2011-5083

IN THE 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 Appeals for Federal Claims in case no. 10-CV-503, Judge Margaret M. Sweeney

CORRECTED BRIEF FOR DEFENDANT-APPELLEE

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CORRECTED BRIEF FOR DEFENDANT-APPELLEE

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Respondent-appellee is also unaware of any case pending in this or any other court that will directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the "bad men" provision of the Fort Laramie Treaty between the United States and the Sioux Nation obligates the United States to compensate members of the Sioux tribe for a "wrong" committed by a white man who was not an employee, agent or representative of the United States or acting for or upon its behalf.

2. Whether plaintiffs, who are suing pursuant to the "bad men" provision of the Fort Laramie Treaty, have failed to state a claim upon which relief can be granted because they have failed to allege that Timothy Hotz, the alleged "bad man," committed the alleged "wrong" intentionally and/or with malice, and because the "wrong" that he allegedly committed was not of the type that would have threatened the peace that the Fort Laramie Treaty was designed to protect.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiffs-appellants (hereinafter, "plaintiffs"), 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), appeal from a March 31, 2011 final decision of the United States Court of Federal Claims in *Richard, et al. v. United States*, No. 10-503. The Court of

Federal Claims dismissed plaintiffs' complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims because plaintiffs failed to allege that the man who was responsible for the deaths of decedents was an agent, employee, representative or otherwise acting for or on behalf of the United States.

II. Statement Of Facts And Course Of Proceedings Below

A. Statement Of Facts

Calonnie D. Randall and Robert J. Whirlwind Horse were members of the Oglala Sioux Tribe. JA 2. On August 27, 2008, they were walking along the highway on the Pine Ridge Indian Reservation in Shannon County, South Dakota when they were struck and killed by a vehicle driven by Timothy Hotz. JA 2. Mr. Hotz, who was intoxicated, fled the scene and was later arrested. JA 2. He pled guilty to involuntary manslaughter in the United States District Court for the District of South Dakota and was sentenced to 51 months of incarceration. JA 2. He is also subject to three years of supervised release. JA 2. Mr. Hotz 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. JA 2.

B. Course Of Proceedings Below

Plaintiffs filed an administrative claim with the United States Department of

the Interior. JA 2. That claim had been neither granted nor denied by August 2, 2010, when plaintiffs filed suit in the Court of Federal Claims. JA 2. In their complaint, they asserted that Ms. Randall and Mr. Whirlwind Horse, as members of the Oglala Sioux Tribe, were beneficiaries of the Fort Laramie Treaty, 15 Stat. 635, which the United States and Sioux Nation entered into in 1868. JA 2. Plaintiffs alleged that Mr. Hotz was a "bad man" under the Treaty and that his actions constituted a "wrong." JA 2. They sought $1.5 million for each estate as compensation for loss of income, companionship and love, as well medical expenses, burial expenses and other damages. JA 2. Additionally, plaintiffs sought costs, attorney fees, and any other relief permitted under the Fort Laramie Treaty. JA 2.

The United States moved to dismiss the complaint for lack of subject matter jurisdiction because plaintiffs failed to allege that Mr. Hotz was an employee or agent of the United States. It also contended that plaintiffs had failed to state a claim upon which relief could be granted because they did not allege that Mr. Hotz committed the alleged "wrong" intentionally and/or with malice, and because the wrong that he allegedly committed was not of the type that would have threatened the peace that the Fort Laramie Treaty was designed to protect.

The Court of Federal Claims granted the United States' motion on March

31, 2011, holding that it did not possess jurisdiction to entertain the complaint because plaintiffs had failed to allege that Mr. Hotz was an employee, agent or representative of the United States or otherwise acting for or on its behalf. The court did not decide the issue of whether plaintiffs had failed to state a claim upon which relief could be granted. Plaintiffs appealed to this Court.

SUMMARY OF ARGUMENT

The Court of Federal Claims correctly concluded that the Fort Laramie Treaty's "bad men" provision does not render the United States liable for wrongs committed by those who are not employees, agents, or representatives of the United States or otherwise acting upon the United States' behalf. Thus, it properly dismissed plaintiffs' complaint upon jurisdictional grounds.

Although *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir 1987) suggested that the "bad men" provision extended to "wrongs" committed by those who were not employees of the United States, that statement was *dicta*.

The plain language of the Treaty supports the trial court's conclusion. The "bad men among the Indians" portion of the "bad men" provision is expressly conditioned by the phrase "subject to the authority of the United States" which clearly modifies Indians, rather than whites.

The history surrounding the Treaty demonstrates that the "lawless white

men" who perpetrated wrongs upon the Indians were United States soldiers. It also establishes that the United States recognized the impossibility of preventing white men who were not its employees, representatives or agents or otherwise acting upon its behalf from attacking the Indians.

The various canons of construction cited by plaintiffs cannot overcome the plain language of the Fort Laramie Treaty and the history surrounding it, which both establish that the parties did not intend the United States to be liable for the actions of "bad men" who were not its employees, agents, or representatives or otherwise acting upon its behalf.

The plain language of the Treaty and history surrounding it establish that the lower court correctly interpreted the phrase "subject to the authority of the United States" notwithstanding plaintiffs' arguments based upon *dicta* in *Tsosie* and the placement of a comma.

The lower court did not rely upon "nonenforcement" of the "bad men" provision in reaching its decision. Furthermore, plaintiffs' reliance upon two Supreme Court cases from the 19th Century is misplaced because the statement they rely upon in the first case is *dicta*, and the second case establishes only 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.

The lower court correctly concluded that plaintiffs' urged interpretation of the "bad men" provision would yield an absurd result because it would impose upon the United States an impossible task and, furthermore, it is based upon the hopelessly outdated notion that the Sioux and the United States are two independent sovereigns standing upon the precipice of war.

Alternatively, this Court should affirm the lower court's dismissal because plaintiffs have failed to state a claim upon which relief can be granted. The history surrounding the provision and case law establish that the alleged "wrong" must be an intentional crime committed with malice, and it must be of the type that would have threatened the peace the "bad men" provision was designed to protect. Plaintiffs have failed to allege that Mr. Hotz acted intentionally or with malice, and the wrong they allege is not of the type that would have threatened the peace the provision was designed to protect.

ARGUMENT

I. Jurisdiction And Standard Of Review

This Court reviews a dismissal of a claim for lack of jurisdiction by the Court of Federal Claims *de novo*. *Guam v. United States*, 578 F.3d 1318, 1325 (2009).

II. The Court Of Federal Claims Correctly Concluded That The Fort Laramie Treaty's "Bad Men" Provision Does Not Render The United States Liable For Wrongs Committed By Those Who Are Not Employees, Agents, Or Otherwise Acting For Or On Behalf Of The United States

A. The "Bad Men" Provision

The Fort Laramie Treaty is one of nine treaties that were negotiated in 1867 and 1868, and were intended to resolve ongoing conflict between the United States and thirteen tribes representing "the great and warlike and dominant powers" among the Indians, consisting of the Kiowa and Comanche, 15 Stat. 581 (October 21, 1867), the Apaches, id. at 589 (October 21, 1867), the Cheyenne and Arapahoe, *id.* at 593 (October 28, 1867), the Ute, *id.* at 619 (March 2, 1868), various bands of the Sioux, id. at 635 (April 29, 1868), the Crows, id. at 649 (May 7, 1868), the Northern Cheyenne and Arapahoe, *id.* at 655 (May 10, 1868), the Navajo, id. at 667 (June 1, 1868), and the Eastern Shoshone and Bannack, *id.* at 673 (July 3, 1868). *Brown v. United States*, 32 Ct. Cl. 432, 435 (1897). Each treaty contains a "bad men" provision that is substantially similar to the one at issue here. *Tsosie*, 825 F.2d at 395. The Fort Laramie Treaty was signed April 29, 1868 and ratified and proclaimed the following February.

Like the other eight treaties, the Fort Laramie Treaty contains a "bad men" provision. That provision states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> [I]f bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws.

15 Stat. 635 at Article I.

B. <u>Treaty Interpretation</u>

"A treaty with an Indian tribe is a contract and should be interpreted to give effect to the intent of the signatories." *Elk v. United States*, 87 Fed. Cl. 70, 78 (2009) (Allegra, J.) *quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty . . . is essentially a contract between two sovereign nations."); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Tsosie v. United States*, 825 F.2d 393, 397 (Fed. Cir. 1987). "[T]he Supreme Court has made clear that while the court should look to the parties' 'choice of words,' it should also consider the 'larger context that frames the

Treaty,' including its 'history, purpose and negotiations.'" *Elk*, 87 Fed. Cl. at 79, *quoting Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196-203 (1999). Treaties are construed "to give effect to the terms as the Indians themselves would have understood them." *Minnesota*, 526 U.S. at 196; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Although treaties are liberally construed in favor of Indians, this canon of construction "is not a license to disregard clear expressions of tribal and congressional intent." *Herrera v. United States*, 39 Fed. Cl. 419, 420-21 (1997) (Hodges, J.); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) ("[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean.").

C. The Lower Court's Interpretation Of The "Bad Men" Provision Was Correct

After thoroughly reviewing the plain language of the Fort Laramie Treaty and the Treaty's history, the Court of Federal Claims correctly concluded that the "bad men" provision did not obligate the United States to pay for wrongs that were

committed by those who were not its employees, agents or representatives or otherwise acting for or on behalf of the United States.

The court examined the historical circumstances that led to the treaty. It noted that the Indian Wars were conducted with no formal declaration of war by Congress, required the use of military force and "constituted a state of war." JA 5 (*quoting Montoya v. United States*, 180 U.S. 261, 267 (1901)). Despite the execution of numerous treaties between the United States and various Indian tribes, hostilities persisted, with resentment among Native Americans towards the United States intensifying in the 1860s when the military increased its presence across the Great Plains. JA 5 (*quoting* Starley Talbott, *Fort Laramie* 8 (2010).

The court explained that in 1867, Native American tribal leaders, along with members of the United States military and other officials testified before a joint special committee charged with inquiring into the condition of Native Americans tribes. JA 5. This commission was known as the Doolittle Commission because it was chaired by Senator James R. Doolittle of Wisconsin. JA 5. The commission issued a report entitled *Condition of the Indian Tribes*, which stated that "useless wars with the Indians" could "be traced to the aggression of lawless white men, always to be found upon the frontier," JA 8 (*quoting Condition of the Indian Tribes* at 5, 10).

The court explained that the "lawless white men" to which the Doolittle Commission referred "were apparently United States soldiers who engaged in the 'indiscriminate slaughter of men, women, and children . . . .'" JA 8 (*quoting Condition of the Indian Tribes* at 5-6). For example, *Condition of the Indian Tribes* noted that soldiers embarked upon a "wholesale massacre" of Native Americans while they "believed themselves to be under the protection of our flag[.]" *Condition of the Indian Tribes* at 5-6. A subsequent passage reported that "officers . . . killed and butchered all they came to." *Condition of the Indian Tribes* at 29. The commission documented in graphic detail the murder and mutilation of Native American women and children by the United States military, even describing a massacre by soldiers of a Native American village. *Condition of the Indian Tribes* at 53, 57.

The Doolittle Commission recounted a battle that erupted after several Native Americans "were suddenly confronted by a party of United States soldiers." *Condition of the Indian Tribes* at 59. It also detailed an incident between a Native American and a soldier, the latter of whom "pulled out his revolver, fired and broke the Indian's arm." *Condition of the Indian Tribes* at 93. On another occasion, soldiers shot and killed a six-year-old girl who presented a "white flag on a stick" during a battle. *Condition of the Indian Tribes* at 96. The

report explained that, according to the Indians, "The soldiers are very drunken and come to our place . . . they run after our women and fire into our houses and lodges . . . ." *Condition of the Indian Tribes* at 371.

The lower court noted that the Indian Peace Commission, which had been established by Congress, explained in its January 1868 report to the president that:

> 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, note 3, at 42. The court observed that the Peace Commission acknowledged that "[m]any bad men are found among the whites," but cautioned that it was "difficult if not impossible to restrain white men, especially white men upon the frontiers from adopting [savage] warfare against the Indians." JA 9 (*quoting Report to the President by the Indian Peace Commission, January 7, 1868* at 36, and S. Rep. No. 39-156 at 5.) Citing *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009), the court observed that the Fort Laramie Treaty was intended to address myriad problems documented by the Doolittle Commission.

As the lower court explained, neither the Fort Laramie Treaty nor any

"legislative history"[1] related thereto defined the phrase "whites, or among other people subject to the authority of the United States." JA 9. However, the court reiterated that the Doolittle Commission's report documented numerous instances of humiliation, abuse, and murder of Native Americans by United States soldiers, and had 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 . . . ." JA 9 (*quoting* S. Rep. No. 39-156, at 7).

The lower court observed that, despite this indication that the "bad men" provision was aimed at curbing the aggressions of United States soldiers, this Court opined in *Tsosie v. United States*, 825 F.2d 393, 400 (Fed. Cir. 1987) that:

> [T]he "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.

JA 9 (*quoting Tsosie*, 825 F.2d at 400).

Noting that plaintiffs cited *Tsosie* to support their assertion that the court

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[1] The trial court used the phrase "legislative history" to describe the historical circumstances surrounding the origins of the Treaty. For consistency's sake, we have continued to use that phrase when appropriate.

possessed jurisdiction to entertain their complaint, the court explained that such reliance was misplaced for three reasons. JA 9-10. First, the alleged "bad man" who committed the "wrong" in *Tsosie* was an employee of a United States hospital facility located within the boundaries of a Navajo Reservation. The lower court pointed out that while *Tsosie* opined that liability was not confined to an employer-employee relationship between the United States and the alleged "bad man," in the instant case, not only was there no employer-employee relationship between Mr. Hotz and the United States, there was no relationship *at all* between the two beyond that Mr. Hotz was, apparently, a United States citizen, like approximately 307,000,000 others (including the decedents). JA 10. Second, the court pointed out that the Federal Circuit's observation was not essential to its analysis of the narrow issue presented on appeal and, therefore, was *dicta*. JA 10 (*citing Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004)).

Finally, the lower court noted that the Federal Circuit not only never explicated the meaning or scope of the clause, it expressly noted its ambiguity, stating: "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* . . . ." JA 10 (*quoting Tsosie*, 825 F.2d at

400) (emphasis supplied by Court of Federal Claims).

Because the court could not conclude, based upon *Tsosie*, that it possessed jurisdiction to entertain plaintiffs' complaint, it conducted a thorough review of "bad men" jurisprudence. The court observed that it was not until 1970, more than 100 years after the treaty was signed, that a case was brought in federal court by a native American invoking the first "bad men" clause. JA 10. It then noted that courts have consistently reached the merits of claims alleging that wrongs were committed by "bad men" who were subject to the authority of the United States. JA 10-13.

Conversely, the court observed that courts have dismissed claims that fail to include an allegation that "wrongs" were committed by individual "bad men" who were subject to the authority of the United States. JA 13. For example, in *Garreaux v. United States*, 77 Fed. Cl. 726, 736 (2007), the court dismissed a "bad men" claim for lack of jurisdiction because the alleged "bad man" was a federal agency rather than an individual affiliated with the United States, and the alleged wrong was a breach of contract or negligence. JA 13-14. *Garreaux* explained that "the primary intent of both 'bad men' provisions was to guard against affirmative criminal acts, primarily murder, assault, and theft of property." JA 13 (*quoting Garreaux*, 77 Fed. Cl. at 737).

Similarly, the lower court observed that, in *Hernandez v. United States*, 93 Fed. Cl. 193, (2010), the court dismissed a "bad men" claim alleging that the United States District Court for the District of Nebraska and a member of a non-federal agency conspired to violate the plaintiff's civil rights during the course of criminal proceedings that resulted in his conviction. JA 13-14 (*citing Hernandez*, 93 Fed. Cl. at 195-96). The plaintiff alleged that the United States breached the Fort Laramie Treaty by failing to arrest purported wrongdoers, including the District Court and a Western Intelligence Narcotics Group ("WING") officer, who allegedly bribed a witness. JA 14 (*citing Hernandez*, 93 Fed. Cl. at 198). *Hernandez* held that the plaintiff had failed to allege an act that would have threatened the peace that the Fort Laramie Treaty was designed to protect. JA 14 (*citing Hernandez*, 93 Fed. Cl. at 199). Additionally, the *Hernandez* court noted that a federal district court was not a "white man" pursuant to the treaty and the claims against the district court did not qualify as wrongful acts under the treaty. JA 14 (*citing Hernandez*, 93 Fed. Cl. at 199, 200 n. 7). Furthermore, *Hernandez* explained that even if the WING officer had committed a wrongful act, the Court of Federal Claims could not assert jurisdiction over the plaintiff's claims because WING was not a federal agency. JA 14 (*citing Hernandez*, 93 Fed. Cl. at 200).

The lower court concluded that plaintiffs' claim did not fall within the scope

of the Fort Laramie Treaty. JA 14. First, it noted that plaintiffs had failed to 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. JA 14. Then the lower court observed that plaintiffs did not allege that Mr. Hotz was "subject to the authority of the United States" – in other words, that he was an agent, employee, representative or otherwise acting for or on behalf of the United States at the time of the accident that caused the deaths of Mr. Whirlwind Horse and Ms. Randall. JA 14.

The lower court explained that the common thread between *Hebah v. United States*, 456 F.2d 696 (Ct. Cl. 1972), *Begay v. United States*, 224 Ct.Cl. 712 (1980), *Tsosie*, *Elk*, and *Hernandez* is that 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. JA 14. It observed that in each of these 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. JA 15.

The court stated that plaintiffs had failed to explain how their broad conception of the government's liability under the "bad men" provision was sustainable under the principle of statutory construction that waivers of sovereign

immunity, including the Tucker Act, must be narrowly construed. JA 15 (*citing Radioshack v. United States*, 566 F.3d 1358, 1360 (Fed. Cir. 2009)). It noted that although Indian treaties are to be liberally interpreted in favor of the Indians, courts are not bound by the interpretation advanced by a tribe or tribal member in support of litigation. JA 15. The court stated that the interpretation advanced by plaintiffs would yield an absurd result and impose upon the 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. JA 15. The court held that this interpretation was unsustainable and contrary to the limitations the parties recognized at the time they negotiated the Fort Laramie Treaty. JA 15 (citing 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)). The court held that the United States "assumed a limited obligation when it negotiated the Fort Laramie Treaty." JA 15. That obligation was "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, [in other words], 'people subject to the authority of the United States,'" . . . maintained the peace between the United States and the Sioux Nation." JA 15.

The court held that the United States is liable solely for the conduct of

individuals associated therewith or acting on its behalf, and that this conclusion is consistent with cases alleging the existence of an enforceable contract with the government. JA 15. It noted that a breach of contract action cannot be maintained absent actual authority by an agent of the United States to bind the government. JA 15 (*citing Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997).

Thus, the lower court correctly dismissed plaintiffs' complaint for lack of jurisdiction.

III. Plaintiffs Have Failed To Establish That The Court Of Federal Claims Erred In Dismissing Their Complaint Upon Jurisdictional Grounds

Plaintiffs make several arguments that the United States is liable pursuant to the Fort Laramie Treaty for the actions of every single white man who commits a "wrong" upon the Sioux, even if that white man has no relationship with the United States apart from being a citizen. These arguments are meritless.

A. Notwithstanding Plaintiffs' Protestations To The Contrary, *Tsosie*'s Statement That The Bad Men Provision Is Not Limited To Wrongs By Government Employees Was *Dicta*

Plaintiffs argue that *Tsosie*'s statement that "the 'bad men' provision is not confined to 'wrongs' by government employees" was not *dicta* and, therefore, that the lower court was bound to follow it. They are mistaken.

This Court explained in *Co-Steel Raritan, Inc. v. International Trade Commission*, 357 F.3d 1294, 1307 (Fed. Cir. 2004) that "[t]he word 'dicta' is an abbreviation for *obiter dicta*, which describes statements made by a court that are unnecessary to the decision in the case, and therefore not precedential . . . ." *Co-Steel Raritan* was a reaffirmance of this Court's statement in *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988) that "[i]t is well established that a general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding."

Plaintiffs state that, in *Tsosie*, "the government argued that the 'bad men' provision [was] no longer needed because of changes since 1868, including the adoption of the Federal Tort Claims Act in 1946." Brief at 7. They further assert that the Court "took [the government's argument] as an argument that the Treaty was preempted." Brief at 9. According to plaintiffs, "*Tsosie* ruled – in the course of deciding the case – that the government's argument failed because the 'bad men' provision extends to non-governmental employees." Brief at 9. They claim that "[t]his ruling was neither incidental nor collateral, nor was it illustration, analogy or argument." Brief at 9.

There are multiple problems with this argument. First, it appears that *Tsosie* may not have definitively decided the preemption issue. This makes sense

because, as plaintiffs concede, it also appears that the United States did not actually argue that the Federal Tort Claims Act preempted the "bad men" provision of the Navajo Treaty. Brief at 9.

In discussing the preemption argument that the United States apparently did not make, the Court noted that "[i]t is *unlikely* that Congress intended the Tort Claims Act . . . to preempt the Navajo treaty . . ." and then noted that "[a]bsent explicit statutory language, the Court has been extremely reluctant to find congressional abrogation of treaty rights." *Tsosie*, 825 F.2d 393 (emphasis added). The Court appeared to leave open the possibility that the FTCA had preempted the bad men provision, declining to state explicitly that it had not but saying instead, "[w]e are asked to pronounce finis to a treaty right, with no showing it has expired by its own express or implicit terms, or was abrogated by consent of the parties, or by Congress unilaterally. It is an inappropriate role for the judiciary . . . ." *Tsosie*, 825 F.2d at 401.

Consistent with the notion that the Court did not definitively conclude that the FTCA did not preempt the bad men provision but, instead, only determined that the parties had not made such a showing, the Court's analysis of the preemption issue was superficial. The Court opined that, "[t]he 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 Navajo tribe but subject to United States law." *Tsosie*, 825 F.2d at 400 (emphasis added). That *Tsosie* made little effort to interpret the clause that the lower court in this case concluded was pivotal to unlocking the meaning of the "bad men" provision is a powerful indication that the Court did not believe that determining the scope and application of the "bad men" provision was essential to its disposition of the case.

Indeed, to the extent that *Tsosie* did conclude that the FTCA did not preempt the bad men provision, the principal reason for that conclusion was that the type of wrong suffered by Ms. Tsosie – an intentional tort perpetrated by a federal government employee – was not one for which she could receive compensation under the FTCA. The Court explained, "[a]s this very case illustrates, [the FTCA] does not provide for assaults and batteries, the very type of 'wrong' most needing to be guarded against by the 'bad men' provision." *Tsosie*, 825 F.2d at 400.

That, in the Court's view, the 'bad men' provision was not confined to wrongs by government employees was only "addition[al]" or "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 . . . ." *Tsosie*, 825 F.2d at

400. It was not essential to the Court's disposition and, thus, was *dicta*. *Smith*, 855 F.2d at 1550.

In any event, plaintiffs fail to acknowledge that there were two other reasons why the lower court concluded that *Tsosie* did not resolve the jurisdictional issue in this case. First, as noted above, the alleged "bad man" in *Tsosie* was an employee of the United States government. Although *Tsosie* opined that liability was not confined to an employer-employee relationship between the United States and the alleged bad man, it did not address the situation present in this case where, as the lower court observed, "no relationship, whether employer-employee or otherwise, existed between Mr. Hotz, the alleged 'bad man,' and the United States." JA 10. In other words, not only was Mr. Hotz not an employee of the United States, he was also not an agent or other type of representative either. Thus, *Tsosie*'s statement that bad men are not confined to government employees would not be controlling here even if it were not *dicta* which, of course, it is.

The other reason why the lower court concluded that *Tsosie* was not controlling was because "the Federal Circuit never explicated the meaning or scope of the ["bad men"] clause." JA 10. The court pointed to *Tsosie*'s concession, through the use of the phrase "whatever that means," that the provision was ambiguous and its exact scope unclear. JA 10. Notably, the lower

court concluded that the very phrase that *Tsosie* conceded that it did not know the meaning of was the key to resolving the jurisdictional issue here.

Thus, even if *Tsosie*'s statement that non-government employees can be "bad men" under the Navajo Treaty were not *dicta*, which it is, it still would not be controlling in this case for the reasons identified by the lower court.

Finally, there is an additional reason why the lower court was not bound by *Tsosie*. *Tsosie* was interpreting the "bad men" provision of the Navajo Treaty, 15 Stat. 667 rather than the Fort Laramie Treaty. Although the "bad men" provisions were similarly worded, there are differences between the two treaties. The Sioux were not privy to the negotiations between the Navajo and the Sioux and, thus, may have had a different understanding of the Treaty's terms, as well as a different intent in entering into the Treaty.

B. The "Bad Men Among The Indians" Provision Does Not Support Plaintiffs' Argument

Plaintiffs also argue that because the phrase "subject to the authority of the United States appears in both the "bad men among the whites" provision of the Fort Laramie Treaty and the "bad men among the Indians" provision, it must be afforded the exact same meaning in both provisions. They assert that if "subject to the authority of the United States" meant employees or agents of the United States

only, then "the Treaty would provide no remedies when Indians massacred white women, children, or civilians." Brief at 13. This argument is not compelling because plaintiffs' urged reading of "subject to the authority of the United States" in the "bad men among the Indians" provision would yield a nonsensical result.

The "bad men among the Indians" provision states:

> 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 . . . deliver up the wrongdoer . . . .

Fort Laramie Treaty at 11. As *Tsosie* noted, "[t]he treaty was between two nations, and each one promised redress for wrongs committed by its nationals against those of the other nation." It 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. The only plausible reason that the United States would become involved in such a situation is if the Indian were "subject to the authority of the United States" – *i.e.*, an employee, agent or representative or someone who was working on the United States' behalf. Thus, the phrase "subject to the authority of the United States" clearly modifies "Indian" rather than "any one white, black[.]"

This conclusion is bolstered by the fact that the phrase "subject to the

authority of the United States" is followed immediately by "and at peace therewith . . . ." This phrase also clearly modifies Indians rather than whites and blacks. The Indians and United States were frequently in a state of war at the time of the Treaty. JA 5; *Elk*, 87 Fed. Cl. at 80. The United States was not, however, at war with its own citizens. Indeed, the Civil War had ended several years before. Therefore, the logical conclusion is that "subject to the authority of the United States, and at peace therewith" modifies "Indians" rather than "any one white [or] black."

It is also important to note that the "bad men among the Indians" provision is worded differently than the "bad men among the whites" provision. While the latter provision applies to wrongs committed by "bad men among the whites, or among other people subject to the authority of the United States . . .," the former provision applies to "wrongs" committed against "any one, white, black, or Indian." And, notably, the "bad men among the whites" provision contains no "at peace therewith" limitation. This indicates that the two provisions were not intended to be coextensive. Thus, even if "subject to the authority of the United States" were intended to modify "whites" as well as "Indians," plaintiffs' argument that the phrase must be read identically in both clauses would be meritless.

C. The Historical Record Supports The Lower Court's Holding That The "Bad Men" Provision Was Not Intended To Impose Liability Upon The United States For The Actions Of Those Who Were Not Government Employees, Agents, And/Or Representatives

Citing various portions of the Indian Peace Commission's Report to the President on January 7, 1868, plaintiffs assert that "[t]his history proves that "bad men among the whites" should not be read as "bad men among the whites who are also officers, agents, or employees of the federal government." Brief at 17. They claim that "[n]o 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." Brief at 17. This argument is meritless.

Notably, plaintiffs rely upon the same legislative history that the lower court did. Both parties acknowledge that there was armed conflict between the Indians and settlers moving westward. Brief at 14; JA 5. They also acknowledge that United States soldiers were drawn into this conflict. Brief at 14; JA 5. Plaintiffs and the lower court also agree that the Indian Peace Commission was created to remove, if possible, the causes of complaints among the Indians and bring about peace. Brief at 15; JA 5, n. 3, 9. And both parties noted that the Peace Commission observed that "[m]any bad men are found among the whites . . . ." Brief at 15; JA 9.

Plaintiffs end their cursory analysis of the history of the "bad men" provision here and pronounce that "[n]o 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." Brief at 17. They simply ignore the substantial evidence cited by the lower court supporting the conclusion that the "bad men" provision did not impose liability upon the United States for the actions of those who were not employees, representatives or agents of the United States. The lower court cited numerous passages in the Doolittle Commission's *Condition of the Indian Tribes* report indicating that the "lawless white men" who perpetrated wrongs upon the Indians were, in fact, United States soldiers. JA 8-9. Indeed, the Commission explicitly noted that "the blunders and want of discretion of inexperienced officers in command have brought on long and expensive wars." JA 9 (citing S. Rep. No. 39-156 at 7.)

The court also pointed out that both the Peace Commission and the Doolittle Commission recognized that it would be impossible to eliminate attacks by white men altogether. JA 9. The Peace Commission noted that it had been enjoined upon it 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.*" JA 9 (emphasis added). Similarly, the Doolittle Commission

stated that it would be "difficult, if not impossible to restrain white men, especially white men upon the frontiers from [adopting] savage warfare against the Indians." JA 9 (citing S. Rep. No. 39-156 at 7.) Thus, the lower court correctly concluded that the United States, which recognized that those who perpetrated wanton attacks upon the Indians were primarily United States soldiers and that it would likely be impossible to stop attacks by whites who had no relationship with the United States other than mere citizenship, did not agree to become liable for the actions of these whites who were not employees, agents, representatives, or otherwise acting on behalf of the United States. JA 15.

D. The Canons Of Construction Of Indian Treaties Do Not Weigh In Favor Of The Interpretation Urged By Plaintiffs

Plaintiffs assert that two canons of construction support its urged interpretation of the "bad men" provision. The first is that "treaties should be liberally construed in favor of the Indians with ambiguous provisions interpreted to their benefit . . . ." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The second is that 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." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 675-76 (1979).

Plaintiffs claim that the words "bad men among the whites" would naturally have been understood by the Indians in 1868 to mean "bad men among the whites" and that any ambiguity must be construed in the Indians' favor. Brief at 18. They are incorrect.

The lower court explicitly acknowledged that ambiguities must be construed in favor of the Indians but pointed out that this canon of construction does not require courts to accept interpretations advanced by a tribe or tribal member in support of litigation. JA 15. Indeed, the Supreme Court held that "[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

As the lower court explained, the Doolittle Commission report establishes that the white men who were perpetrating wrongs against the Indians were, by and large, United States soldiers. The report states that the Indians specifically complained about the United States military, saying "[t]he soldiers are very drunken and come to our place . . . they run after our women and fire into our houses and lodges . . . ." *Condition of the Indian Tribes* at 96. Furthermore, the

Doolittle Commission and the Indian Peace Commission both recognized the impossibility of eliminating all causes of the Indian's grievances (*i.e.*, stopping attacks perpetrated by those white men who had no connection to the United States government beyond citizenship). The Treaty explicitly states that it applies to "bad men among the whites, or among other people *subject to the authority of the United States* . . . ." 15 Stat. at 635-36. In light of the Treaty's "legislative history" and the plain language of the statute, it is clear that the Treaty was not intended by either party to make the United States liable for wrongs committed by those who were not employees, agents or representatives of the United States.

E. The Lower Court Correctly Interpreted The Phrase "Subject To The Authority Of The United States"

Plaintiffs argue that the lower court erred in concluding that the phrase "subject to the authority of the United States" modifies "among the whites" and, therefore, does not render the United States liable for the actions of those who are not its employees, agents or representatives. They are mistaken.

Plaintiffs assert that the lower court's reading is at odds with *Tsosie*'s "common sense" conclusion that "'other persons subject to the authority of the United States' likely refers to Indians who were not members of the Navajo tribe." Brief at 19. As plaintiffs point out, *Tsosie* quoted Lt. General Sherman's

statement promising the Navajo that, "[i]f 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." *Tsosie*, 825 F.3d at 400, n. 2.

Relying upon *Tsosie*'s interpretation is problematic for two reasons. First, the Court in *Tsosie* did not feel it necessary to reach a definitive conclusion about the meaning of "subject to the authority of the United States." It quoted the phrase and then said, "whatever that means, but most likely Indian non-members of the Navajo tribe but subject to United States law." *Tsosie*, 825 F.2d at 400. Thus, the Court expressly admitted its own lack of certitude as to the meaning of this phrase.

Furthermore, *Tsosie*'s musing about the possible meaning of this phrase is fundamentally at odds with its own statement that the treaties were "between two nations, and each one promised redress for wrongs committed by its nationals against those of the other nation." *Tsosie*, 825 F.2d at 400, n.2. *Tsosie* does not explain why the United States would agree to accept liability for "wrongs" committed by individuals from "[an]other nation." Thus, the phrase "subject to the authority of the United States" only makes sense when it is read to mean those who are employees, agents or representatives of the United States.

Plaintiffs also argue that the comma placement after "bad men among the

whites" prevents it from being modified by "or among other people subject to the authority of the United States." In support of their argument, they cite two United States Supreme Court cases: *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991) and *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993). Neither case supports plaintiffs' argument. The latter case actually undermines their position.

In *International Primate Protection League*, the Supreme Court was interpreting several statutes drafted in the late 20th Century. The Court's observations about comma usage are inapplicable to an Indian Treaty drafted in the 19th Century. In the 19th Century, "people tended to punctuate heavily, especially in their use of commas." The Oxford Companion to the English Language. Oxford New York, Oxford University Press 1992. Tom McCarthur ed., p. 824. Consequently, the Supreme Court did not rely upon punctuation when interpreting statutes back then. It explained in *Hammock v. Loan and Trust*, 105 U.S. 77, 84 (1881) (emphasis added) that "[w]hile the comma after the word 'motions,' if any force be attached to it, would give the section a broader scope that it would otherwise have, that circumstance should not have a controlling influence. *Punctuation is no part of the statute.*" *Hammock*, 105 U.S. at 84. For

this reason alone, plaintiffs' argument is meritless.

Furthermore, *United States National Bank of Oregon*, a case that plaintiffs assert supports their interpretation of the "bad men" provision based upon comma placement actually cautions against placing too much emphasis upon punctuation. The Court stated, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's plain meaning." *United States National Bank of Oregon*, 508 U.S. at 454. It added that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Id.* at 455.

Here, the language of the "bad men" provision and the legislative history of the Treaty indicate that the phrase "subject to the authority of the United States" was meant to modify "bad men among the whites" and limit the United States' liability to wrongs committed by its employees, agents, representatives and/or those acting upon its behalf. A single comma cannot overcome the intent of the parties. *Hammock*, 105 U.S. at 84; *United States National Bank of Oregon*, 508 U.S. at 454.

Plaintiffs also argue that, because Article II of the Treaty, which is wholly unrelated to the "bad men" provision refers to "officers, agents, and employes [sic]

of the government," the drafters would have used this language in Article I if they wanted to limit "bad men among the whites" to Government officers, agents and employees. Brief at 20-21. This argument once again fails to heed the Supreme Court's admonition that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States National Bank of Oregon*, 508 U.S. at 455. As explained above, it is clear from the legislative history of the statute that the parties were concerned with "wrongs" perpetrated by United States soldiers and recognized the limitations on the United States' ability to control the behavior of white men who were not employees, agents or representatives of the United States. Consequently, the "bad men" provision includes the "subject to the authority of the United States" limitation. The parties intended that the United States would be liable for the actions of those subject to its authority (*i.e.*, its employees, agents, representatives or those acting on its behalf). That the parties may have used a handful of different words in an unrelated section of the Treaty cannot overcome this compelling evidence of intent.

Finally, plaintiffs argue that the Government's interpretation of the "bad men" provision is contradicted by the words "and at peace therewith" in the "bad men among the Indian" section. They assert that "[i]f 'subject to the authority of

the United States' 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[,]" then "the drafters of the Treaty believed that there were outlaw government agents, employees, and representatives who were at war with the United States and, and who should not be protected by the Treaty." Brief at 21. As explained above, however, "and at peace therewith" clearly modifies "Indians" rather than whites and blacks. Given the frequent outbreaks of hostilities between Indians and the United States at the time of the Treaty, there clearly existed the possibility that an Indian employee, agent, representative or individual otherwise acting on behalf of the United States might suddenly find his tribe at war with the United States.

F. The Lower Court Did Not Rely Upon "Nonenforcement" Of The "Bad Men" Provision In Reaching Its Decision

Plaintiffs claim that "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," and argue that this alleged reliance was misplaced because "*Tsosie* rejected the argument that nonenforcement renders a treaty ineffective." Brief at 21 citing JA 10-14.

In the portion of the opinion to which plaintiffs cite, the court conducted a

thorough review of various bad men cases that have been decided since 1970, when the first "bad men among the whites" claim was brought in federal court by an Indian. Nowhere during the course of that review did the court assert that plaintiffs' claim failed because nobody had ever brought a claim based upon the actions of a non-federal employee. Rather, the court explicitly cited *Hernandez*, 93 Fed. Cl. at 200 in which the Court of Federal Claims concluded that it did not have jurisdiction over a case in which the alleged "bad man" was employed by a non-federal agency. It also observed that the other "bad men" cases in which courts concluded they possessed subject matter jurisdiction to entertain the claims were those in which "there exists a nexus between the individual committing the alleged wrong and the United States." JA 14. The court's conclusion that it lacked subject matter jurisdiction to entertain plaintiffs' claim was based upon the language of the Treaty, the history of the Treaty and numerous other factors, as explained above.

In any event, plaintiffs' reliance upon *Tsosie*'s statement that "prolonged nonenforcement, without preemption, does not extinguish Indian rights" is misplaced. *Tsosie*, 825 F.2d at 399. *Tsosie* cited *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) to support its conclusion that the "bad men" provision remained viable. *County of Oneida* is inapposite in this case, however.

In *County of Oneida*, the Supreme Court held that the Oneida tribe could maintain an action for violation of their possessory rights to land based upon federal common law. The tribe alleged that an agreement by which they conveyed land to the State of New York in 1795 was void because no United States Commissioner or other official of the federal government was present at the transaction as required by law. Defendants did not dispute that no federal government official was present at the transaction. *County of Oneida* did not involve an issue of Treaty interpretation like this case does. Rather, it involved various other issues including laches and statutes of limitations. Here, the question is whether the parties intended the "bad men among the whites" provision to render the United States liable for the actions of those who were not its employees, agents and/or representatives. That no Indian brought a suit against the United States for the actions of a private citizen who had no connection with the United States from the time the Treaty was signed until 2010, when the plaintiff in *Hernandez*, a *pro se* prisoner, raised such a claim 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.

Plaintiffs also cite *Virginia v. Stewart*, 131 S.Ct. 1632 (2011) to support their argument that this Court should attach no significance to the 142 years that

passed between the signing of the Treaty and Mr. Hernandez's complaint, which appears to be the first one alleging that the United States is liable for the actions of private citizens. *Stewart* is of no help to them, however. In that case, the Supreme Court acknowledged that "[l]ack of historical precedent can indicate a constitutional infirmity [in a lawsuit]" and that the lack of similar suits "gave us pause." *Stewart*, 131 S.Ct. at 1642. The Court's fears were alleviated, however, because it was "unaware that the necessary conditions have ever presented themselves except in connection with the [two statutes at issue], and the parties have referred us to no examples." *Stewart*, 131 S.Ct. at 1642.

Here, of course, it defies common sense to believe that, between 1868 and 2010, no private citizen of the United States committed a wrong against an Indian who belonged to one of the signatory tribes. Furthermore, the two statutes at issue in *Stewart* -- the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 114 Stat. 1677, and the Protection and Advocacy for Individuals with Mental Illness Act, 100 Stat. 478 – were passed in 2000 and 1986, respectively. Thus, the lack of historical precedent in *Stewart*, which gave the Court pause, was over a period that was considerably shorter than the 142 years in this case.

Plaintiffs also observe that the "bad men among the whites" provision is not time limited unlike other provisions in the Treaty. This lack of a time limit has no

bearing upon whether the clause applies to wrong committed by those who are not employees, agents and/or representatives of the United States and have no connection therewith.

G. Plaintiffs' Reliance Upon *Janis v. United States* And *Ex Parte Kan-Gi-Shun-Ca* Is Misplaced

Plaintiffs also rely upon *Ex Parte Kan-Gi-Shun-Ca*, 109 U.S. 556 (1883) and *Janis v. United States*, 32 Ct.Cl. 407 (1897) to support their argument that the United States is liable for the actions of non-citizens. This reliance is misplaced.

In *Kan-Gi-Shun-Ca*, the Supreme Court granted a writ of habeas corpus to a member of the Brule Sioux band of the Sioux Nation who had been sentenced to death for killing a fellow member of the Brule Sioux band. The United States argued that the Fort Laramie Treaty had repealed 28 U.S.C. § 2146, which excluded from the jurisdiction of the United States crimes committed by one Indian against another. *Kan-Gi-Shun-Ca*, 109 U.S. at 562. The United States further argued that based upon the Fort Laramie Treaty's "bad men" provision, the United States was entitled to prosecute defendant for crimes he committed against a fellow member of the Brule Sioux band. *Kan-Gi-Shun-Ca*, 109 U.S. at 567. The Supreme Court rejected this argument, holding that the Fort Laramie Treaty's "bad men" provision did not apply to crimes committed by one Indian against another

member of the same tribe. *Kan-Gi-Shun-Ca*, 109 U.S. at 568.

Plaintiffs cite as support for their position *Kan-Gi-Shun-Ca*'s statement that "[h]ere 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." *Kan-Gi-Shun-Ca*, 109 U.S. at 567-68. To the extent that "the party of whites and their allies" can be read to mean "all whites and non-whites who are citizens of the United States regardless of whether they are acting upon the United States' behalf," which is not at all clear, that statement is *dicta* because it was not essential to the Court's conclusion that the Fort Laramie Treaty did not provide the United States with jurisdiction to prosecute a member of the Brule Sioux for crimes he committed against another member of the Brule Sioux.

Plaintiffs' reliance upon *Janis* is also misplaced. There, the Court of Claims held that a white man who was a citizen of the United States but who had elected to marry a Sioux and live on the Sioux reservation could not recover from the Sioux for a wrong that was committed against him by members of the Sioux tribe. Notably, the court conceded that the plaintiff technically fit within the terms "white, black, or Indian" as defined by the "bad men among the Indians" provision and that, because he was a citizen of the United States, "that fact is sufficient to

give the court jurisdiction of his case." *Janis*, 1800 WL 2111 at *2. However, the court added that "[t]he benefits of this jurisdiction are restricted to those who are citizens and withheld from those who are aliens; yet it does not follow that every claimant who is a citizen is a claimant who can maintain a liability against the United States." *Id.* The court concluded, based upon the plaintiff's domicile on the Sioux reservation that he could not recover. Thus, *Janis* demonstrates that merely because somebody appears to fit within the "bad men" treaty provisions does not mean that they were an intended beneficiary of these provisions.

H. The Lower Court Correctly Concluded That Plaintiffs' Urged Interpretation Of The "Bad Men" Provision Of The Fort Laramie Treaty Would Yield An Absurd Result

Finally, plaintiffs take issue with the lower court's conclusion that adopting their urged interpretation of the "bad men among the whites" provision would "yield[] an absurd result and impose[] 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." JA 15.

Plaintiffs contend that they have never argued that the government must guarantee the safety or tranquility of the Sioux but, rather, merely ask that the government reimburse the injured persons for the loss sustained at the hands of "bad men among the whites." Brief at 25. But they are, for all intents and

purposes, arguing that the United States agreed to guarantee financially the safety and tranquility of Indians on reservations by paying for any injury sustained at the hands of any white person. As the lower court pointed out, this interpretation is plainly at odds with the legislative history of the provision because the Indian Peace Commission and the Doolittle Commission both recognized the impossibility of restraining all white men from engaging in armed conflict with the Indians. JA 15.

In an attempt to make the interpretation that it urges seem less far-reaching, plaintiffs assert that the requirement of a "wrong" limits the scope of "bad men" claims. Notably, in the court below, they vehemently opposed the United States' argument that "wrongs" must be intentional and committed with malice and, instead, asserted that a "wrong" was any "invasion of another's right, to his damage." Plaintiffs' Opposition to Motion to Dismiss at 5. Plaintiffs also suggest that these claims are limited geographically because "wrongs" of any kind against Indians who are not on their reservations are not covered. Brief at 26. However, the two cases that they cite to support this assertion – *Herrera* and *Pablo* – involve the Navajo Treaty, which contains a provision specifically excluding those who settle off the reservation from enjoying the rights conferred by the Treaty. The Sioux Treaty does not contain an identical provision, however.

Indeed, plaintiffs' own argument highlights the absurdity of adopting the interpretation it urges. They state:

> 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.

Brief at 26.

Now, 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." Brief at 24, (*quoting Janis*, 32 Ct.Cl. at 410-11). The Sioux are United States citizens who are free to live wherever they please.

Finally, plaintiffs quote *United States v. Sioux Nation*, 448 U.S. 371, 376 n. 4 (1980), which stated that 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.'" Brief at 27 (*citing Sioux Nation*, 448 U.S. at 376, n. 4).

First, it must be pointed out that the Treaty is only viewed that way by "some commentators." And the notion that the United States "exact[ed] nothing in return" is clearly false. The Indians made various concessions as well, including, among other things, "relinquish[ing] all right to occupy permanently the territory outside their reservation[;]" "withdraw[ing] all opposition to the construction of the railroads now being built on the plains[;]" and, "regarding [their] reservation as their permanent home, and . . . mak[ing] no permanent settlement elsewhere . . . ." Treaty at Articles XI and XV.

In any event, even if the Treaty were a "complete victory" for the Sioux, that does not alter the fact that the language of the "bad men among the whites" provision and its legislative history establish that the parties did not intend the United States to be liable for wrongs committed by those who were not its employees, agents, representatives, or otherwise acting for or on its behalf.

IV. Alternatively, This Court Should Affirm The Lower Court's Dismissal Of The Complaint Because Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted

In the event that this Court concludes that the "bad men" provision does

render the United States liable for the actions of someone who was neither its employee, representative or agent, nor acting upon its behalf, this Court should still affirm the lower court's dismissal pursuant to RCFC 12(b)(6) because plaintiffs' complaint fails to state a claim upon which relief can be granted. The "bad men" provision of the Fort Laramie Treaty was intended to curb intentional acts of aggression that frequently led to the outbreak of hostilities between the United States and the Sioux. The legislative history of the provision and case law establish that it is inapplicable to situations like this one, where the alleged "wrong" committed by Mr. Hotz was neither intentional nor committed with malice. See 18 U.S.C. § 1112(a) (the involuntary manslaughter provision to which Mr. Hotz pled guilty); *see also* JA 21 (Complaint, which fails to allege that Mr. Hotz intentionally killed the victims or that he acted with malice in causing their deaths.)

This Court "must affirm the decision of the district court if it is supported by any ground properly preserved on appeal." *Ethicon Endo-Surgery, Inc. v. United States Surgical Corporation*, 93 F.3d 1572, 1582 (Fed. Cir. 1996). The United States raised this RCFC 12(b)(6) argument below, but the Court of Federal Claims declined to reach the issue because it dismissed the complaint pursuant to RCFC 12(b)(1). JA 16, n.11; *see also* Brief at 25.

As explained above, the Fort Laramie Treaty was drafted following a series of wars between the United States and the Indian tribes. It, along with the eight other treaties that the United States entered into with various other Indian tribes during the same time period, aimed to put an end to these wars. The "bad men" provision of the Fort Laramie Treaty begins by stating "[f]rom this day forward all war between the parties to this agreement shall forever cease." 15 Stat. 635 at Article I. Both the Sioux and the United States Government state that they "desire peace" and "pledge their honor to maintain it." *Id.* Thus, the "wrong[s]" contemplated by the "bad men" provision are acts "that would have threatened the peace that the Fort Laramie Treaty was designed to protect." *Hernandez*, 93 Fed. Cl. at 199.

The "bad men" provision does not define "wrong" but it is clear from the "legislative history" that the United States and the Sioux intended the term to apply to intentional criminal acts committed with malice. As explained above, the Doolittle Commission's report was rife with examples of attacks perpetrated by United States soldiers against the Indians. The murders and assaults described were clearly intentional and committed with malice. The Commission reported that it was "the aggression of lawless white men" that was responsible for the wars with the Indians. JA 8 (quoting *Condition of the Indian Tribes* at 5, 10).

Thus, it is clear that the "bad men" provision of the Fort Laramie Treaty was designed to maintain the peace between the United States and the Sioux by curbing the heinous acts of "aggression" perpetrated against the tribe by white men. JA 8. These acts of aggression comprised intentional crimes like murder, assault, rape and other sexual offenses, which frequently led to war between the Sioux and the United States.[2] *Id.*, *see also Elk*, 87 Fed. Cl. at 80. The act at issue here – accidentally killing two people while driving drunk – is of a fundamentally different character. It was an unintentional killing committed without malice. It is not the kind of intentional act of "aggression" that the Indian Tribal leaders described to Congress or that the Doolittle Commission Report warned could lead to war between the Indians and the United States. Indeed, it is not the type of act that the parties intended the "bad men" provision to combat. The "bad men" cases bolster this conclusion.

It appears that no court has held, in any published decision at least, that a crime committed without malice or intent constitutes a "wrong" pursuant to the "bad men" provision of the Sioux Treaty or any of its sister treaties. Indeed, the only published decisions in which courts have held that a plaintiff has a viable

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

"bad men" claim are those involving an intentional crime. For example, in *Tsosie*, the "bad man" allegedly impersonated a doctor and performed a vaginal examination upon the victim. *Tsosie*, 825 F.2d at 397. The "bad men" in *Begay* were teachers at an Indian boarding school who allegedly sexually abused and assaulted their students. *Begay*, 219 Ct. Cl. at 599. The "bad man" in *Hebah v. United States*, 456 F.2d 696, 705 (Ct. Cl. 1972) was an Indian Police Officer who "inten[tionally]" shot the decedent during an arrest. And in *Elk*, the alleged "bad man" was accused of sexually assaulting a woman in his car after driving to a remote area. *Elk*, 87 Fed. Cl. at 74-75.

Similarly, in *Hernandez*, the court recognized that not every crime constitutes a "wrong" pursuant to the Fort Laramie Treaty's "bad men" provision. *Hernandez*, 93 Fed. Cl. at 199, n.5. The plaintiff in that case alleged that various "bad men" had committed eleven different criminal acts against him, including bribing a witness. Hernandez, 93 Fed. Cl. at 196. After noting that "the Fort Laramie Treaty has been applied to affirmative criminal acts and not mere acts of negligence[,]" the court held that, none of the allegedly "affirmative criminal acts" cited by the plaintiff "could be considered a crime of moral turpitude that the 'Bad Men' clause purports to cover . . . ." *Id* at n.5. Consequently, the court concluded that it must dismiss plaintiff's complaint because he "makes many claims that

might result in criminal punishment, but alleges no acts that would have threatened the peace that the Fort Laramie Treaty was intended to protect." *Id.*

Thus, it appears from the published decisions that a viable "bad men" claim must include an allegation that the "bad man" committed an intentional crime of the type that would have threatened the peace that the Fort Laramie Treaty was intended to protect. That is lacking here.

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

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the Court of Federal Claims' decision dismissing plaintiffs' complaint for lack of jurisdiction.

Respectfully submitted,

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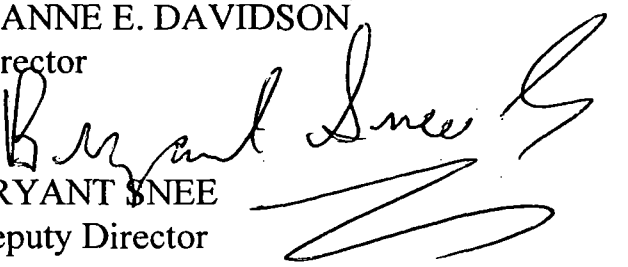

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September 6, 2011

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of September, 2011, I caused to be placed in the United States mail (first-class, postage prepaid), copies of a **CORRECTED BRIEF FOR DEFENDANT-APPELLEE** addressed as follows:

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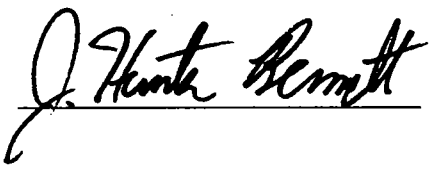

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because it contains 11,888 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).