IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' RESPONSE TO THE UNITED STATES' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

FRANCES C. BASSETT
SANDRA L. DENTON (Of Counsel)
TODD K. GRAVELLE (Of Counsel)
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155/9839

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Plaintiffs, DEBRA JONES, ARDEN C. POST, and UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION ("Tribe") request a hearing and submit this Response to the Defendant UNITED STATES' Motion to Dismiss Plaintiffs' Amended Complaint (ECF No. 17).

INTRODUCTION

This lawsuit arises from the shooting death of 21-year-old Todd R. Murray, a member of the Ute Indian Tribe. Murray died after being shot in the back of his head, execution-style, above and behind his left ear. He was shot after being pursued at gun-point by two Utah state highway troopers, a Uintah County sheriff's deputy, and an off-duty Vernal City, Utah, police officer (the "shooting-involved officers" or "officers involved in the shooting"). The shooting occurred on Indian trust lands more than 25 miles inside the northern boundary of the Ute Tribe's Uncompahgre Reservation. At the time of the shooting, five additional law enforcement officers for the State of Utah and Uintah County were assisting in the pursuit of Todd Murray. The officers had no probable cause or reasonable suspicion to believe Todd Murray had committed any crime; Murray was simply a passenger in a car driven by Uriah Kurip. The Kurip vehicle had been pursued by the Utah Highway Patrol more than 25 miles inside the Uncompahgre Reservation for a traffic speeding violation. The driver, Uriah Kurip, had been taken into police custody before the officers began searching on foot for the passenger, Todd Murray. None of the state/county/municipal law enforcement officers involved in the pursuit and shooting of Todd Murray were cross-deputized by the federal government or the Ute Indian Tribe to exercise law enforcement authority over Native Americans inside the Tribe's Reservation. When FBI and BIA officers arrived on the

scene, the federal officers failed to properly assume jurisdiction over the shooting scene; the federal officers also failed to collect evidence or document the shooting scene, and failed to secure custody of Todd Murray's remains. Instead, the FBI and BIA officers were complicit in the Utah state/county/municipal officers' improper assertion of jurisdictional authority over the scene; even worse, the federal officers were both complicit in, and ultimately responsible for, the intentional and wholesale tampering with, destruction, loss, and failure to preserve critical evidence. The federal officers actively or tacitly participated in, or at a minimum failed to prevent, a conspiracy to obstruct justice and to cover up Todd Murray's execution-style shooting.

BACKGROUND

In its section entitled "background", the Defendant United States ("Defendant U.S.") attempts to condense into three pages all of the facts alleged in the amended complaint (complaint). In doing so, the Defendant U.S. has distorted and glossed over many of the important facts alleged in the 21-page complaint. The complaint alleges, *inter alia*, that Todd Murray was shot, execution-style, in the back of his head, and that "Todd Murray did not shoot himself execution-style in the back of his head." Amend. Compl. ¶¶ 12, 14. The complaint also alleges that state and federal law enforcement officers acted in concert, "whether through an express or implied agreement or understanding . . . to concoct, or to permit to be concocted, the shooting-involved officers' false and self-serving account that Todd Murray shot himself in the back of his head, execution-style, above and behind his left ear." Amend. Compl. ¶¶ 16-19. The complaint alleges that federal officers became accessories after the fact to the shooting-involved officers' execution-style shooting of Todd Murray, and accessories to the

officers' conspiracy to cover-up the fact that Murray was murdered execution-style. Amend. Compl. ¶¶ 16-19. The complaint further alleges that Todd Murray's family members met with FBI Agent Ashdown shortly after the shooting and informed Agent Ashdown that Todd Murray was right-handed; the family members asked Agent Ashdown point-blank to demonstrate how "a right-handed individual could shoot himself on the left side of his head, above and behind his left ear." Amend. Complaint, ¶¶ 54. *See* Exhibit 2, Declaration of Debra Jones, ¶ 6. Agent Ashdown was unable to position a gun in a manner "consistent with the bullet trajectory that was reported by the Utah Office of the Medical Examiner." *Id*. Agent Ashdown promised the Murray family that the FBI would conduct "a full investigation" into their son's shooting death. *Id*. at ¶ 8. Although the U.S. vaguely asserts that the FBI conducted "a separate criminal investigation," FBI Agent Ashdown later admitted under oath that it was largely because of his long-standing relationship with Officer Vance Norton that the FBI never conducted an investigation into Todd Murray's shooting death. *See* Exhibit 3, Declaration of Sandra Denton, Esq., ¶10; *see* Amend. Compl. ¶ 57.

The Plaintiffs first sought administrative review of Todd Murray's shooting death more than two years ago in February 2012, through letters and through telephonic and in-person meetings with attorneys and staff at the Department of Justice and Department of Interior. *See* Exhibit 4, Declaration of Frances C. Bassett, ¶ 6; *see* Amend. Compl. ¶¶ 75, 76. The United States never responded to the Plaintiffs' request for administrative review. The letters to the United States, dated February 1, 2012, February 16, 2012, and March 12, 2013, are included as Exhibits 8, 9 and 10 to this Response.

LEGAL STANDARD

A. Rule 12(b)(1)

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). When considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court accepts as true the undisputed allegations of the complaint and draws all reasonable inferences in favor of the plaintiff. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed.Cir. 1989) (citing *Scheuer*, 416 U.S. at 236). Jurisdiction is a threshold matter, however, and when the Government challenges it, the plaintiff bears the burden of establishing facts sufficient to demonstrate jurisdiction by a preponderance of evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed.Cir.1988). The complaint should not be dismissed unless it is beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Frymire v. United States*, 51 Fed.Cl. 450, 454 (2002) (emphasis added).

The Tucker Act, codified in 28 U.S.C. §1491(a)(1), commonly known as the Tucker Act, does two things: "(1) it confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States, and (2) it waives the Government's sovereign immunity for those actions." *Fisher v. U.S.*, 402 F.3d 1167, 1172 (Fed.Cir. 2005) (en banc). The specified categories of actions are claims for money damages 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). However, since the Tucker Act itself does not create a substantive cause of action, "in order to come within the jurisdictional reach and the [sovereign immunity] waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Fisher*, 402 F.3d at 1172.

When a complaint is filed alleging a Tucker Act claim, the trial court at the outset shall determine whether the Constitutional provision, statute, or regulation is one that is money-mandating. *Fisher*, 402 F.3d at 1173. If the plaintiff has made a nonfrivolous assertion that it is within the class of plaintiffs entitled to recover under the money-mandating source, the Court of Federal Claims has jurisdiction. *Jans Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1307 (Fed.Cir. 2008). "It is enough ... that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

Similarly the Indian Tucker Act, 28 U.S.C. §1505, confers jurisdiction upon the Court of Federal Claims in favor of any tribe with a claim against the United States, "whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." *See* 28 U.S.C. §1505. The Indian Tucker Act provides the necessary consent to suit, and a tribal plaintiff must present a rights-creating source of substantive law that "can fairly be interpreted as mandating compensation by the Federal

Government for the damages sustained." *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003).

B. Rule 12(b)(6)

"A motion made under Rule 12(b)(6) challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced. The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993).

"When reviewing a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims, which is the equivalent of Rule 12(b)(6) of the Federal Rules of Civil Procedure, we must accept as true all the factual allegations in the complaint, and we must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. U.S.*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (internal citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Although specific facts are not necessary to comply with Rule 8(a)(2), the complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests." *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

When ruling upon a Rule 12(b)(6) motion, the court's primary consideration is the allegations set forth in the complaint. *Newtech Research Systems LLC v. U.S.*, 99 Fed.Cl. 193, 201 (2011). RCFC Rule 12(d) provides: "If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."

ARGUMENT

IV. Plaintiffs Have Satisfied all Administrative Exhaustion Requirements Under the Treaties and Jurisdiction is Properly with the Court of Federal Claims

The term "exhaustion" describes two distinct legal concepts. The most common form is "non-jurisdictional exhaustion," which is a judicially created prudential doctrine that grants courts discretion to excuse exhaustion if "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Avacado Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) (citing *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)). The second form of exhaustion, "jurisdictional exhaustion," arises when Congress requires resort to the administrative process as a predicate to judicial review; this latter form of exhaustion is rooted in Congress' power to control the jurisdiction of federal courts. *Avacado Plus Inc*., 370 F.3d at 1247. Any exhaustion inquiry is presumed to be non-jurisdictional unless "Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984).

Defendant U.S. contends that the 1868 Treaty with the Ute Indians, 15 Stat. 619, ("1868 Treaty") requires that the Department of Interior ("DOI") first issue a "binding decision" on Plaintiffs' claims before jurisdiction is properly with the Court of Federal Claims. *See* U.S. Mot. to Dismiss p. 11 (ECF No. 20). In support of this contention, Defendant U.S. cites language from Article 5 of the 1868 Treaty, that is not dispositive of Plaintiffs' claims under Article 6 of the 1868 Treaty – the "bad men" clause. The Defendant's assertion that Article 5 "sets forth the process," while Article 6 focuses on the "available remedy," is not supported by the text of the Treaty itself.

The 1868 Treaty provides generally in Article 5 that a federal agent shall reside among the Indians and shall cause evidence of "depredations" on person or property to be taken in writing and forwarded to the Commissioner of Indian Affairs. The word "depredation" is defined as an "act or an instance of plundering; robbery; pillage." Collins English Dictionary, Complete and Unabridged (10th ed. 2009). In contrast, the "bad men" clause, Article 6, ¶ 1, addresses the remedy and remedial process to be followed when "any wrong" is committed upon the Indians by "bad men." The words "depredation" and "wrong" are not used interchangeably or in the conjunctive in the Treaty; rather, these words are used in the disjunctive, as seen from Art. 6, ¶ 2, which states that if "bad men among the Indians shall commit *a wrong* <u>*or*</u> *depredation* upon the person or property of any one, white, black, or Indian … the tribes herein named ... will … deliver up the wrong-doer to the United States." *See* <u>Exhibit 5</u>, excerpts from Ute Treaty of 1868. (emphasis added)

Although it is true that documents must be read as a whole, "it is a commonplace of statutory construction that the specific governs the general." *RadLAX Gateway Hotel,*

LLC v. Amalgamated Bank, 132 S.Ct. 2065 (2012). Article 6 of the 1868 Treaty provides a specific remedy and remedial procedure for claims arising under the "bad men" clause: for "any wrong" committed upon Indians by bad men, proof is to be made to the federal agent, after which the U.S. will "proceed at once" to reimburse the injured Indian for the loss sustained. In this way the Treaty addresses the specific problem of wrongs committed upon Indians by bad white men, and it provides a specific remedy and remedial procedure that cannot be disregarded in favor of the more generalized terms of Article 5. *Id*. at 2071.

This Court has previously analyzed this specific bad men treaty clause and has held that the only prerequisite required before suit is filed is that a notice of claim must be sent to the agency and a copy be sent to the Commissioner of Indian Affairs in Washington. *Hebah v. U.S. (Hebah I)*, 428 F.2d 1334, 1340 (Fed. Cl. 1970); *see also*, *Elk v. U.S. (Elk I)*, 70 Fed. Cl. 405, 408 (Fed. Cl. 2006) (exhaustion not required for treaty claims under "bad men" clause – the potential for delay and the concomitant possibility of prejudice, outweigh the interests favoring further exhaustion); *Elk v. U.S. (Elk II)*, 87 Fed.Cl. 70, 78 (Fed. Cl. 2009) (neither the 1868 Treaty nor any other source of law required plaintiff to await an administrative decision on her claim before filing suit).

Tsosie v. United States ("Tsosie I") is distinguishable and does not change the precedent and interpretation of the bad men clause provided by the *Hebah* and *Elk* decisions. *Tsosie I*, 11 Cl. Ct. 62 (1986); *Hebah I*, 428 F.2d 1334; *Elk I*, 70 Fed. Cl. 405; *Elk II*, 87 Fed.Cl. 70. In *Tsosie I*, the Court of Claims was considering the question whether the treaty provisions entitled the plaintiff to judicial review in the Court of Claims

of an administrative decision already made, not whether the Court of Claims had jurisdiction to hear the claims before a administrative review was completed. *Id*. at 75. The Court of Claims' statement on administrative exhaustion was dicta. *Id*. Moreover, the Court of Claims in *Tsosie* relied predominantly on *Begay v. United States*, 219 Ct.Cl. 599 (1979) ("Begay I") to support its statement that there must first be an administrative decision by the DOI. In *Begay I*, the treaty at issue included detailed language requiring a thorough examination by the Commissioner of Indian Affairs before judicial intervention, prompting the Court of Claims to reluctantly allow the DOI an additional ninety days to review the claim. *Begay I*, 219 Ct.Cl. 599, fn. 4. The 1868 Ute Treaty contains no such language.

Defendant U.S. attaches the unpublished opinion in *Zephier v. United States*, No. 03-768L (Fed. Cl. Oct. 29, 2004), in support of its argument that full mandatory administrative exhaustion is required here, which would deprive the Court of Federal Claims of jurisdiction. The *Zephier* opinion was picked apart by the Court of Federal Claims in *Elk I*, calling the opinion "inapposite" and its "analysis unpersuasive" as to whether exhaustion requirements should be imposed for "bad men" clause Treaty claims. *Elk I*, 70 Fed. Cl. at 411. In fact, the Court of Federal Claims used the *Herrera* case, cited by Defendant U.S., as an example of why administrative exhaustion should not be required for these treaty claims because in that case it took the agency over four years to decide the claim. Id. at 409; *Herrera v. United States*, 39 Fed. Cl. 419, 419-20 (1997).

Even applying non-jurisdictional discretionary exhaustion principles, Plaintiffs have satisfied the requirements under the Treaty. The potential for delay and the

attendant possibility of prejudice outweigh any interests of this case being heard by an Administrative Law Judge ("ALJ"). The Supreme Court has identified at least three non-exclusive sets of circumstances that mitigate against imposing the prudential exhaustion requirements: (1) where undue prejudice may result from an unreasonable or indefinite timeframe for administrative action, (2) where there is some doubt as to whether the agency was empowered to grant effective relief, and (3) where the administrative body is shown to be biased or has otherwise predetermined the issue before it. *McCarthy*, 503 U.S. at 146-48. In *Elk I*, the Court of Federal Claims analyzed the "bad men" clause of the 1868 Sioux Treaty under the *McCarthy* circumstances and held that exhaustion of administrative remedies was not required: "[i]n the court's view, the potential for delay here and the concomitant possibility of prejudice, outweigh the interest favoring further exhaustion." *Elk I*, 70 Fed.Cl. at 409.

Applying the *McCarthy* factors here, it is clear that Plaintiffs would be unduly prejudiced by having to embark upon an ill-defined administrative process with a potentially indefinite timeframe for action. *McCarthy*, 503 U.S. at 146-48. The events in question occurred more than seven years ago, and what little evidence was not spoliated by federal/state/local law enforcement officers is in danger of disappearing as memories fade with the passage of time. Plaintiffs have been litigating for years in an effort to get their day in court and they would be unduly prejudiced by an administrative decision that could take years and might get them no closer to a remedy than where they are today. Parenthetically, both the U.S. Department of the Interior and the U.S. Department of Justice have been on notice of this case since February 1, 2012, and the federal government has taken no action for more than twenty-six months. *See* Amend.

Compl. ¶¶ 75, 76; Exhibit 4, Declaration of Frances C. Bassett, Esq. In addition, it is questionable whether the Department of the Interior ("DOI") can adequately grant effective relief in this case in light of the complex and multiple constitutional issues that are play in the case. Finally, Plaintiffs believe the administrative tribunal has acted improvidently and demonstrated potential bias by virtue of the Administrative Law Judge having inappropriately provided affidavit testimony on behalf of the Defendant U.S. *See* U.S. Mot. to Dismiss, Ex. 5 (ECF No. 20-5).

The Defendant U.S. finally argues that the March 12, 2013 Notice of Claim mailed to the DOI, the Office of Tribal Justice, the Civil Rights Division and the Assistant Secretary for Indian Affairs was not "proper exhaustion". The *Woodford* case cited by Defendant U.S. is inapplicable as it pertains to the Prisoner Litigation Act, an Act that requires mandatory exhaustion of administrative remedies. *Woodford v. Ngo*, 548 U.S. 81 (2006). The March 12, 2013 Notice of Claim clearly states a claim for breaches of the 1863 and 1868 Ute Treaties and the United States' violation of its trust obligations to the Ute Tribe and its members. Claim was made upon the DOI and a copy sent to the Commissioner of Indian Affairs in Washington. Plaintiffs therefore have "fulfilled the only prerequisite to suit required by the treaty, and all administrative remedies have been exhausted." *Hebah I*, 428 F.2d at 1340.

V. The Rules of Construction Applicable to Indian Treaties

Because it will be necessary for the Court to construe the Treaty with the Utah Tabeguache Band of 1863, 13 Stat. 673 ("1863 Treaty") and the 1868 Treaty between the United State and the Ute Indians, it is essential to understand the rules of construction that apply to treaties generally, and to treaties with Indian tribes in particular. The Supreme Court has made clear that Indian treaties are unique and are

governed by different canons of construction than those applied to statutes and other treaties. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). Owing to the special relationship between the United States and Indian tribes, Indian treaties must be interpreted liberally in favor of Indians. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

Any ambiguities in the language of an Indian treaty must be resolved in favor of the Indians and courts must endeavor to "give effect to the terms as the Indians themselves would have understood them." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 526 U.S. 172, 196-203 (1999); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

In the absence of "explicit statutory language," *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979), the Supreme Court will not find a Congressional abrogation of Indian treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §2.02[1] and [2], at 113-119 (Nell Jessup Newton ed., 2012) (hereinafter "COHEN'S HANDBOOK").

Under the jurisprudence governing the interpretation of Indian treaties, it is unacceptable "for a court to view a treaty as frozen in the year of its creation." *Reed v. Wiser*, 555 F.2d 1079, 1090 (2nd Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (quoting *Day v. Trans World Airlines*, 528 F.2d 31, 35 (2nd Cir. 1975)). Courts recognize that Indian treaties are "not static." *Lac Courte Oreilles Band of Lake Superior Chippewa*

Indians v. Wisconsin, 653 F.Supp. 1420, 1430 (W.D. Wis. 1987); *see Elk II*, 87 Fed. Cl. at 78-82 (interpreting language in the Fort Laramie Treaty of 1868 identical to the Ute Treaty of 1868 to provide individual tribal members with a remedy for any wrongs committed by "bad men").

VI. The Ute Treaties Confer Rights to the Tribe and to Individual Ute Indians

Three separate treaties were negotiated between the United States and the Ute Indians. Two of those Treaties expressly grant rights to individual Ute tribal members. 1863 Treaty at 13 Stat., 673 and 1868 Treaty at 15 Stat., 619.[1]

When the Ute Treaties were executed and ratified, individual Ute Indians lacked the status and the political and civic rights afforded to other American citizens. It was against this backdrop that the Ute leaders negotiated for–-and the United States granted–-certain enumerated rights to individual Ute Indians in return for the Ute Indians' cessions of vast areas of land to the federal government. Article 6 of the 1863 Treaty (which was extended to all Ute Indians under terms of the 1868 Treaty) grants a right of legal redress for harms committed upon individual Ute Indians. *See* Exhibit 6, excerpts from 1863 Treaty.

Article 10 of the 1863 Treaty goes even further and expressly grants a right under federal law to "peaceable possession" to individual Ute Indians who conform to the expectation of peaceful co-existence required by the 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.

[1] Article 1 of the 1868 Treaty expressly reaffirmed the earlier 1863 Treaty with the Tabeguache Band of Utes. In addition, the 1868 Treaty incorporated and extended the terms of the 1863 treaty to all the bands of Ute Indians who were signatories to the 1868 Treaty. See 15 Stats. 619 at p. 2.

13 Stat., 673 at p. 5. The subsequent 1868 Treaty reaffirms this right of peaceable possession by stating that the lands reserved by the federal government for a Ute homeland are "hereby set apart for the absolute and undisturbed use and occupation of the Indians herein named" and further declaring that no individuals except persons authorized by the federal government "shall ever be permitted to pass over, settle upon, or reside" on the lands set aside for the Ute homeland. 15 Stats. 619, Art. 2, p. 3. The 1868 Treaty also includes a "bad men" clause at Article 6, which has been interpreted to provide a remedy to individual injured Indians since at least 1970, meaning that the right of recovery under bad man clauses is a well-defined treaty right. *Hebah I*, 428 F.2d at 1337. *See* Exhibit 5.

Article 10 of the 1863 Treaty states that "all" Ute Indians "shall be protected" in the "quiet and peaceable possession of their said lands and property." 13 Stat., 673, Art. 10, p. 5. By this specific language, the U.S. accepted a double duty of "preserving to the Indians" the quiet possession of the reservation as their home land, and of protecting the persons and property of individual tribal members thereon, and this duty and obligation still exists, never having been released by the action of the Indians or by subsequent treaty or agreement with them. *United States v. Ewing*, 47 F. 809, 813 (D.C.S.D. 1891). Article 2 of the 1868 Treaty expands upon the 1863 Treaty language by granting the Ute Indians a right to the "absolute and undisturbed use and occupation" of their Reservation lands. 15 Stats. 619, Art. 2, p. 3. The "bad men" clause of the 1868 Treaty, further expands the duty of the U.S. to protect not only the Ute Tribe as a whole in its quiet possession of the reservation lands, but also the individual Ute Indians

against "any wrong" perpetrated on them by any non-Indian. *Richard v. United States*, 677 F.3d 1141, 1152-53 (Fed. Cir. 2012).

Analyzing the Ute Treaties of 1863 and 1868 together, and applying the rules of Indian treaty construction, this Court must give effect to the treaty language as the Ute Indians would have understood the language. The Court must also determine the rights that were recognized and conferred under the Ute Treaties of 1863 and 1868 under modern day realities. Applying those interpretative rules here, it is clear that the 1863 and 1868 Treaties grant not only the Ute Tribe itself, but also individual Ute tribal members, the following rights:

> (1) a right to be secure in their homes and tribal homelands and to be free from unlawful incursions, and
>
> (2) a right in individual Ute Indians to seek legal redress for harms suffered as the result of non-Indians entering onto the Ute reservation without legal authority and causing them injury.

The Ute Indians would have understood the terms of the "bad men" clause as providing a remedy to both the Tribe and its individual tribal members to ensure that these rights afforded the Ute Indians under the 1863 and 1868 Treaties were upheld and protected.

VII. Plaintiffs State a Cognizable Claim Under the 1868 "Bad Men" Clause

"A motion made under Rule 12(b)(6) challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced." *Advanced Cardiovascular Systems, Inc.*, 988 F.2d at 1160. "When reviewing a dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims, which is the equivalent of Rule 12(b)(6) of the Federal

Rules of Civil Procedure, we must accept as true all the factual allegations in the complaint, and we must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co.*, 241 F.3d at 1378 (internal citations omitted).

To state a claim under the "bad men" clause of the 1868 Treaty it must be shown that "bad men among the whites" committed a "wrong upon the person or property of the Indians". *Elk II*, 87 Fed. Cl. at 78-84. The allegations of the complaint clearly state a claim under the "bad men" clause of the 1868 Treaty. See, Amend. Compl. ¶¶59-76 (ECF No. 17).

A. Plaintiffs have satisfied the first prong of their 1868 Treaty claim - that the officers, agents and individuals identified were "bad men among the whites".

The "bad men" clauses, and similar Indian indemnity acts in general, 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 Territory." *Janis v. United States*, 32 Ct.Cl. 407, 408 (Ct.Cl. 1897). The "bad men" provisions guarantee the safety and tranquility of all Native Americans on reservations during all of their interactions with any non-Indian. *Richard*, 677 F.3d at 1152-53 ("bad men" not limited to government actors). The individual officers named in the amended complaint are all non-Indians who entered upon the Tribe's reservation and thereafter interacted with Todd Murray, a tribal member. Plaintiffs therefore have satisfied the first prong of their 1868 Treaty "bad men" claim.

Defendant U.S. cites to paragraph 71 of the amended complaint in its argument that Plaintiffs' claims rest on the activities of governmental agencies as "bad men". See Mot. to Dismiss Am. Compl. at pp. 18-19 (ECF No. 20). However, Plaintiffs are not

alleging that the "bad men" are the governmental agencies; rather the complaint identifies multiple individuals and specific facts as to the named individuals' involvement in the wrongs. *See* Amend. Compl. ¶¶18, 67-76 (ECF No. 17). Plaintiffs' reference to the State of Utah, Uintah County, and Vernal City as agencies in ¶71 of the Complaint implicates the individuals previously identified from each agency, whose actions and inactions caused Plaintiffs' damages. Accepting all factual allegations of the complaint as true, Plaintiffs have pled a cognizable claim against "bad men among the whites" within the scope of the 1863 and 1868 Treaties.

B. Plaintiffs' have alleged "wrongs" within the meaning of the 1863 and 1868 Treaties.

The term "any wrong" was not defined by the 1868 Treaty or in judicial decisions, so the Court must determine what the parties to the 1868 Treaty understood the term to mean. *Hernandez v. United States*, 93 Fed. Cl. 193, 199 (Fed. Cl. 2010). Owing to the special relationship between the United States and Indian tribes, Indian treaties must be interpreted liberally in favor of Indians. *Choctaw Nation*, 318 U.S. at 431-32; *Choate*, 224 U.S. at 675. We first look to the historical context of the 1868 Treaty for assistance in determining the meaning of the term.

During a violent and tumultuous time between Native Americans and the westerly advancing settlement of the United States, the Indian Peace Commission was authorized by Congress in 1867 to remove "all just cause of complaint" by the Indians and to establish peace and security for the Indians and white people in the western territories. *See* 15 Stat. 177, §1 (1867). In its report, the Indian Peace Commission recommended treaty-making with the Indians to remove the causes of complaint or "wrongs," and in support of its recommendation, the Commission stated that for the

United States, "the best possible way then to avoid war is to *do no act of injustice*." *See* N.G. Taylor et. al., Report to the President by the Indian Peace Commission 79 (1868) (emphasis added), *available at* http://eweb.furman.edu/~benson/docs/peace.htm (last visited April 8, 2014).

> That [the Indian] goes to war is not astonishing; he is often compelled to do so. Wrongs are borne by him in silence that never fail to drive civilized men to deeds of violence.

Id. at 50. The historical record shows that the "bad men" clause of the 1868 Ute Treaty was meant to redress "wrongs" against the Indians; in other words, any act of injustice against the Indians.

The Court of Federal Claims in *Hebah II* used the Webster's New International Dictionary definition of "wrong" in determining the meaning of the "bad men" clause, defining it as: "Action or conduct which inflicts harm without due provocation or just cause; serious injury wantonly inflicted or undeservedly sustained; unjust or unmerited treatment." *Hebah v. United States (Hebah II)*, 456 F.2d 696, 704 (Ct. Cl. 1972). This definition of "wrong" is certainly not as limiting as Defendant U.S. contends.

The extra-jurisdictional seizure of a tribal member without any articulable suspicion of criminal activity is a "wrong" under the "bad men" clause within the definition provided by the *Hebah* court; it is, simply put, an "action which inflicts harm without just cause." *Id*.; *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (arrest of tribal member on tribal land by a state officer is analogous to a warrantless arrest without probable cause); *U.S. v. Foster*, 566 F.Supp. 1403 (D.C. 1983) (officer's extraterritorial investigative stop of defendant was a deprivation of liberty just as unreasonable as an arrest without probable cause). Moreover, the federal officers' failure to properly

investigate and properly preserve evidence in conformance with standard police investigatory procedures is "unjust, unmerited and differential treatment". *Hebah II*, 456 F.2d at 704.

The United States agreed to protect and reimburse the Ute Indians for all harm, injury, unjust, or unmerited treatment inflicted upon any tribal member or tribal property by non-whites on the reservation. *See* 1868 Treaty, 15 Stats. 619, Art. 6. The Ute Indians would have understood the bad men clause as providing a remedy to both the Tribe and its individual tribal members to ensure that (*i*) the rights afforded to the Ute Indians under the 1863 and 1868 Treaties, as discussed in subsection VI supra, and (*ii*) the pledges made by the United States as consideration for the Ute bands' cessions of vast tracts of land, were honored, protected, and enforced. Courts must endeavor to "give effect to the terms as the Indians themselves would have understood them." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196-203; *Choctaw Nation*, 397 U.S. at 631.

The *Garreaux* opinion, cited by Defendant U.S., is inapposite. The *Garreaux* court dismissed a claim brought under the "bad men" clause of the Fort Laramie Treaty because the claims were made against HUD as an entity rather than against a specific person that qualified as a "bad man" under the Treaty, and the claims alleged sounded in negligence and/or breach of contract. *Garreaux v. United States*, 77 Fed. Cl. 726, 737 (Fed. Cl. 2007). It is unclear from the Court's opinion in *Garreaux* whether the nature of the claim alone would have been reason enough for dismissal, without also the lack of a specifically alleged "bad man". *Id*.

Plaintiffs' complaint alleges wrongs that are not in the nature of simple negligence or breach of contract; rather they are injustices. They include (*i*) Todd

Murray's shooting death; (*ii*) the apparent conspiracy to cover up the facts surrounding the shooting; (*iii*) the failure of federal officers to take custody of Murray's body and to secure the body against desecration and spoliation of evidence; (*iv*) the failure to insure that a proper autopsy was performed on Murray's body; (*v*) the failure of federal officers to conduct any kind of investigation into Murray's shooting death; and (*vi*) the failure of federal officers to protect the territorial integrity of the Tribe's reservation boundary and the Tribe's sovereign interest in the crime scene where Murray was shot. Amend. Compl. ¶¶ 12-19, 39-53. By pursuing and seizing Murray at gunpoint, the Utah state/county/municipal officers were unlawfully attempting to extend state criminal jurisdiction into the boundaries of the Tribe's reservation without consent of the Tribe. *See South Dakota v. Cummings*, 679 N.W.2d 484, 487-89 (S.D. 2004). Further, all of the evidence that the FBI and BIA officers were responsible for–-and that would have been dispositive in any criminal or civil legal proceeding–-was spoilated, i.e., altered or destroyed or not preserved. *See* Amend. Compl. ¶ 53 (ECF No. 17); *Morroccon v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (loss of evidence by willfulness, bad faith or fault is sanctionable spoliation). The state, federal, and local officers' callous disregard for proper investigatory procedure and preservation of evidence is unjust and unmerited treatment by non-white people on the reservation. *Hebah II*, 456 F.2d at 704.

1. The extra-jurisdictional pursuit of Todd Murray at gunpoint by the State, county and local officers without probable cause resulting in Murray's wrongful death by gunshot is a "wrong" within the meaning of the Treaties.

"To an Indian, and undoubtedly to all men, the killing of an Indian without just cause or reason would certainly be a wrong within the meaning of the Treaty of 1868."

Hebah II, 456 F.2d at 704. In this case, Vernal City Police Officer Vance Norton admits that he fired his gun twice at Murray. The wrongful death of Murray is most certainly a wrong within the meaning of the 1868 and 1863 Treaties. *Id*. The amended complaint alleges that Murray's shooting death was a wrong committed by the State/county/municipal officers. Amend. Compl. ¶¶14, 18, 67-76 (ECF No. 17). Defendant U.S. has conceded that Plaintiffs' claim that Murray was shot in the head by Officer Norton is a valid "bad men" claim. *See* Mot. to Dismiss, fn 1, p. 2 (ECF No. 20).

Plaintiffs' have also alleged valid "bad men" claims for the other harmful actions and inactions of the state/federal/local officers involved in the incident. The Utah state and local officers committed a wrong by their armed pursuit of Murray without jurisdiction and without any probable cause. "The purpose served by the two 'bad men' provisions working in concert was to keep the peace between the white men and the Indians." *Janis*, 32 C. Cl. at 410. An extra-jurisdictional pursuit at gunpoint by state officers on the reservation lacking both jurisdictional authority and probable cause to believe Murray had committed any crime is an "act that would have threatened the peace that the [Ute] Treaty was intended to protect." *Hernandez*, 93 Fed. Cl. at 199.

In *Elk II*, an Army recruitment officer, under the auspices of a required recruitment evaluation, drove a tribal member onto a remote part of the reservation and sexually assaulted her. 87 Fed.Cl. 70, 74-75. The U.S. government was held liable to the tribal member under the bad men clause of the Sioux Treaty of 1868 for the assault. Id. at 78. Similar to the *Elk* case, here the state and local officers came onto the

reservation, pursued Murray at gunpoint without jurisdiction or probable cause, and then assaulted and likely killed Murray by firing their weapons at him.[2]

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 342 U.S. 786, 789 (1945). "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Worcester v. Georgia*, 31 U.S. 515, 561-563 (1832). The holding in *Worcester* is as applicable here as it was in 1832. Just as Georgia officials could not employ state law to trespass into Cherokee territory and illegally abduct, arrest, and imprison the two white missionaries, the Utah state and local officers here could not trespass onto the Uintah and Ouray Reservation and pursue a tribal member at gunpoint without probable cause or jurisdictional authority. Id.

> The limitation on state power in Indian Country stems from the Indian Commerce Clause, which vests exclusive legislative authority over Indian affairs in the federal government. This constitutional vesting of federal authority vis-à-vis the states allows tribal sovereignty to prevail in Indian country, unless Congress legislates to the contrary. Because of plenary federal authority in Indian affairs, there is no room for state regulation.

COHEN'S HANDBOOK, §§6.01[2], 6.03, pp. 502-03, 520-35.

[2] Pointing a weapon and firing at a human being is a wrong and a crime under a variety of statutes in the state of Utah and under federal law. *See* 18 U.S.C. §§ 1111, 1112, 1117, 1201 (Murder, Manslaughter, Conspiracy to Commit Murder, Kidnapping); Utah Code Ann. §**76-5-107. Threat of violence -- Penalty.** (1) A person commits a threat of violence if the person threatens to commit any offense involving bodily injury, death, or substantial property damage, and acts with intent to place a person in fear of imminent serious bodily injury, substantial bodily injury, or death; **76-5-102. Assault.** (1) Assault is:(a) an attempt, with unlawful force or violence, to do bodily injury to another;(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; **76-5-209. Homicide by assault -- Penalty.** (1) A person commits homicide by assault if, under circumstances not amounting to aggravated murder, murder, or manslaughter, a person causes the death of another while intentionally or knowingly attempting, with unlawful force or violence, to do bodily injury to another.

The amended complaint clearly alleges that the officers had no jurisdictional authority and no reasonable suspicion nor probable cause to believe that Murray, the passenger of the vehicle, had committed any crime. See Amend. Compl. ¶31 (ECF No. 17). Such unlawful assaults and seizures were certainly contemplated as "wrongs" that the United States agreed to prosecute and reimburse the tribal member for under the "bad men" clause when the 1868 Treaty was adopted. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (exclusive federal and tribal criminal jurisdiction over reservations is necessary "because of the local ill feeling, the people of the states where [Indian tribes] are found are often their deadliest enemies").

The extraterritorial seizure and shooting of Todd Murray was unlawful and in violation of his Fourth Amendment rights. *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990); see also *South Dakota v. Cummings*, 679 N.W.2d at 487-89 (S.D. 2004) (state deputy in "fresh pursuit" could not pursue a tribal member onto the Pine Ridge Reservation for an off-reservation speeding violation); *Farmington v. Benally*, 892 P.2d 629 (N.M. App. 1995) (disallowing arrest after pursuit); *United States v. Foster*, 566 F.Supp. 1403 (D.C. 1983) (officer's extraterritorial investigative stop of defendant was a deprivation of liberty just as unreasonable as an arrest without probable cause); *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002) (extra-territorial search of tribal offices by California district attorney and county sheriff was illegal); *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1202 (10th Cir. 2009) (describing the holding in *Ross* to be that under no circumstances would a state officer have had authority to act on tribal lands, and distinguishing that legal precedent from the state law that allowed peace officers to act within neighboring subdivisions).

A violation of a citizen's constitutional rights by state or federal authorities is not negligence, nor is it a simple breach of contract. *Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir.2001) (in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence.) It is a wrong clearly contemplated by the 1863 and 1868 Treaties to redress.

2. The FBI and BIA officers' failure to properly investigate and spoliation of evidence are wrongs within the meaning of the Treaties.

Defendant U.S. relies on the absence of published cases sustaining "bad men" claims premised on some form of inaction or failure to act. However, the absence of published decisions is not determinative of the meaning of the Treaty language and the Indian right preserved. *Richard*, 677 F.3d at 1151 FN19 (prolonged nonenforcement, without preemption, does not extinguish Indian rights); *Tsosie v. United States*, 825 F.2d 393, 399 (Fed. Cir. 1987). Moreover, the bad men clause allows claims for "any wrong." The inclusion of the word "any" must be afforded its full scope; meaning that the term "wrong" must be construed broadly. *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (an Indian 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).

The Court of Federal Claims in *Hebah II* defined "wrong" as: "Action or conduct which inflicts harm without due provocation or just cause; serious injury wantonly inflicted or undeservedly sustained; *unjust or unmerited treatment*." *Hebah II*, 456 F.2d at 704 (emphasis added). A person can receive unjust or unmerited treatment by the inaction of another. "Statutory prohibitions often go beyond the principal evil to cover

reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

"Unjust or unmerited treatment" is clearly implicated by the federal officers' failure to properly investigate Todd Murray's shooting as they would a white person's shooting. *Cole v. Oravec*, 465 Fed.Apps. 687, 2012 WL 70201 (9th Cir. 2012) (allegations that FBI agent failed to provide Native American decedent's family with same level of investigation into decedent's death, pursuant to standard procedures, stated *Bivens* claim for violation of equal protection based on differential treatment). The failure to properly investigate and properly preserve evidence in conformance with standard police procedures and protocols is unjust, unmerited, and differential treatment.

> As we have noted in a slightly different context, however, **although prosecutorial discretion is broad, it is not 'unfettered.'** Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.

Wayte v. United States, 470 U.S. 598, 608 (1985) (emphasis added and internal citations omitted); see also *Federov v. United States*, 600 A.2d 370, 377 (D.C. 1991) (protesters made a prima facie showing of selective prosecution).

The FBI and BIA's failure to investigate the shooting and to properly preserve critical evidence in the case violates the Plaintiffs' constitutional right "to have police services administered in a nondiscriminatory manner." *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (citing *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000)). "An equal protection violation occurs when the government treats

someone differently than another who is similarly situated." *Penrod v. Zavaras* 94 F.3d 1399, 1406 (10th Cir. 1996).

The extensive destruction and spoliation of critical evidence in this case is listed at ¶53 of the Amended Complaint. (ECF No. 17). Plaintiffs' conspiracy and spoliation claims are clearly "wrongs" contemplated by the Treaties because they are based on unjust and unmerited treatment that inflicted harm on Todd Murray, Murray's family, and the Ute Indian Tribe without just cause. *Hebah II*, 456 F.2d at 704.

It was the duty of the federal police officers, in conformance with their standard practices, to investigate, collect, and protect the critical evidence. *See* Amend. Compl. ¶¶ 36, 42, 46-53 (ECF No. 17). Not only that, but because the shooting scene was in Indian Country it was the duty of the federal police officers to secure and assume jurisdiction over the scene. Id. at ¶36. Instead, the FBI and BIA officers spoliated critical evidence and were complicit in the State officers' improper assertion of jurisdictional authority over the shooting and the state and local officers' apparent cover-up conspiracy. *Sommers Oil Co.*, 241 F.3d at 1378 (in determining whether to dismiss a claim, the Court must accept as true all the factual allegations in the complaint, and must indulge all reasonable inferences in favor of the non-movant).

Moreover, a person can be wronged by the inaction of another. As pertinent here, there was a thirty-minute interval between the time Todd Murray was reported shot and the time Gold Ambulance arrived on the scene. During this thirty-minute interval numerous law enforcement officers arrived on the scene, yet not a single officer rendered medical aid to Murray; instead Murray was left to bleed to death from the gunshot wound to his head as officers stood over his body. Had medical aid been

rendered, Murray might have survived to give his own account of the encounter. This failure to provide Murray with first aid resulted in substantial harm to Murray; he died. Amend. Compl. ¶ 41.

The destruction of the handgun allegedly used by Murray was also a wrong insofar as it was a large part of the spoliation and apparent cover-up conspiracy. On March 28, 2008, the attorney for Murray's family sent a Notice of Claim to the Utah State, county and local officers and agencies involved in the shooting death. *See* Docket Report, *Jones v. Norton*, Civ. No. 2:09-cv-00730 (D. Utah filed August 20, 2009)(Ex. 2 of Defendant U.S. Mot. to Dismiss). The Final Order of Forfeiture of the handgun was ordered almost eight months later on November 14, 2008.

Despite the nearly eight month interval between receipt of Plaintiffs' Notice of Claim and the Final Order of Forfeiture, nothing was ever done by any of the state or local officers to notify the FBI, U.S. Attorney, or the Federal District Court that the handgun should not be destroyed. It defies logic, and suggests bad faith, that all of the recipients of the Notice chose not to act on this information. The officers' inexcusable conduct effectively emptied the coffers of evidence – resulting in unjust and unmerited treatment to the Plaintiffs. Amend. Compl. ¶ 53. A conspiracy to cover up a killing, thereby obstructing legitimate efforts to vindicate the killing through judicial redress, interferes with the due process right of access to the courts, which is protected by 42 U.S.C. § 1985(2) and (3). *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984).

3. The desecration and manipulation of Murray's body is a "wrong" within the meaning of the Treaties.

Tampering with evidence and the desecration of human bodies are criminal acts under both federal law and Utah law. *See* 18 U.S.C. § 1512(c); UTAH CODE ANN. § 76-8-306(1)(c). Here, it was the federal officers' relinquishment of a tribal member's body to be taken off the reservation by state officers who lacked jurisdiction that improperly allowed the state and local officers to manipulate and desecrate Murray's remains. It is a wrong that vitiates the peace that the Ute Treaties were intended to create. *See* VII(B) supra. Moreover, the words "any wrong" in Article 6 of the 1868 Treaty, and the corresponding absence of any qualifier, means that the Treaty's indemnity clause must be construed to apply in circumstances where, as here, a wrong is initiated, or set into motion, on the Tribe's reservation. Consider for instance if a tribal member were to be abducted by bad men, taken off the reservation, and then killed; no one would question the application of the bad men clause in those circumstances. And the circumstances here are not substantively different. But for the federal officers' failure to secure Todd Murray's body, and their improper relinquishing of the body to state and local officers, the body would not have been desecrated and evidence would not have been spoliated. *See* Amend. Compl. ¶¶36 and 42 (ECF No. 17). Defendant U.S. argues that issue preclusion, or collateral estoppel, prevents the Plaintiffs from bringing any claim based upon the desecration of Murray's body at the off-reservation mortuary. *See* Defendant U.S. Mot. to Dismiss at p. 25 FN15 (ECF No. 20). This argument is without merit. To begin with, issue preclusion is limited to issues that have been fully and conclusively litigated, and here the Murray's family's federal lawsuit

against the Utah state defendants is ongoing.[3] Secondly, the doctrine of issue preclusion is limited to issues that are essentially identical, and here there is no identity of issues. The question litigated in the federal lawsuit is whether the jagged incision made to Murray's neck by an employee of Blackburn Mortuary was done with specific intent to inflict injury on Murray's family so as to support the family's claim for intentional infliction of emotional distress claim under Utah law. That is different from the issue presented here: the issue presented under the Plaintiffs' 1863 and 1868 Treaty claims is whether the desecration of Murray's body and the spoliation of critical evidence constitutes a wrong under the "bad men" clause of the 1868 Treaty). *Park Lake Res. Ltd. Liability v. U.S. Dep't. of Agr.*, 378 F.3d 1132, 1138 (10th Cir. 2004); *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000) (no issue preclusion where jury form was unclear as to specific evidence used to find negligence).

4. Failure to protect the territorial integrity of the Tribe's reservation is a "wrong" within the meaning of the Treaties.

The United States promised to protect the Ute Indians' quiet and peaceful possession of their lands within the boundaries of reservation in exchange for the Tribe relinquishing vast tracts of land held in aboriginal title. *See* 1863 Treaty, 13 Stat 673, Art. 1, Art. 6 and Art. 10; and 1868 Treaty, 15 Stat 619, Art. 1, Art. 2, and Art. 6. The "bad men" clause of the 1868 Treaty specifically provides redress for any wrongs done "upon the person or *property of the Indians*." 15 Stat. at 620 (emphasis added). At the time the Treaty was entered, the 'property of the Indians' was the reservation communally owned by the Tribe. Thus any wrong done to the property of the Indians,

[3] On April 1, 2014, the Plaintiffs' in *Jones v. Norton, et al.*, filed a notice of appeal from the district court's dismissal of the Plaintiffs' claims in *Jones v. Norton*. *See* Exhibit 7, Plaintiffs' Notice of Appeal in *Jones v. Norton*.

would have been a wrong done to the Tribe itself. Any wrong done upon the "person", would have been a wrong done to an individual tribal member. The Ute Indians would have understood the "bad men" clause as granting a right of redress for any wrongs done to either individual Ute Indians or to the Tribe itself. *Choctaw Nation*, 318 U.S. at 431-32 (Indian treaties must be interpreted liberally in favor of Indians).

"A treaty with an Indian tribe should be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which it would naturally be understood by the Indians." *Delaware Tribe of Indians v. United States*, 128 F.Supp. 391, 397 (Ct. Cl. 1955), quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899). It should not be assumed that the Ute Indians who signed the treaty in 1868 would have understood the legal refinement of third-party contractual beneficiaries, which is urged by the Defendant U.S. *Delaware Tribe of Indians*, 128 F.Supp. at 395.

VIII. Plaintiffs State a Cognizable Claim for Breach of Trust and Jurisdiction is Properly with the Court of Federal Claims

"Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity together with a claim falling within the terms of the waiver." *White Mountain Apache Tribe*, 537 U.S. at 472 (internal citations omitted). "The Tucker Act contains such a waiver, giving the Court of Federal Claims jurisdiction to award damages upon proof of 'any claim against the United States founded either upon the Constitution, or any Act of Congress,' 28 U.S.C. § 1491(a)(1), and its companion statute, the Indian Tucker Act, confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe,' § 1505." Id.

The Tucker Acts do not create substantive rights; they are jurisdictional provisions that waive sovereign immunity for claims premised on other sources of law (*e.g.*, statutes or contracts). Id; *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 290 (2009). To fall within the waiver of sovereign immunity of the Tucker Acts, "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.'" *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 217 (1983). It is enough, that a statute or treaty creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. *White Mountain Apache Tribe*, 537 U.S. at 473.

Thus, Plaintiffs must first "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", and second, show that the statute or treaty provision "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Navajo II*, 556 U.S. at 290-291. "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *White Mountain Apache Tribe*, 537 U.S. at 472.

There are two basic types of statutes that are scrutinized as potential bases for a money mandate: statutes that concern money payments, which require a determination whether payments are mandatory or discretionary; and statutes that place certain duties on the government. In the latter category, even if the promise to pay money damages is not expressly in the statute, these damages may nevertheless be implied by the statute

as a necessary remedy for the government's breach of its duties. *Contreras v. United States*, 64 Fed.Cl. 583, 590 (Fed.Cl. 2005).

A treaty with an Indian tribe is a contract. However, in carrying out its treaty obligations with the Indian tribes the United States is more than a mere contracting party; the United States "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Pyramid Lake Paiute Tribe of Indians v. C.B. Morton*, 354 F.Supp. 252, 256 (D.C. 1973).

As set forth in Section VI supra, the Treaties of 1863 and 1868 set aside a reservation for the use of the Ute Indians, under which "the United States assumed the double duty of preserving to the Indians the quiet possession of the reservation as their future home and of protecting their persons and property thereon, and this duty and obligation still exists, never having been released by the action of the Indians or by treaty or agreement with them." *Ewing*, 47 F. at 813. Absolute federal jurisdiction and control over the Indian lands was provided as necessary to enable the United States to discharge its treaty obligations and duties to the Indians. *Id*.

A. The United States has breached its duty to protect the territorial integrity of the Ute Tribe's property mandating compensation pursuant to the 1863 and 1868 Treaties.

The United States has a fiduciary duty imposed by the language of the 1863 and 1868 Treaties to protect the territorial integrity of the Ute Tribe's property, i.e., the reservation lands. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 163 (Ct. Cl. 1980) (treaty similar to the Ute treaties imposed the fiduciary duty to protect the integrity

of the reservation and the United States was deemed a trustee with respect to the reservation lands); see also *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming*, 304 U.S. 111, 115-116 (1938) (the phrase 'absolute and undisturbed use and occupation' is to be read as the United States granting and assuring the tribe peaceable and unqualified possession of the land in perpetuity).

When either tribal property or monies are involved, the existence of a fiduciary duty normally exists even though nothing is said expressly in the authorizing or underlying statute about a trust fund, or a trust or fiduciary connection. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980); compare *Gila River Pima-Maricopa Indian Community v. United States*, 427 F.2d 1194 (Ct. Cl. 1970) (no duty imposed on the United States to provide education, health services and administration without precise language in the treaty). Here, the United States' duty to protect the tribal lands from the unlawful assertion of state criminal jurisdiction over tribal members and from trespassers on the reservation has been breached.

Defendant U.S. characterizes the actions at issue here as being "of the typical law enforcement variety". *See* p. 35 (ECF No. 20). That simply is not the case here. The Utah state and local officers' actions against a tribal member within the Reservation were extra-jurisdictional and unlawful, not "typical." The United States, by treaty, promised the Ute tribe and its members that it would indemnify them and punish any "bad man" that commits any wrong upon the person or property of the Indians. *See* Art. 6, 1868 Treaty, 15 Stat. at 620. The Ute Treaties specifically impose these obligations upon the United States government.

The standard by which to assess a breach of trust by the Government is: "Did the Federal Government do whatever it was required to do in the circumstances?" *Gila River Pima-Maricopa Indian Community*, 427 F.2d at 1198-1199. It is clear that the Federal and BIA officers at the shooting site did not do what they were required to do because they failed to assume jurisdiction over the investigation, failed to investigate and preserve evidence in conformance with standard police protocol, and they allowed unauthorized state/county/municipal officers to trespass on the Ute homeland and cause serious harm to a tribal member. See Amend. Compl. ¶¶ 67-70 (ECF No. 17).

The United States has failed to faithfully perform its duty of protecting the reservation from unauthorized state intrusion. Law enforcement jurisdiction on the reservation lies exclusively with federal and tribal police.

> These Indian tribes are the wards of the nation. They are communities dependent on the United States … **They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies**. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

United States v. Kagama, 118 U.S. 375, 383-84 (1886)(emphasis added).

Although some courts have held that the duty of the United States to ensure the quiet enjoyment of reservation lands does not make the government liable for general trespasses by third parties, here the United States actively participated in protecting the Utah state/county/municipal officers in their unlawful trespass and unauthorized assertion of state jurisdiction over the shooting scene and Murray's body. *Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States*, 3 Ind. Cl. Comm. 380, 385 (1954), attached as Exhibit 1; *Lipan Apache Tribe v. United States*,

180 Ct.Cl. 487, 1967 WL 8874 (Ct. Cl. 1967) (conduct of United States troops and officials in driving tribal members from their lands and in failing to protect them from distribution of their lands to white settlers were compensable wrongs); compare *Creek Nation v. United States*, 318 U.S. 629 (1943) (United States not obligated to compensate tribes for encroachments by railroads acting under color of right).

Moreover, due to its absolute jurisdiction and control over Indian lands, the United States has a specific fiduciary duty to protect the reservation from the imposition of state criminal jurisdiction over tribal members, above and beyond a general duty to protect the reservation from general trespasses. *Navajo Tribe of Indians*, 624 F.2d at 989 (special responsibilities stem where the government has control and supervision over tribal property). Pursuant to 25 U.S.C. §200, whenever an Indian is placed in confinement on an Indian reservation, the offense or case shall be immediately submitted to the superintendent of the reservation or such official or officials as he may designate. In this case, although Todd Murray was seized and confined on the reservation, not only did the federal officers fail to alert the superintendent of the reservation, they actively excluded Raymond Wissiup, a member of the Ute Tribe and a certified law enforcement officer, from the shooting scene. See Amend. Compl. ¶38 (ECF No. 17).

It is clear that the United States has failed to fulfill its fiduciary obligations and the provisions of the 1863 and 1868 Treaties are money mandating in the sense that monetary damages may be implied in the 1863 and 1868 Treaties as a necessary remedy for the government's breach of its duties. *Contreras*, 64 Fed.Cl. at 590. The “bad men” clause of the 1868 Treaty specifically provides for the reimbursement and

indemnification of the tribe and individual tribal members who suffer wrongs at the hands of non-Indians on the reservation. As stated above in subsection VII(B)(4), because the "property of the Indians" that were to be protected by the bad men clause were the reservation lands commonly owned by the Tribe, the Ute Indians would have understood the "bad men" clause as granting a right of redress for any wrongs done to either individual Ute Indians or to the Tribe itself.

In addition, the treaty language to which the United States agreed can fairly be interpreted as necessitating money damages. Compensation for loss of property of the Tribe or injury to individual tribal members would be indemnification, as opposed to an equitable remedy. *Contreras*, 64 Fed.Cl. at 591 (non-money-mandating statutes are those which "cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967)).

B. The United States breached its duty to properly investigate, preserve evidence, assume jurisdiction and prosecute the "bad men" who came onto the reservation and harmed tribal member Murray.

Defendant U.S. argues that the "bad men" clause is a discretionary scheme and not money-mandating because it "only requires that the AS-IA 'cause the offender to be punished and arrested.'" *See* Mot. to Dismiss, p. 35 (ECF No. 20). This is incorrect. Defendant U.S. selectively quotes only the first half of the sentence from the 1868 Treaty, which in full reads that the United States will "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*." *See* Art. 6, 1868 Treaty, 15

Stat. at 620 (emphasis added). Such a clear statement of intent to reimburse the Indians for any loss sustained–-which implies a certain sum—is money-mandating and not discretionary. *Perri v. U.S.*, 340 F.3d 1337, 1341 (Fed. Cir. 2003) (statute granting Attorney General discretion to make payments from fund for specified purposes was a money-authorizing statute, not a money-mandating one).

Defendant U.S. argues that the investigatory and prosecutorial duties of the federal officers are discretionary and therefore do not equate to fiduciary duties. The United States, by Treaty, promised the Ute tribe and its members that it would indemnify them and punish any "bad man" that commits any wrong upon the person or property of the Indians. See, Art. 6, 1868 Treaty, 15 Stat. at 620. The Ute Treaties specifically impose these obligations upon the United States government. The discretion of the Attorney General to prosecute cases overall is utterly beside the point. This case was never even presented to the Attorney General for review. The federal officers breached their duty at the outset, in keeping Todd Murray's shooting, the ensuing cover-up, and the sham investigation out of the hands of the Attorney General. Moreover, although prosecutorial discretion is broad, it is not 'unfettered', and selective prosecution is a breach by the United States. *Wayte*, 470 U.S. at 608.

The standard by which to assess a breach of trust by the Government is this: "Did the Federal Government do whatever it was required to do in the circumstances?" *Gila River Pima-Maricopa Indian Community*, 427 F.2d at 1198-1199. It is clear that the Federal and BIA officers at the shooting site did not do what they were required to do because they failed to assume jurisdiction over the investigation, failed to investigate and preserve evidence in conformance with standard police protocol and allowed

unauthorized state/county/municipal officers to trespass on the Ute homeland and cause serious harm to a tribal member. See Amend. Compl. ¶¶67-70 (ECF No. 17).

The FBI and BIA officers' failure to investigate, to properly preserve critical evidence, and to conform to standard police protocol in excluding state officers with no authority to usurp the shooting scene are breaches of the United States' trust duties under the 1863 and 1868 Treaties.

Even discretionary trust responsibilities can cause a breach of trust. *Pyramid Lake Paiute Tribe of Indians*, 354 F.Supp. at 255-258 (a 'judgment call' by the Secretary, even in good faith, breached the United States' fiduciary responsibility to the tribe by not resolving conflicting claims in a precise manner); see also *Oenga v. United States*, 91 Fed.Cl. 629, 639-640 (Fed.Cl. 2010) (by not conducting appropriate inspections, the government breached its trust responsibilities to monitor the lease, discover the violation and take appropriate remedial actions).

Defendant U.S. attempts to equate Plaintiffs' numerous allegations of failures in investigation, preservation of evidence, and conspiracy with the Attorney General's prosecutorial discretion to actually bring litigation on behalf of the Ute tribe. The federal and BIA officers' failure to investigate or preserve evidence of the extra-jurisdictional officer-involved shooting of a tribal member on tribal land is not "presumptively unreviewable."

CONCLUSION

Wherefore, Plaintiffs respectfully request the Court deny in its entirety Defendant U.S.'s Motion to Dismiss Plaintiffs' amended complaint, and for any other such relief as the Court deems proper.

RESPECTFULLY SUBMITTED this 9th day of April, 2014.

FREDERICKS PEEBLES & MORGAN LLP

s/ Frances C. Bassett

Frances C. Bassett (Attorney of Record)
Sandra L. Denton (Of Counsel)
Todd K. Gravelle (Of Counsel)
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: fbassett@ndnlaw.com
Email: sdenton@ndnlaw.com
Email tgravelle@ndnlaw.com

Counsel for the Plaintiffs

PLAINTIFFS' EXHIBIT APPENDIX

Exhibit 1	*Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States*, 3 Ind. Cl. Comm. 380, 385 (1954).
Exhibit 2	Declaration of Debra Jones
Exhibit 3	Declaration of Sandra Denton, Esq.
Exhibit 4	Declaration of Frances C. Bassett, Esq.
Exhibit 5	Ute Treaty of 1868
Exhibit 6	Ute Treaty of 1863
Exhibit 7	Plaintiff's Notice of Appeal in *Jones v. Norton*
Exhibit 8	Letter to the United States dated February 1, 2012
Exhibit 9	Letter to the United States dated February 16, 2012
Exhibit 10	Letter to the United States dated March 12, 2013

CERTIFICATE OF FILING

I hereby certify that on the 9th day of April, 2014 a copy of the foregoing **PLAINTIFFS' RESPONSE TO THE UNITED STATES' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ *Frances C. Bassett*
Frances C. Bassett