2011 WL 4735227 (C.A.Fed.) (Appellate Brief)
United States Court of Appeals, 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.

No. 2011-5083.
September 29, 2011.

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

Reply Brief of Plaintiffs-Appellants

James D. Leach, Attorney at Law, 1617 Sheridan Lake Road, Rapid City, SD 57702-3483, (605) 341-4400, Counsel for Plaintiffs-Appellants.

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*1 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' "

According to the government, *Tsosie* does not mean what it says: that "any 'white' can be a 'bad man.' " The government contends that the words "unlikely," "no showing," and "whatever that means" in *Tsosie* signify that this Court did not mean what it said. And the government rejects *Tsosie's* analysis as "superficial." Government's Brief at 21-25.

Stare decisis is essential to our legal system. "To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). Further, "[p]anels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc." Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006).

Alleged deficiencies in the language or reasoning of a decision do not make it nonprecedential. By that standard, few decisions would be so perfectly written and reasoned as to constitute precedent.

***2** *Tsosie* does not definitively establish the meaning of the Treaty words "other people subject to the authority of the United States." But this was irrelevant in *Tsosie*, and is irrelevant here. In the phrase "bad men among the whites, or among other people subject to the authority of the United States," the post-comma words "other people subject to the authority of the United States" do not modify "bad men among the whites." Indeed, *Tsosie* establishes that the precise meaning of "other people subject to the authority of the United States" is not essential to concluding that "bad men among the whites" means "bad men among the whites."

The lower court disagreed, but had no authority not to follow *Tsosie*. The government argued in *Tsosie* that the Federal Tort Claims Act and other factors had "lessen[ed] the Indian's need for the surviving 'bad men' provision." *Tsosie* rejected this argument, ruling that "the 'bad men' provision is not confined to 'wrongs' by government employees." 825 F.2d at 400. This conclusion was necessary and essential to rejecting the government's argument, so it is not dictum. And if the government's argument is that this conclusion was not "necessary" or "essential" because *Tsosie* could have been written differently, by that standard no decision would be precedent.

The government cites *Hernandez v. United States*, 93 Fed. Cl. 193 (2010), which dismissed a *pro se* complaint partly because it failed to allege that any ***3** defendant was an agent of the United States. But *Hernandez* has no persuasive value because it does not even mention *Tsosie*, by which the *Hernandez* court was bound.

Finally, the government argues that the lower court was not bound by *Tsosie* because *Tsosie* was based on the "bad men" provision of the 1868 Treaty with the Navajo, whereas this case arises under the 1868 Treaty with the Sioux. Government brief at 25. But the two treaties use the same language, and were entered the same year for the same purpose. No basis exists--and the government suggests none--for concluding that the same language means one thing in one treaty, but something else in the other.

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 (including the words "subject to the authority of the United States") and structure of the Treaty

The primary source for construing any text is the text itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) ("The starting point in every case involving construction of a statute is the language itself.") The Fort Laramie Treaty states: "bad men among the whites." The government never explains why these words are ambiguous. Nor does the government suggest how, in 1868, the parties to the Treaty could have believed that these words mean something other than what they say.

***4** The government's sole textual argument is based on the words "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." Government's brief at 32 to 37. *Tsosie* said that "other people subject to the authority of the United States" most likely meant "Indian nonmembers of the Navajo tribe but subject to United States law." 825 F.3d at 400. The government argues that somehow this is inconsistent with the fact that the Treaty was between two nations. But there was nothing inconsistent about the United States, as part of a treaty limiting the rights of Indians, to agree to protect Indians from people who were subject to its authority.

If the drafters of the Treaty had intended to limit the "bad men among the whites" paragraph to the government's officers, agents, and employees, the Treaty would read: "If federal officers, agents, or employees shall commit any wrong upon the person or property of the Indians [etc.]." But instead it reads: "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 [etc.]."

According to the government, the comma that follows "bad men among the whites," and precedes "or among other people subject to the authority of the United States," should be disregarded. The government says that commas were meaningless in the 19th century. Plaintiffs disagree. "Men's lives may depend upon a comma" is ***5** from the 19th century. *United States v. Palmer*, 16 U.S. 610, 636 (1818) (Johnson, J., dissenting). If men's lives may depend on a comma, so too may their treaty rights.

The government cites *Hammock v. Loan and Trust*, 105 U.S. 77, 84 (1881), for the rule that "[p]unctuation is no part of the statute." *Hammock* stands for the rule that a clearly meaningless or inadvertent comma is not controlling. But the rule does not say that punctuation should be disregarded as a matter of course.

Bryan Garner condemns the maxim that "punctuation is not a part of the statute" as "nonsense" which is based on "fallac[y] ... too obvious to require extensive explanation." Garner says: "consider the following statement shorn of the punctuation marks: 'Woman--without her, man would be a savage.' " *Garner's Dictionary of Legal Usage*, Oxford University Press (3d. ed. 2011) at 730.

Punctuation is as essential as words in establishing meaning. Periods, commas, and the like are the road signs of a text. They tell the reader how the words of a text are to be understood in relation to each other. Few if any legal documents would be intelligible if their punctuation were not heeded. The Fort Laramie Treaty's "bad men among the whites" paragraph has six commas among its 81 words. The "bad men among the Indians" paragraph has 12 commas among its 169 words. Neither makes sense without the commas.

***6** As plaintiffs noted in their opening brief, the words "subject to the authority of the United States" appear not only in the "bad men among the whites" paragraph, but also in the "bad men among the Indians" paragraph that follows it, and must be given a consistent meaning in both paragraphs. In response, the government argues that in the "bad men among the Indians" paragraph, "subject to the authority of the United States" modifies only "Indian." According to the government, "[i]t would make no *sense* for the United States to involve itself in situations where a citizen of one Indian nation committed a wrong against a citizen of another Indian nation." Government's brief at 26. But why not? The text itself tells us that if "bad men among the Indians" commit a wrong against *"any one*, white, black, or Indian, subject to the authority of the United States, and at peace therewith." (emphasis added). Deterring war between Indians furthered the United States' goal of bringing peace to the West.

The government argues that in the "bad men among the Indians" paragraph, the words "and at peace therewith" refer to "Indian[s]" and do not include "white [s]" or "black[s]." Government's brief at 26-27 and 36. Plaintiffs agree. But this contradicts the government's argument that the words "subject to the authority of the United States" actually mean "officers, agents, and employees of the United States." Indians who are officers, agents, and employees of the United States necessarily are at peace therewith, so the words "and at peace therewith" would be surplusage. The words ***7** "and at peace therewith" are needed only if there are Indians who are "subject to the authority of the United States" but who are not "at peace therewith." So the words "subject to the authority of the United States" must include more than just federal officers, agents, and employees.

The government points out that some parts of the "bad men among the whites" paragraph are different than the "bad men among the Indians" paragraph. Government's brief at 27. But the government does not suggest how the differences affect the meaning of the words "subject to the authority of the United States" in the "bad men among the whites" paragraph.

As plaintiffs noted in their opening brief, the Treaty itself proves that its drafters knew how to say "officers, agents, and employees of the Government" when they wanted to do so--Article 2 of the Treaty promises that only "officers, agents, and

employees of the Government" may pass over, settle on, or reside on the reservation. And Article 2 follows immediately after the "bad men among the whites" and "bad men among the Indians" paragraphs.

The government's only response is to insist that the "legislative history" is so "compelling" that this inconvenient fact should be ignored. Government's brief at 36. But the Article 2 language "officers, agents, and employees of the Government" proves beyond doubt that in 1868, when the Treaty was made, when its drafters meant ***8** "officers, agents, and employees of the Government," they wrote "officers, agents, and employees of the Government."

b. The purpose of the treaty, the historical record, and the Doolittle Report

According to *Tsosie*, the historical record supports the conclusion that "bad men among the whites" includes "all whites." *Tsosie* says: "The legislative history of the Navajo treaty suggests that the bad man clause relating to wrongs to Navajos applied to such wrongs by *all whites* and nonwhites subject to United States jurisdiction." 825 F.2d at 400 n.2 (emphasis added). And *Tsosie* says: "The treaty was between two nations, and *each one promised redress for wrongs committed by its nationals against those of the other nation." Id*. (emphasis added).

In refusing to follow *Tsosie*, the lower court reinterpreted a small part of the historical record and reached a different conclusion. The lower court reasoned: the Doolittle Commission Report of 1867 cited violence against Indians by whites including United States soldiers; and said it was "difficult if not impossible to restrain white men" from such acts; and eventually resulted in the 1868 treaties, including the Fort Laramie Treaty; therefore the 1868 treaties must be interpreted in light of the Doolittle Commission Report, as well as the January 7, 1868, Report to the President by the Indian Peace Commission. Addendum 8-9. The government adopts the lower court's view. Government brief at 28-30.

***9** But a treaty is a contract. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.") The intention of both parties when they entered the contract controls--not the unexpressed, pre-negotiation statements of some members of one side. *Id*. ("Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties.")

This rule has particular importance in construing Indian treaties. "When Indians are involved, this Court has long given special meaning to this rule." *Id*. The United States, as "the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded," must "avoid taking advantage of the other side." *Id*. at 675-76. The words of a treaty must be construed not in any "technical" sense, but "in the sense in which they would naturally be understood by the Indians." *Id*. at 676.

Judged by these standards, the lower court's analysis proves nothing, because it is based solely on isolated statements in a report that was issued before the treaties were negotiated--statements that the Indians who later signed the Treaty knew nothing of. It would be as logical to interpret the treaties based on what the Indians ***10** wanted, and discussed among themselves in 1867, but did not communicate to the United States.

Furthermore, the lower court's analysis is incorrect If the real problem were violence between Indians and United States soldiers, the problem could have been solved by the United States withdrawing its soldiers. But of course the problem was broader, involving the United States and its citizens on one side, and Indians on the other.

The words of a text are the best guide to its purpose. *West Virginia University Hospitals, Inc., v. Casey*, 499 U.S. 83, 98 (1991). The words of the Treaty express the purpose of the Treaty. Article I states: "From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it." Addendum B at 1.

The "bad men among the whites" paragraph of Article I follows immediately thereafter. The two "bad men" paragraphs seek to preserve the peace by establishing a system to punish a member of one side who commits a wrong against a member of the other side. And both "bad men" paragraphs provide a financial remedy. The United States agrees to "reimburse the injured person for the loss sustained" by "bad men among the whites." The Indians agree that the United States will reimburse ***11** anyone injured by a "bad men among the Indians" from moneys otherwise due the Indians. Addendum B at 1.

Even disregarding all this, the Doolittle Commission Report will not bear nearly the weight the lower court and government give it. The Report consists of a 10-page introduction by Chairman Doolittle, and a 531-page Appendix consisting of raw fieldwork gathered by members of the Commission. *Condition of the Indian Tribes*, Government Printing Office (1867). A disinterested historian describes the Doolittle Report as "incomplete and largely misleading." Harry Kelsey, *The Doolittle Report of 1867 Its Preparation and Shortcomings*, 17 Arizona and the West, A Quarterly Journal of History No. 2 (1975) at 120.

The lower court and government cite the Doolittle Report extremely selectively. Other parts of the Report contradict their conclusions. For example, the lower court and the government claim that pages 5 and 6 of the introduction show that the "lawless white men" referred to in the Doolittle Report were "apparently United States soldiers." Government Brief at 11, 12, 29, and 48. In fact, pages 5 and 6 make clear that the "lawless white men" referred to are *not* United States soldiers:

• Page 5 says: "The committee are [sic] of [the] opinion that in a large majority of cases Indian wars are to be traced to the aggressions of lawless white men, always to be found upon the ***12** frontier, or boundary line between savage and civilized life. Such is the statement of the most experienced officers of the army, and of all those who have been long conversant with Indian affairs." *Condition of the Indian Tribes, supra*. Such "lawless white men, always to be found upon the frontier, or boundary line between savage and civilized life" could not refer to soldiers. And "the most experienced officers of the army" would know how to say "soldiers" if they meant "soldiers."

• Page 5 quotes Colonel Kit Carson as saying: "as a general thing the difficulties arise from aggressions on the part of the whites." And page 5 quotes him again: "The whites are always cursing the Indians, and are not willing to do them justice." *Condition of the Indian Tribes, supra*. Colonel Carson would have known how to say "soldiers" if he meant "soldiers."

• Page 6 cites white territorial expansion--not soldierly misbehavior--as a cause of Indian wars: "In their eager search for gold or fertile tracts of land, the boundaries of Indian reservations are wholly disregarded; conflicts ensue; exterminating wars ***13** follow, in which the Indian is, of course, at the last, overwhelmed if not destroyed." *Condition of the Indian Tribes, supra.*

In support of their theory that the "lawless white men" referred to in the Doolittle Report were United States soldiers, the lower court and government cite selectively from a few pages of the 531-page Appendix. Government brief at 12 and 31. But the Appendix is so full of unedited data that examples abound to support almost any theory. And the Appendix shows that white civilians created many problems for the Indians:

• Hon. J. W. Nesmith, a member of the Joint Special Committee, reported: "As the white population becomes more dense, and as the value of the lands increases, the desire to intrude upon the reservations for purposes of settlement and trade also increases. I assured the chiefs that their apprehensions of having their homes taken from them were groundless, and that so long as they conducted themselves in a peaceable and proper manner, the government would protect them in their homes, which had been guaranteed to them by solemn treaty stipulations." *Condition of the Indian Tribes, supra*, Appendix at 5.

***14** • Colonel Carson recounted that war is caused when Indians are treated unjustly by settlers, who blame the Indians for their own wrongs, and then "abuse[] the Indians, striking or sometimes shooting them." *Condition of the Indian Tribes, supra*, Appendix at 96.

• An Assistant Inspector General stated that in the "aggressions of white men upon our Indians, many of our Indian wars had their inception," that the government should "protect [Indians] in their rights against the aggressions of the white man," and that tribes were "excited to hostility by the unprovoked and outrageous shooting of their people by emigrants." *Condition of the Indian Tribes, supra*, Appendix at 436-37.

The lower court and government say that the Doolittle Report shows that it would have been difficult for the United States to restrain every white on the frontier. But the "bad men among the whites" paragraph does not promise that the United States will prevent every bad man from committing wrongs against the Indians. Rather, it sets up a method to punish offenders and compensate Indians when wrongs occur.

***15** Plaintiffs' historical analysis, as set forth in their opening brief, is far more persuasive than the lower court and government's analysis. Unlike the lower court and government, plaintiffs locate the words "bad men . . . among the whites" and "wrong" in the Indian Peace Commission's Report. Plaintiffs identify the purpose of the Treaty as to remove the cause of Indian grievances. And plaintiffs identify Lieutenant General Sherman as the human link between the Indian Peace Commission Report and the 1868 treaties. Plaintiff's brief at 14 to 17.

Regardless of whose historical analysis is more persuasive, historical antecedents never trump a document's plain meaning as expressed in the words chosen by the parties who entered it. "Legislative history" is a different issue, because it involves relatively contemporaneous statements by the people who actually enacted legislation, not the pre-negotiation hopes of one party to a treaty. But even when dealing with legislative history, while "clear evidence of congressional intent may illuminate ambiguous text," the opposite is not true. "We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dept. of the Navy*, ___ U.S. ___, 131 S.Ct. 1259, 1266 (2011).

***16 c. The canons of construction of Indian treaties**

The government says that the canons of construction of Indian treaties do not "require courts to accept interpretations advanced by a tribe or tribal member in support of litigation," nor do they require courts to "rewrite congressional acts so as to make them mean something they obviously were not intended to mean." Government brief at 31, quoting *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947). Plaintiffs agree. They made no such arguments. The government, not plaintiffs, seeks to rewrite the Treaty, and thereby "fails to carry out its promises to the Indians in good faith." *Id*. at 180.

III. Prolonged nonenforcement does not extinguish Indian treaty rights

The government makes three arguments, all of which lack merit. First, the government argues that *Tsosie's* ruling that "Prolonged nonenforcement, without preemption, does not extinguish Indian rights" should be disregarded because a case that *Tsosie* cited as an "example"--*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)--supposedly does not support this conclusion. Government's brief at 38. But a ruling does not depend on the cases it cites. And a decision is precedent even if the losing party disputes it. The government implicitly asks this panel to overrule *Tsosie*.

***17** Second, the government argues that the lack of a "bad men among the whites" claim based on actions of a private citizen from 1868 to 2010 is "powerful evidence that the Indian signatories to the Treaty did not interpret the Treaty to make the United States liable for wrongs committed by this class of person." Government brief at 39. But by that logic, the lack of *any* "bad men among the whites" claim from 1868 to 1970 would have proven that no such claims could be made--and *Tsosie* rejected that view. The government speculates that there was a shared understanding among Indians that the "bad men among the whites" clause is limited to government representatives. But if this were so, surely the government could cite some evidence of it--but it cites none.

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Finally, the government states that the Treaty's lack of a time limitation on "bad men among the whites" claims does not prove what "bad men among the whites" means. Government's brief at 40 to 41. This is true. But the issue is whether the lack of prior claims means that claims cannot be brought now. The Treaty's time limitations on other provisions, contrasted with the lack of a time limitation on "bad men among the whites" claims, establishes that no time limit exists for such claims. As *Tsosie* noted, "When the parties to the treaty wished a provision to be in effect temporarily only, they knew how to say so." 825 F.3d at 399.

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

Ex Parte Crow Dog, decided fifteen years after the 1868 treaties, describes the "bad men among the whites" paragraph of the Fort Laramie Treaty as an agreement between "the party of whites and their allies" and "the tribe of Indians with whom the treaty is made." 109 U.S. at 567-68. The government's sole response is to claim that this statement is dictum. Government's brief at 42.

Plaintiffs disagree. The statement was necessary and essential to the decision, and inexorably led the Court to the conclusion that the defendant could not be tried by the United States for a crime he allegedly committed against another member of the same tribe, so it is not dictum:

Here there 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. In each case the guilty party is to be tried and punished by the United States, and in case the offender is one of the Indians who are parties to the treaty, the agreement is that he shall be delivered up. In case of refusal, deduction is to be made from the annuities payable to the tribe, for compensation to the injured person, a provision which points quite distinctly to the conclusion that the injured person cannot himself be one of the same tribe.

Ex Parte Crow Dog, 109 U.S. at 567-68.

***19** Likewise, the government's treatment *of Janis v. United States* is unconvincing. *Janis* says that the "bad men" provisions "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." 32 Ct. Cl. at 410-11. And *Janis* says that the phrase "other persons subject to the authority of the United States" 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.

The government's only response to *Janis* is to say that because the plaintiff-- a white who had become a "squaw man" by marrying a Sioux woman, living on the reservation, and allegedly being adopted into the tribe--lost his case, it follows that "merely because somebody appears to fit within the 'bad men' treaty provisions does not mean that they were an intended beneficiary of those provisions." Government brief at 43. But the government's argument is not relevant to this case. *Janis's* conclusion that the plaintiff's particular circumstances excluded him from coverage under the "bad men" provisions does not suggest anything about the outcome of this case.

On the other hand, *Janis's* explanation of the "bad men" provisions, and of the words "other persons subject to the authority of the United States," directly support ***20** plaintiffs. And because *Janis*, like *Crow Dog*, is a relatively contemporaneous understanding of the treaty--as distinct from today's more distant vantage point--they carry extra weight. *In re Bilski*, 545 F.3d 943, 971 (Fed. Cir. 2008), *aff'd* ___ U.S. ___, 130 S.Ct. 3218 ("nearly contemporaneous English cases following shortly after the 1793 Act lend further insight into what processes were thought to be patentable under the English practice at the time the statute was enacted.").

V. *Tsosie* is not "absurd"

Contrary to the government's argument, plaintiffs have never asserted that the government must "guarantee financially the safety and tranquility of Indians on reservations by paying for any injury sustained at the hands of any white person." Government brief at 44.

The government argues that "143 years after the Treaty was signed, the notion that the United States and the Sioux are two independent sovereigns standing on the precipice of war is absurdly outdated, as is the idea that 'the Indians shall be responsible for what Indians do within the white man's territory and . . . the Government will be responsible for what white men do within the Indian's territory.' " Government's brief at 45. But that is not the issue. Plaintiffs have never contended that the Sioux may resume warfare against the United States, or that the two parties must remain entirely separate and apart.

***21** The Fort Laramie Treaty's most fundamental provision remains in full force and effect: the United States, not the Sioux, control most of the Sioux ancestral homeland. So the Sioux remain disadvantaged by the Treaty. The government's position is that it may continue to enforce the Treaty, but the Sioux may not. It cites no authority for its position. And *Tsosie* rejected the government's "obsolescence theory." 825 F.3d at 398. There is nothing "absurd" about requiring the government to continue to honor its Treaty.

According to the government, *Herrera* and *Pablo*, which place territorial limitations on "bad men among the whites" claims under the 1868 Treaty with the Navajo, do not apply to "bad men among the whites" claims by Sioux Indians under the 1868 Fort Laramie Treaty. In support of this argument, the government points out that under the Navajo Treaty, Indians who leave the reservation may not receive Treaty benefits. The government says that the Fort Laramie Treaty does not contain an "identical" provision. Government's brief at 44.

The government chose the word "identical" carefully. The 1868 Fort Laramie Treaty does not contain "identical" language, but has language that has a similar effect. The Sioux promised that after the buildings specified in the Treaty were constructed, "they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere ...." Addendum B at 6 (Article XV). A ***22** Sioux Indian who lives off the reservation today would likely not be eligible to seek an award for a wrong done by a "bad men among the whites," because the Treaty contemplates that Sioux will live on their reservation. A Sioux who ignores one part of the Treaty is unlikely to receive benefits under another part of it. This result is consistent with the territorial construction of the Fort Laramie Treaty in *Ex Parte Crow Dog* (no criminal jurisdiction under "bad men among the Indians" paragraph over Indian on reservation for crime against another Indian of same tribe on reservation) and *Janis v. United States* (no benefits under "bad men among the Indians" paragraph for a white who lives on the reservation).

VI. Involuntary manslaughter of two innocent human beings while driving drunk-- a crime that requires "a wanton or reckless disregard for human life"-- is a "wrong" within the meaning of the Treaty's words "any wrong upon the person or property of the Indians"

Calonnie Randall and Robert Whirlwind Horse's killer drank until intoxicated, drove onto the Pine Ridge Indian Reservation, ran them down, then fled the scene. He pled guilty to involuntary manslaughter. Complaint ¶¶ 5 to 10, A22-23. The crime requires "the unlawful killing of a human being without malice," either "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a).

***23** A person commits involuntary manslaughter only if he "acted with a wanton or reckless disregard for human life, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others." *United States v. Opsta*, 659 F.2d 848, 849 (8th Cir. 1981), quoting *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980). The mental state required for conviction is " 'gross' or 'criminal' negligence," which is "a far more serious level of culpability than that of ordinary tort negligence, but still short of the extreme recklessness, or malice required for murder." *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992). A

maximum sentence of eight years is authorized. 18 U.S.C. § 1112(b). Calonnie Randall and Robert Whirlwind Horse's killer was sentenced to 51 months imprisonment. Complaint ¶ 9, A23.

The Fort Laramie Treaty provides: "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, [etc]." Addendum B at 1 (emphasis added). The nature of the "wrong" is not qualified or limited; to the contrary, the word "any" before "wrong" shows that "wrong" is intended as broadly as possible.

It is self-evident that "any wrong" includes, at a minimum, the unlawful taking of two human lives while acting with "a wanton or reckless disregard for human life" ***24** by driving while intoxicated. "To an Indian, and undoubtedly to all men, the killing of an Indian without just cause or reason would certainly be a wrong within the meaning of the Treaty of 1868." *Hebah v. United States*, 197 Ct. Cl. 729, 456 F.2d 696 (1972). The "bad men among the whites" paragraph of the 1868 Fort Laramie Treaty is word-for-word identical with the "bad men among the whites" paragraph of the 1868 Treaty at issue in *Hebah*.

To attempt to limit the scope of "any wrong," the government relies on *Hernandez v. United States*, 93 Fed. Cl. 193 (2010). But even *Hernandez* says that "any wrong" includes "a crime of moral turpitude." *Id*. at 199 n.5. And in the Eighth Circuit, where Timothy Hotz ran down and killed Calonnie Randall and Robert Whirlwind Horse, involuntary manslaughter is a crime of moral turpitude. *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995).

The dictionary says that "wrong" means "not in accordance with what is morally right or good." *Webster's Unabridged Dictionary of the English Language* 2193 (Random House 2001). In law, it means "(1) out of order; (2) contrary to law or morality; wicked; or (3) other than the right or suitable or the more or most desirable." *Garner's Dictionary of Legal Usage*, Oxford University Press (3d. ed. 2011) at 958. Under these or any other definitions, killing two pedestrians while driving drunk is a "wrong."

***25** The principles of treaty construction are described above. The primary guide is the text itself. The purpose of the Treaty may be considered in understanding the text. Any ambiguity must be construed in favor of the Indians. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The United States, because it is "the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded," bears "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). Accordingly, 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).

According to the government, the purpose of the Treaty does not support reading "any wrong" as including the unlawful killing of two human beings by a white man driving drunk on the reservation. But in *Garreaux v. United States*, 77 Fed. Cl. 726, 735 (2007), the government argued that the "any wrong" requirement is satisfied where plaintiff is the victim of a crime: "According to Defendant, in order for Plaintiff to state a claim pursuant to the [Fort Laramie] Treaty, Plaintiff must allege that she was the victim of a crime, or at least allege that the perpetrator engaged in some ***26** affirmative act." Under the government's position in *Garreaux*, the unlawful killing of two human beings while driving drunk is a "wrong."

The government relies on the Doolittle Commission Report of 1867. But as explained above, the language of the Treaty--not previous statements by some citizens of the United States that the Indians knew nothing about when they entered the Treaty--is the best guide to what the parties agreed to.

The government cites the Treaty's general statement that it sought to end war between the parties, and argues that only acts that would have "threatened the peace" are covered. Government's brief at 48. The drunken killing of two Indians by a white man on the reservation acting with "a wanton or reckless disregard for human life" certainly could have "threatened the peace" in 1868. Indians in the 19th century would not have been impressed by a lawyerly argument that the white killer should be treated

differently because he lacked the specific intent to kill. In any event, the Treaty's words show that it sought to create and keep peace through a comprehensive agreement that included the "bad men among the whites" paragraph, which applied not just to acts that "threatened the peace," but to "any wrong."

Conclusion and Statement of Relief Sought

"[B]ad men among the whites" means "bad men among the whites." A person who drives drunk and runs down and kills two human beings while acting with "a ***27** wanton or reckless disregard for human life," commits a "wrong." The judgment should be reversed and the case remanded for further proceedings.

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