Jesse C. Trentadue (#4961)
Britton R. Butterfield (#13158)
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Telephone: (801) 532-7300
Facsimile: (801) 532-7355
E-mail: jesse32@sautah.com
E-mail: bbutterfield@sautah.com

Attorneys for Vernal City and Uintah County, Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DEBRA JONES and ARDEN C. POST, individually and as the natural parents of Todd R. Murray; and DEBRA JONES, as personal representative of the Estate of Todd R. Murray, deceased, for and on behalf of the heirs of Todd R. Murray; Plaintiffs, v. VANCE NORTON, Vernal City policy officer in his official capacity and individual capacity; et. al., Defendants.	**REPLY MEMORANDUM IN FURTHER SUPPORT OF VERNAL CITY AND UINTAH COUNTY DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** Case No. 2:09cv00730-TC-EJF Judge Tena Campbell

Defendants Vance Norton, Anthoney Byron, Bevan Watkins, Troy Slaugh,

Vernal City, and Uintah County (collectively "Vernal City and Uintah County Defendants") by and through counsel, hereby file this *Reply Memorandum* in support of their *Motion for Judgment on the Pleadings*.

Vernal City and Uintah County Defendants are entitled to judgment on the pleadings on Plaintiffs' Eighth Cause of Action because the Ute Treaty of 1868 ("Ute Treaty") does not secure to Plaintiffs the rights, privileges, or immunities that can be vindicated in a § 1983 civil rights action.

ARGUMENT

The Ute Treaty Does Not Allow Plaintiffs to Recover Damages Under § 1983

Plaintiffs argue that they can recover damages under § 1983 however, they do not cite to a case where a plaintiff recovered damages from an individual under the "bad man" language of a treaty. The majority of cases they cite to deal with land use rights and hunting and fishing rights. Plaintiffs however do cite to one case that interprets the "bad man" language.[1] Plaintiffs also provide a parenthetical explanation stating "interpreting language in the Fort Laramie Treaty of 1868 identical to the Ute Treaty of 1868 to provide individual tribal members

[1] *See Elk v. United States*, 87 Fed. Cl. 70, 78-82 (Fed. Cl. 2009).

with a remedy for any wrongs committed by 'bad men.'"[2] *Elk* does deal with the "bad men" language from a treaty, however, the case actually supports The Vernal City and Uintah County Defendants' argument. In *Elk*, an Army recruiter sexually assaulted a member of the Sioux tribe on a reservation. Ms. Elk then sued the United States and the court found that the United States was liable under the "bad men" clause.[3]

Additionally, the court in *Elk* said that "the 1868 Treaty's 'bad men' provision created an individual third-party contractual right through which an individual claimant could directly pursue a suit against the United States."[4] The proper party for Plaintiffs to sue under the "bad men" clause is the United States. Because the Ute Treaty does not create a cause of action against Vernal City and Uintah County Defendants, the court should grant the *Motion for Judgement on the Pleadings*.

---

[2] Plaintiffs' Opposition, Dkt. 256, p. 10.

[3] *Elk*, 87 Fed. Cl. 70 (Fed. Cl. 2009)

[4] *Id*. at 79 (citing *Hebah v. United States*, 428 F.2d 1334, 1338, 192 Ct. Cl. 785 (Ct. Cl. 1970)).

Treaty Interpretation

Plaintiffs claim that treaties are to be interpreted liberally in favor of Indians. While the Vernal City and Uintah County Defendants do not dispute that the treaties should be interpreted liberally, they also "should be interpreted to give effect to the intent of the signatories."[5] Just because treaties are liberally construed in favor of Indians, "is not a license to disregard clear expressions of tribal and congressional intent."[6] Furthermore, courts "cannot under the guise of interpretation . . . rewrite congressional acts so as to make them mean something they obviously were not intended to mean."[7]

Plaintiffs also claim that treaties are not locked in time. Again, Vernal City and Uintah County Defendants do not dispute their claim. However, Vernal City and Uintah County Defendants dispute Plaintiffs' application of this doctrine. Courts have held that Indians can use modern hunting and fishing techniques under treaties entered into during the 1800s even though the techniques were not

---

[5] *Elk v. United States*, 87 Fed. Cl. 70, 78 (Fed. Cl. 2009) (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979)).

[6] *Herrera v. United States*, 39 Fed. Cl. 419, 420-21 (Fed. Cl. 1997).

[7] *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

known of at that time the treaties were signed. Plaintiffs want the Court, to extrapolate the ruling regarding hunting and fishing techniques into a ruling that the Ute Treaty allows for a cause of action against individuals instead of the United States.[8] Plaintiffs claim that the argument that the United States is the proper party to sue for treaty violations "does not square well with modern realities. Today when there is so much angst over federal budget deficits and debts, when individual Indians are now accorded full rights of citizenship including access to the legal system, the financial liability for injuries to Native Americans should fall, exclusively or primarily, not on the federal government, but on the individuals who cause harm by abridging treaty rights."[9]

While the Vernal County and Uintah County Defendants can appreciate Plaintiffs' desire for fiscal control in Washington D.C. it is not up to the courts to make such policy decisions. Plaintiffs are essentially asking the Court to "rewrite [a] congressional act[] to mean something [it] obviously [was] not intended to mean."[10] Even with a liberal interpretation of the Ute Treaty, the Plaintiffs do not

---

[8] *See* Plaintiffs' Opposition, Dkt. 256, p. 16-7.

[9] *Id*.

[10] *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947).

have a viable cause of action against Vernal City and Uintah County Defendants.

CONCLUSION

Based on the foregoing, the Court should grant Vernal City and Uintah County Defendants' *Motion for Judgment on the Pleadings.*

SUITTER AXLAND, PLLC
/s/ jesse c. trentadue
Jesse C. Trentadue
Britton R. Butterfield
Attorneys for Vernal City and Uintah County Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2013, I caused to be mailed a copy of the foregoing, via electronic case filing CM/ECF, to the following:

Frances C. Bassett
Todd K. Gravelle
Sandra Denton
FREDERICKS PEEBLES & MORGAN, LLP
1900 Plaza Dr.
Louisville, CO 80027-2314

Kimberly D. Washburn
LAW OFFICE OF KIMBERLY D. WASHBURN, P.C.
11451 South 700 East, Suite D
P.O. Box 1432
Draper, Utah 84020

Scott D. Cheney
David N. Wolf
Gregory M. Soderberg
DEPUTY ATTORNEY GENERAL
160 East 300 South, 6th Floor
Salt Lake City, UT 84111

/s/ jesse c. trentadue

T:\7000\7619\3\VERNAL CITY AND UINTAH COUNTY REPLY RE MOTION FOR JUDGMENT ON THE PLEADINGS.wpd