IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBRA JONES, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00227-MBH
	)	Judge Marian Blank Horn
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	

THE UNITED STATES' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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I. Introduction

This matter, brought by the relatives of the decedent, Todd Murray, and the Ute Tribe, seeks compensation from the United States for the purported harms caused by the alleged actions and inactions of the Federal Bureau of Investigation ("FBI"), the Bureau of Indian Affairs ("BIA"), four federal employees, three separate state entities, a private company, as well as eight non-federal individuals, covering a broad range activities in connection with Mr. Murray's death on April 1, 2007. Plaintiffs contend that the law enforcement activities associated with that day's high speed car chase that culminated in Mr. Murray's death form an adequate basis for compensation pursuant to the "bad men" provisions of the relevant treaties, as well as under a general breach of trust theory. Plaintiffs' claims should be dismissed for a number of reasons.

First, throughout the six years following Mr. Murray's death, Plaintiffs have had every opportunity to present a "bad men" claim to the Department of the Interior ("DOI"), as agreed upon by both the Tribe and the United States. See Treaty with the Ute Indians, 15 Stat. 619 (1868) (hereinafter "1868 Treaty"). Plaintiffs have not. As a consequence, DOI has not been provided with an opportunity to "cause the evidence to be taken in writing and forwarded, together with [the government agent's] finding, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty." Art. 5, 1868 Treaty. Having failed to exhaust their administrative remedies, Plaintiffs' Amended Complaint should be dismissed.

In addition to Plaintiffs' procedural failure, all of the allegations contained in the complaint, save for one,[1] set forth actions that are not cognizable under the treaty, which therefore warrants the dismissal of at least some of Plaintiffs' claims pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). Plaintiffs rely upon a host of activities that simply do not rise to the level of "harm" contemplated by the treaty, including the FBI's decision not to prosecute any the officers involved in that day's law enforcement activities to the purported destruction of and tampering with evidence.

With respect to Claim Two (Breach of Trust), because Plaintiffs have not identified a substantive source of law that establishes any specific fiduciary duty that can be fairly interpreted as mandating compensation, it has failed to invoke the Indian Tucker Act's waiver of sovereign immunity. Finally, the rights and obligations of the "bad men" provision flows to individual tribal members, not the tribe; therefore, at a minimum, the Tribe cannot maintain this lawsuit.

II. Background

A. "Bad Men" Treaty Clauses

Plaintiffs allege as a basis for their claims, among other sundry statutes, two treaties entered into between the United States and the Ute Indians. The first is the 1863 Treaty with the Tabequache Band of Utes, and the second is the 1868 Treaty with seven bands of Ute Indians. The 1868 Treaty between the Ute and the United States is one of nine Indian treaties made in 1868, and the clause at issue here appears in Article 6:

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[1] To the extent Plaintiffs' aver that Mr. Murray was murdered by Mr. Norton, see Am. Compl. ¶ 67, ECF No. 17, that is a claim that arguably falls within the ambit of the "bad men" clause. In the event this Court concludes that Plaintiffs need not exhaust their administrative remedies, however, that is the only claim that properly falls within the jurisdiction of this Court.

> 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.

Art. 6, 1868 Treaty, 15 Stat. at 620. This clause, which appears in substantially the same form in five other treaties,[2] is commonly referred to as the "bad men" provision.

B. Events of April 1, 2007

On April 1, 2007, while on a routine patrol of U.S. Highway 40 in the northeast quadrant of Utah, Dave Swenson, a Utah Highway State Trooper, observed a vehicle traveling seventy-four miles an hour in a sixty-five mile an hour zone. Am. Compl. ¶ 21 (ECF No. 17). At the time, the vehicle was located "outside the boundary of the Ute Tribe's Uncompaghre Reservation." Id. The vehicle was driven by Uriah Kurip, and Todd Murray was a passenger. Id. ¶ 20. When Mr. Kurip refused to pull over, a chase ensued. Id. ¶ 22.

The chase eventually ended at the intersection of Seep Ridge Road and Turkey Track Road, an intersection that is within the Uncompahgre Reservation. Id. ¶¶ 23-24. State Trooper Swenson arrived at the intersection soon thereafter, exited his car, and approached the two males who were at that point standing on either side of the car. Id. ¶ 26. Defying the State Trooper's orders that they get on the ground, the two suspects ran from the car in different directions. Id. State Trooper Swenson ran after and quickly apprehended Mr. Kurip. Id.

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[2] Similar "bad men" clauses appear in the following Treaties: 1) Treaty with the Sioux and Arapaho, 15 Stat. 635 (1868); 2) Treaty with the Navajo, Navajo, 15 Stat. 667 (1868); 3) Treaty with the Eastern Band Shoshonee Indians and Bannack Tribe, 15 Stat. 673 (1868); 4) Treaty with the Northern Cheyenne and Northern Arapahoe, 15 Stat. 655 (1868); and 5) Treaty with Crow Tribe, 15 Stat. 649 (1868).

Prompted by State Trooper Swenson's calls to dispatch for help, other law enforcement officers soon arrived at the accident location, and pursued Mr. Murray on foot, including Vance Norton, an off-duty Vernal City police officer. Officer Norton reported that during his search he encountered Mr. Murray coming around a hill and running towards him. Id. ¶ 31. Upon seeing Mr. Murray, Officer Norton ordered him to "get to the ground." Id. According to Officer Norton's account, Mr. Murray then fired shots in his direction, and he quickly returned fire. Id. ¶ 32. Following the exchange of gunfire, Mr. Norton reported that Mr. Murray turned the gun on himself and pulled the trigger. Id. ¶ 33. Mr. Norton then called dispatch and described what had happened. Id. Soon thereafter, two BIA law enforcement officers (Officers James Beck and Terrance Cuch) and two FBI Special Agents (Agent Rex Ashdown and Agent Ryan) arrived at the accident location. Id. ¶ 35.

Mr. Murray's body was taken to the medical center in Vernal, Utah, and later to the Thomson-Blackburn Vernal Mortuary. Id. ¶¶ 42-43. At the medical center, blood was drawn from Mr. Murray's body, and the Utah Medical Examiner examined Mr. Murray's body, listing the cause of death as suicide. Id. ¶ 56. Plaintiffs do not allege that either the medical facility or the mortuary is on Reservation land.

In a separate criminal investigation, the FBI concluded that the only crime that had occurred was with regard to the purchase of the .380 caliber handgun found next to Mr. Murray's body. The United States later indicted the "straw purchaser"[3] of the weapon, which later resulted in the District Court entering a criminal forfeiture order[4] for the .380 caliber weapon.

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[3] "Straw purchasers" are individuals who buy firearms on behalf of others, typically "prohibited persons" who are not allowed to buy or possess firearms themselves.

[4] A criminal forfeiture order is part of the sentence imposed on a person who has been found guilty in a criminal case for which forfeiture is specifically authorized. United States v.

See Final Order of Forfeiture, United States v. Shirley, No. 2:08-CR-00045-DAK (D. Utah Nov. 14, 2008), ECF No. 29 (attached as Ex. 1).

C. Plaintiffs' Lawsuits

Plaintiffs have pending two lawsuits with regard to Mr. Murray's death. The first lawsuit was filed in the Uintah County Court on July 17, 2009, and later removed to the federal District Court of Utah on August 20, 2009. See Docket Report, Jones v. Norton, Civ. No. 2:09-cv-00730 (D. Utah filed August 20, 2009) (attached, as Ex. 2). There, Plaintiffs allege a host of claims ranging from Section 1983 constitutional claims to the intentional infliction of emotion distress for desecration of a corpse (since dismissed) against Vernal City Police Officer Vance Norton, Vernal City, Vernal City Police Department, the Utah Highway Patrol, the State of Utah, Blackburn Mortuary, Uintah County, State Troopers Dave Swenson, Craig Young, Rex Olsen, and Jeff Chugg, Uintah County Sherriff's Sergeant Bevan Watkins and Deputy Troy Slaugh, and Utah Division Wildlife Officer Sean Davis. Plaintiffs seek upwards of $3,000,000 in damages for Mr. Murray's death, not including punitive damages. See Ex. 2, Docket Report at 18, Third Am. Compl., filed Mar. 15, 2012, ECF No. 170.

Exactly six years after Mr. Murray's death, Plaintiffs filed the present lawsuit. The Complaint contains two claims. The first claim includes allegations that the FBI, BIA, FBI Special Agents Rex Ashdown and Dave Ryan, and BIA Officers James Beck and Terrance Cuch, in addition to all of the non-federal entities and individuals named above, are "bad men" as that term is understood in the 1868 Treaty. Plaintiffs rest their claims on a number of purported violations of the 1863 Treaty, 1868 Treaty, and other sundry statutes.

Libretti, 38 F.3d 523, 527 (10th Cir. 1994), cert. granted, 514 U.S. 1035 (1995), aff'd, 516 U.S. 29 (1995). The only remedy to challenge a forfeiture order is direct appeal. Young v. United States, 489 F.3d 313, 315 (7th Cir. 2007).

Claim Two largely repeats the same allegations as Claim One but relies instead on the conceptual framework of United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 224–25 (1983), and its progeny to fashion a claim for breach of trust. Plaintiffs appear to seek $10,000,000.00 in damages, including the "litigation costs" associated with their lawsuit in the District Court. Am. Compl. ¶ 74.

III. Standard of Review

A. Rule 12(b)(1)

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Navajo Nation ("Navajo I"), 537 U.S. 488, 502 (2003) (quoting Mitchell II, 463 U.S. at 212). "Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." United States v. Navajo Nation ("Navajo II"), 556 U.S. 287, 290-91 (2009) (citing United States v. Testan, 424 U.S. 392, 400 (1976)).

Jurisdiction has to be established before the Court may proceed to the merits of a case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is Plaintiffs' responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction") (citations omitted)).

Once the Court's subject-matter jurisdiction is put into question under Rule 12(b)(1), the

Court accepts as true the undisputed factual allegations in the complaint and draws all reasonable inferences in a plaintiff's favor. Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995). However, a plaintiff bears the burden of proving by a preponderance of the evidence the facts sufficient to establish that the court possesses subject matter jurisdiction. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

The court may look also to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. Land v. Dollar, 330 U.S. 731, 735 & n.4 (1974); Reynolds, 846 F.2d at 747. In doing so, the court may examine relevant evidence to decide any factual disputes. Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999). If the defendant or the court questions jurisdiction, then a plaintiff cannot rely solely on factual allegations in the complaint but must bring forth relevant adequate proof to establish jurisdiction. See McNutt, 298 U.S. at 189. If the court concludes that it lacks subject matter jurisdiction over a claim, Rule 12(h)(3) requires the court to dismiss that claim.

B. Rule 12(b)(6)

In considering a motion to dismiss a complaint for failure to state a claim under RCFC 12(b)(6), a court must accept as true all factual allegations in the complaint and must draw all reasonable inferences in the plaintiff's favor. See Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001). Where it appears beyond doubt that a plaintiff cannot prove any set of facts that would entitle him to relief, a court may dismiss the cause of action. See Conti v. United States, 291 F.3d 1334, 1338 (Fed. Cir. 2002). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claim.

Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 938 (Fed. Cir. 2007). Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations and quotation marks omitted); Esch v. United States, 77 Fed. Cl. 582, 587 (2007) (quoting Bell Atl. Corp., 550 U.S. at 555); see also Steward v. United States, 80 Fed. Cl. 540, 543 (2008) (explaining that "[t]he court must inquire whether the complaint meets the 'plausibility standard' . . . ."); May v. United States, 80 Fed. Cl. 442, 448 (2008), aff'd, 293 F. App'x 775 (Fed. Cir. 2008) (emphasizing that plaintiff must establish her right to relief above the speculative level).

ARGUMENT

IV. Claim One—Violation of the Ute Treaties and Other Federal Laws—Fails for Lack of Jurisdiction and Failure To State a Claim.

In Claim One, Plaintiffs contend that the United States is liable for damages under "both the Ute Treaties of 1863 and 1868 and the various federal laws listed under Paragraph 10 above." Am. Compl. ¶ 78. For a number of reasons, Plaintiffs cannot state a cognizable claim within the scope of the treaties. First, the 1868 Treaty explicitly requires that a claimant seeking relief pursuant to the "bad men" clause must first present the claim to the agent (now the Agency Superintendent) for investigation, with the ultimate decision of the Commission of Indian Affairs (now the Assistant Secretary-Indian Affairs ("AS-IA")), subject to revision by the Secretary of the Interior, "binding upon on the parties." See 1868 Treaty, art. 5, 15 Stat. at 620.

Plaintiffs failed to satisfy the plain requirements of the Treaty. Plaintiffs' March 12, 2013, letter did nothing more than inform DOI of Plaintiffs' intention to file suit in the CFC,

which they did nineteen days later, see ECF No. 14-7, while the February 2012 letters only requested that the Department of Justice, an entirely different agency not mentioned in either treaty, conduct an investigation into Mr. Murray's death. See ECF No. 14-5. Plaintiffs never submitted a claim for compensation to the DOI, and have therefore failed to exhaust their administrative remedies before seeking judicial review, depriving this Court of jurisdiction.

Second, many of the "wrongs" alleged by Plaintiffs are not the type of harms to individuals that would have threatened the peace—a requirement of the "bad men" clause—namely, criminal acts such as assault, murder, and robbery, or harms to property such as theft or arson that resulted in damage. Garreaux, 77 Fed. Cl. at 737. Finally, Plaintiffs' claim relies on the actions or inactions of agencies and governmental entities that by the very terms of the provision cannot be considered "bad men." Id. Thus, Plaintiffs fail to state a claim and this Court should dismiss Count One.

A. Plaintiffs have not complied with the terms of the Treaty and have not exhausted the administrative remedies required by the express terms of the Treaty.

The doctrine of exhaustion of administrative remedies is well-established and no exception to it should be made here, particularly when the federal agency tasked by Congress and the Tribe with the initial review of treaty claims—now the Assistant Secretary of Indian Affairs—has not been provided an opportunity to issue a "binding decision" on Plaintiffs' claims.

Where an administrative process is available, a plaintiff must first exhaust administrative remedies before seeking relief in the federal courts, including the Court of Federal Claims. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); and Darby v. Cisneros, 509 U.S. 137 (1993). Indeed, for over seventy years, American courts have followed the basic rule

of prudent judicial administration that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers, 303 U.S. at 50-51. Relevant here, non-jurisdictional exhaustion is a judicially created, prudential doctrine that "require[s] parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court." Avocados Plus, Inc. v. Veneman, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Moreover, while there may exist a presumption that exhaustion of administrative remedies is non-jurisdictional, id. at 1248, exhaustion, whether jurisdictional or non-jurisdictional, remains the default process. Congressional intent is of "paramount importance" in any exhaustion inquiry. McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

Against this doctrinal backdrop, both the language and the context of the relevant treaty provisions support a reading that Plaintiffs must first exhaust their administrative remedies. Taken together, Article 5 of the 1868 Treaty establishes a procedural framework for resolving disputes, while Article 6 provides for the remedy. United States v. Atl. Research, Corp., 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'") (quotations omitted). For example, Article 5 sets forth the duties of government agents that the United States and the Tribe agreed would "reside among the Indians" for purposes of "prompt and diligent inquiry into such matters of complaint by and against the Indians, as may be presented for investigation under the provisions of their treaty-stipulations . . . ." Thus, "[i]n all cases of depredation on person or property," the Tribe and the United States stipulated that the agent "shall cause the evidence to be taken in writing and forwarded, together with their finding, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty." 1868 Treaty, art. 5, 15 Stat. at 620 (emphasis added).

While Article 5 sets forth the process to be followed, Article 6 is entirely focused on the available remedy. Article 6 goes on to provide that only "upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City," would the United States then "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." Id., art. 6, 15 Stat. at 620.

Thus, taken in context,[7] articles 5 and 6 provide for indemnification by the United States' for any "wrong" committed on the reservation against members of a signatory tribe, so long as the DOI had actually concluded, and memorialized in a "binding decision," that indemnity and prosecution, if necessary, were appropriate measures. After all, it would have made little sense for the United States to release funds from the public fisc to reimburse an aggrieved individual, let alone commit its government resources to the potential incarceration of a wrongdoer, in the absence of any final determination by the Secretary. Nat'l Steel Car, Ltd. v. Canadian Pacific Ry., Ltd., 357 F.3d 1319, 1329 (Fed. Cir. 2004) (invoking "the canon of statutory construction that an interpretation that causes absurd results is to be avoided if at all possible") (quotations and citations omitted).

Indeed, the Court of Claims in Tsosie v. United States ("Tsosie I") likewise concluded that an identical provision in a treaty with the Navajo[8] "was designed and intended by the parties

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[7] Cf Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2563 (2013) (explaining that "statutory construction 'is a holistic endeavor' and that 'a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.") (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)).

[8] Compare Article IV of the Treaty with the Navajo Tribe, 15 Stat. 667:

to provide the administrative procedures to be followed when a claim by or against an Indian was filed under [the "bad men" provision]." 11 Cl. Ct. 62, 74-75 (1986) aff'd and remanded, 525 F.2d 393 (Fed. Cir. 1987). Citing Begay v. United States, ("Begay I"), 219 Ct. Cl. 599 (1979), the Court went on to observe that the Court of Claims had "clearly addressed this jurisdictional issue" and held "that there must first be an administrative decision by the Department of the Interior, pursuant to the treaty." Tsosie I, 11 Cl. Ct. at 75. That "administrative decision" would then be subject to judicial review in the Court of Claims, now the Court of Federal Claims. Id. The court then remanded the matter to DOI for a final administrative determination on the merits. Id. at 75-76.

And other Courts in this circuit have likewise held that a person seeking compensation pursuant to a "bad men" clause must first exhaust administrative remedies before seeking relief

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> The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

with Article 5 of the 1868 Ute Treaty:

> The United States agree that the agents for said Indians, in the future, shall make their homes at the agency-buildings; that they shall reside among the Indians, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians, as may be presented for investigation under the provisions of their treaty-stipulations, as also for the faithful discharge of other duties enjoined on them by law. In all cases of depredation on person or property they shall cause the evidence to be taken in writing and forwarded, together with their finding, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

from this forum. Hebah v. United States, 428 F.2d 1334, 1340 (Ct. Cl. 1970) (finding in case brought pursuant to a bad men clause exhaustion of all administrative remedies is a "prerequisite to suit required by the treaty"); Zephier v. United States, No. 03-768L (Fed. Cl. Oct 29, 2004) (attached as Ex. 4); cf Begay I, 219 Ct. Cl. 599, at *2 (administratively staying and providing DOI a period of ninety days to review plaintiffs' "bad men" claims); but see, Elk v. United States, 70 Fed. Cl. 405, 409 (2006).

For example, in Hebah, a Native American widow sought compensation under the "bad men" clause of the 1863 Treaty between the United States and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, 15 Stat. 673, for the death of her husband killed by members of the Indian police force. This Court allowed the Hebah matter to go forward because the plaintiff, in accordance with the requirements of that particular "bad men" clause, made a claim upon the Superintendent of the Wind River Indian Agency, and a copy of the claim was sent to the Commissioner of Indian Affairs in Washington. The Court therefore concluded that the plaintiff had fulfilled the perquisites contained within the treaty. 428 F.2d at 1340.

In contrast to Hebah, this Court dismissed a "bad men" claim, premised on a nearly identical clause, in Zephier v. United States, where plaintiffs had failed to seek an administrative determination from DOI regarding their claims. There, plaintiffs argued that despite their failure to avail themselves of the DOI's administrative process, exhaustion would be futile because the court would not provide the relief they requested, primarily damages. Ex. 4 at 6. The Zephier court rejected plaintiff's concerns and dismissed the complaint for failure to exhaust available administrative remedies. Id. at 19. In reaching this conclusion, the Zephier court undertook a thorough analysis of the language of the Treaty with the Sioux of April 29, 1868, concluding:

> The treaty language requiring proof, together with the explanation as to why it is needed (to forward to the Commissioner), and that administrative review is contemplated, if arrest and/or compensation is desired, is straightforward and clear.

Id. at 9. The court also considered the relevant caselaw concerning bad men claims finding:

> Plaintiffs' protestations to the contrary notwithstanding, in the only cases that have focused on the mechanics of prosecuting claims under the "bad men" clauses of Indian treaties, the courts either have found that the plain language of the treaties mandates exhaustion of administrative remedies or have accepted without question that such remedies are available.

Id. at 13. Accordingly, considering both the language included in this Treaty and the history of "bad men" claims, it is clear that exhaustion of administrative remedies is a necessary element before seeking relief from this Court.

And petitioners have availed themselves in the past of this administrative process. For example, the plaintiffs in Goombi v. United States agreed to remand their claims for an administrative hearing, which, after extensive discovery and a two-week hearing, culminated in a report issued by the administrative law judge that the AS-IA then reviewed and adopted. No. 99-145-L (Fed. Cl. Mar. 19, 1999) (attached as Ex. 3). Although plaintiffs' challenge to the AS-IA's decision in the CFC was ultimately dismissed as an improper de novo challenge, the court observed that the plaintiffs could have conceivably "initiated an action seeking judicial review of the [AS-IA's] ruling on the administrative record." Id. at 5; Herrera v. United States, 39 Fed. Cl. 419 (1997) (reviewing case based on bad men clause after DOI denied the plaintiff's claim); Janis v. United States, 32 Ct. Cl. 407, 408 (1897) ("[t]he defense in this case rests upon certain facts, which are thus summarized by the special agent of the Interior Department who investigated the case"); Tsosie v. United States ("Tsosie II"), 825 F.2d 393, 397 (Fed. Cir. 1987)

(observing that plaintiff filed both an FTCA claim against the Department of Health and Human Services as well as treaty claim with the AS-IA).

Plaintiffs, however, have not provided the AS-IA an opportunity to issue a decision on treaty claims that now implicate the actions or inactions of two federal agencies, in addition to four federal employees, three separate state entities, a private company, as well as eight non-federal individuals, covering a broad range of activities that go well beyond a failure to investigate. Instead, Plaintiffs simply notified the AS-IA of their intent to file a lawsuit nineteen days before filing this complaint. Indeed, the clear language of Plaintiffs March 12, 2013, "notice of claim" proves that it is simply a notice to sue, and affords neither party the opportunity to review the adequacy of the evidence, let alone the opportunity for a binding decision.[9] Therefore, Plaintiffs' March 12 letter does not satisfy their contractual obligation to submit their claim to the DOI. It bears emphasis that the doctrine of exhaustion requires of Plaintiffs "proper exhaustion," meaning the use of "all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits.)." Woodford v. Ngo, 548 U.S. 81, 90 (2006) (emphasis in original) (citation omitted).

Plaintiffs have had the opportunity to request that DOI investigate these claims pursuant to Articles 5 and 6 of the 1868 Treaty prior to their filing of this complaint six years to the day of Mr. Murray's death. Mr. Murray died on April 1, 2007, and Plaintiffs filed suit against all of the non-federal individuals in July of 2009. Since then, Plaintiffs have extensively litigated that

[9] See Exhibit A to Porter Decl., Mar. 12, 2013 Letter ("Please accept this letter as our notice of claim to your respective agencies of our intent to file a complaint against the United States based on breaches of the 1863 and 1868 Ute Treaties and the United States' violation of its trust obligations to the Ute Tribe and its members.
We plan to file suit in the Federal Court of Claims . . .").

lawsuit, which includes the deposition of Mr. Norton, see ECF No. 14-7 at 92-109, FBI Special Agent Rex Ashdown, id. at 253-59, and all of the other individuals identified in Plaintiffs' Amended Complaint, see id. at 205 (Plaintiffs' expert report summarizing the nearly 1,000 pages of documents then available, including an extensive list of depositions).

Plaintiffs' failure to submit an administrative claim for Mr. Murray's death is particularly anomalous, given Plaintiffs' letters to the AS-IA dated February 14, 2011, and March 18, 2011. Those letters sought federal assistance with respect to the purportedly unlawful activities of state law enforcement on Indian lands within Utah but nowhere mentioned Mr. Murray's death or the "bad men" clause. For instance, the February 14, 2011, correspondence explicitly requested that the AS-IA assist the tribe in seeking a "formal investigation" by the Department of Justice to "address reported instances of unlawful arrest by State and local enforcement officers on lands subject to exclusive federal and tribal jurisdiction on the Uintah and Ouray Reservation [] of the Ute Indian Tribe." ECF No. 14-5 at 173. In fact, the March 18 letter requested, among other things, that the BIA provide its "legal opinion" as to criminal jurisdiction on "trust lands" in light of local law enforcement activities on the Tribe's reservation, id. at 175-77, but likewise failed to raise the issue of Mr. Murray's death. These two letters further highlight Plaintiffs' failure to exhaust administrative remedies—a failure that deprives this Court of jurisdiction.

Finally, DOI has the capacity and authority to resolve properly presented "bad men" claims. While DOI has not promulgated a set of regulations particular to "bad men" claims, DOI's authority to review claims of this nature is clear. As this court noted in Zephier, (Ex. 4), the Secretary has authorized the Director of the Office of Hearings and Appeals ("OHA") to adjudicate, on behalf of the Secretary, "matters within the jurisdiction of the Department involving hearings, and appeals, and other review functions of the Secretary." (quoting 43 C.F.R.

§ 4.1); see also Decl. of Harvey C. Sweitzer ("Sweitzer Decl.") (attached as Ex. 5). Moreover, OHA is equipped with administrative law judges and has established general rules governing hearings and appeals before the DOI found in 43 C.F.R. Part 4. Most importantly, DOI has conducted several administrative reviews of "bad men" claims and the underlying "proof" over the years; it has available the administrative process to adjudicate these very claims; and it has awarded money damages with respect to at least one meritorious claim, as the Court in Zephier observed. Ex. 4 at 10.

In the event this Court dismisses this case for failure to exhaust administrative remedies, Plaintiffs must first present its "bad men" claims to DOI in the manner prescribed by the Treaty. If Plaintiffs present their "bad men" claim to DOI, the agency may assess the claim as it has done in other "bad men" cases. Plaintiffs will then be able to seek judicial review of that final "binding decision," as required by the Treaty. Tsosie I, 11 Cl. Ct. at 75; Goombi, Ex. B at 5. Allowing DOI to issue an administrative decision in the first instance is in line with this Court's precedent; it will allow DOI to compile a "useful record for subsequent judicial consideration," McCarthy, 503 U.S. at 145-46; and exhaustion will prevent the needless "repetition of administrative and judicial factfinding." Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984). Additionally, "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court," Woodford, 548 U.S. at 89, and the full and fair adjudication of all possible claims before the agency tasked with initial review may conclude with the very relief Plaintiffs seek: monetary damages. Given Plaintiffs' failure to exhaust their administrative remedies, this Court should dismiss Count One.

B. Plaintiffs' do not state a cognizable claim under the "bad men" provision.

Pursuant to Janis v. United States, 32 Ct. Cl. 407 (1897) and Hebah v. United States ("Hebah II"), 456 F.2d 696, 704 (Ct. Cl. 1972), at least three inquiries are required to determine whether a claim fits within the "bad men" provision: (1) whether the perpetrator is a bad man in the sense of the treaty; (2) whether he or she committed a "wrong" within the meaning of the treaty, id. at 704, and; (3) whether activities that form the basis of the "bad men" claim occurred on the reservation of the harmed Indian, Janis, 32 Ct. Cl. at 408.

Plaintiffs' allegations falter at each hurdle. First, the actions or inactions of agencies and governmental entities, separate and apart from individuals, cannot serve as a basis for a "bad men" claim. Second, to the extent Plaintiffs rely on the actions of individuals, except for a lone allegation,[10] Plaintiffs have entirely failed to allege any claim that would constitute a "wrong" falling within the category of activities contemplated by the Treaties, namely, affirmative criminal acts perpetrated by a non-Ute against a Ute on the Reservation. As a corollary, the FBI's and BIA's subsequent investigation falls squarely within the prosecutorial discretion of the government and is presumptively unreviewable.

1. Governmental entities, as opposed to individuals, are not "bad men" as that term is used in the treaties.

In addition to the various individuals identified in the Complaint, Plaintiffs aver that the FBI, BIA, the State of Utah, Unitah County, Vernal city, and various non-federal enforcement agencies are "bad men" as that term is used in the treaties. See, e.g., Am. Compl. ¶ 71 ("the [state entities] have condoned the actions of the 'bad men' by failing to adequately train, supervise, or discipline the individual police officers . . . ."). The federal government and

[10] See infra fn.1.

various state enforcement agencies, however, cannot be "bad men" as that term is used in the treaties.

Allowing for "bad men" claims to be premised on the activities of governmental entities would contradict the plain language of the treaty, which indicates that the bad men provision was intended to guard against the actions of individuals, not governmental entities: "If bad men among the whites or among other people . . . ." 1868 Treaty, art. 6, 15 Stat. at 620 (emphasis added). Article 6 goes on to state that upon proof made, the United States would proceed to "cause the offender to be arrested and punished," terms reserved for the punishment of individuals. Id. (emphasis added).

That Plaintiffs cannot rest their bad men claim on the actions or inactions of governmental entities is further buttressed by Garreaux and Hernandez. In Garreaux, the tribal member brought a bad men claim against the United States, alleging the BIA and Department of Housing and Urban Development ("HUD") were "bad men" as that term was used in the Treaty of Fort Laramie, because the agencies had failed to properly administer an Indian housing program, resulting in the loss of plaintiff's home. The Court squarely rejected the notion that a bad men claim could be premised on the activities of an agency of the federal government, concluding that the bad men provision, substantially identical to the 1868 Treaty here, did not encompass claims against HUD. Garreaux, 77 Fed. Cl. at 737. Likewise, the Court in Hernandez concluded that the plaintiff could not maintain an action against the United States District Court of Nebraska, because "[a] court, however, is not a specific white man, and may not qualify as a 'bad man' for the purposes of this treaty without extending the Fort Laramie Treaty beyond its intended bounds." Hernandez v. United States, 93 Fed. Cl. 193, 200 (Fed. Cl. 2010).

Thus, Plaintiffs' allegations that rest on the actions or inactions of the FBI, BIA, and remaining governmental entities are outside the scope of claims contemplated by the treaty. If this Court concludes that Plaintiffs correctly identified "bad men" falling within the confines of the treaty provision at issue, the next inquiry is whether the alleged harms are "wrongs" in the sense of the treaty.

2. Plaintiffs fail to allege the commission of a "wrong" within the meaning of the Treaty.

Plaintiffs stretch the bounds of the "bad men" provision beyond its intended use, alleging that a variety of activities, ranging from investigatory and prosecutorial failures to the destruction of "critical" evidence, comprise acts cognizable under the treaties. See Am. Compl. ¶¶ 67, 69. Those "wrongs," however, fall far outside the scope of the "bad men" provision, which has traditionally "been applied to affirmative criminal acts and not mere acts of negligence." Hernandez, 93 Fed. Cl. at 199; see also Garreaux, 77 Fed. Cl. at 736 (concluding that the "bad men" provision of the Ute Treaty was intended to "to guard against affirmative criminal acts, primarily murder, assault, and theft of property.").

a. Actions and inactions connected with the subsequent federal investigation are not wrongs within the meaning of the treaty.

Plaintiffs' allegations that the Special Agents violated the bad men provision by failing to conduct a proper investigation into the circumstances surrounding Mr. Murray's death and subsequently failing to prosecute any of the individuals involved in the police pursuit that day fail for a number of reasons. See Am. Compl. ¶ 69. First, neither the treaty text nor the legislative history support Plaintiffs' claim premised not on the robbery, assault, or murder of a tribal member, but the decision of the agents not to prosecute. Second, Plaintiffs' claim conflicts with the principle that the prosecutorial discretion of the United States is generally unreviewable.

Neither the 1863 Treaty nor the 1868 Treaty define "wrong," but the text, history, and subsequent interpretations of the treaties make clear that the parties intended this term to apply to harmful acts that would have incited further hostilities between the Utes and the United States. For example, the 1868 Treaty includes terms reserved for the criminal context, requiring that the "offender" be "arrested and punished according to the laws of the United States." See 1868 Treaty, art. 6. And, indeed, it was not uncommon in various Indian treaties entered into at the time to offer a guarantee of peace between the parties, including provisions for the punishment of crimes between Indians and non-Indians. See generally Felix S. Cohen, Handbook of Federal Indian Law 65-66 (1982 ed.).

Following the conclusions reached in the Doolittle Committee report in January 1867,[12] Congress established the Indian Peace Commission ("Commission") in July 1867, comprised of both civilian and military leaders with interest and competence in Indian Affairs, and tasked the Commission "to establish Peace with certain Hostile Indian Tribes." Act of July 20, 1867, ch. 32, 15 Stat. 17. Relevant here, the Report to the President from the Indian Peace Commission that followed observed that there were "many 'bad men' . . . among the whites" and that "scarcely a night passes but, in spite of refinement, religion, and law, crime is committed." H.R. Exec. Doc. No. 40-97, at 10 (1868) (emphasis added). The treaties negotiated by the Peace Commission with the various tribes, including the Ute, in 1867 and 1868, were the culmination of these efforts to make peace—in essence, an attempt to break the cycle of retribution between the

[12] Native American tribal leaders, along with members of the United States military and other officials testified before a joint special committee, appointed under a joint resolution of March 3, 1865, charged with inquiring into the condition of Native Americans tribes. This commission, chaired by Senator James R. Doolittle of Wisconsin, submitted its report on January 26, 1867, entitled "Condition of the Indian Tribes", which discussed, in its view, the reasons for the decrease in Indian population and made recommendations for ameliorating the conditions.

various tribes and the United States by providing individual Indians a means of recourse for heinous acts and provocations perpetrated by non-Indians and vice versa. Richard v. United States, 677 F.3d 1141, 1148 (Fed. Cir. 2012).

Plaintiffs' allegations that the Special Agents failed to prosecute any of the law enforcement officers involved in the pursuit of Mr. Murray do not allege acts that fall within the class of activities encompassed by the Treaty. Contrary to Plaintiffs' conception, "wrong" was considered to be synonymous with "an injury" and the verb to "injure," see J. Worcester, Dictionary of the English Language 475 (1860); see also Webster's Dictionary 642 (1895).[13] Indeed, Hebah II defined "wrong" as an "[a]ction or conduct which inflicts harm without due provocation or just cause; serious injury wantonly inflicted or undeservedly sustained; unjust or unmerited treatment." 456 F.2d at 704 (citation omitted).[14] Thus, at the time of the treaty, wrongs were associated with affirmative acts; inaction was never a contemplated basis for a "bad men" claim.

Plaintiffs' attempt to fashion a "bad men" claim out of the manner in which the Special Agents conducted the subsequent investigation also runs headlong into the principle that the exercise of the prosecutorial discretion of the United States is, while not unfettered, generally

[13] When searching for contemporary 19th century definitions, the Supreme Court has often looked to J. Worcester's Dictionary and Webster's Dictionary, 1860 edition. See, e.g., Cooper Mfg. Co. v. Ferguson, 113 U.S. 727, 735 (1885); United States v. Ramsey, 431 U.S. 606, 630 n.5 (1977); Smith v. Wade, 461 U.S. 30, 64 n.3 (1983) (Rhenquist, J. dissenting); Tennessee v. Lane, 541 U.S. 509, 559 (2004).

[14] Moreover, the plain meaning of the verb "to commit" taken with "wrong," consists of an affirmative act by the perpetrator. "Commit" was defined, among other definitions, at the approximate time of passage as a verb meaning "to perpetrate (a crime, sin, etc.)." Webster's Dictionary 119 (1895); see also J. Worcester, A Comprehensive Dictionary of the English Language 475 (1866) (defining "commit" as "to do" or "to perpetrate."). [14] Based upon the common and plain meaning of these terms, then, one cannot "commit" a "wrong" through inaction.

unreviewable. It is well-established that, "in our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607 (1985) (citation omitted); see also United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."). Judicial review of such decisions is sharply limited by the separation of powers and is guided by "the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. at 607; see also infra Section VI.B.2.

The FBI investigation of Mr. Murray's death revealed that the only plausible crime committed was associated with the purchase of the .380 caliber gun found next to Mr. Murray's body. The FBI investigation thereafter focused on the prosecution of Cody Shirley—the "straw purchaser"— and the forfeiture of the gun upon his conviction. See Ex. 1, Forfeiture Order. Thus, this Court lacks subject-matter jurisdiction over Plaintiffs' claims attacking the United States' discretionary prosecutorial judgment.

b. The alleged destruction of and tampering with evidence is not a wrong within the meaning of the treaty.

Plaintiffs' allegations that the individual law enforcement officers conspired to destroy and tamper with evidence, see Am. Compl. ¶ 69, likewise fails to set out a cognizable "wrong" within the meaning of the treaty. While Plaintiffs' allegations of conspiracy and evidence tampering might result in prosecution—which, again, is a judgment call within the broad discretion of the United States—those claims do not allege affirmative criminal acts that would have "threatened the peace." The allegations of conspiracy are therefore insufficient to form an actionable "bad men" claim.

The text and history of the treaty also indicates that the United States and the tribe were primarily concerned with criminal acts that injured either the individual tribal members or their property, such as robbery, assault, and murder. 1863 Treaty, art. 6; Garreaux, 77 Fed. Cl. at 737; Hernandez, 93 Fed. Cl. at 199. Indeed, in the cases that have evaluated the "bad men" provision, each claim was predicated upon some criminal act perpetrated by one individual against another. Murder and assault have formed the most frequently cited basis for an actionable bad men claim, Tsosie I, 11 Cl. Ct. 62 (sexual assault); Tsosie II, 825 F.2d at 393 (sexual assault); Begay I, 219 Ct. Cl. 599; Begay II, 224 Ct. Cl. at 712 (sexual assault); Elk, 70 Fed. Cl. at 405 (sexual assault); Herrera, 39 Fed.Cl. at 420 (assault); Zephier Order, Ex. 4 at 2 (sexual, physical and mental abuse); Friend v. United States, 29 Ct. Cl. 425, 426 (1894) (involving a raid where it was found that the Indians shot the rancher's wife with an arrow and stabbed and otherwise mutilated her, in addition to kidnapping their son); Ex parte Kan-gi-shun-ca, 109 U.S. 556, 557 (1883) (murder), while the willful taking or wanton destruction of property was the next most frequently relied upon basis. Janis, 32 Ct. Cl. at 408 (killing of cattle); Friend, 29 Ct. Cl. at 426 (stolen property). Here, the only property "destroyed," was the gun found next to Mr. Murray's body that was disposed of off-reservation and pursuant to a criminal forefeiture order. As Hebah II concluded, actions permissibly taken by law enforcement officers are not "wrong" and cannot support a finding of liability under the "bad men" provision. 456 F.2d at 706-08. Plaintiffs' allegations of evidence tampering simply cannot form the basis for a cognizable "bad men" claim, particularly for actions that occurred off of the reservation.

c. The alleged "desecration" of a body at an off-reservation Mortuary cannot form a basis for a "bad men" claim.

Plaintiffs' contention that various individuals desecrated Mr. Murray's body while it was located at the mortuary, Am. Compl. ¶ 69, and "fail[ed] to insure that a proper autopsy was performed," id., should be dismissed for a number of reasons. Again, as described above, crimes of moral turpitude that would not have threatened the peace do not give rise to a "bad men" claim. While it may be difficult to know what precisely the Native American signatories had in mind when they executed the treaty almost 140 years ago, it is doubtful that they contemplated the term "wrong" to encompass the drawing of blood for law enforcement purposes. See also Ex. 2, Jones v. Norton, Docket Report, Jul. 26, 2012 Mem. Decision, Civ. No. 2:09-cv-730, ECF No. 216 (Jul. 26, 2012) (dismissing plaintiff's claims of intentional infliction of emotional distress against the mortuary because the incisions were made in furtherance of law enforcement activities, and "[p]laintiffs have not provided any compelling evidence to the contrary.").[15]

Even accepting as true that the desecration of a corpse could form a cognizable "bad men" claim, all of the purported activities that form the basis of the allegation occurred off the reservation. See Am. Compl. ¶ 70 (averring that the individuals who "permitted and participated in, the desecration of Todd Murray's body" did so "at the Mortuary."); see also id. ¶ 46 (averring that the incision was conducted by a mortuary employee "at the Mortuary."). Contrary to

[15] Issue preclusion, formerly referred to as collateral estoppel, also prevents Plaintiffs from relitigating issues already settled in the district court lawsuit. Because the application of issue preclusion is not a matter within the exclusive jurisdiction of this court, this court applies the law of the circuit in which the district court sits, Pharmacia & Upjohn Co. v. Mylan Pharms., Inc., 170 F.3d 1373, 1381 n. 4 (Fed. Cir. 1999), which is the Tenth Circuit in this case. In the Tenth Circuit, non-mutual issue preclusion prevents a plaintiff from asserting an issue that the plaintiff has litigated and lost against another defendant in a prior lawsuit. Park Lake Res. Ltd. Liability v. U.S. Dep't of Agric., 378 F.3d 1132, 1138 (10th Cir. 2004).

Plaintiffs' construction, the Treaties "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." Janis, 32 Ct. Cl. at 410 (emphasis added). Because the alleged mistreatment of Murray's corpse did not occur on the Reservation, it cannot support a claim under the "bad men" provision.

d. A failure "to protect the territorial integrity of the Tribe's reservation" is not a "wrong" within the meaning of the Treaty.

The Tribe claims that the United States failed to "protect the territorial integrity of the Tribe's reservation boundary and the Tribe's sovereign interests in the crime scene where Murray was shot," Am. Compl. ¶ 67. Though unclear, it appears that the thrust of the Tribe's argument is that law enforcement officers acted without "jurisdictional authority" when they crossed onto reservation lands and were therefore trespassing. Plaintiffs' argument is without merit.

The Tribe cannot recover damages under the "bad men" provision of the Treaty for this claim, however, because the benefits of that particular provision flow to the individual members of the Tribe, not the Tribe itself. Hebah I, 428 F.2d at 1337; 1868 Treaty, art. 6, 15 Stat. at 620 (providing that the United States will "reimburse the injured person for the loss sustained."); 1863 Treaty, art. 6, 13 Stat. at 675 ("And the United States hereby guarantee to any Indian or Indians of said band a full indemnification for any horses or other property which may be stolen from them by any of their citizens or white residents.") (emphasis added). Thus, as discussed below, see infra Section VII, the treaty cannot be fairly interpreted to "grant the claimant"—which here would be the Tribe, not the individuals—"a right to recover damages." Navajo I, 537 U.S. at 506.

C. The remaining statutes cited in Claim One do not impose a fiduciary duty on the United States.

Although Plaintiffs contend that the United States and/or the other named defendants identified violated "various federal laws" in Paragraph 10 of the Complaint, none of the remaining statutes cited by Plaintiffs impose "specific fiduciary or other duties," Navajo II, 556 U.S. at 290 (emphasis added), lacking, in other words, any authoritative content that could even be violated. See infra, Section VI.B.1.

VI. This Court Lacks Jurisdiction Over Claim Two—Breach of Trust in Violation of the Ute Treaties and Other Federal Law

A. The United States' Limited Waiver of Sovereign Immunity in the Tucker Acts.

As long held by the Supreme Court, claims for breaches of the general trust relationship between the United States and Indians are outside this Court's subject-matter jurisdiction. See United States v. Mitchell ("Mitchell I"), 445 U.S. 535, 542 (1980) (holding that the General Allotment Act created only "limited trust relationship" that did not give rise to enforceable fiduciary obligations against the United States). An Indian plaintiff has to do more than generally allege a breach of fiduciary or trust obligations.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." Navajo I, 537 U.S. at 502 (quoting Mitchell II, 463 U.S. at 212). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver has to be "strictly construed . . . in favor of the sovereign," Lane v. Peña, 518 U.S. 187, 192 (1996), and "not 'enlarge[d] . . . beyond what the language requires.'" U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (citation omitted); see Cooper, 132 S. Ct. at 1448.

The Tucker Act provides a "[l]imited" waiver of the United States' immunity from suit (Navajo II, 556 U.S. at 289) by granting this Court jurisdiction over

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The corresponding Indian Tucker Act, 28 U.S.C. § 1505, provides essentially the "same access" to relief. Mitchell I, 445 U.S. at 540.

While the text of the two Tucker Acts addresses damages claims "founded . . . upon" (28 U.S.C. § 1491(a)(1)) or "arising under" (28 U.S.C. § 1505) the Constitution or a federal statute or regulation, it is well settled that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable . . . ." Mitchell II, 463 U.S. at 216. Instead, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Id. at 216-217 17 (quoting United States v. Testan, 424 U.S. 392, 400 (1976); accord Navajo I, 537 U.S. at 503.

An Indian tribe asserting a non-contract claim under the Tucker Act or Indian Tucker Act must therefore clear "two hurdles" to invoke federal jurisdiction. Navajo II, 556 U.S. at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" Id. (quoting Navajo I, 537 U.S. at 506). That "threshold" showing must be based on "specific rights-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the government allegedly has failed to fulfill. Navajo I, 537 U.S. at 506; see United States v. Jicarilla Apache Nation, ___ U.S. ___, 131 S. Ct.

2313, 2325 (2011) (holding that the government's duties vis-a-vis Indian tribes are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles") (quoting Navajo II, 556 U.S. at 302 (same).

Second, "[i]f that threshold is passed," the plaintiff must further show that "the relevant source of substantive law," the violation of which forms the basis of his claim, "'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.'" Navajo II, 556 U.S. at 290 (quoting Navajo I, 537 U.S. at 506) (brackets alterations and citation omitted). That second showing reflects the understanding that not "all [such provisions conferring] substantive rights" mandate the award of money damages from the government "to redress their violation," and that the limited waivers of sovereign immunity in the Tucker Acts extend only to claims that the government has violated provisions that themselves require payment of a damages remedy. Testan, 424 U.S. at 400-01 (citation omitted); see also Navajo I, 537 U.S. at 503, 506; Mitchell II, 463 U.S. 216-218.

In other words, "the basis of the federal claim—whether it be the Constitution, a statute, or a regulation"—that is identified in the first step of the analysis can in turn give rise to a claim for money damages under the Tucker Act only if "that basis 'in itself can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" Testan, 424 U.S. at 401-402 (ellipsis and citation omitted). The Tucker Acts therefore "waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)" "only if " the "other source of law" creating "the right or duty" that the government has allegedly violated "'can fairly be interpreted as mandating compensation.'" Navajo II, 556 U.S. at 290 (quoting Testan, 424 U.S. at 400); accord Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 739-41 (1982) (Tucker Act "jurisdiction . . . cannot be premised on the asserted violation of

regulations that do not specifically authorize awards of money damages.").

"Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." Jicarilla, 131 S. Ct. at 2323 (quoting Mitchell I, 445 at 542; and Mitchell II, 463 U.S. at 224). Thus, the general trust relationship between the United States and Indians is insufficient to invoke this Court's subject-matter jurisdiction and Indian tribes, like other litigants before this Court, have to clear both jurisdictional hurdles, Navajo II, 556 U.S. at 290, before proceeding to the merits of their claim.

B. Plaintiffs' breach-of-trust claims are barred by the United States' sovereign immunity because plaintiffs did not allege the violation of a specific statutory or regulatory money-mandating duty.

1. Overview

Plaintiffs' Claim Two alleges multiple breaches of trust by the United States. Am. Compl. ¶¶ 78-81. Plaintiffs attempt to portray the events of April 1, 2007, as breaches of trust to the Ute Tribe, to the deceased Todd Murray, and to Murray's family. They specifically assert the following alleged breaches:

1. Various federal law enforcement officials "fail[ed] to investigate Todd Murray's death and by taking no action to promote justice in Indian Country" (id. ¶ 78);
2. Various federal law enforcement officials "fail[ed] to safeguard or prosecute violations of the Tribe's and its tribal members' right to 'peaceable possession' of the Ute tribal homeland without interference from persons unauthorized to 'pass over' the lands set aside for the Ute homeland" (id. ¶ 79);
3. "The United States has failed to investigate or prosecute the individuals involved in the shooting death" of Todd Murray "or the subsequent conspiracy to suppress, alter, and destroy critical evidence related to the shooting death" (id. ¶ 80); and,
4. The United States "fail[ed] to protect the territorial integrity of the Tribe's reservation and the Tribe's sovereign interest in the shooting site, thus allowing unauthorized persons to trespass on the Ute homeland and cause harm to tribal members with complete impunity" (id. ¶ 81).

Plaintiffs' allegations draw upon passages from Article 10 of the 1863 Treaty ("All the Indians of said band who may adopt and conform to the provisions of this article shall be protected in the quiet and peaceable possession of their said lands and property," 13 Stat. at 675 (emphasis added)),[17] Article 2 of the 1868 Treaty (United States agrees that only authorized persons "shall ever be permitted to pass over" the Ute's reservation," 15 Stat. at 620 (emphasis added)), and Article 6 of the 1868 Treaty (United States "will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs . . . , proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained"), id.

Plaintiffs attempt to ground these breach allegations in a substantive source of law by loosely and broadly linking the alleged conduct with several treaties and statutes described as "Ute Treaties of 1863 and 1868" (Am. Compl.. ¶ 78), "various federal laws listed under Paragraph 10" (id.), unspecified "federal trust obligations" (id. ¶ 79), unspecified provisions related to "violation of federal law and its treaty obligations" (id. ¶ 80), and unspecified "trust obligations" (id. ¶ 81). In sum, absent further specification which Plaintiffs should have shouldered in the first place, the universe of substantive sources of law Plaintiffs invoke are the Ute Treaties of 1863 and 1868, and the statutes listed in paragraph 10 of the Complaint[18] as the bases for their claims.

From the outset, this Court's scrutiny of the sources of law need not linger on the

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[17] Provisions from the 1863 Treaty that are not inconsistent with the 1868 Treaty are "re-affirmed and declared to be applicable and to continue in force." See 1868 Treaty, art. 1, 15 Stat. at 619.

[18] In addition to the statutes listed in paragraph 10 of the Complaint, Plaintiffs also refer to a third treaty, the Treaty of Guadalupe Hildalgo, 9 Stat. 922 (1848). For purposes of this motion, reference to the Paragraph 10 "federal laws" includes the Treaty of Guadalupe Hildalgo.

"various federal laws listed under Paragraph 10" in the Complaint. See Compl. ¶¶ 10, 62. They do not support Plaintiffs' claim. In fact, Plaintiffs have not identified any "specific right-creating or duty-imposing [constitutional,] statutory or regulatory prescriptions" that establish "specific fiduciary or other duties" that the United States allegedly has failed to fulfill. Navajo I, 537 U.S. at 506. A brief survey of the Paragraph 10 "federal laws" shows that none of them establish a "specific fiduciary or other duty" that the United States has allegedly breached:

- The Treaty of Guadalupe Hildalgo is silent about any fiduciary duty owed by the United States to the Ute Tribe, nor does the Treaty contain any money-mandating provisions related even remotely to the facts of this litigation. The Treaty of Guadalupe Hildalgo addresses a range of different topics, but none relate to the types of events alleged to have occurred on April 1, 2007.
- The Federal Circuit has already held that the Indian Civil Rights Act, 25 U.S.C. §§ 1301, 1302, 1321, is not money-mandating for establishing subject-matter jurisdiction. Wopsock v. Natchees, 454 F.3d 1327, 1333 (Fed. Cir. 2006), aff'd, 279 F. App'x 679 (10th Cir. 2008) (noting that the Indian Civil Rights Act "does not impose duties upon the federal government or its officials" and that the Act is "directed not at the federal government, but rather at Indian tribes") (citation omitted).
- The Major Crimes Act of 1885, 18 U.S.C. § 1153, only covers crimes committed by Indians and has nothing to do with the facts of this case. Nor does the Major Crimes Act identify any fiduciary duty or mandate any compensation for damages.
- 18 U.S.C. § 2343 addresses trafficking in cigarette contraband and has nothing to do with the facts of this case.

- The Assimilative Crimes Act of 1825, 18 U.S.C. § 13, addresses scenarios in which State law is adopted for areas within federal jurisdiction and mentions no fiduciary duty for the allegations set out by Plaintiffs, nor is it a money-mandating statute.
- Public Law 280, 18 U.S.C. § 1162, is completely inapposite because the reach of the Statute, which allows certain States to have jurisdiction over offenses committed by or against Indians in certain circumstances, does not include the State of Utah, does not impose any fiduciary duty upon the United States, and is not money mandating.
- The Indian Country Crimes Act of 1817, 18 U.S.C. §§ 1151, 1152, speaks to the jurisdiction of the United States over crimes in Indian Country, but sets forth no fiduciary duty nor is it money mandating.
- Similarly, 42 U.S.C. §§ 1981, 1983, and 1985 address actions people can take to enforce their civil rights, but do not impose a fiduciary duty on the United States. Moreover, this Court does not have jurisdiction to consider civil rights claims. See Pikulin v. United States, 97 Fed. Cl. 71, 77 (2011) ("Plaintiff also cites various provisions of the Civil Rights Acts, including § 1981, § 1983, § 1985, and § 1986, as bases for his claim. The court does not possess jurisdiction to entertain claims based on these statutes." (citing Marlin v. United States, 63 Fed. Cl. 475, 476 (2005) ("[T]he Court does not have jurisdiction to consider civil rights claims brought pursuant to 42 U.S.C. §§ 1981, 1983, or 1985 because jurisdiction over claims arising under the Civil Rights Act resides exclusively in the district courts."))).

With the Paragraph 10 "federal laws" ruled out as substantive sources of law for

harboring a specific-right creating or fiduciary duty imposed upon the United States,[19] the remaining examination focuses correctly on whether the Ute Treaties of 1863 and 1868 identify specific fiduciary duties owed by the United States to Todd Murray and Murray's family which have allegedly been breached and, if so, are they money-mandating duties. As discussed below, the Ute treaties do not.

2. The Ute Treaties of 1863 and 1868 do not impose a non-discretionary fiduciary duty upon the United States to prosecute alleged "bad men" without exercising its prosecutorial discretion.

Plaintiffs' first three breach-of-trust allegations charge the United States with failing to investigate Mr. Murray's death and failing to prosecute the individuals and government entities involved. Am. Compl.. ¶¶ 78-80. The fourth allegation (as well as the second allegation) charges the United States with allowing trespass. Id. ¶ 81. All four allegations fail to establish subject-matter jurisdiction in this Court because Plaintiffs' incorrectly equate the United States' prosecutorial discretion with a fiduciary duty.[20]

First, a fair inference of a money mandating obligation does not flow independent of the treaty that directly addresses the extent of bad men compensation and liability. This is not a Mitchell II situation where the government is managing with elaborate control trust assets with

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[19] Moreover, the Paragraph 10 "federal laws," with the exception of the Indian Civil Rights Act (but Wopsock holds that the Act is not money mandating), address jurisdictional issues and matters that relate to *individuals*, not tribes. Thus, the Ute Tribe cannot legitimately claim that any of the Paragraph 10 "federal laws" provide a substantive source of law that establishes any specific fiduciary duty owed by the United States to the Tribe, much less the particular ones alleged by Plaintiffs.

[20] The fourth allegation, as well as the second allegation which also includes features of trespass ("failure to safeguard"), also fail to meet the money-mandating requirement because the land on which the alleged April 1, 2007 disturbance occurred was not owned by Todd Murray or Murray's family, but by the Tribe. And under the Ute Treaty of 1868, Article 6 provides for re-imbursement to "the injured person."

the intent to secure profit from the trust res. See Grady v. United States, 2013 WL 4957344, 3 (Fed. Cl. 2013). The actions at issue are of the typical law enforcement variety with no specification of statutory and regulation prescriptions that have been violated. As the D.C. Circuit in Shoshone Bannock Tribes v. Reno recognized when it rejected the tribe's attempt to compel the Attorney General to file water rights claims on its behalf, "the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations," and "an Indian tribe cannot force the government to take a specific action unless a treaty, statute, or agreement imposes, expressly or by implication that duty." 56 F.3d 1476, 1482 (D.C. Cir. 1995).

To be money-mandating in breach, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." Eastport S.S. Corp., 372 F.2d at 1007. Discretionary schemes are money-mandating for Indian Tucker Act jurisdiction only if: (1) they provide "clear standards for paying" money to recipients; (2) they state the "precise amounts" that must be paid; or (3) as interpreted, they compel payment on satisfaction of certain conditions. Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (citation and quotation omitted).

The "bad men" clause does not meet these strict requirements. The "bad men" clause only requires that the AS-IA "cause the offender to be punished and arrested," but the clause is wholly discretionary, relying first and foremost on the AS-IA's prerogative to issue a binding a decision concluding that a claim has merit. And the clause "is drawn in such broad terms that in a given case there is no law to apply." Heckler v. Chaney, 470 U.S. 821, 830 (1985); see also E. Band of Cherokee v. United States, 16 Cl. Ct. 75, 78 (1988) (where statute "accords the Secretary the discretion to confer certain money benefits, [it] cannot serve as a basis for Claims

Court jurisdiction"); Mitchell v. United States, 13 Cl. Ct. 474, 480 (1987) (where regulation made revocation of road permits discretionary, not mandatory, failure to revoke road permit did not give rise to Tucker Act claim); Pope v. United States, 9 Cl. Ct. 479, 485 (1986) ("A claim for money, the allowance of which is wholly discretionary with an executive official, cannot be the subject of a Tucker Act suit."). Thus, this Court lacks subject-matter jurisdiction over Plaintiffs' claims attacking the United States' discretionary litigation judgment—whether to investigate and prosecute for the events of April 1, 2007.

Second, the authority to institute both civil and criminal litigation on behalf of the United States is committed to the discretion of the Attorney General.[21] 28 U.S.C. § 516. The Attorney General's exercise of his discretion to file litigation on behalf of the United States is "presumptively immune from judicial review." Shoshone Bannock, 56 F.3d at 1480; Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1983). The Attorney General, as the chief legal officer of the Executive Branch of government "must initially interpret" the law of the United States, United States v. Nixon, 418 U.S. 683, 703 (1974), and present the position of the United States where the matter comes into litigation. It is then the "province and duty" of the judiciary "to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Within this system, the Attorney General's authority to decide whether the United States will initiate a lawsuit is discretionary. And his "authority to make determinations includes the power to make erroneous decisions as well as correct ones." Swift & Co. v. United States, 276 U.S. 311, 332 (1928).

In Heckman v. United States, the Supreme Court held that it is "the right of the

[21] There are limited exceptions not relevant here, such as the Federal Election Commission's independent prosecutorial authority. 2 U.S.C. § 437d(a)(6).

government" to enforce Indian trust obligations against third-parties by litigation, not its obligation. 224 U.S. at 413, 442 (1912). "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under the acts of Congress, to the discretion of the Executive Department." Id. at 446. As in Heckman, in this case, the Plaintiffs "may be permitted to bring [their] own action, or, if so brought, the United States may aid [them] in [their] conduct." Id.

Moreover, the prosecution of actions by the United States on behalf of Indians is distinctly discretionary. The Supreme Court recognized this discretion with respect to claims against the United States for failure to bring actions on behalf of the Creek Nation to protect trust property, holding that

> [i]t must be remembered that the Secretary was traditionally given wide discretion in the handling of Indian affairs and that discretion would seldom be more necessary than in determining when to institute legal proceedings.

Creek Seminole Nation v. United States, 318 U.S. 629, 639 (1943); see also Shoshone-Bannock, 56 F.3d at 1482.

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The Attorney General has long interpreted his authority to represent Indians in litigation

as discretionary. For example, 25 U.S.C. § 175 provides, in part, that "the United States attorney shall represent [allotted Indians] in all suits at law and in equity." Nonetheless, the Department of Justice and the courts have consistently interpreted that statute as discretionary, containing "no 'meaningful standard' limiting [the Attorney General's] prosecutorial discretion." Shoshone Bannock, 56 F.3d at 1482; Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F.2d 1095, 1097 (D.C. Cir. 1974) (per curiam) (25 U.S.C. § 175 "impose[s] only a discretionary duty of representation"); Rincon Band of Indians v. Escondito Mut. Water Co., 459 F.2d 1082, 1084 (9th Cir. 1972) (25 U.S.C. § 175 is "not mandatory").

Legal action conceivably triggered by the events of April 1, 2007, and its aftermath, falls within the Attorney General's broad discretion and necessarily involves consideration of non-justiciable factors such as political, social, and policy goals of the United States. See Gonzales v. Oregon, 546 U.S. 243, 295-96 (2006) ("decision to . . . bring an action . . . implicates all the policy goals and competing enforcement priorities that attend any exercise of prosecutorial discretion."). Courts have also long acknowledged that they are ill-equipped to evaluate the myriad factors that may go into an agency's decision not to bring suit. Chaney, 470 U.S. at 832; Wayte, 470 U.S. at 607. Thus, the decision on whether to investigate and prosecute—which Plaintiffs allege to be a "duty"—falls squarely within the Attorney General's broad discretion to institute litigation on behalf of the United States and remains presumptively unreviewable. Distilled to its essence, no fiduciary duty exists to do so.

3. The Ute Treaties of 1863 and 1868 cannot be fairly read as mandating compensation to the Tribe for trespass.

Plaintiffs' second and fourth breach-of-trust allegations levy accusations that the federal government allowed unauthorized persons to "pass over" the Tribe's land (Am. Compl.. ¶ 79)

and to "trespass on the Ute homeland" (id. ¶ 81). Plaintiffs here claim, at bottom, that the United States—in a wide-open unmarked terrain—failed to keep allegedly unauthorized State or County law enforcement officials, in pursuit of a speeding car which carried Todd Murray as a passenger, off the Ute Reservation. The Treaties cited by Plaintiffs, however, impose a duty upon the government to only pay individual members, not the Tribe, in the event that unauthorized persons cause cause harm to person or property. See 1868 Treaty, art. 6, 15 Stat. at 620 (stating that the United States shall "reimburse the injured person for the loss sustained.") (emphasis added); 1863 Treaty, art. 6, 13 Stat. at 675("And the United States hereby guarantee to any Indian or Indians of said band a full indemnification for any horses or other property which may be stolen from them by any of their citizens or white residents.") (emphasis added). Because the Treaties do not mandate the government to compensate the Tribe, Plaintiffs have failed to establish a basis for this Court's jurisdiction over their trespass claims.

VII. Dismissal of the Tribe, separate and apart from individual tribal members, is warranted.

At a minimum, the Tribe, separate and apart from Mr. Murray's family, has not stated an actionable claim for compensation under the Treaties, thereby depriving this Court of jurisdiction over any tribal claim contained in the Complaint. To bring an Indian Tucker Act claim, a tribe must show: (1) that the government failed to perform a specific fiduciary duty rooted in a "substantive source of law," and; (2) that same source of law that was violated can "fairly be interpreted" to "'grant the claimant a right to recover damages.'" Navajo I, 537 U.S. at 506 (quoting Mitchell II, 463 U.S. at 217 n.16). Minimally, the Tribe cannot clear the second hurdle, because Congress never intended the Tribe to be "the channel or conduit through which reimbursement is to flow." Hebah I, 428 F.2d at 1338-39.

As discussed previously, supra Section VI.B.3., the only provision that can be fairly interpreted as mandating compensation provides that the United States will "reimburse the injured person for the loss sustained." 1868 Treaty, art. 6, 15 Stat. at 620 (emphasis added). That individual tribal members may bring suit under the "bad men" provision is well settled. Hebah I, 428 F.2d at 1339. But the treaties do not secure for the tribe itself the right to bring suit under the "bad men" provision. Id. Indeed, Plaintiffs concede this fact in the Amended Complaint. As set forth in the Amended Complaint, the Utes promised to "forego 'private revenge or retaliation' for injuries they suffered," but the only guarantee received in return was that "individual Ute Indians would have a right to legal redress . . . ." Am. Compl.. ¶ 65 (emphasis added). And Plaintiffs' understanding comports with settled caselaw that the injured Indian is the only "intended beneficiary" and the "Federal Government's promise of redress and reimbursement manifests an intention to give those benefits to the 'injured person' himself, directly." Hebah I, 428 F.2d at 1338.

Therefore, when analyzed under the conceptual framework of Mitchell II and its progeny, the Tribe cannot maintain this lawsuit and should be dismissed.

CONCLUSION

For these reasons, the Court should grant the United States' motion and dismiss Plaintiffs' Complaint.

Respectfully submitted on this 5th day of February 2014.

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