IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Cheyenne & Arapaho Tribes, Plaintiff, v. **United States**, Defendant.	Case No. 20-143 L Judge Loren A. Smith

United States' Reply in Support of Motion to Dismiss

JEAN E. WILLIAMS
Deputy Assistant Attorney General

KRISTOFOR R. SWANSON
Senior Attorney
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The Complaint should be dismissed for failure to state a claim and lack of jurisdiction. The Tribe posits that the United States, by moving to dismiss, has sought to avoid its treaty obligations. Treaty obligations, however, are defined by the treaty itself. Here, the 1867 Medicine Lodge Treaty's "bad men" clause created an individual (rather than tribal) right. The Tribe cannot pursue a claim under the clause. In any event, to be compensable, a "wrong" under the clause must derive from on-reservation, criminal conduct by an individual "upon the person or property of the Indians." The Complaint does not plead such a claim. And, even if it had, the "bad men" clause requires the Tribe to exhaust administrative remedies, which the Tribe has failed to do. The United States' motion to dismiss should be granted.

ARGUMENT

I. The Tribe is Not a Valid Plaintiff.

The Complaint should be dismissed because the Tribe cannot pursue claims under the "bad men" clause in the 1867 Medicine Lodge Treaty. Our opening brief explained that the Treaty's text created an individual right, not a tribal one, and that the Tribe does not have prudential standing to pursue the claims of its members. *See* Mem. in Supp. of U.S. Mot. to Dismiss ("U.S. Mem.") at 10–16, ECF No. 7-1. The Tribe responds that tribes can bring "bad men" claims, both on their own behalf and on behalf of an allegedly-harmed

tribal member. *See* Mem. in Opp'n to Mot. to Dismiss of U.S. ("Pl.'s Resp.") 6–13, ECF No. 10. The argument is misplaced.

For one, the Tribe's argument is contrary to the Treaty's plain language. The "bad men" clause covers "any wrong upon the *person or property* of the Indians," and requires, "upon proof made," that the United States "reimburse the injured *person* for the loss sustained." Treaty with the Cheyenne Indians, art. 1, Oct. 28, 1867, 15 Stat. 593 ("1867 Treaty") (emphasis added), attached as Ex. US-12.

Because of this plain language, the Federal Circuit's predecessor concluded that an identical clause in another tribe's treaty "concerns the rights of and obligations to individual Indians" because "the obligation and payment both run directly to the individual." *Hebah v. United States (Hebah I)*, 428 F.2d 1334, 1337–38 (Ct. Cl. 1970), *cert. denied,* 409 U.S. 870 (1972). The fact that the treaty was between the tribe and the United States did not change the court's conclusion: "the injured Indian is the 'intended beneficiary' of Article I because recognition of his rights is appropriate to effectuate the intention of the treaty-parties." *Hebah I*, 428 F.2d at 1338.

In other words, the Tribe cannot exercise the treaty right at issue here because it is not the Tribe's right to exercise. That the Tribe or its members may otherwise generally be affected by the opioid epidemic or the opioid companies' allegedly-tortious conduct cannot create for the Tribe a general

welfare claim that does not otherwise exist within the terms of the Treaty. *Nw. Band of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("We stop short of varying [a treaty's] terms to meet alleged injustices."). It is of no matter that (fifty years ago) the United States argued in *Hebah I* that only tribes could bring "bad men" claims. *See* Pl.'s Resp. at 6–7. The Court of Claims disagreed and—as Judge Hertling recognized just this summer—*Hebah I* has been the law ever since. *See Jones v. United States*, __ Fed. Cl. __, 2020 WL 4197757 at *23 (July 8, 2020) ("The Ute Tribe does not have standing to bring a claim under the treaty's 'bad men' provision." (citations omitted)).

Rather than focus on what the "bad men" clause actually says, the Tribe argues that canons of construction require treaties to be interpreted in the Indians' favor. *See* Pl.'s Resp. at 2–3, 8–10. As made clear by the very cases to which the Tribe cites, however, those canons only apply, if at all, when interpreting *ambiguous* treaty terms. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) ("But even Indian treaties cannot be re-written or expanded beyond their clear terms . . . ."); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("*Doubtful* expressions are to be resolved in favor of the [tribe] . . . ." (emphasis added)).

Here, the Tribe agrees that "[t]he words of the Bad Man clause at issue in this litigation are plain and clear[.]" Pl.'s Resp. at 3. The canons are

therefore not implicated. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) ("But liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty."); *Jones v. United States*, 846 F.3d 1343, 1355–56 (Fed. Cir. 2017) (noting, in interpreting a "bad men" clause as unambiguous, that "We turn first to the text of the [Treaty] itself."). Further, applying the canons in the manner advocated by the Tribe would necessarily require interpreting the Treaty to only allow claims brought by the first to file—the Tribe or the individual who actually suffered the alleged "wrong." The Indian canons do not apply when Indians are pitted one against the other. *See Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *see also Hebah I*, 428 F.2d at 1337–38 (interpreting "bad men" clause to allow individual Indians to bring claim).[1]

But let us assume the Tribe is correct that *Hebah I* did not preclude tribes from bringing claims under a "bad men" clause. *See* Pl.'s Resp. at 7–8.

[1] The Tribe also quotes a different and prior treaty to support its interpretation of the 1867 Treaty. *See* Pl.'s Resp. at 9 (quoting Treaty with the Cheyenne and Arapaho, art. 1, Oct. 14, 1865, 14 Stat. 703). But that prior treaty is nowhere incorporated into the terms of the latter. If it had been, it would only support the United States' argument that the Tribe was required to, but has not, exhausted administrative remedies. *See* Treaty with the Cheyenne and Arapaho, art. 1, 14 Stat. 703 ("the party or parties aggrieved shall submit their complaints through their agent to the President of the United States, and thereupon an impartial arbitration shall be had, . . . and the award thus made shall be binding on all parties interested . . . .").

Even then, the Tribe would still need to deal with the Treaty's actual text. That text would foreclose the Tribe's claim here for two reasons.

First, the Treaty requires the United States to "reimburse *the injured person* for the loss sustained." 1867 Treaty, art. 1, 15 Stat. 593 (emphasis added). "The tribe is not to be the channel or conduit through which reimbursement [to an individual Indian] is to flow." *Hebah I*, 428 F.2d at 1338.[2] Thus, the Tribe's case could only be about "wrongs" committed against the Tribe as the Tribe. The Complaint, however, nowhere alleges that an individual came onto Tribal lands and committed a crime against the Tribe as the Tribe. *See* Compl. ¶¶ 1, 75, 87, 92, 93, 97 (alleging economic damage and loss of resource from need to spend funds on effort to combat the epidemic). The two cases the Tribe cites (Pl.'s Resp. at 8) to support a tribal claim only illustrate our point because both involved a tribe pursuing a *tribal* proprietary interest. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 384–90 (1980) (involving an alleged taking of tribal land); *Pueblo of Isleta v. Universal Constructor, Inc.*, 570 F.2d 300, 301 (10th Cir. 1978) (involving land held in trust for the benefit of the tribe, on which individuals had certain rights of occupancy).

[2] The Tribe has not responded to (and therefore conceded) our argument that it lacks third-party standing to litigate any individualized "wrong" suffered by a member of the Tribe. *See* U.S. Mem. at 13–15.

Second, any cognizable "wrong" suffered by one or more tribal members is not the type of claim that can be litigated by way of parens patriae standing. The harms that would be at issue—on-reservation criminal conduct against one or more individual tribal members—are not sovereign or quasi-sovereign interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600, 607 (1983). They are interests specific to each individual tribal member who was been the victim of the alleged "wrong upon" his or her "person or property." 1867 Treaty, art. 1, 15 Stat. 593. Those individuals are perfectly capable of pursuing those interests themselves, making parens patriae standing inappropriate. *Alfred L. Snapp*, 458 U.S. at 607 (parens patriae standing can only exist where the sovereign "articulates an interest apart from the interests of particular private parties").

The Tribe cites to *Sisseton-Wahpeton Sioux Tribe v. United States* in support of parens patriae standing. *See* Pl.'s Resp. at 12 (citing 90 F.3d 351 (9th Cir. 1996)). But nowhere in that case did the court analyze the doctrine. And the tribe there clearly had a proprietary interest at stake—the case challenged Congress's approval of a distribution plan for funds from settlement of the tribe's takings claim against the United States. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 590 (9th Cir. 1990). The Tribe here, by contrast, is seeking to step into the shoes of those of its members who have allegedly suffered a "wrong" under the Treaty. But

that is not parens patriae standing. *Alfred L. Snapp*, 458 U.S. at 600. The Complaint should be dismissed.

II. The Complaint's Allegations Do Not Satisfy the Necessary Elements for a "Bad Men" Claim.

Even if the Tribe could theoretically bring a claim under the "bad men" clause, the Complaint here fails to plead such a claim. The Tribe has not disputed the necessary pleading elements: the alleged "wrong upon the person or property of the Indians" must be [1] on-reservation conduct constituting a [2] federally-punishable crime [3] committed by an individual. *See* U.S. Mem. at 16–18 (citing primarily *Jones*, 846 F.3d at 1352, 1355–57, 1362); *accord Jones,* __ Fed. Cl. __, 2020 WL 4197757 at *10 ("[F]or the plaintiffs to prevail, they must prove that a non-Indian committed one or more federally punishable crimes against [the tribal member's] person or property on the reservation or as a direct result of actions on the reservation.").[3]

The Tribe now states in its brief that the Complaint "center[s] around the criminal fraud and deception of the Bad Men." Pl.'s Resp. at 14, 17. The face of the Complaint, however, clearly and repeatedly states that the Tribe

[3] The Federal Circuit has also stated that "the bad men provision may take cognizance of off-reservation activities that are a clear continuation of activities that took place on-reservation." *Jones*, 846 F.3d at 1360. But that still requires on-reservation conduct to begin with.

is seeking compensation for a "*civil* conspiracy" and tortious conduct. *See* Compl. ¶¶ 4, 7, 98 (emphasis added). The Complaint plainly fails to include facts necessary to allege a cognizable "bad men" claim.

The Tribe attempts to overcome its pleading deficiency in two ways. First, the Tribe argues the Complaint alleges that the sale of opioids made its way onto Tribal lands and also identifies "conduct directed to and against the Plaintiff and its Tribal members." *See* Pl.'s Resp. at 13–14. Second, apparently in an attempt to satisfy the criminal portion of the pleading requirement, the Tribe references prior criminal proceedings (in the United States District Court for the Western District of Virginia) against Purdue Frederick Company. *See* Pl.'s Resp. & Exs. A & B.

But the Tribe still has not alleged (as it must) that a particular individual came onto tribal lands and committed a federally-prosecutable crime "upon the person or property of the Indians." The fact that certain conduct harms Tribal members—even severely—does not implicate the "bad men" clause unless that conduct was criminal and began on Tribal lands. *See Jones*, 846 F.3d at 1360–61. Contrary to what it now appears to be arguing, the Tribe's complaints in the Multidistrict Litigation alleged that the conduct in question did not occur or begin on Tribal lands. *See, e.g.,* Petition ¶ 23, *Cheyenne & Arapaho Tribes v. Purdue Pharma*, No. CJ-2018-677 (Canadian Cnty. Ct. Nov. 29, 2018), attached as Ex. US-1 to U.S. Mot, ECF No. 7-2.

The prior criminal proceedings also do not cure the pleading deficiency. The Purdue Frederick Company is not an individual, and its conduct therefore cannot give rise to a "bad men" claim. *See Jones,* __ Fed. Cl. __, 2020 WL 4197757 at *11 ("The state of Utah, its agencies, and political subdivisions listed by the plaintiffs are not arrestable, and thus cannot be 'bad men' under a provision that is limited to arrestable wrongs." (citing *Jones*, 846 F.3d at 1356)). The three individuals identified in the Tribe's Exhibit B—Michael Friedman, Howard R. Udell, and Paul D. Goldenheim—are nowhere mentioned in the Complaint, let alone alleged to have ever been on Tribal lands. *See* Pl.'s Ex. B at 2–3. Indeed, neither of the Tribe's Exhibit A or B says anything about conduct on the Tribe's lands at all. The Tribe has failed to state a claim under the "bad men" clause.[4]

III. The Tribe Failed to Exhaust Mandatory Administrative Remedies.

Finally, the Complaint should be dismissed for lack of jurisdiction because the Tribe has failed to exhaust mandatory administrative remedies. Our motion explained that: (1) the 1867 Treaty includes a requirement to pursue administrative remedies; and (2) the Tribe has failed to exhaust those

[4] The Tribe also references the United States' general trust relationship with tribes. *See* Pl.'s Resp. at 2. If the Tribe is arguing that it has a separate Tucker Act claim for breach of trust, the Federal Circuit has rejected that notion. *See Jones*, 846 F.3d at 1364.

remedies because it has not provided the Department of the Interior information with which the agency can "examine[ ] and pass[ ] upon" the Tribe's claim. *See* U.S. Mem. at 20–26; 1867 Treaty, art. 1. The Tribe's argument in response is essentially that the Treaty does not require administrative exhaustion, and that, in any event, exhaustion would be futile. *See* Pl.'s Resp. at 17–21. Neither argument is correct.

The Tribe's argument that exhaustion is not required is based on the premise that our motion cited no cases requiring exhaustion for Treaty rights. *See* Pl.'s Resp. at 17. But, of course, we cited numerous cases discussing administrative exhaustion in the context of "bad men" claims. *See* U.S. Mem. at 21–23, 25–26.[5] Most notably among them was *Begay v. United States*. *See* U.S. Mem. at 21–22, 23–24. The "bad men" clause at issue in *Begay*, like the one at issue here, includes the "examined and passed upon" language that makes administrative exhaustion mandatory, rather than permissive. *See Begay*, 219 Ct. Cl. at 602 n.4 (quoting 15 Stat. at 667–68). The Tribe simply has no response to *Begay*.

[5] Citing *Begay v. United States*, 219 Ct. Cl. 599, 602 (1979); *Jones v. United States*, 122 Fed. Cl. 490, 509–17 (2015), *vacated and remanded on other grounds*, 846 F.3d 1343 (Fed. Cir. 2017); *Elk v. United States (Elk I)*, 70 Fed. Cl. 405 (2006); *Tsosie v. United States*, 11 Cl. Ct. 62, 64, 68 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987); *Harrison v. United States*, No. 15-1271 C, 2016 WL 3606066 at *2, *5 (Fed. Cl. June 30, 2016).

Nor has the Tribe disputed that, should the Court determine that the Tribe failed to exhaust administrative remedies, dismissal (as opposed to a stay) is the appropriate remedy. And, of course, as *Begay* amply illustrates, there is nothing to the Tribe's theory (Pl.'s Resp. at 17) that administrative exhaustion only applies in cases brought under the Administrative Procedure Act. *See also Lins v. United States*, 688 F.2d 784, 786–87 (Ct. Cl. 1982) (breach of contract claim); *Ace Property & Cas. Ins. v. United States*, 60 Fed. Cl. 175, 183–84 (2004) (breach of contract), *aff'd on other grounds*, 138 Fed. Appx. 308 (Fed. Cir. 2005); *Moncrief v. United States*, 43 Fed. Cl. 276, 284–89 (1999) (monetary damages under a lease).

Perhaps recognizing the significance of the case law, the Tribe next attempts to reconstruct the Treaty to remove the exhaustion requirement. The Tribe relies on the fact that the "examined and passed upon" language appears at the end of Article 1, and that the "bad men among the whites" clause includes the phrase "proceed at once." Pl.'s Resp. at 19–20.

Neither of the Tribe's theories is correct. As noted above, Article 1 in the 1867 Treaty is identical to the treaty language at issue in *Begay*. *Compare* 1867 Treaty, art. 1 *with* Treaty with the Navaho, art. 1, June 1, 1868, 15 Stat. 667, 667–68. The *Begay* court did not make the distinction the Tribe attempts to make here. *See* 219 Ct. Cl. at 601–02. Further, the "proceed at once" language refers to the requirement that the United States

"cause the offender to be arrested and punished according to the laws of the United States" (not the requirement to reimburse) and, even then, only *after* the claimant's proofs are presented to the Indian agent and forwarded to the Assistant Secretary. *See* 1867 Treaty, art. 1.

The Tribe's citations (Pl.'s Resp. at 18) to *Hebah I*, *Flying Horse*, and *Jones* are off-point. *Hebah I* nowhere analyzed administrative exhaustion, and pre-dated *Begay* by nine years. *See generally Hebah I*, 482 F.2d 1334. *Hebah II*, however—which resolved the case after the jurisdictional issue decided in *Hebah I*—noted that the "plaintiff had a proof of wrong-doing served upon the Superintendent of the Wind River Indian Reservation and the Commissioner of the Bureau of Indian Affairs in Washington, D.C." *Hebah v. United States (Hebah II)*, 456 F.2d 696, 699 (Ct. Cl. 1972). *Flying Horse* and *Jones* involved "bad men" clause treaties that do not contain the "examined and passed upon" requirement like the treaties at issue here and in *Begay*. *See Flying Horse v. United States*, 696 Fed. Appx. 495, 497 (Fed. Cir. 2017) (1868 treaty with the Sioux Tribes, art. 1, 15 Stat. 635); *Jones*, 122 Fed. Cl. at 514–15 (1868 treaty with the Ute Tribe, art. 6, 15 Stat. 619).

There is also nothing to the Tribe's argument that the Court should ignore the Treaty's mandatory exhaustion requirement because further administrative proceedings would be futile. *See* Pl.'s Resp. 18. For one, there is a question of whether futility is even an available excuse given that the

exhaustion requirement here is a mandatory one. *See Ross v. Blake*, 136 S. Ct. 1850, 1856–57 (2016) (finding judicial discretion not available for statutory exhaustion requirement). In any event, the Tribe's theory of futility would effectively destroy the doctrine of administrative exhaustion. The Tribe still—despite two requests from Interior and a motion to dismiss in this case—has not submitted any "proofs" (evidence) to Interior identifying a particular individual who came onto Tribal lands and committed a crime against the "person or property of the Indians." Until the Tribe provides Interior with evidence supporting its claim, there is nothing for Interior to "examine[ ] and pass[ ] upon." 1867 Treaty, art. 1. Thus, if the Tribe's futility theory holds, a plaintiff could circumvent the Treaty's explicit requirements by sending a bare "notice" letter to the Assistant Secretary, refusing to provide any information upon which the agency could actually consider the claims, and then filing suit claiming that administrative exhaustion would be futile.

The Tribe is required to exhaust administrative remedies. Because it has failed to do so, the Complaint should be dismissed for lack of jurisdiction.

CONCLUSION

The Tribe cannot bring a claim under the 1867 Treaty's "bad men" clause, which created an individual right, not a tribal one. Even if the Tribe were a valid plaintiff, the Complaint fails to allege the elements necessary for a "bad men" claim. And, in any event, the Tribe failed to comply with the Treaty's mandatory administrative exhaustion requirement. The Complaint should be dismissed.

Date: July 30, 2020

JEAN E. WILLIAMS
Deputy Assistant Attorney General

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
Senior Attorney
Natural Resources Section
Envt. & Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0248
Fax: (202) 305-0506
kristofor.swanson@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I filed the above pleading and its exhibit with the Court's electronic filing system, which will send notice to counsel of record.

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON