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' REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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I. Introduction

The United States respectfully submits this Reply in support of its motion to dismiss. Because Plaintiffs prematurely filed suit without ever having filed a valid claim with the Department of the Interior, this Court should dismiss their Complaint for failure to exhaust administrative remedies. In the alternative, the doctrine of issue preclusion bars Plaintiffs from relitigating the central premise of their lawsuit that the district court of Utah has since rejected: That the state defendants "executed" Mr. Murray and engaged in a vast conspiracy, and by implication that the Federal Bureau of Investigation's and Bureau of Indian Affairs' subsequent investigation merely perpetuated the conspiracy. Contrary to Plaintiffs' allegations, however, the district court in Jones v. Norton has resolved this issue, concluding in a 71-page opinion that "[t]he evidence clearly shows that Mr. Murray shot himself," and that the totality of evidence "is strong and is consistent with a self-inflicted gunshot wound." ___ F.Supp.2d ___, 2:09-CV-730-TC, 2014 WL 910349 at **12-14 (D. Utah, Mar. 7, 2014).

With respect to the Tribe's claim for breach of trust—separate and apart from the individual Indians' claims—Plaintiffs have failed to identify any substantive source of law that eliminates the United States' prosecutorial discretion and instead requires the prosecution of individuals for crimes committed on the reservation, let alone a duty that is money-mandating. Not only is the treaty drawn in such broad terms such that the United States' duties are wholly discretionary, but 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." Treaty with the Ute ("1868 Treaty"), art. 6, 15 Stat. 619, 620 (Mar. 2, 1868) (emphasis added). That individual tribal members may bring suit under the "bad men" provision is well settled. But the Tribe has failed to establish a jurisdictional basis for its claim.

II. Plaintiffs' only cognizable "bad men" claim fails for lack of jurisdiction and failure to state a claim.

A. Plaintiffs failed to comply with the terms of the Treaty and have not exhausted the administrative remedies, a jurisdictional prerequisite under binding circuit precedent.

The Court of Claims in Hebah,[1] Begay,[2] and Tsosie[3] made clear that jurisdiction does not lie for an unexhausted bad men claim. Plaintiffs fail to come to grips with this binding authority. As explained in our opening brief, Articles 5 and 6 of the 1868 Treaty set forth a mechanism by which the United States government could keep peace between Indians and non-Indians by compensating harmed individuals. The treaty establishes as a condition to reimbursement (or prosecution) that: 1) "proof be made" to the "agent" on the reservation (now the Agency Superintendent of the reservation); and 2) binding decision be issued by the Commissioner of Indian Affairs. 1868 Treaty, arts. 5, 6; 15 Stat. at 620. Neither prerequisite has been met.

Plaintiffs err in their insistence that a threat to file a federal lawsuit equates to a "notice of claim." See Pl. Resp. to the United States' Mot. to Dismiss Pls.' Am. Compl. ("Pls.' Resp.") 12 (ECF No. 23). Plaintiffs' March 2013 letter is not a request that the agency Superintendent review the claim that the actions or inactions of four federal employees, eight non-federal individuals, three separate state entities, and a private company violated the Treaty. Nor is the March 2013 letter a request that BIA assess the weight of evidence that Plaintiffs portray as indisputable and issue a finding that would then be forwarded along to the Assistant Secretary-Indian Affairs ("AS-IA"). Plaintiffs simply threatened to file a lawsuit, which they did seventeen days later.

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1 Hebah v. United States, 428 F.2d 1334 (Ct. Cl. 1970).

2 Begay v. United States, 219 Ct.Cl. 599 (1979).

3 Tsosie v. United States, 11 Cl. Ct. 62 (1986).

Plaintiffs also miss the mark with their argument that Articles 5 and 6 are self-contained and to be read in isolation. The Court of Claims in Tsosie interpreted identical language in Article IV of the Treaty with the Navajo (Article V here) and squarely rejected Plaintiffs' argument that the process established by Article IV does not apply to "bad men" claims. 11 Cl. Ct. at 74. Although discussed in the context of the government's defense that Article IV precluded judicial review, the Court in Tsosie concluded that the plaintiff was only entitled to judicial review of the Assistant Secretary's "final administrative decision." Id. The Court observed that the provision "was designed and intended by the parties to provide the administrative procedures to be followed when a claim by or against an Indian was filed under Article I of the treaty." Id. at 74-75. Because the AS-IA had not ruled on the merits—concluding only that the provision was obsolete and inoperative—the Court held that the "matter should be remanded to the Assistant Secretary of Interior for Indian Affairs at the Department of the Interior for a final decision of the plaintiff's claim on the merits."

Plaintiffs' case is further undermined by their reliance on Elk v. United States, 70 Fed. Cl. 405 (2006). The plaintiff in Elk had "filed a claim under the treaty and then waited ten months for a decision before filing suit . . . ." Id. at 411. By contrast, Plaintiffs' threat to file a lawsuit cannot be confused with a valid "bad men" claim. True to their word, Plaintiffs followed through with their threat and filed the instant complaint seventeen days later. As Elk observed, however, plaintiffs' decision to file suit effectively prevents DOI from ruling on Plaintiffs' claim, as control over the case and any settlement thereof passes to the Department of Justice. Id. at 410. Thus, even had DOI treated Plaintiffs' threat as a valid claim, Plaintiffs chose to pursue a judicial path, rather than an administrative path a mere seventeen days later.

Plaintiffs' reliance on prudential exceptions to exhaustion likewise misses the mark. Pls.' Resp. at 11-12. Plaintiffs' contention that DOI cannot "adequately grant effective relief in this case in light of the complex and multiple constitutional issues," Pls.' Resp. 12, does not square with their request for relief that is far more straightforward than the premise of their argument suggests: They seek monetary damages pursuant to the "bad men" clause of the 1868 Treaty.[4] DOI has the authority and the capacity to adjudicate these suits, as has occurred in the past. See United States' Mot. to Dismiss Pls.' Am. Compl. ("U.S. Mot.") 14 (citing cases where DOI first ruled on the claim, and a subsequent suit was brought that challenged DOI's decision). Plaintiffs' extensive litigation in the district court of Utah, where Plaintiffs fully, fairly, and forcefully presented their case, further ameliorates any concern that additional time spent adjudicating this matter before DOI may prejudice Plaintiffs. Indeed, Plaintiffs have not explained what they would present here that they have not already presented to that court.

Contrary to Plaintiffs' arguments otherwise, nothing about this reading is inconsistent with the Indian canon of construction. Requiring Plaintiffs to engage in DOI's adjudication process is not inherently detrimental to Indian interests. See Shakopee Mdewakanton Sioux Cmty. v. Hope, 16 F.3d. 261 (8th Cir. 1994) (declining to apply the Indian canon where it was unclear what position favored Indian tribes).

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[4] Plaintiffs likewise miss the mark with their suggestion that the ALJ situated within DOI has "demonstrated a potential bias" by providing an affidavit that outlines the authority of the administrative courts situated in Utah to oversee Plaintiffs' claim. Pls.' Resp. 12. First, Courts presume that an ALJ is unbiased until demonstrated otherwise. Rollins v. Massanari, 261 F.3d 853, 857–58 (9th Cir. 2001) (citation omitted). And the declaration is not "so extreme as to display clear inability to render fair judgment." Liteky v. United States, 510 U.S. 540, 551 (1994). To the contrary, the affidavit sets forth a well-established point of law: Bad Men claimants are entitled to the same administrative procedures as any other claimant, codified at 43 C.F.R. Part 4, subpart B.

B. The doctrine of issue preclusion prevents the re-litigation of Plaintiffs' only cognizable claim for relief under the Bad Men clause.

The district court of Utah has entered an order in Norton, 2014 WL 910349 rejecting with finality, for purposes of issue preclusion, the keystone of Plaintiffs' argument: that the state defendants violated Mr. Murray's constitutional rights when they allegedly trespassed on tribal lands, executed Mr. Murray, and subsequently engaged in a conspiracy to thwart the investigation into his murder. Plaintiffs' lawsuit in the CFC does not provide them with an additional opportunity to litigate this central thesis that the Utah district court concluded was without merit.

"The general principle of [issue preclusion] . . . is that a right, question or fact distinctly put in issue [in a previous suit] . . . cannot be disputed in a second suit." In re Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994) (citing S. Pac. R.R. v. United States, 168 U.S. 1, 48 (1897)). The rule of issue preclusion precludes a party from re-litigating an issue that was "litigated and resolved in a valid court determination essential to the prior judgment." New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001). By precluding re-determination of issues that the parties have "had a full and fair opportunity to litigate," issue preclusion protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana, 440 U.S. at 153–54 (footnote omitted). The party seeking to preclude an issue need not have been a party to the earlier suit, so long as the party who will be bound by the preclusion had a full and fair opportunity to litigate the precluded issue, a rule known as "defensive non-mutual [issue] preclusion." See, e.g., Bryson v. Gere, 268 F.Supp.2d 46 (D.D.C. 2003).

"Issue preclusion is appropriate only if: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action." In re Freeman, 30 F.3d at 1465 (citation omitted). Because Plaintiffs focus only on the identity of issues and finality prongs, so too will the United States.

1. Plaintiffs' causes of action in Norton and in this case turn on identical issues.

A fact, question, or right decided in one suit is precluded in a second suit as long as "the factual and legal context in which the issues . . . arise has not materially altered." Montana v. United States, 440 U.S. 147, 162 (1979). In Norton, the Utah district court gave Plaintiffs great leeway in their discovery, accepted extensive briefing on the issues, held multiple hearings, and issued a well-reasoned opinion rejecting almost all of Plaintiffs' theories. See U.S. Mot. Ex. 2 (Pacer report). There is therefore no question that the issues currently at stake are identical, were actually litigated in the Utah district court, and that Plaintiffs had a full and fair opportunity to litigate those issues.

That Plaintiffs' bring different claims is immaterial. The fundamental point of contention—Mr. Murray's cause of death—has been resolved. In an extensive 71-page opinion, the District Court rejected Plaintiffs' theory, finding:

- "[t]he evidence clearly shows that Mr. Murray shot himself, and that the evidence "is strong and is consistent with a self-inflicted gunshot wound" Norton, 2014 WL 910349 at *12.
- Conversely, "the actual evidence in the record (that is, testimony by Detective Norton and Deputy Byron) shows that Detective Norton was not right next to Mr. Murray when the fatal shot was fired." Id. at *13.
- Dr. Leis also testified that the location of the entrance wound, the trajectory of the bullet, and the location of the exit wound would be consistent with Mr. Murray putting the gun in his right hand to the left side of his head and pulling the trigger." Id. at *13 n.58.

- All of the direct evidence presented by the Defendants, including Dr. Leis' testimony and report, supports the conclusion that Mr. Murray shot himself. Plaintiffs offer no more than speculation and no reasonable jury could find that Detective Norton shot Mr. Murray in the head at point-blank range. Id. at *13.
- And finally, that "[i]t is much more reasonable to infer that Mr. Murray's acute intoxication rendered him irrational and that he pulled the trigger. Under all of the circumstances, no reasonable jury could accept the Plaintiffs' theory about an execution-style killing." Id. at 14.

Plaintiffs cannot use this Court to overrule that answer.

Plaintiffs are also incorrect that there is no identity of issues because the "question litigated in [Norton]" is whether "the jagged incision made to Murray's neck" by staff of the Mortuary was sufficient to support a claim for "intentional infliction of emotional distress claim under Utah law," whereas the claim here relates to the "desecration of Murray's body." Pls.' Resp. at 30. Plaintiffs confuse claim preclusion with issue preclusion. In re Freeman, 30 F.3d at 1465 ("Issue preclusion, as distinguished from claim preclusion, does not include any requirement that the claim (or cause of action) in the first and second suits be the same."). Even assuming that there was an underlying law to apply to Plaintiffs' claim, the issues overlap: whether the individuals involved in the post-mortem examination of Mr. Murray's remains acted in an "illegal and unethical" manner, Am. Compl. ¶ 42. They did not. See Norton, No. 2:09-CV-730-TC, Order & Mem. Decision, ECF No. 216 (filed July 26, 2012) (finding that Plaintiffs provided no evidence that the incision made was anything other than the typical incision funeral homes use to embalm bodies). Artfully phrasing a claim to "attempt an end run" around the fact that two questions turn on the same underlying issue will not destroy identicality. See In re Freeman, 30 F.3d 1465-66.

The identity of issues in both cases is similarly made apparent in the Utah district court's rejection of Plaintiffs' conspiracy theory, that is, that the individuals involved in that day's events engaged in a conspiracy to cover up Mr. Murray's "execution." Norton, ECF No. 170,

Pls.' Third Am. Compl. Utah ¶¶ 140, 147-57. The District Court declined Plaintiffs' invitation "to infer the existence of such a conspiracy . . . from a handful of facts and the Plaintiffs' speculative characterization of those facts as so 'brazen and flagrant' and 'unjustifiable and irrational' that they support a finding of conspiracy." Norton, 2014 WL 910349, at *13n.58. Instead, the Court concluded that Plaintiffs failed to provide any evidence that could support or establish the existence of a conspiracy or any other violation of Mr. Murray's constitutional rights. Id. at*22-23.

Lastly, Plaintiffs' argument that the United States had a duty to "to protect the territorial integrity" of the tribe's reservation hinges on the assumption that the police officers' "extra-jurisdictional pursuit" resulted in a "seizure" of Mr. Murray.[5] Pls.' Resp. at 23-24. The Utah District Court likewise resolved that issue, finding, that the "pursuit was reasonable under the circumstances," Norton, 2014 WL 910349 at *17, and that while Deputy Byron's decision to handcuff Mr. Murray was a violation of the Fourth Amendment, "albeit a technical violation," Id. at *14, there was "no evidence of physical harm or emotional harm to Mr. Murray. The manner in which Deputy Byron handcuffed Mr. Murray was simple and the least intrusive way to secure the scene for the EMTs." Id. at 16.

2. The Utah district court's summary judgment order is final for purposes of issue preclusion, notwithstanding Plaintiffs' appeal.

Plaintiffs counter that the principle of issue preclusion has been effectively suspended because they have appealed the Utah District Court's order on summary judgment. Pls.' Resp. at 29-30. That is not the law. Issue preclusion applies to a trial court's order, even if that judgment is pending on appeal. Rice v. Dep't of Treasury, 998 F.2d 997, 999 (Fed. Cir. 1993); Ruyle v.

[5] The United States reiterates that "failure to protect territorial integrity" fails as a "bad man" claim, it not being an actionable "harm" inflicted on an Indian. See supra Section III.

Cont'l Oil Co., 44 F.3d 837, 846 (10th Cir. 1994); cf. Pines v. EMC Mortg. Corp., No. 2:08-CV-137-TC, 2009 WL 1683283, at *6 (D.Utah June 15, 2009) (observing, as to claim preclusion, that "a rendered judgment is final for purposes of res judicata until reversed on appeal, modified by the rendering court, or set aside by the rendering court.") (citing Youren v. Tintic School Dist., 86 P.3d 771, 773 (Utah Ct. App. 2004)).

C. Even if not barred by the doctrine of issue preclusion, the only cognizable claim presented in Plaintiffs' Complaint is that Mr. Murray was murdered by the state law enforcement officers.

Plaintiffs contend that that the following actions or inactions are "wrongs" within the meaning of the "bad men" provision: 1) the FBI's and BIA's failure to "properly investigate" and the "spoliation of evidence," Pls.' Resp. 25-28; and 2) desecration, id. at 29-30; 3) the "extra-jurisdictional pursuit" that culminated in the "unlawful assault and seizure" of Mr. Murray, id. at 21-23; and 4) failure to protect territorial integrity, id. at 30-31. For the reasons explained in Federal Defendants' motion to dismiss, Plaintiffs' claims are not cognizable wrongs.

1. The FBI's and BIA's investigation is not subject to a "bad men" claim.

Plaintiffs' claim that the FBI's and BIA's investigation violated the treaties fails for a number of reasons. As an initial matter, such conduct does not fall within the confines of the "bad men" clause, which is limited to affirmative criminal acts. Hernandez v. United States, 93 Fed. Cl. 193, 199 (2010); see also, Garreaux v. United States, 77 Fed. Cl. 726, 736 (2007) (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.").

Moreover, Plaintiffs' Complaint is entirely devoid of any corresponding allegation that supports its newly-minted Equal Protection claim, let alone a prima facie case of selective enforcement—a standard that is "demanding." United States v. Armstrong, 517 U.S. 456, 463-64 (1996); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006). Plaintiffs alleging discriminatory enforcement in violation of equal protection must produce "clear evidence" that supports two key elements: 1) the federal prosecutorial policy had a discriminatory effect; and 2) it was motivated by a discriminatory purpose." Armstrong, 517 U.S. at 468.

As to the first prong, Plaintiffs have not produced a single example of differential treatment—that a similarly situated individual was investigated for the conduct alleged here. Plaintiffs point to paragraph 53 of their amended complaint that details the purported flaws in both the state and federal investigation, but the FBI's underlying conclusion that guided the subsequent investigation (i.e. that Mr. Murray committed suicide), is entirely consistent with Utah district court's conclusion. Norton, 2014 WL 910349 at *12-14. And there was nothing improper about the FBI's destruction of the gun pursuant to the criminal forfeiture order, given that the only notice of an impending lawsuit was filed with the state defendants, not the federal defendants identified here. Jones v. Norton, 2:09-CV-730-TC, 2014 WL909569, at *6 (D. Utah Mar. 7, 2014) (holding, in the context of the order on spoliation, that "[w]ithout notice, the Uintah County Defendants did not have a duty to preserve the firearm and could not have reasonably foreseen that they would be subject to any claims involving the firearm.").

As to the second prong, Plaintiffs also fail to allege any "purposeful discrimination." McCleskey v. Kemp, 481 U.S. 279, 292 (1987). Plaintiffs cite Cole v. Oravec, 465 F. App'x 687 (9th Cir. 2012) as an example of "unjust or unmerited" treatment that was discriminatory;

however, the cause of death there had been ruled as a homicide—the non-Native American man had admitted to shooting the victim; and there was evidence that negated the claim of self-defense. The Utah District Court, on the other hand, has not only concluded that Mr. Murray died as a result of a self-inflicted gunshot wound, but that this injury was "un-survivable" and no reasonable jury could find that Mr. Murray would have survived had the defendants rendered first aid. Norton, 2014 WL 910349, at *29; Norton, 2014 WL 909569, at *3. Given the district court's conclusions, any amendment to address these fatal flaws would be futile.

2. The Bad men clause is limited to affirmative criminal acts.

Plaintiffs' remaining claims—the desecration of Mr. Murray's body at an off-reservation mortuary and a general failure to protect the "territorial integrity" of the tribe's reservation—are likewise without any basis in the aforementioned treaties.

As a threshold matter, the "bad men" clause does not include, as Plaintiffs, suggest the universe of off-reservation activities that would have occurred "but for" the initial conduct on the reservation. Such a limitless reading is not supported by the text of the treaty. Janis v. United States, 32 Ct. Cl. 407, 410 (1897) (stating that 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."); Medellin v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").[6]

[6] Although it is true that this Court is to construe treaties liberally, resolving ambiguities in favor of the Indians, the Court cannot rewrite or expand treaties beyond their clear terms to remedy a claimed injustice. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943); Herrera v. United States, 39 Fed.Cl. 419, 421 (1997), aff'd 168 F.3d 1319 (Fed. Cir. 1998).

Regardless, Plaintiffs have not identified a single regulation, policy, or statute that required the FBI or BIA to "secure Mr. Murray's body," or, conversely, that the FBI or BIA "improper[ly] relinquish[ed]" the body to the local medical examiner. Pls.' Resp. 29. Rather, Plaintiffs suggest that 18 U.S.C. § 1512(c) and Utah Code Ann. § 76-8-306(1)(c) could serve as an underlying basis for their claim, but those citations refer to obstruction of justice under federal and state law, respectively, not the "desecration of human bodies," as Plaintiffs contend. Indeed, the state of Utah has not recognized desecration of a corpse as a cause of action. Utah Order 1, (ECF No. 149, Oct. 21, 2011) ("The Court denies the motion to add alternative claims for desecration of a corpse and interference with Plaintiffs' right of sepulcher on the ground that the state of Utah has not recognized these causes of action.").

Lastly, Plaintiffs' claim that the pursuit of Mr. Murray was an unreasonable one has been squarely rejected by the Utah district court:

> The pursuit was reasonable under the circumstances. Mr. Murray was part of a high speed chase and fled from Trooper Swenson. This information created sufficient concern in the officers' minds about Mr. Murray's motives for the flight and the danger he posed, if any. They reasonably believed he had committed at least one crime (flight from a police officer) and pursuing him for that was reasonable.

Norton, 2014 WL 910349, at *17. Thus, Plaintiffs' reliance on the "bad men" clause as opening the door to relitigation of issues that have been decided is misplaced.

III. The Tribe's Breach of Trust Claim is without merit.

A. Plaintiffs fail to identify any specific, unambiguous language in the Treaties that impose a fiduciary duty on the United States to guard against the assertion of state criminal jurisdiction.

Plaintiffs suggest that 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." Pls.' Resp. 33-34. According to Plaintiffs, the United States breached its "duty to protect the tribal lands from unlawful assertion of state criminal jurisdiction over tribal members and from trespassers on the reservation . . . ." Id. at 34. Nothing in those Treaties, however, indicates any intention by Congress that the federal government would "protect[] the reservation from unauthorized state intrusion." Pls.' Resp. 35.

At bottom, this case has none of the indicia of a fiduciary relationship.[7] First, while a limited trust relationship does exist between the United States and Indian tribes, United States v. Mitchell, 445 U.S. 535, 542 (1979) ("Mitchell I"), a fiduciary duty only arises if it is plain from the relevant statutes or regulations that the government has accepted such a responsibility. The Tribe fails to identify any comprehensive managerial duties defined by statute or regulation that are violated when the state, in hot pursuit, comes upon the reservation. For example, the Court in United States v. Mitchell, 463 U.S. 206, 221 (1983) ("Mitchell II") allowed a fair interpretation of a money mandating duty where the trustee was directed by statute and regulation to manage a forest to generate income for the allottees and tribe.[8] By contrast, there is no elaborate control or management that is fiduciary in nature with regard to keeping state police

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[7] The federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources. The elements of this type of common law trust are a trustee (the United States), a beneficiary . . . and a trust corpus (the regulated Indian property lands or funds)." Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995); see Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1298 (D.N.M. 1996), aff'd 104 F.3d 1546 (10th Cir. 1996). ("The Secretary has no detailed, comprehensive control over the daily management of the casino or the money earned by such operations.); Vizenor v. Babbitt, 927 F. Supp. 1193, 1201 (D. Minn. 1996) (finding that "[u]nlike Mitchell II, no fiduciary duty created by an elaborate regulatory scheme exists [under IGRA].").

[8] "First, the statutes and regulations in question expressly subject the forest resources to a trust, mandating that timber sales be based on 'the needs and best interests of the Indian owner and his heirs,' with proceeds paid to owners 'or disposed of for their benefit,' and that the forests be managed to 'obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests.'" Grady, 2013 WL 4957344, at *3-4 (citations omitted).

that are in hot pursuit off the reservation; nor do Plaintiffs identify any statutory or regulatory prescriptive rights that anchor such a decision to a fiduciary function in managing property as a trustee for the generation of profit.[9] Instead, the role alleged by plaintiff is that of policing trespassers, or, more precisely, policing the state police to prevent the hot pursuit of members onto tribal land. This is the sort of "referee function" referred to in Grady v. United States that has none of the attributes of a fiduciary relationship. 13-15C, 2013 WL 4957344 (Fed. Cl. July 31, 2013) aff'd, 2014 WL 1797475 (Fed. Cir. May 7, 2014).

Again, while a limited trust relationship does exist between the United States and Indian tribes, Mitchell II, 445 U.S. at 542, this limited trust relationship does not in and of itself impose duties upon the United States such as those applicable to private trustees. To impose such obligations, the substantive law at issue must unambiguously impose upon the United States detailed, comprehensive duties over Indian affairs. Id. at 221 (Congress specifically directed Interior Department on method of managing Indian forest resources). Instead, Plaintiffs, like other litigants before this Court, must clear both jurisdictional hurdles, United States v. Navajo Nation, 556 U.S. 287, 290 (2009). ("Navajo II"),[10] before proceeding to the merits of their claim.

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[9] In Mitchell II, "[v]irtually every stage of the process of harvesting and selling timber on the reservation was 'under federal control' per duly enacted statutes and regulations." Grady, WL 4957344, at *3-4.

[10] Specifically, a party asserting a breach-of-trust claim under the Tucker Act or Indian Tucker Act, such as Plaintiffs have, must clear "two hurdles" to invoke federal jurisdiction. Navajo II, 556 U.S. at 290. "First, the [plaintiff] '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 United States v. Navajo Nation, 537 U.S. 488, 506 (2003) ("Navajo I")). "If that threshold is passed," the plaintiff must then 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).

For example, in Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995), the D.C. Circuit, interpreting Mitchell II and Mitchell I, in the context of an APA action challenging the Attorney General's refusal to file claims for off-reservation water rights on behalf of the tribe, stressed that "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." Id. at 1482 (quoting National Wildlife Fed'n v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980)). Plaintiffs do not take exception with these basic principles. Yet, they do no more than generally allege a breach of fiduciary or trust obligations, failing to identify any portion of the Treaties that unambiguously required that the United States prevent the state of Utah's assertion of criminal jurisdiction over a reservation that covers hundreds of thousands of acres in northeastern Utah.

Plaintiffs' reliance on Yankton Sioux Tribe v. United States, 623 F.2d 159, 163 (Ct. Cl. 1980) for the proposition that the Ute Treaty "imposed the fiduciary duty to protect the integrity of the reservation," Pls.' Resp. 34, further highlights the flaws of Plaintiffs' attempt to impose fiduciary duties where there are none. That case had nothing to do with law enforcement activities, and instead arose in the context of the United States decision to "liquidate the Yankton Sioux Reservation through allotment of some lands and cession of the rest." Yankton Sioux Tribe, 623 F.2d at 167. The Court therefore concluded that the United States "had certain fiduciary duties in undertaking to allot and liquidate the Yankton Sioux Reservation." Id. The present case, however, has nothing to do with the United States' fiduciary duty to prudently and comprehensively manage the Ute's land for the tribe's profit. And Plaintiffs have not identified a single case that would suggest that a clause that guarantees to the tribe "peaceable possession" would impose a fiduciary duty to guard against improper state law enforcement activities.

Indeed, Plaintiffs' attempt to rely on United States v. Ewing, 47 F. 809, 813 (1891), for the overarching proposition that "[a]bsolute 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" is likewise unavailing. Pls.' Resp. 33. The case is entirely inapposite. The case had no bearing on whether there were money mandating duties stemming from a fiduciary relationship in managing property for profit, and instead revolved around whether federal criminal jurisdiction allowed the United States to prosecute white men charged with stealing the horses of an Indian on the Yankton Tribe's reservation. Thus, the question addressed by the Ewing court—whether the treaty extended federal criminal jurisdiction over the reservation—is wholly different than whether the United States has any fiduciary duty to the tribe, let alone one that is money mandating.

Indeed, taken together Yankton Sioux, Ewing, and Shoshone Bannock reinforce the principle that the United States' role as chief law enforcement officer for federal lands is in no way comparable to the responsibility for Indian forest management that was involved in Mitchell II. In sum, Plaintiffs: (1) fail to identify a substantive source of law that establishes specific fiduciary duties,[11] and (2) likewise fail to establish that the source of law they rely upon for a purported fiduciary duty is one that mandates compensation for damages sustained as result of a breach of those duties. Both must be established. Plaintiffs establish neither one.

[11] Plaintiffs' response is silent and no longer even attempts to justify their citation to "various federal laws listed under Paragraph 10" in their Amended Complaint. See Am. Compl. ¶¶ 10, 62; U.S. Mot. 31-34.

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

Plaintiffs' four breach-of-trust claims include, first, three allegations that 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.[12] These four claims are grounded in two basic arguments: (1) a common contention for each claim that the United States does not have prosecutorial discretion under the facts and must, therefore, prosecute alleged wrongdoers or have breached a fiduciary duty; (2) monetary damages may be implied in the 1863 and 1868 treaties as a necessary remedy for the United States' alleged breach of duties. As discussed below, the arguments hold no merit.

Plaintiffs admit that "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." Pls.' Resp at 35.[13] Notwithstanding, to advance their position, Plaintiffs misplace their hope on a factual distinction that does not apply. Plaintiffs contend that

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[12] In addition, with these two allegations – the second (Am. Compl. ¶ 79) and fourth (Am. Compl. ¶ 81) allegations – the Tribe attempts to shoehorn the alleged claim of trespass under the auspices of the "bad men" provision of the 1863 and 1868 treaties. Pls.' Resp. 36-37. Plaintiffs ignore the fact that the language of the treaties is clear and speaks only about wrong done to individual members of the Tribe. 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). U.S. Mot. 38-39.

[13] Nor do Plaintiffs take exception with fundamental precepts that the authority to initiate civil or criminal litigation on behalf of the United States is committed to the discretion of the Attorney General, 28 U.S.C. § 516; and that 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 Tribes, 56 F.3d at 1480; Weisberg v. U.S. Dep't of Justice, 489 F.2d 1195, 1201 (D.C. Cir. 1973)); U.S. Mot. 36-38.

"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." Id., citing Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States, 3 Ind. Cl. Comm. 380, 385 (1954); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 1967 WL 8874 (Ct. Cl. 1967). The recent decision by the United States District Court for the District of Utah squarely rejects Plaintiffs' version. See Norton, 2014 WL 910349 at *1-6.

Conspicuously absent in the events that constitute the alleged trespass of state law enforcement officials on the Reservation is the presence of any federal law enforcement officer. With the first involvement by a federal law enforcement officer occurring well after the pursuit had ended and the site of Mr. Murray's death secured, it cannot be said that the United States "actively participated" in the actual trespass operations (Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. United States, 3 Ind. Cl. Comm. 380, 385 (1954)), and even less so that the United States' conduct was the equivalent of United States troops and officials driving tribal members from their lands. Lipan Apache Tribe, 180 Ct. Cl. 487, 1967 WL 8874. Plaintiffs confuse the United States' exercise of prosecutorial discretion with having "actively participated in protecting the . . . unlawful trespass." Pls.' Resp. at 35.[14]

[14] Citing Wayte v. United States, 470 U.S. 598, 608 (1985), Plaintiffs criticize the federal government's investigation as a "sham investigation," a "cover up," and that its "selective prosecution" is a "breach by the United States." Pls.' Resp. 38. A review of the passage cited in Wayte reveals no mention about breach of fiduciary duties. Instead, it speaks to standards for assessing allegations about passive prosecutorial discretion based on improper "discriminatory effect and that [is] motivated by a discriminatory purpose." 470 U.S. at 608. Without asserting such in their amended complaint, much less any basis or evidence for it, Plaintiffs appear to link the odious scent of discrimination in the same rhetorical breath with breach of fiduciary duty.

C. The "Bad Men" provisions of the 1863 and 1868 Treaties cannot be fairly interpreted as mandating money to the Tribe.

We do not question that the Treaty requires payment to individuals under the "Bad Men" clause, if the requirements of the Treaty are met. The Treaties, however, impose a duty upon the government to only pay individual members, not the Tribe, in the event that unauthorized persons cause harm to person or property. See 1868 Treaty, art. 6 (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 . . .") (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.

The "bad men" clause goes no further than the explicit treaty language, and the creation of a particular monetary remedy does not allow the implication of additional remedies. The United States' opening brief explained that the "bad-men" provisions of the 1863 and 1868 treaties (1868 Treaty, articles 5 and 6, and 1863 Treaty, article 5) set forth a process to evaluate claims, and these provisions go no further. See Samish Indian Nation v. United States, 419 F.3d 1355, 1364 (Fed. Cir. 2005). Indeed, 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) (internal marks and citations omitted); 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"); 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.") (citations omitted). Thus, the "bad-men" provisions are not money mandating.

Plaintiffs' rejoinder is twofold. First, Plaintiffs merely repeat the conclusion that the treaties are money-mandating, but they do not take into account nor address the Samish decision by the Federal Circuit. Pls.' Resp. 36-37. Second, Plaintiffs attempt to elevate the language in the treaty that the United States shall "also reimburse the injured person for the loss sustained" to suggest it applies no matter what and thus the "bad-men" provisions are money-mandating. Pls.' Resp. 37-38, citing 1868 Treaty, art. 6. In this second rebuttal, Plaintiffs' logic is flawed three times over.

First, Plaintiffs' contention that the Tribe itself is an eligible beneficiary is at odds with both the text of the treaty and subsequent interpretations that limits recovery to the "injured person." Hebah I, 428 F.2d at 1338-39. In addition, Plaintiffs' interpretation of the 1868 Treaty, art. 6 language that indemnification is required no matter whether there is a causal link between the alleged act of the "bad man" and the loss sustained by the "injured person" is inconsistent facially with the scheme prescribed in the Treaty itself. And moreover, importantly, the United States District Court for the District of Utah closely scrutinized the facts and reached well-reasoned findings and a conclusion that Mr. Murray – the "injured person" – committed suicide. Norton, 2014 WL 910349 at **12-14.

CONCLUSION

For the reasons discussed, the United States respectfully requests this Court dismiss Plaintiffs' First Amended Complaint.

Respectfully submitted on this 12th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served upon counsel of record through the Court's electronic service system (ECF/CM).

Dated: May 12, 2014.

/s/ Kenneth D. Rooney
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