly states that the United States will both arrest a non-Native American government representative who harms a Sioux or his property and reimburse the damages sustained by the claimant . . . ." (emphasis added)). In each of these

[9] Because the court assumes all factual allegations are true and draws all reasonable inferences in the plaintiffs' favor, the court deems plaintiffs' allegation that Mr. Hotz was a "non-Indian" to mean that he was "white."

cases, the alleged "bad men" were individuals–whether "white" or "other people"–who were "subject to the authority of the United States" in some capacity.[10] See, e.g., Tsosie, 825 F.2d at 397 (involving a United States Public Health Service Hospital employee); Begay, 219 Ct. Cl. at 599 (involving teachers, both white and Native American, who were employed at a BIA school); Hebah, 456 F.2d at 696 (involving an Indian Police Force officer who was subject to the authority of Interior); Elk, 70 Fed. Cl. at 406 (involving an Army staff sergeant). A claim alleging that an individual not affiliated with the United States committed "wrongs" against Native Americans was dismissed for lack of subject matter jurisdiction. See Hernandez, 93 Fed. Cl. at 200 (involving an officer who was employed by WING, a non-federal agency).

Waivers of sovereign immunity, including the Tucker Act, must be narrowly construed. Radioshack Corp. v. United States, 566 F.3d 1358, 1360 (Fed. Cir. 2009). Plaintiffs do not explain how their broad conception of the government's liability under the relevant "bad men" clause is sustainable under this principle of statutory construction. Although "Indian treaties are to be interpreted liberally in favor of the Indians," Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999), courts are not bound by the interpretation of a treaty advanced by a tribe or tribal member in support of litigation. Plaintiffs' interpretation yields an absurd result and imposes upon the federal government an impossible task: to guarantee the safety and tranquility of all Native Americans on reservations during any and all of their interactions with anyone. Such an interpretation is unsustainable, and it is contrary to the limitations the parties recognized at the time they negotiated the Fort Laramie Treaty. See S. Rep. No. 39-156, at 5 (acknowledging the difficulty, if not impossibility, of restraining all white men from engaging in armed conflict with Native Americans). It is apparent that the United States assumed a limited obligation when it negotiated the Fort Laramie Treaty: to ensure that an identifiable class of individuals who acted as agents, employees, representatives, or in any other capacity for or on behalf of the United States, viz., "people subject to the authority of the United States," 15 Stat. at 635 (emphasis added), maintained the peace between the United States and the Sioux Nation, see Report to the President by the Indian Peace Commission, January 7, 1868, supra note 3, at 5. Accordingly, the court holds that, in order to invoke jurisdiction under the first "bad men" clause contained in Article I of the Fort Laramie Treaty, a plaintiff must allege a "loss" that resulted from a "wrong" committed by a "bad man" who was "subject to the authority of the United States," i.e., an individual who acted as an agent, employee, representative, or in any other capacity for or on behalf of the United States.

That the United States is liable solely for the conduct of individuals associated therewith or acting on its behalf is consistent with cases alleging the existence of an enforceable contract with the government. A breach of contract action against the government cannot be maintained absent actual authority by an agent of the United States to bind the government, Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997); see also id. ("Anyone entering

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[10] Although it is unclear who the "bad men" were in Zephier, the plaintiffs alleged that the "wrongs" to which they were subjected occurred while they attended educational institutions that were overseen by Interior. Slip op. at 2.

into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains . . . even when the Government agents themselves may have been unaware of the limitations of their authority."), and no liability attaches absent such authority. Just as the United States may not be held liable for any alleged breach of contract that may have been executed in the absence of an agent's authority to bind the government, so, too, can the United States not be held liable for any "wrong" committed by any "bad man" who does not act on behalf of or represent the United States. See Slattery, 2011 WL 257841, at *9 n.3.

Plaintiffs do not allege that Mr. Hotz was an agent, employee, representative, or otherwise acting in any other capacity for or on behalf of the United States at the time of the tragic incident that killed Ms. Randall and Mr. Whirlwind Horse. Despite their profound loss, plaintiffs have not alleged that they are within the class of plaintiffs–Native Americans who sustained losses as a result of a "wrong" committed by a "bad man" who acted in a capacity for or on behalf of the United States–entitled to recover under the relevant "bad men" clause of Article I of the Fort Laramie Treaty. See Jan's Helicopter Serv., Inc., 525 F.3d at 1309. Accordingly, plaintiffs cannot invoke jurisdiction under the Tucker Act. See Slattery, 2011 WL 257841, at *9 n.3. Because the court lacks subject matter jurisdiction over the complaint, defendant's motion to dismiss pursuant to RCFC 12(b)(1) is granted.[11]

IV. CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is **GRANTED**. The clerk is directed to **DISMISS WITHOUT PREJUDICE** the complaint for lack of subject matter jurisdiction and to enter judgment. No costs.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge

[11] In light of its jurisdictional ruling, the court need not address the arguments raised in defendant's RCFC 12(b)(6) motion concerning the nature of the "wrong" contemplated by the Fort Laramie Treaty.

In the United States Court of Federal Claims

No. 10-503 C

JAMES RICHARD, SR., ET AL.,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion and Order, filed March 31, 2011, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, without prejudice, for lack of subject matter jurisdiction. No costs.

Hazel C. Keahey
Clerk of Court

March 31, 2011 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

ADDENDUM B

ADDENDUM B
TREATY WITH THE SIOUX INDIANS, April 29, 1868

Treaty between the United States of America and different Tribes of Sioux Indians; Concluded April 29 et seq., 1868; *Ratification advised February 16*, 1869; *Proclaimed February 24*, 1869.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: April 29 *et seq.*, 1868.

WHEREAS a treaty was made and concluded at Fort Laramie, in the Territory of Dakota, [now in the Territory of Wyoming,] on the twenty-ninth day of April, and afterwards, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S. F. Tappan, C. C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Ma-za-pon-kaska, Tah-shun-ka-co-qui-pah, Heh-won-ge-chat, Mah-to-non-pah, Little Chief, Makh-pi-ah-lu-tah, Co-cam-i-ya-ya, Con-te-pe-ta, Ma-wa-tan-ni-hav-ska, He-na-pin-wa-ni-ca, Wah-pah-shaw, and other chiefs and headmen of different tribes of Sioux Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: Preamble.

Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C C. Augur, J. B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises. Contracting parties.

ARTICLE I. 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. War to cease and peace to be kept.

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. Offenders against the Indians to be arrested, &c.

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; 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 the provisions of this article as in his judgment may be proper. But no one sustaining Wrong-doer against the whites to be punished. Damages.

loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Reservation. ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river Boundaries. where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those Certain persons not to enter or reside thereon. herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Additional arable land to be added, if, &c. ARTICLE III. If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as farmers, the United States agrees to set apart, for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

Buildings on reservation. ARTICLE IV. The United States agrees, at its own proper expense, to construct at some place on the Missouri river, near the centre of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a storeroom for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached to the same, to cost not exceeding eight thousand dollars.

Agent's residence, office, and duties. ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he 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, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he 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.

Heads of families may select land for farming.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Others may select land for cultivation.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "SIOUX LAND BOOK."

Surveys.

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the commissioner of the general land office, and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

Alienation and descent of property.

Certain Indians may receive patents for one hundred and sixty acres of land.

Such Indians receiving patents to become citizens of the United States.

Education.

ARTICLE VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and

Children to attend school.

female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

School-houses and teachers.

Seeds and agricultural implements.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

Instruction in farming.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

Second blacksmith.

Physician, farmer, &c may be withdrawn.

ARTICLE IX. At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer, and miller herein provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations for the expenditure of said sum as will best promote the educational and moral improvement of said tribes.

Additional appropriation in such case.

Delivery of goods in lieu of money or other annuities.

ARTICLE X. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on [or before*] the first day of August of each year, for thirty years, the following articles, to wit:

Clothing.

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Other necessary articles.

Appropriation to continue for thirty years.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress

* The words "or before" are inserted with black pencil.

may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

Army officer to attend the delivery.

Meal and flour.

Cows and oxen.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

Right to occupy territory outside of reservation surrendered.

Right to hunt reserved.

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

Agreements as to railroads;

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.

emigrants &c.;

4th. They will never capture, or carry off from the settlements, white women or children.

women and children;

5th. They will never kill or scalp white men, nor attempt to do them harm.

white men;

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

Pacific railroad, wagon roads, &c.

Damages for crossing their reservation.

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.

Military posts or roads.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI. of this treaty.

No treaty for cession of reservation to be valid unless, &c.

United States to furnish physicians, teachers, &c.

ARTICLE XIII. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Presents for best crops.

ARTICLE XIV. It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.

Reservation to be permanent home of tribes.

ARTICLE XV. The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI. hereof.

Unceded Indian territory.

ARTICLE XVI. The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be

Not to be occupied by whites, &c.

permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

Effect of this treaty upon former treaties.

ARTICLE XVII. It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

Execution by the Brulé band.

In testimony of all which, we, the said commissioners, and we, the chiefs and headmen of the Brulé band of the Sioux nation, have hereunto set our hands and seals at Fort Laramie, Dakota Territory, this twenty-ninth day of April, in the year one thousand eight hundred and sixty-eight.

N. G. TAYLOR, [SEAL.]
W. T. SHERMAN, [SEAL.]
Lt. Genl.
WM. S. HARNEY, [SEAL.]
Bvt. Maj. Gen. U. S. A.
JOHN B. SANBORN, [SEAL.]
S. F. TAPPAN, [SEAL.]
C. C. AUGUR, [SEAL.]
Bvt. Maj. Genl.
ALFRED H. TERRY, [SEAL.]
Bvt. M. Gen. U. S. A.

Attest:
A. S. H. WHITE, *Secretary.*

Executed on the part of the Brulé band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized, at Fort Laramie, D. T., the twenty-ninth day of April, in the year A. D. 1868.

MA-ZA-PON-KASKA, his x mark, Iron Shell. [SEAL.]
WAH-PAT-SHAH, his x mark, Red Leaf. [SEAL.]
HAH-SAH-PAH, his x mark, Black Horn. [SEAL.]
ZIN-TAH-GAH-LAT-SKAH, his x mark, Spotted Tail. [SEAL.]
ZIN-TAH-SKAH, his x mark, White Tail. [SEAL.]
ME-WAH-TAH-NE-HO-SKAH, his x mark, Tall Mandas. [SEAL.]
SHE-CHA-CHAT-KAH, his x mark, Bad Left Hand. [SEAL.]
NO-MAH-NO-PAH, his x mark, Two and Two. [SEAL.]
TAH-TONKA-SKAH, his x mark, White Bull. [SEAL.]
CON-RA-WASHTA, his x mark, Pretty Coon. [SEAL.]
HA-CAH-CAH-SHE-CHAH, his x mark, Bad Elk. [SEAL.]
WA-HA-KA-ZAH-ISH-TAH, his x mark, Eye Lance. [SEAL.]
MA-TO-HA-KE-TAH, his x mark, Bear that looks behind! [SEAL.]
BELLA-TONKA-TONKA, his x mark, Big Partisan. [SEAL.]
MAH-TO-HO-HONKA, his x mark, Swift Bear. [SEAL.]
TO-WIS-NE, his x mark, Cold Place. [SEAL.]
ISH-TAH-SKAH, his x mark, White Eyes. [SEAL.]
MA-TA-LOO-ZAH, his x mark, Fast Bear. [SEAL.]
AS-HAH-KAH-NAH-ZHE, his x mark, Standing Elk. [SEAL.]
CAN-TE-TE-KI-YA, his x mark, The Brave Heart. [SEAL.]
SHUNKA-SHATON, his x mark, Day Hawk. [SEAL.]
TATANKA-WAKON, his x mark, Sacred Bull. [SEAL.]
MAPIA SHATON, his x mark, Hawk Cloud. [SEAL.]
MA-SHA-A-OW, his x mark, Stands and Comes. [SEAL.]
SHON-KA-TON-KA, his x mark, Big Dog. [SEAL.]

Attest:
ASHTON S. H. WHITE, *Secretary of Commission.*
GEORGE B. WITHS, *Phonographer to Commission.*
GEO. H. HOLTZMAN.
JOHN D. HOWLAND.
JAMES C. O'CONNOR.
CHAS. E. GUERN, *Interpreter.*
LEON F. PALLARDY, *Interpreter.*
NICHOLAS JANIS, *Interpreter.*

Execution by the Ogallalah band.

Executed on the part of the Ogallalah band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized, at Fort Laramie, the twenty-fifth day of May, in the year A. D. 1868.

TAH-SHUN-KA-CO-QUI-PAH, his x mark, Man-afraid-of-his-horses. [SEAL.]
SHA-TON-SKAH, his x mark, White Hawk. [SEAL.]
SHA-TON-SAPAH, his x mark, Black Hawk. [SEAL.]
E-GA-MON-TON-KA-SAPAH, his x mark, Black Tiger. [SEAL.]
OH-WAH-SHE-CHA, his x mark, Bad Wound. [SEAL.]
PAH-GEE, his x mark, Grass. [SEAL.]
WAH-NON-REH-CHE-GEH, his x mark, Ghost Heart. [SEAL.]
CON-REEH, his x mark, Crow. [SEAL.]
OH-HE-TE-KAH, his x mark, The Brave. [SEAL.]
TAH-TON-KAH-HE-YO-TA-KAH, his x mark, Sitting Bull. [SEAL.]
SHON-KA-OH-WAH-MON-YE, his x mark, Whirlwind Dog. [SEAL.]
HA-HAH-KAH-TAH-MIECH, his x mark, Poor Elk. [SEAL.]
WAM-BU-LEE-WAH-KON, his x mark, Medicine Eagle. [SEAL.]

CHON-GAH-MA-HE-TO-HANS-KA, his x mark, High Wolf. [SEAL.]
WAH-SE-CHUN-TA-SHUN-KAH, his x mark, American Horse. [SEAL.]
MAH-HAH-MAH-HA-MAK-NEAR, his x mark, Man that walks under the ground. [SEAL.]
MAH-TO-TOW-PAH, his x mark, Four Bears. [SEAL.]
MA-TO-WEE-SHA-KTA, his x mark, One that kills the bear. [SEAL.]
OH-TAH-KEE-TOKA-WEE-CHAKTA, his x mark, One that kills in a hard place. [SEAL.]
TAH-TON-KAH-TA-MIECH, his x mark, The poor Bull. [SEAL.]
OH-HUNS-EE-GA-NON-SKEN, his x mark, Mad Shade. [SEAL.]
SHAH-TON-OH-NAH-OM-MINNE-NE-OH-MINNE, his x mark, Whirling Hawk. [SEAL.]
MAH-TO-CHUN-KA-OH, his x mark, Bear's Back. [SEAL.]
CHE-TON-WEE-KOH, his x mark, Fool Hawk. [SEAL.]
WAH-HOH-KE-ZA-AH-HAH, his x mark, One that has the lance. [SEAL.]
SHON-GAH-MANNI-TOH-TAN-KA-SEH, his x mark, Big Wolf Foot. [SEAL.]
EH-TON-KAH, his x mark, Big Mouth. [SEAL.]
MA-PAH-CHE-TAH, his x mark, Bad Hand. [SEAL.]
WAH-KE-YUN-SHAH, his x mark, Red Thunder. [SEAL.]
WAK-SAH, his x mark, One that Cuts Off. [SEAL.]
CHAM-NOM-QUI-YAH, his x mark, One that Presents the Pipe. [SEAL.]
WAH-KE-KE-YAN-PUH-TAH, his x mark, Fire Thunder. [SEAL.]
MAH-TO-NONK-PAH-ZE, his x mark, Bear with Yellow Ears. [SEAL.]
CON-REE-TEH-KA, his x mark, The Little Crow. [SEAL.]
HE-HUP-PAH-TOH, his x mark, The Blue War Club. [SEAL.]
SHON-KEE-TOH, his x mark, The Blue Horse. [SEAL.]
WAM-BALLA-OH-CON QUO, his x mark, Quick Eagle. [SEAL.]
TA-TONKA-SUPPA, his x mark, Black Bull. [SEAL.]
MOH-TO-HA-SHE-NA, his x mark, The Bear Hide. [SEAL.]

Attest:
S. E. WARD.
JAS. C. O'CONNOR.
J. M. SHERWOOD.
W. C. SLICER.
SAM DEON.
H. M. MATTHEWS.
JOSEPH BISSONETTE, *Interpreter.*
NICHOLAS JANIS, *Interpreter.*
LEFROY JOTT, *Interpreter.*
ANTOINE JANIS, *Interpreter.*

Execution by the Minneconjon band.

Executed on the part of the Minneconjon band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

At Fort Laramie, D. T., May 26, '68, 13 names.

HEH-WON-GE-CHAT, his x mark, One Horn. [SEAL.]
OH-PON-AH-TAH-E-MANNE, his x mark, The Elk that bellows Walking. [SEAL.]

At Fort Laramie, D. T., May 25, '68, 2 names.
HEH-HO-LAH-REH-CHA-SKAH, his x mark, Young White Bull. [SEAL.]
WAH-CHAH-CHUM-KAH-COH-KEE-PAH, his x mark, One that is afraid of Shield. [SEAL.]
HE-HON-NE-SHAKTA, his x mark, The Old Owl. [SEAL.]
MOC-PE-A-TOH, his x mark, Blue Cloud. [SEAL.]
OH-PONG-GE-LE-SKAH, his x mark, Spotted Elk. [SEAL.]
TAH-TONK-KA-HON-KE-SCHNE, his x mark, Slow Bull. [SEAL.]
SHONK-A-NEE-SHAH-SHAH-A-TAH-PE, his x mark, The Dog Chief. [SEAL.]
MA-TO-TAH-TA-TONK-KA, his x mark, Bull Bear. [SEAL.]
WOM-BEH-LE-TON-KAH, his x mark, The Big Eagle. [SEAL.]
MA-TOH-EH-SCHNE-LAH, his x mark, The Lone Bear. [SEAL.]
MAH-TOH-KE-SU-YAH, his x mark, The One who Remembers the Bear. [SEAL.]
MA-TOH-OH-HE-TO-KEH, his x mark, The Brave Bear. [SEAL.]
EH-CHE-MA-HEH, his x mark, The Runner. [SEAL.]
TI-KI-YA, his x mark, The Hard. [SEAL.]
HE-MA-ZA, his x mark, Iron Horn. [SEAL.]

Attest:
JAS. C. O'CONNOR.
WM. H. BROWN.
NICHOLAS JANIS, *Interpreter.*
ANTOINE JANIS, *Interpreter.*

Execution by the Yanctonais band.

Executed on the part of the Yanctonais band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized:

MAH-TO-NON-PAH, his x mark, Two Bears. [SEAL.]
MA-TO-HNA-SKIN-YA, his x mark, Mad Bear. [SEAL.]
HE-O-PU-ZA, his x mark, Louzy. [SEAL.]
AH-KE-CHE-TAH-CHE-CA-DAN, his x mark, Little Soldier. [SEAL.]
MAH-TO-E-TAN-CHAN, his x mark, Chief Bear. [SEAL.]
CU-WI-H-WIN, his x mark, Rotten Stomach. [SEAL.]
SKUN-KA-WE-TKO, his x mark, Fool Dog. [SEAL.]
ISH-TA-SAP-PAH, his x mark, Black Eye. [SEAL.]
IH-TAN-CHAN, his x mark, The Chief. [SEAL.]
I-A-WI-CA-KA, his x mark, The one who Tells the Truth. [SEAL.]
AH-KE-CHE-TAH, his x mark, The Soldier. [SEAL.]
TA-SHI-NA-GI, his x mark, Yellow Robe. [SEAL.]
NAH-PE-TON-KA, his x mark, Big Hand. [SEAL.]
CHAN-TEE-WE-KTO, his x mark, Fool Heart. [SEAL.]
HOH-GAN-SAH-PA, his x mark, Black Catfish. [SEAL.]
MAH-TO-WAH-KAN, his x mark, Medicine Bear. [SEAL.]
SHUN-KA-KAN-SHA, his x mark, Red Horse. [SEAL.]
WAN-RODE, his x mark, The Eagle. [SEAL.]
CAN-HPI-SA-PA, his x mark, Black Tomahawk. [SEAL.]
WAR-HE-LE-RE, his x mark, Yellow Eagle. [SEAL.]
CHA-TON-CHE-CA, his x mark, Small Hawk, or Long Fare. [SEAL.]
SHU-GER-MON-E-TOO-HA-SKA, his x mark, Tall Wolf. [SEAL.]

MA-TO-U-TAH-KAH, his x mark, Sitting Bear. [SEAL.]
HI-HA-CAH-GE-NA-SKENE, his x mark, Mad Elk. [SEAL.]

Arapahoes.

LITTLE CHIEF, his x mark. SEAL.
TALL BEAR, his x mark. SEAL.
TOP MAN, his x mark. SEAL.
NEVA, his x mark. SEAL.
THE WOUNDED BEAR, his x mark. SEAL.
THIRLWIND, his x mark. SEAL.
THE FOX, his x mark. SEAL.
THE DOG BIG MOUTH, his x mark. SEAL.
SPOTTED WOLF, his x mark. SEAL.
SORREL HORSE, his x mark. SEAL.
BLACK COAL, his x mark. SEAL.
BIG WOLF, his x mark. SEAL.
KNOCK-KNEE, his x mark. SEAL.
BLACK CROW, his x mark. SEAL.
THE LONE OLD MAN, his x mark. SEAL.
PAUL, his x mark. SEAL.
BLACK BULL, his x mark. SEAL.
BIG TRACK, his x mark. SEAL.
THE FOOT, his x mark. SEAL.
BLACK WHITE, his x mark. SEAL.
YELLOW HAIR, his x mark. SEAL.
LITTLE SHIELD, his x mark. SEAL.
BLACK BEAR, his x mark. SEAL.
WOLF MOCASSIN, his x mark. SEAL.
BIG ROBE, his x mark. SEAL.
WOLF CHIEF, his x mark. SEAL.

Witnesses:
ROBT. P. MCKIBBIN,
Capt. 4 Inf. Bvt. Lt. Col. U. S. A. Comdg. Ft. Laramie.
WM. H. POWELL, *Bvt. Maj. Capt. 4th Inf.*
HENRY W. PATTERSON, *Capt. 4th Infy.*
THEO. E. TRUE, *2d Lieut. 4th Inf.*
W. G. BULLOCK.
CHAS. E. GUERN,
Special Indian Interpreter for the Peace Commission.

FORT LARAMIE, WG. T., *Nov.* 6, 1868.

MAKH-PI-AH-LU-TAH, his x mark, Red Cloud. [SEAL.]
WA-KI-AH-WE-CHA-SHAH, his x mark, Thunder Man. [SEAL.]
MA-ZAH-ZAH-GEH, his x mark, Iron Cane. [SEAL.]
WA-UMBLE-WHY-WA-KA-TUYAH, his x mark, High Eagle. [SEAL.]
KO-KE-PAH, his x mark, Man Afraid. [SEAL.]
WA-KI-AH-WA-KOU-AH, his x mark, Thunder Flying Running. [SEAL.]

Witnesses:
W. MCE. DYE, *Bvt. Col. U. S. A. Comg.*
A. B. CAIN, *Capt. 4 Inf. Bt. Maj. U. S. A.*
ROBT. P. MCKIBBIN, *Capt. 4 Inf. Bvt. Lt. Col. U. S. A.*
JNO. MILLER, *Capt. 4th Inf.*
G. L. LUHN, *1st Lieut. 4th Inf. Bvt. Capt. U. S. A.*

H. C. SLOAN, *2d Lt. 4th Inf.*
WHITTINGHAM COX, *1st. Lieut. 4th Infy.*
A. W. VOGDES, *1st Lt. 4th Infy.*
BUTLER D. PRICE, *2d Lt. 4th Inf.*

HEADQRS., FORT LARAMIE, *Novr.* 6, '68.

Executed by the above on this date.
All of the Indians are Ogallalahs excepting Thunder Man and Thunder Flying Running, who are Brulés.

WM. McE. DYE,
Maj. 4th Infy. and Bvt. Col. U. S. A. Comg.

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOISE, *Interpreter.*
P. J. DE SMET, S. J., *Missionary among the Indians.*
SAML. D. HINMAN, B. D., *Missionary.*

Execution by the Uncpapa band.

Executed on the part of the Uncpapa band of Sioux, by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

CO-KAM-I-YA-YA, his x mark, The Man that Goes in the Middle.	[SEAL.]
MA-TO-CA-WA-WEKSA, his x mark, Bear Rib.	[SEAL.]
TA-TO-KA-IN-YAN-KE, his x mark, Running Antelope.	[SEAL.]
KAN-GI-WA-KI-TA, his x mark, Looking Crow.	[SEAL.]
A-KI-CI-TA-HAN-SKA, his x mark, Long Soldier.	[SEAL.]
WA-KU-TE-MA-NI, his x mark, The One who Shoots Walking.	[SEAL.]
UN-KCA-KI-KA, his x mark, The Magpie.	[SEAL.]
KAN-GI-O-TA, his x mark, Plenty Crow.	[SEAL.]
HE-MA-ZA, his x mark, Iron Horn.	[SEAL.]
SHUN-KA-I-NA-PIN, his x mark, Wolf Necklace.	[SEAL.]
I-WE-HI-YU, his x mark, The Man who Bleeds from the Mouth.	[SEAL.]
HE-HA-KA-PA, his x mark, Elk Head.	[SEAL.]
I-ZU-ZA, his x mark, Grind Stone.	[SEAL.]
SHUN-KA-WI-TKO, his x mark, Fool Dog.	[SEAL.]
MA-KPI-YA-PO, his x mark, Blue Cloud.	[SEAL.]
WA-MLN-PI-LU-TA, his x mark, Red Eagle.	[SEAL.]
MA-TO-CAN-TE, his x mark, Bear's Heart.	[SEAL.]
A-KI-CI-TA-I-TAU-CAN, his x mark, Chief Soldier.	[SEAL.]

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOIS[E], *Interpreter.*
P. J. DE SMET, S. J., *Missy. among the Indians.*
SAML. D. HINMAN, *Missionary.*

by the Blackfeet band.

Executed on the part of the Blackfeet band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

CAN-TE-PE-TA, his x mark, Fire Heart.	[SEAL.]
WAN-MDI-KTE, his x mark, The One who Kills Eagle.	[SEAL.]
SHO-TA, his x mark, Smoke.	[SEAL.]
WAN-MDI-MA-NI, his x mark, Walking Eagle.	[SEAL.]
WA-SHI-CUN-YA-TA-PI, his x mark, Chief White Man.	[SEAL.]

KAN-GI-I-YO-TAN-KE, his x mark, Sitting Crow. [SEAL.]
PE-JI, his x mark, The Grass. [SEAL.]
KDA-MA-NI, his x mark, The One that Rattles as he Walks. [SEAL.]
WAH-HAN-KA-SA-PA, his x mark, Black Shield. [SEAL.]
CAN-TE-NON-PA, his x mark, Two Hearts. [SEAL.]

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOISE, *Interpreter.*
P. J. DE SMET, S. J., *Missy. among the Indians.*
SAML. D. HINMAN, *Missionary.*

Execution by the Cutheads band

Executed on the part of the Cutheads band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

TO-KA-IN-YAN-KA, his x mark, The One who Goes Ahead Running. [SEAL.]
TA-TAN-KA-WA-KIN-YAN, his x mark, Thunder Bull. [SEAL.]
SIN-TO-MIN-SA-PA, his x mark, All over Black. [SEAL.]
CAN-I-CA, his x mark, The One who Took the Stick. [SEAL.]
PA-TAN-KA, his x mark, Big Head. [SEAL.]

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOIS[E], *Interpreter.*
P. J. DE SMET, S. J., *Missy. among the Indians.*
SAML. D. HINMAN, *Missionary.*

by the Two Kettle band;

Executed on the part of the Two Kettle band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

MA-WA-TAN-NI-HAN-SKA, his x mark, Long Mandan. [SEAL.]
CAN-KPE-DU-TA, his x mark, Red War Club. [SEAL.]
CAN-KA-GA, his x mark, The Log. [SEAL.]

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOISE, *Interpreter.*
P. J. DE SMET, S. J, *Missy. among the Indians.*
SAML. D. HINMAN, *Missionary to the Dakotas.*

by the Sans Arch band.

Executed on the part of the Sans Arch band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized.

HE-NA-PIN-WA-NI-CA, his x mark, The One that has Neither Horn. [SEAL.]
WA-INLU-PI-LU-TA, his x mark, Red Plume. [SEAL.]
CI-TAN-GI, his x mark, Yellow Hawk. [SEAL.]
HE-NA-PIN-WA-NI-CA, his x mark, No Horn. [SEAL.]

Attest:
JAS. C. O'CONNOR.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOIS[E], *Interpreter.*
P. J. DE SMET, S. J., *Missy. among the Indians.*
SAML. D. HINMAN, *Missionary.*

Executed on the part of the Santee band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized. Execution by the Santee band.

WA-PAH-SHAW, his x mark, Red Ensign. SEAL.
WAH-KOO-TAY, his x mark, Shooter. SEAL.
HOO-SHA-SHA, his x mark, Red Legs. SEAL.
O-WAN-CHA-DU-TA, his x mark, Scarlet all over. SEAL.
WAU-MACE-TAN-KA, his mark x, Big Eagle. SEAL.
CHO-TAN-KA-E-NA-PE, his x mark, Flute-player. SEAL.
TA-SHUN-KE-MO-ZA, his x mark, His Iron Dog. SEAL.

Attest:
SAML. D. HINMAN, B. D., *Missionary.*
J. N. CHICKERING, *2d Lt. 22d Infy., Bvt. Capt. U. S. A.*
P. J. DE SMET, S. J.
NICHOLAS JANIS, *Interpreter.*
FRANC. LA FRAMBOISE, *Interpreter.*

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the sixteenth day of February, one thousand eight hundred and sixty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit: Ratification.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 16, 1869.

Resolved (two thirds of the senators present concurring), That the Senate advise and consent to the ratification of the treaty between the United States and the different bands of the Sioux nation of Indians, made and concluded the 29th April, 1868.

Attest:

GEO. C. GORHAM,
Secretary.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the sixteenth of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty. Proclamation.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-
[SEAL.] nine, and of the Independence of the United States of America, the ninety-third.

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD, *Secretary of State.*

United States Court of Appeals
for the Federal Circuit

No. 2011-5083

----------)

JAMES RICHARD, SR., (Personal Representative of the Estate of Calonnie D. Randall, Deceased), and JON WHIRLWIND HORSE, (Personal Representative of the Estate of Robert J. Whirlwind Horse, Deceased),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

----------)

DECLARATION OF AUTHORITY PURSUANT TO 28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am an employee of Counsel Press. Counsel Press was retained by James D. Leach, Esq., Attorney for Plaintiffs-Appellees to print the enclosed documents.

The attached Brief of Plaintiffs-Appellants has been submitted to Counsel Press, by the above attorney, electronically and/or has been reprinted to comply with the Court's rules. Because of time constraints and the distance between counsel of record and Counsel Press, counsel is unavailable to provide an original signature, in ink, to be bound in one of the documents. Pursuant to 28 U.S.C. §1746 and Federal Circuit Rule 47.3(d), I have signed the documents for James D. Leach, with actual authority on his behalf as an attorney appearing for the party.

June 20, 2011

John Kruesi

CERTIFICATE OF SERVICE

United States Court of Appeals
for the Federal Circuit
No. 2011-5083

----------)

JAMES RICHARD, SR., (Personal Representative of the Estate of Calonnie D. Randall, Deceased), and JON WHIRLWIND HORSE, (Personal Representative of the Estate of Robert J. Whirlwind Horse, Deceased),

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by JAMES D. LEACH, ESQ., Attorney for Plaintiffs-Appellants to print this document. I am an employee of Counsel Press.

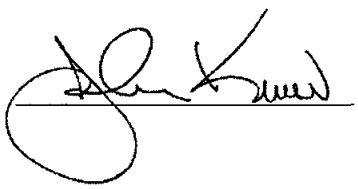
On the **20th Day of June, 2011**, I served the within **Brief of Plaintiffs-Appellants** upon:

J. Hunter Bennett
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044

via Express Mail, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

Unless otherwise noted, the required copies have been hand-delivered to the Court on the same date as above.

June 20, 2011



CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

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2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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June 20, 2011
Date

(s) James D. Leach
Name: James D. Leach
Attorney for Plaintiffs-Appellants