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

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

PRERAK SHAH
Deputy Assistant Attorney General

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

Date: May 26, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

LIST OF EXHIBITS

Exhibit	Document
US-1	Petition, *Cheyenne & Arapaho Tribes v. Purdue Pharma*, No. CJ-2018-677 (Canadian Cnty. Ct. Nov. 29, 2018)
US-2	Complaint, *Cheyenne & Arapaho Tribes v. Watson Laboratories, Inc.*, No. CJ-2018-714 (Canadian Cnty. Ct. Dec. 14, 2018)
US-3	Complaint, *Cheyenne & Arapaho Tribes v. McKesson Corp.*, No. CJ-2018-715 (Canadian Cnty. Ct. Dec. 14, 2018)
US-4	Transfer Order, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L. Apr. 3, 2019), ECF No. 1510
US-5	Conditional Transfer Order, *In re: National Prescription Opiate Litigation*, MDL No. 2804, (J.P.M.L. Feb. 21, 2019), ECF No. 1383
US-6	Plaintiffs' Revised Position Statement Regarding Continuing Litigation, *In re National Prescription Opiate Litigation*, No. 1:17-md-2804-DAP (N.D. Ohio Nov. 13, 2019), ECF No. 2935
US-7	Remand Order, *In re National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L. Feb. 10, 2020), ECF No. 3160
US-8	November 5, 2019, Letter from J. Nixon Daniel to Tara Sweeney
US-9	March 16, 2020, Letter from Tara Sweeney to J. Nixon Daniel
US-10	April 22, 2020, Letter from J. Nixon Daniel to Tara Sweeney
US-11	May 21, 2020, Letter from Tara Sweeney to J. Nixon Daniel

QUESTIONS PRESENTED

1) Whether the Tribe can seek compensation under the "bad men" clause in the 1867 Treaty between the Cheyenne and Arapaho Tribes and the United States where that clause creates an individual (rather than tribal) right.

2) Whether the Tribe has stated a plausible claim for relief under the "bad men" clause in the 1867 Treaty between the Cheyenne and Arapaho Tribes and the United States where the Complaint alleges no on-reservation, criminal conduct by a specific individual against a specific Tribal member.

3) Whether the Tribe has complied with the mandatory exhaustion requirements in the 1867 Treaty between the Cheyenne and Arapaho Tribes and the United States where the Tribe has not provided any evidence in support of its "bad men" claim to the Department of the Interior.

INTRODUCTION

Plaintiff Cheyenne and Arapaho Tribes seek damages from the United States for alleged civil conspiracies and tortious actions by companies that manufacture and distribute opioids. The Tribe relies upon the "bad men" clause in an 1867 treaty, which states that the United States will "reimburse the injured person" 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 Tribe alleges that its members, like many other people in the United States, have been negatively affected by the opioid epidemic. Indeed, the Tribe has three pending tort actions against opioid manufacturers and distributors in federal district court. But the Tribe's "bad men" claim against the United States cannot proceed for three independent reasons.

First, the Tribe is not a valid plaintiff. The "bad men" clause created an individual right, not a tribal one. The Tribe lacks prudential standing to pursue the claims of its members.

Second, the Complaint has not pled a proper "bad men" claim. Only certain on-reservation criminal acts by individuals are cognizable under the clause. The Tribe, however, has essentially just re-pled its tort claims against the companies. The Complaint does not allege any on-reservation

criminal conduct, and focuses on corporate actions, rather than individual ones.

Third, the Tribe has failed to exhaust required administrative remedies. Before any damages are to be paid under the clause, the treaty requires that the claimant submit his or her evidence to the Department of the Interior's Bureau of Indian Affairs, and that the claim be "thoroughly examined and passed upon" by the Assistant Secretary for Indian Affairs and Secretary of the Interior. The Tribe has not submitted any legal support or evidence to Interior, and the Department has therefore not had an opportunity to render a decision on the claim. Interior has requested that the Tribe submit evidence to support the claim; as of this filing, the Tribe has been unwilling (or unable) to do so. The Complaint should be dismissed.

FACTUAL AND LEGAL BACKGROUND

I. The "Bad Men" Clause

This case involves the 1867 Medicine Lodge Treaty between the United States and the Cheyenne and Arapaho Tribes. *See* Compl. ¶ 2, ECF No. 1.[1] Article 1 of the Treaty contains a so-called "bad men" clause:

[1] The October 21, 1867, treaties with the Kiowa, Comanche, and Apache tribes (15 Stat. 581, 589) were also made at Medicine Lodge and are therefore also sometimes called the "Medicine Lodge Treaty." We, of course, refer to the Treaty with the Plaintiff-Tribe here.

> 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 Affair 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.
>
> * * *
>
> But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the [Assistant Secretary for Indian Affairs] and the Secretary of the Interior; . . . .

Treaty with the Cheyenne Indians, art. 1, Oct. 28, 1867, 15 Stat. 593 ("1867 Treaty").[2] A similar provision appears in a total of nine treaties (with thirteen tribes) from the same period. *Brown v. United States*, 32 Ct. Cl. 432, 435 (1897).

The Complaint also invokes a "Treaty of May 10, 1868." *See* Compl. ¶¶ 2, 3 (citing 15 Stat. 635). But the treaty at 15 Stat. 635 is an April 28, 1868, treaty with the Sioux tribes. There was a May 10, 1868, treaty with the *Northern* Cheyenne and Arapaho Tribes. *See* Treaty with the Cheyenne Indians, May 10, 1868, 15 Stat. 655 ("Fort Laramie Treaty"). By the 1860s, however, the Northern Cheyenne and Arapaho Tribes were distinct from the Plaintiff Cheyenne and Arapaho Tribes, and the United States negotiated

[2] The duties and authorities formerly vested in the Commissioner of Indian Affairs were transferred to the Assistant Secretary for Indian Affairs in 1977. *See* Secretarial Order 3010, 42 Fed. Reg. 53,682 (Oct. 3, 1977).

with the two groups separately. *See Cheyenne-Arapaho Tribes of Indians of Okla. v. United States*, 10 Ind. Cl. Comm. 1, 33 (1961); Fort Laramie Treaty, art. 2, 15 Stat. 656 (referencing Medicine Lodge Treaty with "Southern Cheyenne and Arapahoe Indians"); Compl. ¶ 1 (referring to "Southern Arapaho and Southern Cheyenne people"). In any event, Article 1 in the 1867 Medicine Lodge Treaty and Article 1 in the 1868 Fort Laramie Treaty are nearly identical. *Compare* 1867 Treaty, art. 1, 15 Stat. 593, art. 1 *with* Fort Laramie Treaty, art. 1, 15 Stat. 655.

The general aim of these treaties was "peace between the [tribes] and white settlers." *Jones v. United States*, 846 F.3d 1343, 1348 (Fed. Cir. 2017) (citing *Tsosie v. United States*, 825 F.2d 393, 395 (Fed. Cir. 1987)); *see Garreaux v. United States*, 77 Fed. Cl. 726, 736 (2007). At the time, Congress had concluded that the "aggressions of lawless white men" were the cause of most "Indian" wars. *Tsosie*, 825 F.2d at 396; *see Elk v. United States* (*Elk II*), 87 Fed. Cl. 70, 80 (2009). 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 (1897). The hope was that the provision—and a mirroring provision addressing wrongs committed by "bad men among the Indians"—would keep the peace. *See id.*

II. The Tribe's Opioid-Related Litigation.[3]

Today, the Cheyenne and Arapaho Tribes are a "federally recognized tribe of Southern Arapaho and Southern Cheyenne people in western Oklahoma." Compl. ¶ 1. The Complaint states that "[a]n epidemic of prescription opioid abuse is devastating" the Tribe and causing economic damages and health and welfare harms to the Tribe and its members. *Id.*

In 2018, the Tribe filed three separate complaints in Oklahoma state court against numerous opioid manufacturers and distributors. *See* Petition, *Cheyenne & Arapaho Tribes v. Purdue Pharma*, No. CJ-2018-677 (Canadian Cnty. Ct. Nov. 29, 2018) (attached as Ex. US-1); Compl., *Cheyenne & Arapaho Tribes v. Watson Labs., Inc.*, No. CJ-2018-714 (Canadian Cnty. Ct. Dec. 14, 2018) (attached as Ex. US-2); Compl., *Cheyenne & Arapaho Tribes v. McKesson Corp.*, No. CJ-2018-715 (Canadian Cnty. Ct. Dec. 14, 2018) (attached as Ex. US-3). The complaints allege, verbatim, a "civil conspiracy . . . and intentional wrongful conduct, to cause as many people as possible to use and get addicted to opioid prescription pills . . . and ongoing nuisance on the property, and to the lives of Tribes' Members." Petition ¶¶ 2–3, *Purdue Pharma*, No. CJ-2018-677; Compl. ¶¶ 2–3, *Watson Labs., Inc.*, No. CJ-2018-

[3] Given the current stage of proceedings, we cite to the Tribe's Complaint, correspondence referenced therein, and judicially-noticeable pleadings in other cases. We do not admit any facts related to the merits of the Tribe's suit.

714; Compl. ¶¶ 9–10, *McKesson Corp.*, No. CJ-2018-715. Each case includes claims for nuisance, negligence, unjust enrichment, fraud, civil conspiracy, and violation of state law. *See* Petition ¶¶ 13, 90–167, *Purdue Pharma*, No. CJ-2018-677; Compl. ¶¶ 13, 102–182, *Watson Labs., Inc.*, No. CJ-2018-714; Compl. ¶¶ 22, 123–203, *McKesson Corp.*, No. CJ-2018-715.

The three tort cases were removed to federal court and eventually transferred by the Judicial Panel on Multidistrict Litigation to the Northern District of Ohio. *See* Transfer Order, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L. Apr. 3, 2019), ECF No. 1510 (transferring *Purdue Pharma* and *Watson Labs.*) (attached as Ex. US-4); Conditional Transfer Order, *In re: National Prescription Opiate Litigation*, MDL No. 2804, (J.P.M.L. Feb. 21, 2019), ECF No. 1383 (transferring *McKesson Corp.*) (attached as Ex. US-5). There, the cases joined thousands of similar suits in a multidistrict litigation (or "MDL"), including some by other tribes.[4] Upon a November 2019 proposal by the MDL's Plaintiff Executive Committee, a tribal bellwether case—that brought by the Cherokee Nation of

[4] Once removed to federal court, the Tribe's three cases were assigned numbers 5:19-cv-39 (W.D. Okla.), 5:19-cv-42 (W.D. Okla.), and 5:19-cv-96 (W.D. Okla.). Once part of the MDL, they also took-on case numbers 1:19-op-45231, 1:19-op-45232, and 1:19-op-45187, respectively. The MDL, on the whole, holds case number 1:17-md-2804 (N.D. Ohio). As of May 15, it involved 2,794 different cases.

Oklahoma—was transferred out of the MDL to the Eastern District of Oklahoma for trial. *See* Pls.' Revised Position Statement Regarding Continuing Litigation at 10–12, *In re National Prescription Opiate Litigation*, No. 1:17-md-2804-DAP (N.D. Ohio Nov. 13, 2019), ECF No. 2935 (attached as Ex. US-6); Remand Order, *In re National Prescription Opiate Litigation*, MDL No. 2804 (J.P.M.L. Feb. 10, 2020), ECF No. 3160 (attached as Ex. US-7). The Cheyenne and Arapaho Tribes' cases remain pending in the MDL.

While the MDL's Plaintiff Executive Committee was proposing which case would serve as the tribal bellwether, the Cheyenne and Arapaho Tribes sent a letter to the Department of the Interior's Assistant Secretary for Indian Affairs to purportedly "present their claim" under Article I of the 1867 Medicine Lodge Treaty. *See* Nov. 5, 2019, Letter from J. Nixon Daniel to Tara Sweeney (attached as Ex. US-8). Three months later, the Tribe filed suit in this Court. *See* Compl., ECF No. 1. In March 2020, the Assistant Secretary responded to the Tribe's November 2019 letter, identifying numerous deficiencies therein and requesting more information. *See* Mar. 16, 2020, Letter from Tara Sweeney to J. Nixon Daniel (attached as Ex. US-9). The Tribe responded to that letter in April 2020, declining to provide any further factual evidence but offering to do so. *See* April 22, 2020, Letter from J. Nixon Daniel to Tara Sweeney (attached as Ex. US-10). On May 21,

Interior reiterated its request for more information. *See* May 21, 2020, Letter from Tara Sweeney to J. Nixon Daniel (attached as Ex. US-11).

The Tribe's allegations in this case are identical to those in the three tort actions that are part of the MDL. *Compare generally, e.g.,* Petition, *Purdue Pharma*, No. CJ-2018-677, *with* Compl., ECF No. 1. Specifically, and verbatim to its tort case allegations, the Tribe asserts that the opioid manufacturers and distributors "engaged in a lengthy civil conspiracy, via fraud, misrepresentation, and intentional wrongful conduct, to cause as many people as possible to use and get addicted to opioid prescription pills . . . ." Compl. ¶ 4. The suit is "brought by the Tribe in the exercise of its authority as a sovereign government and on behalf of the Tribe in its proprietary capacity and under its *parens patriae* authority . . . to recover damages and seek other redress for harm caused by the improper, wrongful, fraudulent, and tortious conduct . . . ." *Id.* ¶ 7. The Tribe claims that the companies "knowingly and wrongfully have manufactured, distributed and dispensed prescription opioid drugs to and within the economic proximity of the Tribe in a manner that foreseeably injured, and continues to injure, the Tribe and its members." *Id.* ¶ 98. The Complaint bases Court of Federal Claims jurisdiction on the Tucker Act, 28 U.S.C. § 1491(a)(1). *See* Compl. ¶ 8.

STANDARD OF REVIEW

The United States moves to dismiss under Court of Federal Claims Rules 12(b)(6) and 12(b)(1). Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate where "the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) (under prior organization of the Rule as 12(b)(4)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In ruling on a 12(b)(6) motion, a court's review is limited to the allegations in the complaint, materials relied upon therein, and matters of public record. *See A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014); *Terry v. United States*, 103 Fed. Cl. 645, 652 (2012).

Where an exhaustion requirement goes to the court's jurisdiction over a claim, however, a motion to dismiss is properly one under Rule 12(b)(1). *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (mandatory exhaustion is a pre-requisite to subject matter jurisdiction), *superseded by statute on other grounds*, Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321–71 (1996); *Basset, New Mexico LLC v. United States*, 136 Fed. Cl. 81, 87–88 (2018). The plaintiff has the burden to demonstrate jurisdiction.

Rocovich v. United States, 933 F.2d 991, 993 (1991). If the defendant challenges the factual basis for jurisdiction, the plaintiff cannot rest upon allegations in the complaint. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993). In those circumstances, a court may consider extrinsic evidence in assessing its jurisdiction over the claim. *See id.* at 1584 (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947)).

ARGUMENT

The Complaint should be dismissed for three independent reasons. First, the "bad men" clause created a cause of action for individuals, not tribal governments. Second, even assuming that the Tribe could properly bring a "bad men" claim, the Complaint has not pled a cognizable "wrong" under the Treaty. Third, and again assuming a tribal cause of action, the Tribe has failed to comply with the Treaty's mandatory requirements to exhaust administrative remedies.

I. The Tribe Is Not a Valid Plaintiff.

The Complaint should be dismissed because, even if we assume the opioid companies had committed a "wrong" cognizable under the Treaty, the Tribe cannot pursue those claims. The "bad men" clause created an individual right, not a tribal one. Thus, *the Tribe* has no claim under the clause and it lacks prudential standing. We have uncovered no case in which

a tribe has brought, let alone succeeded upon, an independent claim for recovery of damages under a "bad men" clause.

A. The "Bad Men" Clause Created an Individual Right, Not a Tribal One.

Tribes, in and of themselves, are not the intended beneficiaries of a "bad men" clause. "'The interpretation of a treaty, like the interpretation of a statute, begins with its text.'" *Richard v. United States*, 677 F.3d 1141, 1145 (Fed. Cir. 2012) (quoting *Medellin v. Texas*, 552 U.S. 491, 506 (2008)). The text of the 1867 Medicine Lodge Treaty states that the "wrong" in question must be to "person or property," and the United States, upon proper proof, is to "reimburse the injured *person* for the loss sustained." 1867 Treaty, art. 1 (emphasis added). Thus, while "the very great majority of Indian treaties create tribal, not individual rights," the "bad men" clauses "concern[ ] the rights of and obligations to individual Indians." *Hebah v. United States (Hebah I)*, 428 F.2d 1334, 1337 (Ct. Cl. 1970) (citation and internal quotation omitted).

In *Hebah I*, the Federal Circuit's predecessor considered a "bad men" clause identical to that in the 1867 Medicine Lodge Treaty and rejected the United States' argument that the clause granted only a tribal right. *Compare* 1867 Treaty, art. 1, *with Hebah I*, 428 F.2d at 1335 (quoting Treaty with the Eastern Band Shoshoni and Bannock, art. 1, July 3, 1868, 15 Stat. 673); *see*

Hebah I, 428 F.2d at 1335–38.[5] After comparing cases identifying tribal treaty rights against those identifying individual treaty rights, the court concluded that the "bad men" clause entailed an individual right because "the obligation and payment both run directly to the individual." *Id.* at 1338. The language in the clause "manifests an intention to give [the Treaty's] benefits to the 'injured person' himself, directly." *Id.* As a result, "[t]he tribe is not the channel or conduit through which the reimbursement is to flow." *Id.*

Because the Tribe is not the intended beneficiary, it "cannot sustain a claim under the 'bad men' provision." *Jones v. United States*, 122 Fed. Cl. 490, 528 n.31 (2015), *vacated and remanded on other grounds*, 846 F.3d 1343 (Fed. Cir. 2017).

B. The Tribe Does Not Have Standing to Litigate, as "Bad Men" Claims, the Alleged Harms to its Members or to the Tribe Itself.

For similar reasons, the Tribe does not have prudential standing to pursue "bad men" clause compensation for the alleged "wrongs" by opioid manufacturers and distributors. The Complaint alleges harm to both the Tribe's members and the Tribe itself. See Compl. ¶¶ 6, 7, 87, 92, 93, 96, 97. The Tribe does not have standing to litigate either category.

---

[5] The Federal Circuit has adopted Court of Claims case law as binding precedent. *South Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed. Cir. 1982) (en banc).

First, the Tribe does not have standing to litigate any alleged Treaty "wrongs" suffered by its members. Standing requires, in part, that a plaintiff "assert his own legal rights and interests," rather than the "legal rights or interests of third parties.'" *Starr Int'l Co. v. United States*, 856 F.3d 953, 964 (Fed. Cir. 2017) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004)); *accord Warth v. Seldin*, 422 U.S. 490, 515–16 (1975) (explaining why the remedy of damages cannot be pursued by uninjured third parties).

As explained above, the "bad men" clause pertains to individual rights. Thus, by the very nature of its claim, the Tribe would be litigating the rights of individual tribal members who had suffered the "wrongs" in question. Indeed, the Complaint requests compensation be paid *to the Tribe* for these individualized, third-party wrongs. *See* Compl. ¶ 6 ("Members of the Tribe who primarily live on the Reservation were wronged by the actions of [the Opioid Bad Men] . . . ."); ¶ 102 ("The Tribe is entitled to . . . compensation for the damages which it has incurred . . . as a result of the wrongful acts of the Opioid Bad Men . . . ."). Such third-party compensation is not appropriate, particularly where "bad men" clause case law makes clear that harmed tribal members (or their next of kin) freely litigate their own rights. *See Hebah v. United States (Hebah II)*, 456 F.2d 696 (Ct. Cl. 1972) (result of claims allowed to proceed in *Hebah I*); *Kowalski*, 543 U.S. at 129–30 (discussing exception for

third-party standing only where, among other factors, "there is a 'hindrance' to the possessor's ability to protect his own interests" (citation omitted)).

The Tribe also cannot rely upon the doctrine of parens patriae to litigate the "bad men" rights of its individual members. *See* Compl. ¶ 7. Under the doctrine, a state may have standing to litigate quasi-sovereign interests "in the well-being of its populace." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601–02 (1982). But the doctrine does not apply to claims against the United States. *See id.* at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)); *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179–80 (D.C. Cir. 2019); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990); *N. Paiute Nation v. United States*, 10 Cl. Ct. 401, 406 (1986) (applying equally to tribes).[6]

In any event, the doctrine is reserved for situations in which a sovereign brings claims on behalf of *all* its citizens. *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *United States v. Santee Sioux Tribe*, 254 F.3d 728, 734 (8th Cir. 2001). Here, however, the Tribe could only be litigating the claims of those of its members who suffered a "wrong"

[6] We anticipate that the Tribe may attempt to counter this point by relying upon the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). But, as the D.C. Circuit recently reiterated, the Supreme Court's standing conclusion in that case is not fairly read as being based upon parens patriae. *See Gov't of Manitoba*, 923 F.3d at 181–83.

cognizable under the "bad men" clause. And the Complaint acknowledges that, even under the Tribe's theory of its case, not all tribal members have suffered a "wrong" at the hands of the alleged "bad men." *See* Compl. ¶ 92 ("A *substantial number* of the Tribe's Members have fallen victim to the opioid epidemic . . . ." (emphasis added)). Thus, the Tribe would be litigating *in place of* its members as individuals, rather than *on behalf of* its members as the tribal public. That is not a claim in parens patriae. *See Alfred L. Snapp*, 458 U.S. at 600 (no parens patriae standing where the state is merely "stepping in to represent the interest of particular citizens"); *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990); *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269, 277 (D. Mont. 1983); *accord Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076, 1083 (9th Cir. 2019) (noting, in rejecting a claim in parens patriae, that "quasi-sovereign interests are not individual rights").

Second, the Tribe does not have standing under the "bad men" clause to litigate the harms the Tribe itself has allegedly suffered. In addition to prohibiting litigation of third-party rights, the standing doctrine requires that a plaintiff's claim fall within the scope of the relied-upon cause of action—what is also called the "zone of interests" requirement. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014); *Mylan Pharm., Inc. v. Research Corp. Tech., Inc.*, 914 F.3d 1366, 1373 (Fed.

Cir. 2019). The Tribe alleges that it has incurred "significant costs in an attempt to abate the opioid epidemic" through medical services, education, security, and other governmental expenditures. *See* Compl. ¶¶ 93, 97. But those alleged harms are not within the "bad men" clause's "zone of interests." They are not harms to an individual. Because the "bad men" clause established an individual (not tribal) right, the Complaint should be dismissed.

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

Even assuming a tribe could recover from the United States under a "bad men" clause, the Complaint would still need to be dismissed because the Tribe has failed to allege a "wrong" that would be cognizable under the Treaty. The "bad men" clause does not make the United States a guarantor for every harm that may be suffered at the hands of a non-Indian. Instead, a cognizable "bad men" claim must contain several elements.

First, only "wrongs" that occur on a tribe's reservation, or any off-reservation "wrongs" resulting directly therefrom, can give rise to a "bad men" claim. *Jones*, 846 F.3d at 1361. That is because the treaties "contemplate that the Indians shall be responsible for what Indians do within the white man's territory and that the Government will be responsible for what white men do *within the Indian's territory*." *Janis*, 32 Ct. Cl. at 410

(emphasis added). Courts have rejected "bad men" cases where the alleged "wrong" occurred wholly outside the lands of the plaintiff's tribe. *See Hernandez v. United States*, 141 Fed. Cl. 454, 462 (2019); *Pablo v. United States*, 98 Fed. Cl. 376, 381–82 (2011); *Herrera v. United States*, 39 Fed. Cl. 419, 420–21 (1997); *Banks v. U.S. Marshals Serv.*, No. 15-cv-127, 2016 WL 1394354, at *10 (W.D. Pa. Feb. 16, 2016), *report and recommendation adopted*, 2016 WL 1223345 (W.D. Pa. Mar. 24, 2016).

Second, "[t]o state a claim for relief under the bad men provision requires the identification of particular 'bad men,' . . . ." *Jones*, 846 F.3d at 1352. Claims against organizations or entities are not cognizable. *See Hernandez*, 93 Fed. Cl. at 200 ("A court, however, is not a specific white man, and may not qualify as a 'bad man' . . . ."); *Garreaux*, 77 Fed. Cl. at 737 (rejecting on jurisdictional grounds a claim against a federal agency rather than a "specified white man"); *Banks*, 2016 WL 1394354, at *11 ("[F]ederal agencies cannot be 'bad men' as they are not persons.").

Third, the alleged "wrong" must be one that "could be prosecutable as criminal wrongdoing." *Jones*, 846 F.3d at 1355. The phrase "any wrong" in the clause is "tied to the concept that the United States would at least have the authority to make an arrest with respect to such wrong." *Id.* This federal authority would need to rest in either a federal criminal provision applicable to Indian country under 18 U.S.C. § 1152, or in a state criminal provision

made federally punishable through the Assimilative Crimes Act, 18 U.S.C. § 13. *Jones*, 846 F.3d at 1356–57. Further, under the Treaty's plain language, the "wrong" in question must be one "upon the person or property of the Indian." 1867 Treaty, art. 1.

Under these standards, the Tribe has not pled a cognizable "bad men" claim. For one, the Complaint does not allege any on-reservation conduct, let alone on-reservation criminal conduct.[7] Instead, the Tribe's case is one of an alleged "*civil* conspiracy" and "improper, wrongful, fraudulent, and tortious conduct" by companies that "manufactured, distributed and dispensed prescription opioid drugs to and within the *economic proximity* of the Tribe . . . ." Compl. ¶¶ 4, 7, 98 (emphasis added). The companies are located in such places as Connecticut, Rhode Island, Texas, California, New Jersey, New York, Utah, and even Australia. *See, e.g.*, Compl. ¶¶ 11, 12, 18, 38, 39, 47, 54. The Tribe's tort actions against these companies concede that the alleged activities did not occur on Tribal lands. *See* Petition ¶ 23, *Purdue*

[7] The Cheyenne and Arapaho Tribes' reservation was disestablished in 1891. *See Cheyenne & Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 666–7 (10th Cir. 1980). We use the term "reservation" to refer to the approximately 10,000 acres of lands the United States currently holds in trust for the Tribe. There may be a question as to the effect of reservation disestablishment on what could qualify as a "wrong" under the 1867's "bad men" clause. Given that the Complaint does not allege any criminal conduct to have occurred on Tribal land, however, the Court need not reach that question for purposes of this motion.

Pharma, No. CJ-2018-677 ("Defendants engaged in activities and conduct that took place *near*, and had direct impacts on, land that constitutes Indian Lands of the Tribes in the State of Oklahoma." (emphasis added)); Compl. ¶ 30, *Watson Labs., Inc.*, No. CJ-2018-714 (same); Compl. ¶ 30, *McKesson Corp.*, No. CJ-2018-715 (same).

Thus, the Tribe's case—rather than alleging an on-reservation, criminal "wrong upon" a specific tribal member's "person or property"—is just a restatement (in some places verbatim) of the separate tort actions against the manufacturers and distributors. *Compare, e.g.*, Petition ¶¶ 2, 4–7, 17–19, *Purdue Pharma*, No. CJ-2018-677 *with* Compl. ¶¶ 4, 7, 87–90, 92–93, ECF No. 1. The Tribe alleges a broad, nationwide civil tort conspiracy, the effects of which are felt by members of the Tribe, some of whom reside on the Tribe's lands. *See* Compl. ¶¶ 4, 7, 86–89, 91–98. As tragic as these circumstances may be, they are not the type of "wrong" that the "bad men" clause was intended to cover. The Complaint does not allege that a specific non-Indian came onto the Tribe's reservation and criminally harmed a specific Tribal member. *Accord Garreaux*, 77 Fed. Cl. at 736–37 (rejecting claims for negligence and breach of contract).

Further, the Complaint is primarily based upon corporate actions, rather than those of individuals. *See* Compl. ¶¶ 11–17, 38–85. The Tribe does identify some company owners or executives. *See* Compl. ¶¶ 18–26. But

the Complaint does not allege any of those individuals to have ever set foot on the Tribe's lands. *See* Compl. ¶¶ 28–37. Similarly, while the Complaint insinuates potential crimes by some of those individuals, no crimes are alleged to have been committed on Tribal lands. *See* Compl. ¶¶ 30, 31, 32. Nor does the Complaint identify any specific on-reservation crime for which the United States would be authorized to make an arrest. Instead, the alleged "wrong" is the identified individuals' off-reservation torts. *See* Compl. ¶ 37. The Tribe has failed to allege a cognizable "bad men" claim.

III. Even if the Tribe Had a Potentially-Cognizable "Bad Men" Claim, the Case Should Be Dismissed for Failure to Exhaust Administrative Remedies.

The Tribe's Complaint should also be dismissed for an entirely separate reason: the Tribe has not complied with the 1867 Treaty's administrative exhaustion requirements. Where an administrative process is available, a plaintiff must first exhaust administrative remedies before seeking relief in the federal courts, including the Court of Federal Claims. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938); *Burlington N. Ry. Co. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985). Where Congress has established the exhaustion requirement—as the Senate did here in ratifying the Treaty—exhaustion is a pre-requisite to a court's subject matter

jurisdiction. *See McCarthy*, 503 U.S. at 144.[8] Stated differently, "[i]f disputes are subject to mandatory administrative proceedings, then the claim does not accrue until their conclusion." *Lins v. United States*, 688 F.2d 784, 786–87 (Ct. Cl. 1982).

The "bad men" clause in 1867 Medicine Lodge Treaty contains two claim exhaustion requirements. The first states that the United States will "reimburse the injured person for the loss sustained," but only "upon proof made to the agent and forwarded to the [Assistant Secretary for Indian Affairs]." 1867 Treaty, art. 1. This requirement appears in all nine treaties that contain a "bad men" clause.

The second exhaustion requirement appears in only seven of the nine treaties, including the 1867 Treaty at issue here. It states that "no such damages" under Article 1 "shall be adjusted and paid until thoroughly examined and passed upon by the [Assistant Secretary for Indian Affairs] and the Secretary of the Interior." 1868 Treaty, art. 1. Courts have interpreted treaties with this second requirement as preventing judicial

[8] The circumstances here present an even stronger case for jurisdictional exhaustion than when exhaustion is statutorily mandated. Under the 1867 Treaty, exhaustion is a contractually-required pre-condition to compensation. *Accord Maine Yankee Atomic Power Corp. v. United States*, 225 F.3d 1336, 1340 (Fed. Cir. 2000) (where a government contract "provides a specific administrative remedy for a particular dispute, the contractor must exhaust its administrative contractual remedies prior to seeking judicial relief").

review from occurring until the Department of the Interior has had the opportunity to complete an administrative review of the claim. *See Begay v. United States*, 219 Ct. Cl. 599, 602 (1979).[9]

Despite an allegation to the contrary (*see* Compl. ¶ 9), the Tribe has failed to comply with these exhaustion requirements. The Tribe sent a bare "notice" letter to the Department of the Interior's Assistant Secretary for Indian Affairs on November 5, 2019. *See* Ex. US-8. But the Tribe provided no legal foundation for its claim, let alone "proof"—evidence—in support of it. *See* 1867 Treaty, art. 1. The letter did not append any exhibits or affidavits. It did not identify the specific victims or "bad men." And it did not identify the Tribal lands on which the supposed "wrongs" occurred. The same is true of the Tribe's April 2020 response to Interior's March 2020 letter. *See* Ex. US-10 (Tribe's April 2020 letter); Ex. US-11 (Interior's May 2020 letter). Thus, contrary to the Treaty's requirements, the Tribe has not submitted its evidence to the Bureau of Indian Affairs, and the Tribe has given nothing upon which Interior can "thoroughly examine[ ] and pass[ ] upon" the Tribe's claim. 1867 Treaty, art. 1.

[9] The two treaties that do not contain this second requirement are those with the Sioux tribes (15 Stat. 635, art. 1) and the Ute Tribe (15 Stat. 619, art. 6). Some of the others limit the "thoroughly examined and passed upon" requirement to only the Assistant Secretary for Indian Affairs.

The circumstances here are even more compelling than those at issue in *Begay*. The *Begay* court concluded that "there was sufficient information for the Interior Department to go forward to investigate the treaty claims." 219 Ct. Cl. at 601. The plaintiff had submitted a notice under the treaty, a Federal Tort Claims Act notice, and (after a request from Interior) an affidavit identifying the individuals involved; and a tribal advisory council had held a hearing. *Id.* Thus, the *Begay* court stayed the judicial proceedings to allow Interior to complete its administrative review. *See id.* at 602. Here, by contrast, the Tribe has not submitted any factual support from which Interior could even begin to examine the claim. *See* Ex. US-9 (March 2020 Interior response); Ex. US-10 (Tribe's April 2020 letter); Ex. US-11 (Interior's May 2020 letter). Until the Department of the Interior has the opportunity to "examine[ ] and pass[ ] upon" the claim—which is contingent upon the Tribe presenting the Department with the necessary factual information—litigation is premature. *See Begay*, 219 Ct. Cl. at 602; *Harrison v. United States*, No. 15-1271 C, 2016 WL 3606066 at *2, *5 (Fed. Cl. June 30, 2016); *see also Tsosie v. United States*, 11 Cl. Ct. 62, 64, 68 (1986) (plaintiff awaited Interior decision before filing suit under Navajo Nation treaty), *aff'd* 825 F.2d 393 (Fed. Cir. 1987).[10]

[10] Depending on the nature of any Department of the Interior decision on the merits, the proper recourse, should the Tribe be unsatisfied, may be to

Further, dismissal without prejudice is the appropriate outcome here, rather than a stay like that issued in *Begay*. *See* 219 Ct. Cl. at 602. The 1867 Treaty's exhaustion requirement is mandatory. The Treaty plainly states that "no such damages shall be adjusted and paid until thoroughly examined and passed upon" by the Department of the Interior. 1867 Treaty, art. 1.[11] Because the exhaustion requirement is mandatory, federal courts lack jurisdiction until the Tribe has exhausted that administrative remedy. *See McCarthy*, 503 U.S. at 144. The *Begay* court stayed (rather than dismissed) that case without the benefit of the Supreme Court's *McCarthy* decision—*Begay* predates *McCarthy* by thirteen years. Since *McCarthy*, the Court of Federal Claims has dismissed cases for lack of jurisdiction where a plaintiff failed to comply with a Congressionally-mandated exhaustion requirement. *See, e.g., Ace Property & Cas. Ins. v. United States*, 60 Fed. Cl.

---

challenge any "final agency action" in district court under the Administrative Procedure Act. *See Bowen v. Massachusetts*, 487 U.S. 879, 893–96 (1988) (holding that a suit, the subject of which is an amount of money, is not always necessarily a suit for money damages).

[11] The role that the signatories intended for the Department of the Interior is further evidenced by Article 5, which states: "In all cases of depredations on person or property [the Agent] shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty." 1867 Treaty, art. 5; *but see Tsosie*, 825 F.2d at 401–02 (concluding that similar language in the Navajo Nation treaty did not preclude judicial review altogether).

175, 183–84 (2004) (noting that exhaustion exceptions do not apply where exhaustion is mandatory), *aff'd on other grounds*, 138 Fed. Appx. 308 (Fed. Cir. 2005); *Moncrief v. United States*, 43 Fed. Cl. 276, 284–89 (1999).

The *Elk* and *Jones* decisions that allowed "bad men" claims to proceed without a final determination from the Department of the Interior are distinguishable. *See Elk v. United States (Elk I)*, 70 Fed. Cl. 405 (2006); *Jones*, 122 Fed. Cl. at 509–17, *vacated and remanded on other grounds*, 846 F.3d 1343. Those cases involved the two of the nine "bad men" treaties that do not include the "examined and passed upon" language like that in the 1867 Medicine Lodge Treaty at issue here. *See Elk I*, 70 Fed. Cl. at 407 (treaty with the Sioux tribes); *Jones*, 122 Fed. Cl. at 514–15 (treaty with the Ute Tribe). Each court was therefore analyzing *permissive* exhaustion, rather than *mandatory* exhaustion. *See Elk I*, 70 Fed. Cl. at 407–08; *Jones*, 122 Fed. Cl. at 514.

In addition, the court in each case determined that the plaintiffs had satisfied the first exhaustion requirement; they had submitted evidence. *See Elk I*, 70 Fed. Cl. at 406 (victim had immediately reported the alleged assault to the Bureau of Indian Affairs and also submitted a Federal Tort Claims Act notice); *Jones*, 122 Fed. Cl. at 511, 514–15 (submittal to Interior included 400 pages of exhibits and plaintiffs had also submitted a Federal Tort Claims Act notice). Here, by contrast, the Tribe has not provided any factual information

to the agency, nor alleged any specific, on-reservation crime against a Tribal member.

Because the Tribe has not complied with the 1867 Treaty's exhaustion requirements, the Complaint should be dismissed.

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: May 26, 2020

PRERAK SHAH
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