No. 15-5148

In the United States Court of Appeals
for the Federal Circuit

Debra Jones, Arden C. Post, and
Ute Indian Tribe of the Uintah and Ouray Reservations,

Plaintiffs-Appellants,

v.

United States,

Defendant-Appellee.

On appeal from the Order dated September 10, 2015 in Case No. 1:13-cv-227 in the United States Court of Federal Claims, Judge Horn

Brief of the United States as Defendant-Appellee

JOHN C. CRUDEN
Assistant Attorney General

JAMES A. MAYSONETT
Attorneys, U.S. Department of Justice
Environment & Nat. Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov
Attorneys for Appellee

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Statement of Related Cases

This Court has not previously heard any appeal from the underlying action in the Court of Federal Claims, Case No. 1:13-cv-227. This appeal is directly affected by the decisions in the related case *Jones v. Norton*, 3 F. Supp. 3d 1170 (D. Utah 2014), *aff'd*, 809 F.3d 564 (10th Cir. 2015).

Jurisdictional Statement

The Plaintiffs-Appellants brought claims against the United States for money damages arising out of treaties and Federal statutes. They invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. The Court of Federal Claims entered its final judgment on July 31, 2015. The Plaintiffs-Appellants filed a timely notice of appeal on September 2, 2015. This Court has jurisdiction over this appeal under 28 U.S.C. § 1295(a)(3).

Statement of the Issues

1. Are Ms. Jones and Mr. Post (the "Tribe Members") barred by the doctrine of "issue preclusion" from litigating the circumstances surrounding Mr. Murray's death because they have already litigated (and lost) those issues in the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit?

2. Can the Tribe Members maintain a claim under the "bad men" clause for the alleged failure of Federal law-enforcement officers to investigate and prosecute state and local police?

3. Can the Ute Indian Tribe of the Uintah and Ouray Reservations (the "Ute Tribe") sue the United States for money damages under their treaties for a breach of trust because the United States did not stop state and local police from pursuing Mr. Murray on the Ute Tribe's reservation and because the United States did not prosecute those police for Mr. Murray's death?

Statement of the Case and the Facts

I. The Law

The United States entered into treaties with the Ute Indians in 1863 and 1868. The "bad men" clause of the 1868 treaty requires the United States to compensate individual Ute Indians for their loss if "bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong" upon their person or their property:

> If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

A 350.

The purpose of the "bad men" clause was "to keep the peace between the white men and the Indians."[1] *Garreaux v. United States*, 77 Fed. Cl. 726, 736

[1] Tensions on the borders between Indian country and the United States gave rise to comparable provisions in treaties and statutes from the earliest days of the United States. *See, e.g.*, Treaty of Watertown (July 19, 1776) (available at http://www.abbemuseum.org/headline-

(2007). Similar "bad men" clauses were included in nine treaties signed between 1867 and 1868 with thirteen tribes, including the Utes, which were then "the great and warlike and dominant powers" of the Great Plains.[2] *Brown v. United States*, 32 Ct. Cl. 432, 435 (1897). Under these treaties, the tribes agreed to make peace with the United States and move to reservations. *Tsosie v. United States*, 825 F.2d 393, 396 (Fed. Cir. 1987). The tribes, however, were concerned that the peace would be hard to keep—they still "feared attacks by other Indian tribes" and were especially concerned about the encroachments of white settlers and the "aggressions of lawless white men," which Congress had concluded were the actual cause of most "Indian" wars. *Id*. at 396; *Elk v. United States*, 87 Fed. Cl. 70, 80 (2009) ("*Elk II*").

Through these treaties, and through the "bad men" clauses in particular, the tribes agreed not to seek retaliation against other tribes or "bad men among the whites, or among other people subject to the authority of the United States" for wrongs and depredations, but rather to "trust to the protection of

---

news/Hunting%20and%20Fishing/Treaty%20of%20Watertown%201776.pdf); Indian Trade and Intercourse Act of 1796, 1 Stat. 469 § 4. Section 16 of the Trade and Intercourse Act of 1834 set out a "bad man" provision for compensating Indians for harms committed by white men. 4 Stat. 729, 731. The Act was valid Federal law at the time of the Ute Treaties and was incorporated verbatim into the Revised Statutes in Statutes of 1874 and 1878 at sections 2154–2155.

[2] The other tribes were the "the Kiowas and Comanches, the Apaches, the Cheyennes and Arapahoes, the different bands of the Sioux, the Crows, the Northern Cheyennes and Arapahoes, the Navajoes, [and] the Eastern Shoshones and Bannocks." *Brown*, 32 Ct. Cl. at 435.

the United States for their security."[3] A 350; *Tsosie*, 825 F.2d at 399. For its part, the United States agreed that it would "arrest[] and punish" offenders and reimburse the Indians for losses that they sustained. The "bad men" clauses made the Federal government "responsible for what white men do within the Indian's territory." *Janis v. United States*, 32 Ct. Cl. 407, 410 (Ct. Cl. 1897). The hope was that this "Indian indemnity act[]" would "keep the peace." *Id*. The history of these provisions has been summarized by this Court and the Court of Federal Claims before. *See, e.g.*, *Richard v. United States*, 677 F.3d 1141, 1148–50 (Fed. Cir. 2012); *Elk II*, 87 Fed. Cl. at 80–83.

II. The Facts

On April 1, 2007, Todd Murray, a member of the Ute Tribe, was riding in a car that was pursued by a Utah State Trooper for a speeding violation. A 1–2. *See generally* A 1–13 (summarizing facts). That pursuit began off of tribal lands, but ended on the Ute Tribe's Uncompaghre Reservation. A 2. After the car stopped, Mr. Murray fled on foot and was pursued by local police. A 2–3. During that pursuit, Mr. Murray was shot in the head and later died of his wounds. A 4. As discussed below, the United States District Court for the

[3] These treaties also included parallel "bad men" clauses that required the Tribes to compensate non-Indians for harms committed by Indians. A 350 ("If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the tribes . . . agree that they will . . . deliver up the wrong-doer to the United States . . . and, in case they willfully refuse so to do, the person injured shall be reimbursed for his loss."). These provisions were effectively superseded by the Indian Depredations Act of 1891. 26 Stat. 851.

District of Utah ("Utah District Court") reviewed the evidence and determined that Mr. Murray shot himself. *Jones*, 3 F. Supp. 3d at 1190. That decision has now been affirmed by the Tenth Circuit. 809 F.3d 564 (10th Cir. 2015). No Federal law-enforcement officers were present during the pursuit or when Mr. Murray was shot, but an agent of the Federal Bureau of Investigation ("FBI") and an officer of the Bureau of Indian Affairs ("BIA") arrived at the scene later. A 3.

III. The History of the Case

On March 12, 2013, nearly six years after this incident, and four years after the Tribe Members had sued state and local police in the Utah District Court, the Ute Tribe and the Tribe Members sent a letter informing the United States that they intended to sue for breaches of their 1863 and 1868 treaties. A 581–83. Nineteen days later they filed suit in the Court of Federal Claims. A 65 (original complaint filed Apr. 1, 2013).

Their first amended complaint states two claims for relief. In their first claim, the Tribe Members demand money damages under the "bad men" clause of the 1868 treaty, arguing that state and local police are "bad men" because they allegedly shot Mr. Murray and then conspired to cover up that shooting, and that Federal law-enforcement officers are "bad men" for failing to investigate and prosecute those state and local police officers. A 101–06 (¶¶ 59–76). In their second claim, the Ute Tribe argues that it is also (and independently) entitled to money damages because the United States allegedly

breached its trust obligations under the 1868 treaty by failing to protect the Tribe's "peaceable possession" of its reservation and by failing to "prosecute" these state and local police officers. A 106–07 (¶¶ 77–83).

The United States moved to dismiss those claims on August 9, 2013. The Court of Federal Claims granted that motion on July 30, 2015 and dismissed both claims. A 1–56. The court concluded that (1) the Tribe Members were barred by the doctrine of "issue preclusion" from litigating the circumstances surrounding Mr. Murray's death because they had already litigated those issues (and lost) in the Utah District Court, and thus could not maintain their claims that state and local police were "bad men," A 39–49; (2) the Tribe Members could not maintain their claims against Federal law-enforcement officers for their alleged failure to investigate and prosecute these state and local police because the "bad men" clause reaches only affirmative criminal acts, not the failure to act, A 33–39; and (3) the Ute Tribe did not state a proper claim for breach of trust because the cited treaty did not create a fiduciary duty and is not "money-mandating," A 49–56. This is an appeal from that decision.

Summary of the Argument

Todd Murray died after he shot himself in the head during a police pursuit on the Ute Tribe's Uncompaghre Reservation. The only witnesses to that shooting—because Mr. Murray later died of his wounds—were the state and local police officers involved in the pursuit. Those officers testified that

Mr. Murray shot himself. The physical evidence at the scene supports their testimony.

Mr. Murray's family (the Tribe Members) and the Ute Tribe do not believe that Mr. Murray shot himself. They believe instead that Mr. Murray was shot by the police and that those police then conspired to cover up their actions. Plaintiffs-Appellants' Principal Brief ("Br.") at 2, 10. They also believe that the FBI and BIA did not investigate this incident properly and may have even participated in the conspiracy to cover up the events surrounding Mr. Murray's death.

These are serious allegations. But they are also allegations that have already been heard—and rejected—by a Federal court. The Tribe Members sued these state and local police officers in 2009 and, after exhaustive discovery and thorough briefing, the Utah District Court found that the evidence "clearly shows that Mr. Murray shot himself." *Jones*, 3 F. Supp. 3d at 1190. More than that, the Utah District Court concluded that "no reasonable jury" could find that the police had killed Mr. Murray and that the evidence offered by the Tribe Members to support their allegations was "sparse, circumstantial, subject to more than one interpretation, and, at times, very speculative." *Id.* at 1190–91. That court's conclusions have now been affirmed by the Tenth Circuit. 809 F.3d 564 (10th Cir. 2015).

Here, the Tribe Members claim that they are entitled to compensation for Mr. Murray's death under the "bad men" clause of their 1868 treaty with the United States. The "bad men" clause provides that the United States will

"reimburse the injured person for the loss sustained" whenever "bad men" "commit any wrong upon the person or property of the Indians." A 350. The Tribe Members allege that the state and local police who pursued Mr. Murray are "bad men" who "committed a wrong" by shooting him and then conspiring to cover up that shooting. A 41.

These claims fail because the Tribe Members have already made them in Federal court, and the court rejected them. The doctrine of "issue preclusion" bars the Tribe Members (and the Ute Tribe) from litigating these issues again here, in the hope that the Court of Federal Claims will review the same evidence and reach a different conclusion. And because they are estopped from litigating these issues again, they cannot show that the state and local police are "bad men" or that they "committed any wrong," and their "bad men" claims necessarily fail.

The Tribe Members also argue that the FBI and BIA officers who arrived at the scene after the shooting are "bad men" who "committed a wrong" by failing to conduct a proper investigation of Mr. Murray's death and by failing to prosecute these state and local police officers for Mr. Murray's death. These claims fail because the "bad men" clause requires the United States to compensate individual Indians only when "bad men" "commit any wrong" and, even if the Tribe Members' allegations had not already been heard and rejected, these Federal law-enforcement officers could not "commit" a wrong by failing to act.

The Ute Tribe advances a separate and independent claim that it is

entitled to compensation from the United States for a breach of trust. The Tribe argues that the United States was required to stop these state and local police from pursuing Mr. Murray onto the reservation because the treaties promise the Tribe the "peaceable possession" of its reservation. And the Tribe argues that the United States was required to "arrest and punish" these police officers for the wrongs that they allegedly committed. But again, even if these allegations had not already been heard and rejected, the Tribe's claims would still fail because these treaties do not create a fiduciary duty and because they do not authorize the award of money damages for a breach of any such duty.

For these reasons, this Court should affirm the judgment of the Court of Federal Claims.

Argument

I. Standard of Review

The Court of Federal Claims dismissed this complaint for failure to state a claim and for lack of jurisdiction. A 56. This Court reviews that dismissal *de novo*. *See, e.g.*, *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377–78 (Fed. Cir. 1999).

II. The Tribe Members cannot show that state and local police are "bad men" because they have already litigated those issues and lost.

The core of this case is the Tribe Members' claim that Vance Norton, a Vernal City police detective, pursued Mr. Murray onto reservation lands "at gunpoint without jurisdiction and without probable cause," shot Mr. Murray

"execution-style," and then conspired with other police "to cover-up the [] shooting and to obstruct justice." A 43. *See generally* A 103–05 (¶¶ 67–71). The Tribe Members argue that all the police officers "involved in the murder and/or the cover up of Todd Murray's murder" are "'bad men' as that term is used in the Ute Treaty of 1868," A 91 (¶ 18), and that they are thus entitled to compensation for their loss from the United States, A 105 (¶ 72).

These allegations state a cognizable claim under the "bad men" clause.[4] "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]." *Hebah II*, 456 F.2d at 704. This is the only cognizable claim that the Tribe Members have brought here, and it can be maintained only by the Tribe Members themselves, and not by the Ute Tribe, because the treaty requires the United States to compensate "the injured person," not the Tribe. A 350; *Hebah v. United States*, 428 F.2d 1334, 1338 (Ct. Cl. 1970) ("*Hebah I*") (holding that the "intended beneficiary" of the "bad men" clause is the individual injured Indian and that this "promise . . . manifests an intention to give those benefits to the 'injured person' himself, directly").

But these allegations have already been heard—and rejected. Ms. Jones and Mr. Post—the individual plaintiffs in this case—sued the state and local

[4] To prove these claims, the Tribe Members would have to show not only that Detective Norton shot Mr. Murray, but also that the shooting was unjustified, because a justified and necessary shooting by a law-enforcement officer is not a "wrong" under the "bad men" clause. *Hebah v. United States*, 456 F.2d 696, 704–10 (Ct. Cl. 1972) ("*Hebah II*").

police in 2009 in a case that was ultimately removed to the United States District Court for the District of Utah.[5] *Jones*, 3 F. Supp. 3d at 1177–78. The Ute Tribe was not a party to that case. *Id.*

After years of discovery, briefing, and hearings, the Utah District Court rejected all of the Tribe Members' claims. *Jones*, 3 F. Supp. 3d at 1192. It found that the evidence "clearly shows that Mr. Murray shot himself." *Id.* at 1190. It held that "no reasonable jury could find that Detective Norton inflicted the mortal blow to Mr. Murray," *id.* at 1191, because the evidence offered by the Tribe Members was "sparse, circumstantial, subject to more than one interpretation, and, at times, very speculative," *id.* at 1190. It determined that the police officers who were present at this shooting—including Detective Norton—acted within the norms of "expected police behavior" and that none of their actions was "egregious or conscience shocking." *Id.* at 1195. It rejected the Tribe Members' claims that these law-enforcement officers "conspired to cover-up that killing and protect Detective Norton." *Id.* at 1197. It also denied the Tribe Members' motion for sanctions for spoliation of evidence, finding variously that the alleged spoliation had not prejudiced the Tribe Members or that the state and local police had not been obligated to prevent spoliation. A 1189–209.

The Utah District Court's review was thorough and comprehensive,

[5] The Tribe Members initially filed their case in Uintah County Court, but it was removed to the Utah District Court. A 6.

[6] FBI Agent Ashdown testified that he did not believe that such tests were

A 45, and its judgment has now been affirmed by the Tenth Circuit. *Jones*, 809 F.3d 564; *see also* A 39–49. The Tenth Circuit agreed that the "uncontroverted" evidence disproves the Tribe Members' theories and that there is "no genuine dispute of fact that the shooter was anyone but Murray himself." *Jones*, 809 F.3d at 575. The Tenth Circuit also affirmed the district court's decision to deny sanctions for spoliation. *Id.* at 580–82.

Because the Tribe Members have already litigated these issues fully, they are barred from litigating them again here by the doctrine of "issue preclusion" (also called "collateral estoppel"). *See, e.g.*, *In re Jerre M. Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). Issue preclusion requires that "a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." *Id*. It "bring[s] about some finality to litigation." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009).

The Tribe Members had their day in court, and they lost. Now they want this Court to hear the same evidence, but reach a different conclusion. That is exactly what issue preclusion is meant to prevent. Because these issues have already been decided, the Court of Federal Claims correctly concluded that the Tribe Members (and the Ute Tribe) are "estopped from litigating the factual circumstances of Todd Murray's death, and the allegations of the destruction of evidence." A 48. *See generally* A 33–49. And without those allegations—that Detective Norton shot Mr. Murray and then conspired with other police officers to cover up that shooting—the rest of their case collapses because those are the only "wrongs" that they have alleged that fall under the "bad men"

clause.

The Tribe Members argue that issue preclusion does not apply here. While issue preclusion prevents a litigant from getting a second chance at an issue, it applies only in certain carefully defined circumstances "to avoid depriving litigants of their first chances." *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1371 (Fed. Cir. 2013). Because the Tribe Members litigated these issues in the Tenth Circuit, this Court applies the law of the Tenth Circuit on issue preclusion. A 41 (citing *Dana v. E.S. Originals, Inc.* 342 F.3d 1320, 1323 (Fed. Cir. 2003)). In the Tenth Circuit, issue preclusion bars a claim if "four elements are met: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Moss*, 559 F.3d at 1161; *see also, e.g.*, *Murdock v. Ute Indian Tribe*, 975 F.2d 683, 686–90 (10th Cir. 1992). The Tribe Members admit that they were parties to the Utah District Court litigation and that it has been "finally adjudicated on the merits." Br. at 32.

The Tribe Members argue, however, that the issues in these cases are not "identical." Br. at 15. They concede that "both actions arise out of the same events," Br. at 33, namely, "the shooting death of Todd Murray," Br. at 4. The cases also turn on the same evidence and the testimony of the same witnesses.

The factual claims that the Tribe Members have made here—that it was "impossible" for Mr. Murray to shoot himself, and that Detective Norton shot Mr. Murray and then covered up that shooting with the help of other police—are plainly identical. *See* Br. at 3–10. If the Court of Federal Claims were to hear this case, it could rule for the Tribe Members only if it concluded that Mr. Murray had been shot by the police, and it would be impossible to reconcile that decision with the decision of the Utah District Court, which has already held that "Mr. Murray shot himself" and that "no reasonable jury could find that Detective Norton inflicted the mortal blow to Mr. Murray." *Jones*, 3 F. Supp. 3d at 1190–91. The Court of Federal Claims correctly decided that the issues presented here are "identical" to "those decided in the [Utah] District Court litigation." A 45.

Despite all that, the Tribe Members argue that the issues in this case are "substantially different." Br. at 32. First, they argue that the issues are different because they "arise under different laws"—their claims in the Utah District Court were for "constitutional violations," while their claims here are for "treaty violations." Br. at 15–16, 32–33. But that is irrelevant because issue preclusion "does not include any requirement that the claim (or cause of action) in the first and second suits be the same." *In re Jerre M. Freeman*, 30 F.3d at 1465. To the contrary, issue preclusion "bars a party from relitigating **an issue** once it has suffered an adverse determination **on the issue**, even if the issue arises when the party is pursuing or defending against **a different claim**." *Moss*, 559 F.3d at 1161 (emphasis added). The Tribe Members cannot make an

end run around the Utah District Court's decision simply by presenting the same issues in different claims.

Second, the Tribe Members argue that the Utah District Court did not rule on their claim that the pursuit of Mr. Murray by state and local police was "extra-jurisdictional" and unlawful. Br. at 29, 33. But that is not true. The Utah District Court expressly held that this "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.

Jones, 3 F. Supp. 3d at 1195. The justified and lawful actions of law enforcement officers are not a "wrong" under the "bad men" clause. A 39; *Hebah II*, 456 F.2d at 708, 710.

Third, the Tribe Members argue that the "spoliation of evidence" was not "fully litigated" in the Utah District Court. As discussed above, the Utah District Court denied the Tribe Members' motion for sanctions for spoliation. A 1189–209. For each of the allegations of spoliation, the court found either that the Tribe Members were not prejudiced or that the state and local police had not been obligated to preserve the evidence at issue. A 1190–91. Significantly, the Utah District Court also rejected the Tribe Members' claim that the police had engaged in a conspiracy or cover-up by intentionally destroying evidence. *Jones*, 3 F. Supp. 3d at 1201–02.

As the Tribe Members note, however, the Utah District Court did not address the role played by Federal law enforcement officers because they were not a party to that case. *See* Br. at 32–33; A 1201–02. The Tribe Members take these claims too far—they argue that the Utah District Court "expressly concluded that the federal officers bore responsibility for the spoliation, not state defendants," Br. at 35, when, in fact, the court merely stated that an FBI agent "**possibly** should have taken Detective Norton's firearm" to have tests performed.[6] A 1201–02 (emphasis added).

But even if they were right, and Federal law-enforcement officers had failed "to secure or investigate the scene," Br. at 36, that still would not state a cognizable claim under the "bad men" clause because, as we discuss in the next section, that clause provides compensation only for affirmative criminal acts, not for negligence or for acts of omission. The core issue presented in this case—the alleged shooting of Mr. Murray by the police—is the only issue that could form the basis of a valid "bad men" claim, and that issue has already been adjudicated by the Utah District Court.

Nor is this a case like *Moss v. Kopp*, where the claims shifted from the conduct of one set of parties to the conduct of a different set of parties, 559 F.3d at 1163. Instead, the core of the Tribe Members' claims—that Detective Norton shot Mr. Murray and then conspired with other police to cover up that

[6] FBI Agent Ashdown testified that he did not believe that such tests were necessary in light of the other evidence at the scene (and that some of the tests suggested by the Tribe Members are "inherently unreliable" and are no longer used by the FBI). A 1203.

shooting—is exactly the same. The doctrine of issue preclusion bars them from litigating those issues again.

Fourth, the Tribe Members argue that they did not receive a "full and fair opportunity" to litigate these issues in the Utah District Court. Br. at 15. Issue preclusion may not apply where "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation." *In re Jerre M. Freeman*, 30 F.3d at 1467. In the Tenth Circuit, the inquiry into whether a party had a "full and fair opportunity" often focuses on whether "there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Murdock*, 975 F.2d at 689 (citations omitted). So the Tenth Circuit has held, for example, that the litigation of an issue before a tribal court was not a "full and fair opportunity" where the tribal judge failed to rule on the pending motions for "four years," his final order did not explain his reasoning or cite any testimony, and there was no tribal appellate court to review his decision. *Burrell v. Armijo*, 456 F.3d 1159, 1173 (10th Cir. 2006).

The record here, in contrast, shows that the Tribe Members had a "full and fair opportunity" to litigate these issues in the Utah District Court. They were given more than four years to conduct discovery, and they briefed these issues extensively, participated in an evidentiary hearing, and submitted an expert report summarizing "nearly 1,000 pages of documents," including "an extensive list of depositions." A 47–49. The Utah District Court documented

its reasoning and conclusions in a comprehensive 71-page decision, and the Tenth Circuit reviewed and affirmed that decision. *Id.* The Tribe Members "cannot now complain that [they] did not have a full and fair opportunity to litigate the issue" when they "raised the issue in [their] initial complaint," they asked the Utah District Court to decide it, they "argued [their] position extensively," and the court "did decide the issue." *Murdock*, 975 F.2d at 690. Their only complaint is that the Utah District Court rejected their claims, but that "does not reflect . . . on a party's opportunity to litigate an issue." *Id.*

The Tribe Members contend that they did not have a "full and fair opportunity" to litigate these issues "[i]n view of the extensive spoliation of evidence." Br. at 15. Again, the issue of spoliation was "intensely litigated over the course of five years in the [Utah District Court], with extensive discovery, briefing, and an evidentiary hearing," and the Utah District Court denied the Tribe Members' motion for spoliation. A 48. But all of that is ultimately irrelevant to issue preclusion because, even if there was spoliation of evidence, that would only show that the underlying investigation was imperfect, not that the proceedings in the Utah District Court were unfair. *Id.*

To avoid issue preclusion here, the Tribe Members must show that there were "significant procedural limitations" in the Utah District Court—as there were with the tribal court at issue in *Burrell v. Armijo*—and they cannot make that showing. 456 F.3d at 1173. The Utah District Court and the Tenth Circuit dealt with these claims as fully and fairly as they could. If there was spoliation, giving the Tribe Members another chance to litigate these issues in a different

court would not fix that problem. This Court should not allow the Tribe Members to litigate these issues again just because they did not receive their preferred result.

III. The "bad men" clause provides compensation for losses caused only by an affirmative criminal act, not by a failure to act.

The "bad men" clause does not require the United States to compensate Indians for every loss. Instead, when "bad men" "commit any wrong upon the person or property of the Indians," the "bad men" clause requires the United States to "arrest[] and punish[]" the "offender" and to "reimburse the injured person for the loss sustained." A 350. The Tribe Members' core claims—about the alleged shooting and cover-up—fail because they have already litigated those issues and lost. Their remaining claims fail because they do not allege the kinds of affirmative criminal acts that constitute "wrongs" under the "bad men" clause. *See Hernandez v. United States*, 93 Fed. Cl. 193, 199 (2010) (holding that plaintiffs must allege that "bad men" "committed a wrong" within the sense of the treaty to state a cause of action).

Having already lost the core of their case, the Tribe Members argue that—even if they are not entitled to compensation for what these police allegedly did—they are still entitled to compensation for what they allegedly failed to do. Br. at 17–27. They argue, for example, that Federal law-enforcement officers are "bad men" who "committed a wrong" by "failing to take custody of Murray's body," failing "to secure the body against desecration," "tacitly allowing . . . spoliation of critical evidence," failing "to

insure that a proper autopsy was performed," and "failing to conduct any kind of investigation into Todd Murray's murder." A 104 (¶ 69); A 37.

But as the Court of Federal Claims held, and as it has held before, such allegations do not state a claim under the "bad men" clause because that clause only reaches "wrongs" that are "affirmative criminal acts," not "omissions or acts of negligence." A 35; *see, e.g.*, *Garreaux*, 77 Fed. Cl. at 736; *Hernandez*, 93 Fed. Cl. at 200. While the treaty does not define the term "wrong," the court's reading is supported by the language of the treaty. A "wrong" is generally defined as "[a]ction or conduct which inflicts harm," not as inaction. *Hebah II*, 456 F.2d at 704 (noting dictionary definition of "wrong" as "[a]ction or conduct which inflicts harm without due provocation or just cause; serious injury wantonly inflicted or undeservedly sustained; unjust or unmerited treatment."); *Garreaux*, 77 Fed. Cl. at 736 (relying on dictionary definition of "wrong").

The treaty also expressly says that Indians will be compensated only when "bad men" "**commit** any wrong upon the person or property of the Indians," not when they fail to act. A 350 (emphasis added). And the treaty requires the "offender" to be "arrested and punished," terms that typically are reserved for criminal acts. *Garreaux*, 77 Fed. Cl. at 736. "Because arresting and criminally prosecuting individuals for **civil** wrongs does not logically follow, 'wrongs' . . . are only allegations of criminal wrongs." A 38. "A more expansive interpretation would render the remedy provided for inappropriate." *Id.*

The Tribe Members argue that the term "any wrong" is expansive and should be read to include "tortious acts and acts of omission like those here," Br. at 15, but they cannot muster any support for that argument from the treaty itself. *See generally* Br. at 17–27. For example, they contend that, when this treaty was written, dictionaries defined the term "wrong" to include "civil as well as criminal injuries." Br. at 20. But even if that were true, it still doesn't show that the "bad men" clause reaches an omission or a failure to act. The Tribe Members, moreover, ignore the fact that the treaty provides compensation only when "bad men" "commit" a wrong, not when they "omit" an action.

The Tribe Members suggest that the treaty's requirement that the "offender" be "arrested and punished" does not necessarily mean that it is limited to affirmative criminal acts. They propose that the term "punish" might also refer to "civil penalties," Br. at 21, and claim that Webster, in his 1828 dictionary, defined "arrest" to mean "to check or hinder motion," without any reference to crime. Br. at 22. But then, as now, the requirement that "bad men" be "arrested and punished" overwhelmingly suggests that this clause is limited to criminal acts—indeed, the Tribe Members have ignored Webster's second definition of "arrest": "[t]o take, seize or apprehend by virtue of a warrant from authority; as, **to arrest one for debt or for a crime**." Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (emphasis added).

Reading "wrongs" to include only affirmative criminal acts is also

consistent with the purpose and context of this treaty. The "bad men" clause was meant to keep the peace. The Indian Peace Commission found that there were "many 'bad men' among the whites" and that, as a result, "[s]carcely a night passes but, in spite of [their] refinement, religion, and law, **crime is committed**." H. Exec. Doc. No. 40-90 at 10 (1868) (emphasis added). The Indians, victims of that crime, and lacking any lawful means of redress, would retaliate, and those conflicts would sometimes escalate into deadly and costly "Indian wars." *See, e.g.*, Conditions of the Indian Tribes: Report of the Joint Special Committee Appointed Under Joint Resolution of March 3, 1865, S. Rep. 39–156 at 5 (1867) (the "Doolittle Commission Report") ("The committee are of [the] opinion that in a large majority of cases Indian wars are to be traced to the aggressions of lawless white men."). The United States tried to address these provocations in its earlier, 1863 treaty with the Utes: In that treaty, the Utes agreed to forego "private revenge" and "retaliation"; in return, the United States guaranteed the Tribe legal redress for "any robbery, violence, or murder" committed "on any Indian or Indians." A 353.

Similarly, the "bad men" clause was meant to keep the peace by "guard[ing] against affirmative criminal acts, primarily, murder, assault, and theft of property." *Garreaux*, 77 Fed. Cl. at 736; *Hernandez*, 93 Fed. Cl. at 199. It did that, in part, by providing for "the extradition of criminals." *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 568 (1883); *see also Friend*, 29 Ct. Cl. at 429 (holding that the "primary object" of these provisions "was for the delivery of the wrongdoers for punishment"). Nothing in its purpose or context suggests

that the "bad men" clause was meant to provide compensation for civil torts or for acts of omission.

The Tribe Members nonetheless argue that the Ute negotiators of the treaty "would have justifiably expected compensation" for "a host of tortious injuries" and would not have understood the legal distinction between "civil" and "criminal" acts. Br. at 25. This is mere speculation—the Tribe Members do not cite any actual evidence of what the Ute negotiators would or would not have understood. But even if civil torts were included among the "wrongs" reached by the "bad men" clause, the Tribe Members still have not shown that this language would somehow reach the failure to act.

This Court has itself observed that the term "wrong" in the "bad men" clause "seems to be limited to the criminal jurisdiction of the United States"; and the Court of Federal Claims has repeatedly held that the "bad men" clause provides compensation only for affirmative criminal acts. *Richard*, 677 F.3d at 1153 n.22 (noting that "because the Treaty determines offenders are to 'be arrested and punished according to the laws of the United States,' 'wrongs' seems to be limited to the criminal jurisdiction of the United States"); *see, e.g.*, *Hernandez*, 93 Fed. Cl. at 199, n.5, 200 (holding that a "bad men" claim lies only for "an affirmative criminal act" and applies only to "a crime of moral turpitude"); *Garreaux*, 77 Fed. Cl. at 736 (holding that the "bad men" clause must be read "to guard against affirmative criminal acts, primarily, murder, assault, and theft of property"). In almost all the reported cases, the "wrong"

underlying the "bad men" claim has been either murder or assault.[7] In contrast, there are no reported cases awarding compensation for an act of negligence or an omission. *Cf. Garreaux*, 77 Fed. Cl. at 736 (rejecting "bad men" claim for alleged breach of lease agreement on the grounds that it addresses only "affirmative criminal acts"). In fact, the Court of Federal Claims has expressly rejected a claim for the failure "to arrest suspected 'wrongdoers'" for these reasons. *Hernandez*, 93 Fed. Cl. at 198.

The Tribe Members, unable to cite any precedent in their favor, brush these decisions aside as mere "*ipse dixit*." Br. at 27. But that argument misses the mark because the court's reasoning in these cases is firmly grounded in both the language of the treaty itself—which requires compensation only when "bad men" "commit" a wrong for which they must be "arrested and punished"—and in the purpose and context of the "bad men" clause—which was meant to keep the peace by giving the Indians redress for crimes committed against them by "bad men." None of this supports the Tribe Members' claim that the "bad men" clause reaches not only affirmative criminal acts, but also acts of negligence and even the failure to act.

As the Tribe Members note, it is a maxim of Indian law that these treaties "must be liberally construed and ambiguities resolved in favor of tribes." Br. at 18. The courts must do that, however, "without extending the

[7] *See, e.g.*, *Tsosie*, 825 F.2d at 397 (sexual assault); *Begay*, 219 Ct. Cl. at 600 (sexual abuse and assault); *Elk I*, 70 Fed. Cl. at 405 (sexual assault); *Zephier* at A 230 (sexual, physical, and mental abuse); *Friend*, 29 Ct. Cl. at 426 (assault and kidnapping); *Kan-gi-shun-ca*, 109 U.S. at 557 (murder).

treaty beyond its bounds in order to meet varying alleged injustices." *Hernandez*, 93 Fed. Cl. at 199; *see Garreaux*, 77 Fed. Cl. at 737 ("Although it is true that the 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."). As the Court of Federal Claims has held before, reading the "bad men" clause to reach negligence or the failure to act would do just that and would "improperly extend the clause beyond its intended bounds." *Hernandez*, 93 Fed. Cl. at 199.

The Tribe Members contend that the Court of Federal Claims missed some of the "wrongs" alleged in their first amended complaint: Specifically, they claim that the court reviewed only the allegations set out in paragraph 69 and "ignor[ed] the wrongs enumerated under [p]aragraphs 67, 70, and 71." Br. at 13. This is not true. As the Tribe Members concede, the court dealt with the allegations set out in paragraph 69 in detail. A 36–39. The court also expressly addressed the "wrongs" alleged in paragraph 67, noting that many of those claims "overlap[ped]" with the allegations set out in paragraph 69, and that the remaining allegations either failed to state a cognizable claim or that the Tribe Members were estopped from making those claims by issue preclusion. A 49 n.33.

The first clause of paragraph 70 restates the core of the Tribe Members' case—that state and local police are "bad men" because they shot Mr. Murray and then covered it up—and the trial court, of course, held that the Tribe Members were barred by issue preclusion from litigating those issues again.

The second clause of paragraph 70 (A 105) alleges that "the owners and employees" of the mortuary "permitted and participated in the desecration" of Mr. Murray's body, which the court found was not covered by the "bad men" clause because it did not happen on the reservation, A 38–39. Paragraph 71 does not allege any "wrong," but merely states that "the State of Utah, Uintah County, and Vernal City have condoned the actions of the 'Bad Men.'" Even the Tribe Members do not claim that "condoning" the actions of a "bad man" is a "wrong" under the "bad men" clause. And even if it was, paragraph 71 would still fail to state a claim because the State of Utah, Uintah County, and Vernal City are not "men" and are not covered by the "bad men" clause. *See Hernandez*, 93 Fed. Cl. at 199 (holding that a court cannot qualify as a "bad man" for the purpose of the treaty because the court is "not a specific white man"); *Garreaux*, 77 Fed. Cl. at 737 (rejecting claim that a government agency could be a "bad man").

Next, the Tribe Members contend that the Court of Federal Claims "only analyzed the claims made against the FBI and BIA officers . . . and failed to rule on the claims made against the Utah state and local officers as the 'bad men.'" Br. at 29–30. Again, this is not true. The Court of Federal Claims acknowledged the Tribe Members' allegation that "all of the Utah state/county/municipal law enforcement officers involved in the events of April 1, 2007" were "bad men." A 36. In its detailed analysis of issue preclusion, the court concluded that the issues presented here and the issues litigated in the Utah District Court are "identical," namely, the allegations that

state and local police "committed 'a wrong by pursuing Murray at gunpoint without jurisdiction and without probable cause, by shooting Murray execution-style, and by then conspiring to cover up the execution-style shooting and to obstruct justice.'" A 45. The Court of Federal Claims then concluded that the Tribe Members are "estopped" from litigating those issues again, and specifically are "estopped from litigating the factual circumstances of Todd Murray's death, and the allegations of the destruction of evidence." A 48. Thus, the court did analyze the Tribe Members' claims that state and local police were "bad men," and it dismissed those claims.

Finally, the Tribe Members object to the Court of Federal Claims' conclusion that the "bad men" clause applies only to acts that occur on the reservation (and not, for example, to acts like the alleged desecration of Mr. Murray's body at the mortuary off the reservation). A 38–39. The Tribe Members argue that the court reached this conclusion "[w]ithout citing to any authority." Br. at 27. The "bad men" clause, however, "contemplate[s] that the Indians shall be responsible for what Indians do within the white man's territory and that the Government will be responsible for what white men do **within the Indian's territory**." *Janis*, 32 Ct. Cl. at 410 (emphasis added). And so this Court and the Court of Federal Claims have repeatedly held that it provides compensation to Indians only for those "wrongs" that occur on the reservation. *See, e.g.*, *Richard*, 677 F.3d at 1153 n.22 (noting that "claims under this provision are limited to the clear geographic limits found in the Treaties."); *Pablo v. United States*, 98 Fed. Cl. 376, 380 (2011) (holding that an Indian was

not entitled to compensation under the "bad men" clause for wrongs suffered outside of the boundaries of the reservation recognized by that treaty.); *Campbell v. United States*, 44 Ct. Cl. 488, 491–92 (1909); *Janis*, 32 Ct. Cl. at 410. The Court of Federal Claims' conclusion here is fully supported by this authority.

IV. The Ute Tribe cannot recover for breach of trust because there is no fiduciary duty here and because these treaty terms are not "money-mandating."

In addition to the Tribe Members' "bad men" claims, the Ute Tribe argues in a separate and independent claim that it is entitled to compensation from the United States for a "breach of trust." Br. at 36–40. Specifically, it claims that the 1863 and 1868 Ute treaties imposed a "trust" obligation on the United States to "protect Indian lands from 'unauthorized state intrusion'" and "to prosecute and punish any 'bad man' that commits any wrong upon the person or property of the Indians." A 51. It claims that the United States breached that trust by failing to prevent state and local police from entering its reservation in pursuit of Mr. Murray and by failing to prosecute those police officers for shooting Mr. Murray. And it contends that it is now owed money damages for that breach of trust. A 106–07 (¶¶ 78–83); A 51.

The law governing these claims is well-established and clear. There is, of course, a general trust relationship between the United States and the Indian people, but that general trust relationship "alone is insufficient to support jurisdiction" in this Court over claims, like these, that are brought under the

Indian Tucker Act. A 52; *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *see United States v. Mitchell*, 463 U.S. 209, 216–17 (1983) ("*Mitchell II*") (holding that a "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*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"). Moreover, the Federal government is not a "private trustee," and it "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323–25 (2011).

The Ute Tribe, therefore, was required to clear "two hurdles" to bring this claim for breach of trust. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*"); *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). First, the Tribe had to "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." *Hopi Tribe*, 782 F.3d at 667 (citing *Navajo II*, 556 U.S. at 290). That "threshold" showing had to be based on "specific rights-creating or duty-imposing [constitutional,] statutory[,] or regulatory prescriptions," not on the "general trust relationship between the United States and the Indian people." *Navajo I*, 537 U.S. at 506.

Second, the Tribe had to show that the law creating that duty can be "fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]." *Hopi Tribe*, 782

F.3d at 667 (citing *Navajo II*, 556 U.S. at 290–91); *Mitchell II*, 463 U.S. at 216–17. Just because these treaties impose duties on the United States does not also mean that they mandate an award of money damages if the United States fails to perform those duties. *See, e.g.*, *id.*; *United States v. Testan*, 424 U.S. 392, 400–1 (1976). Thus, even if these treaties created a fiduciary duty, the Ute Tribe could still recover for a breach only if the treaties were also "money-mandating."[8]

As the trial court correctly held, the Ute Tribe failed to make these showings. A 49–56. It has not identified a "substantive source of law" that establishes a money-mandating fiduciary duty. The Ute Tribe cites the 1863 and 1868 treaties, but those treaties do not create a fiduciary duty where the United States assumes "elaborate control over . . . property belonging to Indians" and manages that property for the benefit of the Tribe. *See Mitchell II*, 463 U.S. at 225; A 53 (noting that the trust relationship is "limited to the management of tribal lands and assets"). The cases recognizing claims by Indian tribes against the United States for breaches of these kinds of duties have universally involved the alleged government mismanagement of a

[8] The Ute Tribe argues that 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?" Br. at 38 (citing *Gila River Pima-Maricopa Indian Comm. v. United States*, 427 F.2d 1194 (Ct. Cl. 1970)). This argument is wrong. That case does not represent the current Supreme Court jurisprudence governing federal liability in damages for a breach of trust. Rather, the Court must determine that the treaty at issue creates a trust duty and that it is "money-mandating." Moreover, even if the United States did not do what the Tribe asserts "it was required to do," this Court would still lack jurisdiction over the Ute Tribe's breach-of-trust claims because there is no fiduciary duty here and because these treaties are not "money-mandating."

property interest held for the economic benefit the Tribe—for example, the United States' sale of timber or oil and gas mining leases for the benefit of the Tribe. *See, e.g.*, *Mitchell II*, 463 U.S. at 207 (forest resources); *Navajo I*, 537 U.S. at 493 (mining leases); *Pawnee v. United States*, 830 F.2d 187, 188 (Fed. Cir. 1987) (oil and gas mining leases). In each of these cases, the United States exercised "elaborate" and "pervasive" control over the resource at issue. *Mitchell II*, 463 U.S. at 225; *Navajo I*, 537 U.S. at 507; *see also* Cohen's Handbook of Federal Indian Laws § 5.05(1)(b) (Nell Jessup Newton ed. 2012).

Here, while the United States holds these reservation lands in trust for the Ute Tribe, nothing in these treaties gives the United States pervasive control over the management of the reservation that creates a money-mandating fiduciary duty. To the contrary, the 1868 treaty expressly sets this reservation aside for the "absolute and undisturbed use and occupation of the Indians" and allows the "officers, agents, and employees of the Government" to enter into the reservation only "in discharge of duties enjoined by law." A 349. These treaties do not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of [these] lands." *Mitchell I*, 445 U.S. at 542. The allegations in this case, unlike the cases cited above, are not about the United States' management of a resource for the economic benefit of the tribe.

The Ute Tribe has also failed to show that these treaties are "money-mandating." Although the "bad men" clause obligates the United States to compensate individual Indians who prove that they have suffered "wrongs" at

the hands of "bad men," that provision is not relevant to the Ute Tribe's breach-of-trust claims. Instead, the Ute Tribe had to show that this treaty mandates the payment of money damages by the United States to the Ute Tribe for failing to prevent the police from pursuing Mr. Murray onto the reservation, and nothing in the treaties suggests that. Other than the "bad men" clause, the treaties make no reference to money-mandating obligations of any kind. And as the Ute Tribe concedes, the "bad men" clause "mandates compensation only to individual Indians and not the Tribe itself." Br. at 37 n.8.

Moreover, these treaties stand in stark contrast to other laws that have been found to be "money-mandating." In *Mitchell II*, for example, the Supreme Court found that a law was "money-mandating" because it gave the Federal government "full responsibility" over the harvesting of Indian timber, directed the government to pay the proceeds from those timber sales to the Indians, and required the government to manage Indian forests to obtain the greatest revenue for the Indians. 463 U.S. at 224. The treaties at issue here impose none of these obligations.

The 1863 treaty entitles the Ute Tribe to the "quiet and peaceable possession" of its lands. A 354. The Ute Tribe argues that the United States breached that term of the treaty because it failed to stop state and local law-enforcement officers from pursuing Mr. Murray onto the reservation. A 102, 107 (¶¶ 63, 79). The Supreme Court, however, has already held that such a right to "peaceable possession" does not obligate the United States to pay

money damages for the "encroachments" of third parties, especially where—as in this case—there is not "a single explicit word in the [t]reaty to that effect." *Creek Nation v. United States*, 318 U.S. 629, 633–34 (1943). Also, this was not an act of criminal trespass by "bad men"—it was a pursuit by police, which the Utah District Court found to be "reasonable under the circumstances." *Jones*, 3 F. Supp. 3d at 1195. And this case is nothing like *Lipan Apache Tribe v. United States*, where the United States Army participated in driving tribal members from their land. 180 Ct. Cl. 487, 500 (1967). The trial court properly rejected this claim. A 54–55.

Where "bad men" commit "any wrong upon the person or property of the Indians," the 1868 treaty requires the United States "to cause the offender to be arrested and punished according to the laws of the United States." A 350. The Ute Tribe argues that the United States breached that term of the treaty because it failed to prosecute state and local police for shooting Mr. Murray (and then covering up that shooting).[9] A 107 (¶ 80). But the United States was not under any duty to prosecute the police because, as discussed above, the evidence shows that Mr. Murray shot himself and that there was no cover-up or conspiracy. The Ute Tribe, moreover, is precluded from litigating those issues again here.

In addition, even if there were "bad men" here, these claims would run

[9] The United States did prosecute one individual as a result of this incident—it prosecuted the "straw purchaser" who bought the gun that Mr. Murray used. A 163–64.

headfirst into the principle that the prosecutorial discretion of the United States is broad and generally not subject to judicial review. 28 U.S.C. § 516; *Wayte v. United States*, 470 U.S. 598, 607 (1985). That includes the prosecution of actions by the United States on behalf of Indians. *Creek Nation v. United States*, 318 U.S. 629, 639 (1943); *Heckman v. United States*, 224 U.S. 413, 446 (1912). And again, even if there was a duty here, these provisions of the treaty are still not "money-mandating." *Cf. Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005) (holding that a discretionary scheme is "money-mandating" only if it (1) provides "clear standards for paying" money to recipients, (2) states the "precise amounts" that must be paid, or (3) compels payment on satisfaction of certain conditions). The trial court properly rejected these claims. A 55–56.

The Ute Tribe argues that, if they cannot get money damages for these alleged breaches, that "nullifies" the terms of the treaties and "renders" them "illusory." Br. at 37. But there are many terms in many treaties that do not provide for money damages and, as the Supreme Court has explained, that does not mean that they are "empty promise[s]." *Creek Nation*, 318 U.S. at 634. When the United States commits to ensure a tribe's "quiet possession" of its lands, for example, it may undertake "to use its military power to protect the Indians against military aggression" or it may use "its administrative and legislative policy to aid the tribes to hold possession of their lands." *Creek Nation*, 318 U.S. at 634–35. Such terms are not an "empty promise," even though they do not make a "pledge of monetary reparation," because they

commit the United States to a course of "legislative, administrative, and military" action. *Id.*

If Mr. Murray had been killed on the Ute reservation by "bad men," the Tribe Members may have been entitled to claim compensation from the United States under the "bad men" clause. But the Utah District Court found that Mr. Murray was not shot by "bad men." Rather, that court found that he shot himself, and the Tribe Members cannot recover under the "bad men" clause because they are precluded from litigating that issue again. The Ute Tribe has tried to argue, in the alternative, that it is entitled to compensation for a breach of trust. But that claim also fails because the Tribe has not identified a specific and relevant fiduciary duty and because these treaties do not provide for money damages. The trial court properly dismissed the Ute Tribe's breach-of-trust claims, and its judgment should be affirmed.

Conclusion

The trial court's judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ *James A. Maysonett*

JAMES A. MAYSONETT
Attorneys, U.S. Department of Justice
Environment & Nat. Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov

Attorneys for Appellee

March 22, 2016
90-2-20-13949

Proof of Service

I hereby certify that on March 22, 2016, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *James A. Maysonett*

_____

JAMES A. MAYSONETT

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e).

___X___ The brief contains **9,735** words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or

_____ The brief uses a monospaced typeface and contains ___ _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

___X___ The brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2013** in **14 pt. Calisto MT**, or

_____ The brief has been prepared in a monospaced typeface using _____ with _____.

JOHN C. CRUDEN
Assistant Attorney General

/s/ *James A. Maysonett*

JAMES A. MAYSONETT
Attorneys, U.S. Department of Justice
Environment & Nat. Resources Div.
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov

Attorneys for Appellee
March 22, 2016