IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HENRY DELORE RED CLOUD; PAUL HAROLD TRUE BLOOD; EUGENE HUNTS HORSES III; DANIEL JOSEPH MARTIN; AND FREDRICK LOUIS GAYTON Plaintiffs, vs. THE UNITED STATES Defendants	CIV. CASE NO. 1:20-cv-00608-EJD **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** **Oral argument requested**

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SUMMARY

Defendant brings their motion claiming that the rule of *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) does not apply to Plaintiffs' Tucker Act claims and that Plaintiffs' claims of concealment are insufficient. Plaintiffs oppose Defendant's motion to dismiss on the ground that the following facts are undisputed by Defendant's in their motion:

1. Unknown agents and employees of the United States discovered and concluded that Doctor Stanley Patrick Weber was a pedophile ***prior to*** and after his 1995 transfer and/or employment in Pine Ridge, South Dakota, and, despite that knowledge, ***allowed him to continue treating*** the young male native boys he was known to fetishize, and ***actively concealed that knowledge*** until reporters revealed the cover up in the joint PBS and Wall Street Journal series of reporting entitled "Predator on the Reservation", which aired at the beginning of 2019.

2. The internal knowledge of the Indian Health services was unknown and inherently unknowable to Plaintiffs and, in fact, the agency officially denied such knowledge up to and beyond the reporting by PBS and the Wall Street Journal.

3. The childhood sexual abuse and the injuries suffered by these plaintiffs was unknown and inherently unknowable and they were blamelessly ignorant under the well-established rule of *Urie v. Thompson*.

4. All Plaintiffs brought this action within six years of discovering that unknown agents and employees received notice, received, knowledge, failed to report, and/ or concealed the fact that Dr. Stanley Patrick Weber is a pedophile.

5. All Plaintiffs brought this action within six years of when they became aware or should have been aware of the causal connection between their injury and its cause.

In the alternative, Plaintiffs request jurisdictional discovery to ascertain the internal

knowledge of the Indian Health Services and to establish the active efforts to conceal that knowledge as Plaintiffs raise non-frivolous claims and are entitled to develop the factual record. See e.g. *Fox Logistics and Construction Company v. United States*, 145 Fed.Cl. 236 (2019).

As a further alternative, Plaintiff requests permission to amend their complaint as they will be able to clarify each and every claimed deficiency raised in Defendant's motion as demonstrated herein.

STATEMENT OF THE ISSUES

1. Whether accrual was suspended on claims based on the acts of unknown officials and agents of the Indian Health System based on the inherent unknowability of internal knowledge of the Indian Health System.

2. Whether accrual was suspended on claims based on the acts of Stanley Patrick Weber by the inherent unknowability of the causal connection between Plaintiffs' injuries and the acts of Weber under the well-established rule of *Urie v. Thompson*.

3. In the alternative, whether jurisdictional facts are in dispute such that jurisdictional discovery is required on the issue of when Plaintiffs were or should have been aware of the pertinent events that fix the potential Government liability for the criminal acts of unknown Indian Health Services agents and employees that discovered that Doctor Stanley Patrick Weber was a pedophile, failed to act on knowledge that Doctor Stanley Patrick Weber was a pedophile, and concealed information that Doctor Stanley Patrick Weber was a pedophile.

4. In the alternative, whether Plaintiffs should be allowed to amend.

BACKGROUND

This case involves allegations against Doctor Stanley Patrick Weber, an Indian Health Services doctor, and unknown agents and employees of the Indian Health Services that

discovered that Weber was abusing little boys, failed to prevent Weber's abuse of little boys, and actively concealed these facts. Plaintiffs allege abuse at the hands of Dr. Weber, that they did not discover the connection between their abuse and injury until recently, and only discovered that unknown agents and employees of the Indian Health Service (IHS) contributed to the cause of their injury after reporting by the Wall Street Journal and PBS Frontline in 2019. All Plaintiffs allege discovery of the facts that make up their causes of action within six years of filing suit because of the inherent unknowability of the knowledge of IHS, because of active concealment by unknown agents and employees of the IHS and because of the inherent unknowability of their injuries resulting from childhood sexual abuse.

The following is a description of evidence that has become available by transcript in the criminal prosecution of Weber, as well as the public reporting of journalists for the Wall Street Journal and PBS Frontline. Obviously, the information recorded by journalists waits formal collection through discovery.

1. IHS receives notice that Weber was a pedophile prior to Weber's 1995 transfer to Pine Ridge, SD

Dr. Daniel Foster worked with Dr. Weber at Indian Health Services in the Blackfeet Area in Browning, Montana in the early 1990s. (See Appendix ("App") pp.1-11 (Dr. Foster Testimony at 4:21-22; 5:8-12; 6:3-7.)) Dr. Foster and Weber overlapped while working for IHS in Browning for approximately 15 months. (App at p. 8, Foster Testimony at 6:3-7). During the time of this overlap, Dr. Foster was serving as the Director of Behavioral Health or Chief of Psychology and served in a management role. (App at p. 6, Foster Testimony at 6:8-13; 6:14-15.)

Very early in Dr. Foster's 15 months of observing aspects of Weber's work, Dr. Foster became concerned about Weber's conduct. (App at p. 6, Foster Testimony at 6:19 – 25.) Dr.

Foster had a professional history treating sex offenders and "immediately saw some patterns" in Weber's behaviors that concerned him. (App at pp. 6-7, Foster Testimony at 6:23 – 7:20.) "A concern [Dr. Foster] had early on" was that Weber was targeting and spending time with boys who were "identified as "youths that were at risk for neglect and abuse…sexual abuse included." (App at p. 8, Foster Testimony at 8:1-6.) Weber "had a list of prepubescent males that he spent time with" – at the hospital and the middle school. (App at p. 8, Foster Testimony at 8:7-13.) In his entire career, Dr. Foster never saw another physician spending time with a list of at-risk males. (App at p. 8, Foster 8:11 – 13.)

Dr. Foster also observed Weber taking boys out to a restaurant without any of their family members or other adults, at which time Weber was "dressed in the attire of these middle school kids" – "hat sideways . . . [and] baggy pants[.]" (App at pp. 8-9, Foster Testimony at 8:16 – 9:8.) IHS staff recognized Dr. Weber's conduct as "grooming" behavior indicating a likelihood that Weber was sexually abusing his patients.[1]

Dr. Foster's concerns only increased when he learned that Dr. Weber was "bringing a couch into . . . his office and that he was keeping young males in there after hours when most of the staff had gone home."[2] Dr. Weber's colleagues were also concerned about his pattern of

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[1] "This is grooming behavior. So you take kids who are high-risk, who are from difficult family circumstances, and who are poor. And you offer them new clothes and you offer them food and you offer them, you know, a home where the lights are on all the time. A child will gravitate toward that." Recorded Statement of IHS Therapist REBECCA FOSTER, Predator on the Reservation video (at 12:26) available at https://www.pbs.org/wgbh/frontline/film/predator-on-the-reservation/, (2/12/2019)(accessed 12/12/2020); Frontline Transcript at Appendix p. 17.

[2] Recorded Statement of IHS Psychologist DR. DANIEL FOSTER, Predator on the Reservation video (at 10:32); Frontline Transcript at Appendix p. 16.

meeting with young boys alone.[3]

Based on his experience with sex offenders and his concerns about these familiar patterns that he observed Weber exhibiting, Dr. Foster was concerned enough to bring his concerns to the IHS Service Unit Director (i.e. Hospital CEO) as well as the Regional Director of Behavior Health for IHS. (App at p. 9, Foster Testimony at 9:13 -17.)

As a result of raising his concerns that Dr. Weber may be a pedophile predator, Dr. Foster and his wife "were ostracized by several of our colleagues for the next 11 years." (App at pp. 9-10, Foster 9:18 – 10:8.) Dr. Foster's reports about his concerns regarding Weber and the resulting ostracization within his department eventually contributed to his transfer to a different IHS service area. (App at pp. 9-10, Foster 9:18 – 10:8.) The Fosters, were not alone in raising suspicions to the Browning IHS hospital CEO. (App at pp.199-213 (Transcript of South Dakota Criminal Trial of Weber (hereinafter Tr. Tran.) at 707:25-709:9 [Montana victim Ronald Four Horns (aka Joe) tried to tell staff not to let Weber see his family]).[4]

2. IHS concludes Weber is a pedophile prior to his 1995 transfer to Pine Ridge, SD

The Browning IHS hospital CEO at that time has admitted receiving reports of concerns

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[3] Recorded Statement of REBECCA FOSTER, IHS Therapist, Predator on the Reservation video (at 9:49); Transcript at Appendix p. 16. ("Normally, if you bring your child to a pediatrician, a parent …[or] social worker is with them. The adult is with them. But these boys were going in there alone.")

[4] See also Recorded Statement of maintenance man TIM DAVIS, Predator on the Reservation video (at 7:35); Transcript at App. p. 15. ("When I went downstairs is when I was kind of like floored because of what I saw there is to me a signal of something that wasn't right. The gentleman had a lot of food items, candy, pop, cookies, and then toys, games, videos, games that boys would play with. I mean it wasn't just a, a small… It was stacks of stuff. I mean they were stacked. I mean I'm a dad, I got boys, I got eight boys, and I mean I buy my kids stuff but it's not stacked up in the basement like, like that was. You know, that to me signaled there's something wrong with this guy.")

about Weber's interest in children.[5] After a boy's family member attacked Weber, the CEO conferred with staff and concluded "something's going on".[6] The CEO contacted "the region's top IHS official" who told the acting IHS clinical director at the time: "I'm concerned that you have a pedophile on your staff and, and you need to get rid of him."[7]

The IHS clinical director told Weber to leave.[8] Weber left Montana in approximately June of 1995 and was immediately transferred to Pine Ridge, SD. (App. At pp. 243-251, Tr. Tran. 904:15-16, 965:6-9 [OIG Inspector Muller Testimony]). The clinical director admitted that: "the IHS response is typically to sweep it under the rug or, you know, or pass it on to some other place."[9]

3. IHS continues to receive notice that Weber is a Pedophile while Weber is at Pine Ridge

Within months of the transfer of Weber to Pine Ridge, a parent complained that their child received an improper medical exam and a federal investigation was launched.[10] No charges were brought.[11]

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[5] "The comments that were coming from maintenance about how there was a lot of traffic of young people in and out of Dr. Weber's quarters." Recorded Statement of MARY ELLEN LAFROMBOISE in Predator on the Reservation video (at 8:47); Frontline Transcript at App. p. 15.

[6] Recorded Statement of Mary ELLEN LAFROMBOISE in Predator on the Reservation video (at 15:13); Frontline Transcript at App. p. 18.

[7] Recorded Statement of RANDY ROTTENBILLER, M.D. in Predator on the Reservation video (at 15:33); Frontline Transcript at Appendix p. 18.

[8] Recorded Statement of RANDY ROTTENBILLER, M.D. in Predator on the Reservation video (at 15:54); Frontline Transcript at Appendix p. 19.

[9] Recorded Statement of RANDY ROTTENBILLER, M.D. in Predator on the Reservation video (at 16:27); Frontline Transcript at Appendix p. 19.

[10] See Weaver, C., Frosch, D., Johnson, G., "A Pedophile Doctor Drew Suspicions for 21 Years. No One Stopped Him." PBS (February 8, 2019) https://www.pbs.org/wgbh/frontline/article/patrick-stanley-weber-sexual-abuse-pine-ridge-blackfeet-reservation/ (accessed 12/12/20) (statement attributed to Dr. Sandra Dye, IHS Aberdeen, SD chief medical officer at the time).

[11] *Id*.

During the years following Weber's arrival, government employees and agents received reports and made observations of Weber's behavior.[12] (App. At pp. 214-228, Tr. Tran 801:16-811:3 [Nurse who supervised the pediatric section testimony]), (App. At pp. 234-242, Tr. Tran 834:13-839:1[Nurse in acute care/ neighbor]). Upon learning that Dr. Weber was transferred to Pine Ridge, Dr. Daniel Foster, who had encountered Weber in Browning, Montana, called IHS officials in Pine Ridge to report that Weber is a pedophile.[13]

In November of 2006, Dr. Weber was attacked. Dr. Mark Butterbrodt, another pediatrician at the Pine Ridge IHS hospital, became suspicious of Dr. Weber when no charges were ever brought for the attack.[14]

4. IHS is again told definitively that Weber is a pedophile prior to the abuse of at least some of the Plaintiffs

At some point, Dr. Butterbrodt learned that Dr. Daniel Foster had called Pine Ridge IHS officials and explicitly told them that Dr. Weber was a pedophile.[15] Dr. Butterbrodt became more

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[12] Recorded Statement of KELLY BREWER, R.N. in Predator on the Reservation video (at 18:22); Frontline Transcript at Appendix pg. 19 (strange congregation of young boys at Weber's house); Recorded Statement of officer DAN HUDSPETH in Predator on the Reservation video (at 21:29); Frontline Transcript at Appendix pg. 21 (report of Paul True Blood abuse to BIA); Recorded Statement of former IHS Pine Ridge CEO, BILL POURIER in Predator on the Reservation video (at 26:20); Frontline Transcript at Appendix pg. 21(report to IHS of attack on Weber that Weber strangely kept secret).

[13] Recorded Statement of DR. DANIEL FOSTER in Predator on the Reservation video (at 30:12); Frontline Transcript at Appendix p. 24 ("Yes. Oh, I was clear. My concerns was that this man was sexually using children.").

[14] Recorded Statement of DR. MARK BUTTERBRODT in Predator on the Reservation video (at 27:12); Frontline Transcript at Appendix p. 23 ("When he was beaten to the point of needing skull X-rays and no charges were filed for beating up a commissioned officer on federal grounds to the point where he needed skull films, I thought: What on earth is going on? What kind of coverup is this? I mean this involves a lot of people in a lot of high places.").

[15] Recorded Statement of former DR. STANLEY PATRICK WEBER in Predator on the Reservation video (at 27:44); Frontline Transcript at Appendix p. 23("Dr. Butterbrodt has been

vigilant about Weber's selection of patients and discovered a pattern; he was specifically selecting normal-weight teenage boys as patients.[16] On December 2, 2008 Butterbrodt complained to the State Medical Board.[17] By letter dated May 25, 2009, Dr. Butterbrodt informed the medical director and the CEO of the Pine Ridge IHS hospital that Weber was a pedophile in no uncertain terms.[18]

Investigation of Dr. Butterbrodt's allegations was overseen by persons with motive to cover for Dr. Weber and nothing became of the warnings. According to the CEO of Pine Ridge at the time, the allegation was investigated by Ronald Keats, an IHS administrator in Aberdeen, SD.[19] The investigation was dropped.[20] Shortly thereafter Keats himself pled guilty to child pornography charges. See *United States v. Ronald Keats*, 1:10CRI0046-1 (D. SD July 24, 2012)(Document 78). The CEO of the Pine Ridge IHS hospital also, apparently, had reason to

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trying to hang me because apparently he heard that there was an accusation of abuse. OK? And he's been bringing it up ever since. OK? Repeatedly."). See also Recorded Statement of DR. MARK BUTTERBRODT in Predator on the Reservation video (at 28:35); Frontline Transcript at Appendix p. 23 ("And I learned that there was a psychologist who had worked with him at Browning and was aware of his activities in Browning, Montana, prior to 1995 when he came here.")

[16] Recorded Statement of DR. MARK BUTTERBRODT in Predator on the Reservation video (at 30:59); Frontline Transcript at Appendix p. 24 ("I kept asking myself why would a pediatrician zero in on a population consisting of normal-weight boys and teenage boys? It just seemed incomprehensible to me.").

[17] See Weaver, C., Frosch, D., Johnson, G., "A Pedophile Doctor Drew Suspicions for 21 Years. No One Stopped Him." PBS (February 8, 2019) https://www.pbs.org/wgbh/frontline/article/patrick-stanley-weber-sexual-abuse-pine-ridge-blackfeet-reservation/ (accessed 12/12/20).

[18] See *id*. See specifically https://i2.wp.com/www.pbs.org/wgbh/frontline/wp-content/uploads/2019/02/Mark-Butterbrodt-letter.jpg?w=900 (accessed 12/11/2020). See also (App. At pp. 252-260, Sentencing Transcript at 45:12-46:22).

[19] See Weaver, C., Frosch, D., Johnson, G., "A Pedophile Doctor Drew Suspicions for 21 Years. No One Stopped Him." PBS (February 8, 2019) https://www.pbs.org/wgbh/frontline/article/patrick-stanley-weber-sexual-abuse-pine-ridge-blackfeet-reservation/ (accessed 12/12/20).

[20] See *Id*.

overlook allegations against Weber: in 2014 she took a $5,000.00 payment from Weber and failed to report it. See *United States of America v. Wehnona Stabler*, 5:17-cr-50097-JLV (D. SD) (Documents 2, 47).[21]

In the summer of 2010, Dr. Butterbrodt was transferred to Belecourt, North Dakota after a clash with Dr. Weber. Butterbrodt attributes his treatment to his whistleblowing.[22] The former IHS regional chief medical officer has concurred with Dr. Butterbrodt's assessment.[23]

5. Weber is convicted in Montana and South Dakota

On September 6, 2018, a federal jury in Montana found Stanley Patrick Weber guilty of four of five counts involving sexual abuse and attempted sexual abuse of children. See *United States v. Weber* 4:18-cr-00014 (Dist. MT), On September 27, 2019 a federal jury in Rapid City, South Dakota returned a verdict of guilty on all counts presented to them, which alleged sexual abuse of Plaintiffs Daniel, Fred, Paul, and Eugene. See Document 129 in *U.S. v. Weber*, CR. 17-50033-JLV (Dist. SD).

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[21] During the sentencing hearing of the CEO, the prosecutor "told the court, and Stabler received reports about the doctor's 'horrifying' alleged sexual offenses." Tan, T., "Former Pine Ridge Hospital CEO sentenced to probation for false statement." Rapid City Journal (June 29, 2018) https://rapidcityjournal.com/news/local/crime-and-courts/former-pine-ridge-hospital-ceo-sentenced-to-probation-for-false-statement/article_89231e59-5e4d-53f3-9da6-4b1ce55486b5.html (accessed 12/12/20).

[22] Recorded Statement of DR. MARK BUTTERBRODT in Predator on the Reservation video (at 33:38); Frontline Transcript at Appendix p. 25 ("The nurses came up to me and said, "Now you know why we don't say anything, Dr. B. Look what they've done to you." I was ordered to leave. I was chased off by a pedophile and the people who chose him over me.").

[23] Recorded Statement of ROD CUNY, M.D., Former IHS regional chief medical officer: in Predator on the Reservation video (at 34:17); Frontline Transcript at Appendix p. 25 ("Now I credit Mark Butterbrodt because he, I mean he laid his career on the line in doing what he needed to do. Really, he did the right things, and you know, and he's a direct result of people fearing would happen, what might happen to you. I mean, it happened to him, and that's why people didn't come forward like he did. And that's sad that that attitude has to prevail, but you know, people are scared to come forward.").

6. IHS continues the cover up

The abuse was never disclosed by the HIS to anyone. Instead, the case was cracked by Pine Ridge tribal prosecutors.[24] To this date, the IHS refuses to release information on what unnamed officials and employees knew and covered up in relation to the abuses of Dr. Stanley Patrick Weber. See, e.g., *Dow Jones & Company, Inc. et al v. Department of Health & Human Services*,1:2020-cv-03145 (S. Dist. NY 2020).[25] IHS is well aware that their undisclosed officials and employees have acted criminally by violating child sexual abuse reporting laws, at the very least: in senate confirmation hearings of Rear Admiral Weahnke on December 11, 2019, the current IHS director stated: "We want to make sure that not only are employees trained, but that they have tested to that training, and that they know their roles and responsibilities in the

[24] Recorded Statement of ELAINE YELLOW HORSE, Former prosecutor, Oglala Sioux Tribe, in Predator on the Reservation video (at 38:23); Frontline Transcript at Appendix p. 27 ("Mark and I are really good friends. I've known him since I was in high school. So he was frustrated I remember one day, and he told me about me about Dr. Weber and how he was molesting kids. I was driving to work and there was snow on the ground when I was thinking about the case. And I was like: I wonder if the attorney general even heard about this?"). Recorded Statement of TATEWIN MEANS, Former attorney general, Oglala Sioux Tribe: in Predator on the Reservation video (at 38:51); Frontline Transcript at Appendix p. 27 ("She just asked, "There's some leads that I have on this. Can I start looking into this and seeing what I can find?" So I said, "Absolutely. If you can find something, let's track it down and we'll take that information forward."); See also *id* video (at); App. p. 28 ("we provided that, that potential victim's name to the Bureau of Indian Affairs.").

[25] See also "IHS Principal Deputy Director Michael Weahkee statement on announcement of contract for medical quality assurance review" Indian Health Services (May 13, 2019) https://www.ihs.gov/newsroom/pressreleases/2019pressreleases/ihs-principal-deputy-director-michael-weahkee-statement-on-announcement-of-contract-for-medical-quality-assurance-review/ (accessed 12/11/2020); Bolton, A. "Senate Committee Gets Redacted IHS Report On Child Sexual Abuse Case." Montana Pub. Radio (March 13, 2020) https://www.mtpr.org/post/senate-committee-gets-redacted-ihs-report-child-sexual-abuse-case (accessed 12/11/2020).

process."[26] The former director of IHS, Bob McSwain, admitted that IHS tolerates risky behavior because of a need to fill positions.[27] The former IHS clinical director in Browning, Montana admitted "I didn't do much to prevent it."[28] The former CEO of Pine Ridge IHS stated that he couldn't do anything to stop Weber out of fear for his own job.[29] The current IHS director, Rear Admiral Michael Weahkee admitted: "If there are individuals who were aware that something was going on, then you're basically culpable and complicit in, in those actions."[30]

7. Plaintiffs' allegations under the Fort Laramie Treaty

Plaintiffs bring their claims under the Treaty with the Sioux of April 29, 1868 (15 Stats. 635, ratified Feb. 16, 1869, proclaimed February 29, 1869) (the "Treaty"). Article 1 of the Treaty provides, in relevant part, as follows:

If bad men among the whites, or among other people subject to the authority of the

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[26] "S. Hrg. 116-124. NOMINATION OF RADM MICHAEL D. WEAHKEE TO SERVE AS DIRECTOR OF THE INDIAN HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES." Gov. Printing Ofc. (Dec. 11, 2019) https://www.govinfo.gov/content/pkg/CHRG-116shrg39563/html/CHRG-116shrg39563.htm (accessed 12/11/2020). See also *id* at answer to question 12h.

[27] Recorded Statement of BOB McSWAIN, Former IHS director, in Predator on the Reservation video (at 35:17); Frontline Transcript at Appendix p. 26 ("It goes back to the, the very heart of, they needed his skills, and so they, they moved him around to, to maintain his, his contribution. It's fair to say that because of the, the absolute need to fill positions, we don't really get the best of the best. We get someone who… They have a degree, they're licensed. And our requirement on licensing is at least licensed in one state in the system. And there's a strange tolerance level that: Oh, OK, the guy's a, a womanizer, or a guy's this and a guy's that. But he comes in to see patients. OK? The, the, the antithesis is what would it be if he didn't come in? Who's going to see the patients?").

[28] Recorded Statement of RANDY ROTTENBILLER, M.D. in Predator on the Reservation video (at 51:10); Frontline Transcript at Appendix p. 34.

[29] Recorded Statement of BILL POURIER, Former CEO, Pine Ridge IHS hospital: in Predator on the Reservation video (at 51:24); Frontline Transcript at Appendix p. 34 ("Well, at that time you think of your career and job and your livelihood. So I probably would have got fired. I guess that was the risk I would've took. I couldn't afford to take the risk at that time to lose my job. Do I feel responsible for it? No. No.").

[30] Recorded Statement of REAR ADMIRAL MICHAEL WEAHKEE, Acting IHS director: in Predator on the Reservation video (at 49:13); Frontline Transcript at Appendix p. 33.

> United States, shall commit any wrong upon the person or property of the Indian, 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.

Article 1, Treaty with the Sioux of April 29, 1868 (15 Stats. 635, ratified Feb. 16, 1869, proclaimed February 29, 1869).

The Treaty of 1868 "was concluded at the culmination of the Powder River War of 1866–1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980). After the Sioux defeated Lieutenant Colonel William Fetterman in 1866---termed by the Sioux the Battle of the Hundred Slain, and by the whites the Fetterman Massacre--Congress in 1867 authorized an Indian Peace Commission. Lazarus, E., Black Hills White Justice 38-39, 44-45 (Harper Collins 1991). The purpose of the Indian Peace Commission was to attempt to end the Indian wars being waged against the United States and its people. The Commission was charged to "remove all just cause of complaint" by the Indians, and to "establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites." 15 Stat. 17 § 1.

The types of "wrongs" that formed "just cause of complaint" are found in the report that was the foundation of the treaties drafted by the Commission. The testimony of various tribal leaders that spoke to Congress about the mistreatment of their people by white men was included in the report, known as the Doolittle Commission Report: Report of the Joint Special Committee

Appointed Under Joint Resolution of March 3, 1865, S. Rep. 39–156 (1867).[31] "Depredations" to family (women and children) were prominent amongst the wrongs identified. (See Appendix at pp. 262-304.) Both abuse of women and children and disrespect of their bodies were among specific concerns. *Id*. Sexual wrongs were specifically identified. (*Id* at pp. 265 (extreme sexual prevision by United States soldiers in the dismembering of Indians and taking sexual organs for trophies), 283 (rape by outsiders), 302–3 (describing the coercion of Indian women into sex, often in exchange for food for starving children), 293-295 (same)). The sexual offenses committed by whites were particularly pernicious as they led to the spread of syphilis, which ravaged the women and men of the tribes alike, causing, in turn, many deaths. (*Id* at pp. 301-4). Kidnapping of women and children by outsiders and soldiers was also identified. (*Id* at 284-5 (women and children kidnapped as prisoners),254-5 (same), 288– 292 (same)). Administrative negligence was also complained of. (See e.g. *Id* at 296-300).

A broad indemnification of "any wrong" causing injury to the person of an Indian was plainly agreed to under the Treaty. The "bad man" clause was designed to remedy the injustices caused by non-Indians through the tort concept of indemnification and reimbursement.[32] See *Elk*

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[31] Available at https://quod.lib.umich.edu/m/moa/abb3022.0001.001/3?page=root;size=100;view=image (accessed 12/7/2002).

[32] The Indian Peace Commission presented its Report, to the President on January 7, 1868. That Report appears to be the origin of the words "bad men among the whites" that appeared shortly thereafter in the 1868 treaties. The Report states: "Many bad men are found among the whites; they commit outrages despite all social restraints; they frequently, too, escape punishment." N.G. Taylor et al., Report to the President by The Indian Peace Commission (1868) (emphasis added), available at http://eweb.furman.edu/~benson/docs/peace.htm (last visited December 7, 2020), at p. 49. The Report directly ties war by Indians to "wrongs" (another critical word in the Fort Laramie Treaty) done to them: "That he [the Indian] goes to war is not astonishing; he is often compelled to do so. Wrongs are borne by him in silence that never fail to drive civilized men to deeds of violence." *Id.* at 50 (emphasis added). Providing a system of redress for those "wrongs"

v. U.S., 87 Fed.Cl. 70, 79-83 (2009)(finding that the United States agreed to "indemnify" losses, which includes tort measures of recovery). The context of the "wrong[s] upon the person or property" to be remedied under the clause "plainly includes a focus on keeping the peace and preventing retaliation for wrongs." *Jones v. US,* 846 F. 3d 1343, 1358 (Fed Cir. 2017). The provision had a jurisdictional purpose as well as a remedial one: the agreement formalized the proposition that the tribes were deprived of *all* criminal jurisdiction over non-Indians. *Ex parte Crow Dog*, 109 US 556, 567-8 (1883)(finding that the treaty does not allow prosecution by the United States for Indian upon Indian crime, but in the cases of non-Indian on Indian, or vice versa, "the guilty party is to be tried and punished by the United States"); *id* at 567 (listing examples of crimes cognizable under the jurisdiction of the United States over Indian Country, including bigamy found in Rev. Stat. § 5352); [33]*Elk v. U.S.*, 87 Fed.Cl. at 80 (noting that the 1855 treaty with the Choctaws and Chickasaws provided that "[t]he United States shall protect

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was believed essential to preserving the lives of United States citizens: "When he [the Indian] is our friend he will sometimes sacrifice himself in your defense. When he is your enemy he pushes his enmity to the excess of barbarity." *Id*. The Report identifies the purpose of treaties with the Indians: to remove the causes of their grievances. "In making treaties it was enjoined on us to remove, is [sic] possible, the causes of complaints on the part of the Indians." *Id*. at 79. The Report was co-authored by Lieutenant General William Tecumseh Sherman, who in the ensuing months of 1868 was "a principal negotiator" of the 1868 treaties. *Elk v. United States*, 87 Fed. C1. 70, 80 (2009). In short, the historical record discloses that the phrase "bad men among the whites" apparently originates in the Indian Peace Commission Report; explains that Indians should be provided with redress for "wrongs" done to them to prevent them from making war; and confirms the interest of the United States and its people in establishing peace with the Indians, namely to preserve their lives and open the West. And the historical record establishes Lieutenant General Sherman as the direct human link between the Report, which he co-authored, and the language "bad men among the whites" and "wrong" in the Treaty that he negotiated with the Sioux less than four months later.

[33] Article 3 of the 1851 treaty with the Sioux, which was immediately broken by the United States, promised to protect the tribes from "all depredations", while Article 7 provided annual compensation, in part, for "damages which have or may occur". Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851. 11 Stats. p. 749, available at https://dc.library.okstate.edu/digital/collection/kapplers/id/26435 (accessed 12/12/2020).

the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons ***not subject to their jurisdiction and laws***; and for ***all injuries*** resulting from such invasion or aggression full indemnity is hereby guaranteed to the party or parties injured, out of the Treasury of the United States") (emph. added); *Id* at 81 (Concluding that the 1851 and 1868 treaties all were "necessitated by the same 'public purpose' or 'exigency', so the two treaties aid in interpretation of the other). The divestiture of jurisdiction of the tribes over non-Indians under the treaties with the United States was confirmed in *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978). Thus, *all* criminal wrong defined by "laws then existing …and by that future appropriate legislation which was promised to secure to [the Sioux] an orderly government" was to be remedied under the Treaty. See *Ex parte Crow Dog*, 109 US at 569 (citing Article 8 of the February 28th, 1877 act to ratify The Treaty (19 Stat. 254.)). The citation of Article 8 of the ratifying act by the Supreme Court in *Crow Dog* is especially instructive to the scope of "wrongs upon the person" indemnified: the article ends with the promise that "each individual shall be protected in his rights of property, person, and life." *Id*. The United States clearly undertook to protect individual Indians from personal injury from bad men among the whites.

Because the treaty ceded jurisdiction in return for a peaceful remedy, the "wrongs upon the person" that the Indian signatories would have envisioned, then, would be *all* "white" "wrong" resulting in personal injury that they would have sought compensation for under their legal traditions. There was not a division between criminal and civil remedy in the traditional

Sioux justice system, a concept derived from English Common Law.[34] The Sioux system included a compensatory procedure for personal injuries resulting from wrong. See e.g. Wissler, C., Societies and ceremonial associations in the Oglala division of the Teton-Dakota, p. 65 (the American Museum of Natural History 1916) Appendix at p. 305-6 ("For example, it was said that if anyone commits a wrong the chiefs society, miwatani, or omaha go to the wronged one and prevent him from retaliating by offering him a pipe to smoke and presenting him with a horse. He in turn presents a horse. Then they go to the guilty one and tell him that he must settle with the man he has wronged by a payment of some kind."),[35] Clow, R. L, The Anatomy of a Lakota Shooting: Crow Dog and Spotted Tail, 1879-1881, South Dakota History Vol. 28, no. 4, p. 224 (1998) (describing the tribal resolution of the Crow Dog case).[36] See also Hassrick, R. B., The Sioux: Life and Customs of a Warrior Society, pp. 50-51 (2012) (gift giving to atone for murder).[37] Legal scholar Karl Llewellyn took up the task of recording and distilling the jurisprudence of the Cheyenne in The Cheyenne Way: Conflict and case law in primitive jurisprudence. Llewellyn's treatise demonstrates that the Sioux would most certainly view a cover up of a breach of a duty as a wrong with a specific example of tribal "precedent" involving the Sioux cited:

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[34] Indian treaties "are to be construed, so far as possible, in the sense in which the Indians understood them." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). See also e.g., *Richard v. United States*, 677 F.3d 1141, 1149 n.14 (Fed. Cir. 2012) (applying this canon). Treaties are to be construed liberally and ambiguities are to be resolved in the favor of the Indians. *Minnesota v. Mille Lacs Band of Chippewa Indians*. 526 US 172 (1999).

[35] Available at http://digitallibrary.amnh.org/handle/2246/147 accessed 12/12/20.

[36] Available at https://www.sdhspress.com/journal/south-dakota-history-28-4/the-anatomy-of-a-lakota-shooting-crow-dog-and-spotted-tail-1879-1881/vol-28-no-4-the-anatomy-of-a-lakota-shooting.pdf (accessed 12/8/2020).

[37] Available at https://books.google.vg/books?id=73DlFbo8uvIC&pg=PT35&source=gbs_toc_r&cad=3#v=onepage&q&f=false (Accessed 12/8/2020).

> Six Cheyennes and Sioux were sent out with instructions to locate a Pawnee village which was thought to lie in the vicinity. They were explicitly told that if they accidentally came upon any Pawnee on the prairie they should kill him so that no news could be carried to the Pawnee camp. They came on a lone Pawnee warrior who repulsed their attack so bravely that they drew off with one wounded. When the scouts reported, they hid the story of their frustrated attack, until Wolf Mule, the wounded one, unfolded under questioning. The Sioux Soldiers whipped the Sioux "unmercifully," and the Dog Soldiers did likewise to the Cheyennes. Note the careful division of "jurisdiction."

Llewellyn, K. N., & Hoebel, E. A., The Cheyenne way: Conflict and case law in primitive jurisprudence, p. 115 (University of Oklahoma Press 1941)[38] Appendix at 313 (citing Grinnell, G.B., The Cheyenne Indians: Their History and Lifeways, Volume Two, p. 54, (World Wisdom 2008)).[39] (See also *id*, Appendix at 311-2 (offering a blanket for breach of a duty)). Misuse of authority was punished with impeachment. (See *id*, Appendix at 310). Furthermore, the Cheyenne legal precedent as documented by Llewellyn included a concept of damages for negligence. (See *id*, Appendix at p. 315-6 (providing a horse in compensation for unintentionally cutting another's back with a knife)), (*id*, Appendix at 314 (negligent homicide of White Bear)).[40] Even the Doolittle Commission was informed that failure to provide compensation for negligence was one of the wrongs that led to conflict: the famed Christopher "Kit" Carson documented negligence in handling and caring for livestock, and refusal to pay compensation for

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[38] Available at https://ia801609.us.archive.org/28/items/in.ernet.dli.2015.157252/2015.157252.The-Cheyenne-Way-Conflict-And-Case-Law-In-Primitive-Jurisprudence_text.pdf (accessed 12/7/2020).

[39] Llewellyn's observation as to jurisdiction whereby the Sioux punished the Sioux and the Cheyenne punished the Cheyenne is apt in this case as punishment of whites by the whites is what the Fort Laramie treaty provides for.

[40] Llewellyn's observations related to the Cheyenne are useful in understanding the bad man clause. The Cheyenne borrowed Sioux ceremonies and traditions. See Grinnell, George Bird, The Cheyenne Indians: Their History and Lifeways (2008) p. 43 (borrowing of Sioux courtship rituals). Furthermore, the Fort Laramie Treaty with the Cheyenne includes an identical bad man clause. Compare 15 Stat 655 and 15 Stat. 635. The treaties were signed contemporaneously as a result of the Doolittle Commission's efforts and purportedly ratified by the same act. See 19 Stat 254.

loss caused thereby, as a source of war. (See Appendix at 281, Doolittle Report at 96). Even negligence was "just cause of complaint" identified by the Doolittle Report.

In their complaint, Plaintiffs identify two groups of bad men: unknown agents and employees of the Indian Health Service and Dr. Stanley Patrick Weber.

A. Unknown Agents and Employees are bad men because of their failure to report, failure to protect from, and concealment of the abuse, which, therefore, facilitated and caused Plaintiffs' injuries to their person

Plaintiffs allege the following specific to unknown agents and employees as bad men:

> 25. Through news reporting in early 2019, it was publicly revealed that multiple abuse allegations had been made against Dr. Weber during his time at an Indian Health Service clinic on the Blackfeet Reservation in Browning, Montana, between approximately 1992 and 1995. News reporting in early 2019 revealed that Dr. Weber had been terminated after a top Indian Health Service official concluded that Dr. Weber was a pedophile and should be fired from his position in Montana. The 2019 news reporting revealed that ***the Indian Health Service had institutional knowledge of Dr. Weber's sexual abuse of minors in Montana and, despite this, failed to protect Plaintiffs from sexual abuse, assault and battery and, by so failing, facilitated and, therefore, caused said injuries to Plaintiffs.***
> 26. Plaintiffs were not aware and could not have been aware ***of the liability of the United States government*** because ***the facts which fix the liability of the United States government were exclusively in the possession of the United States government and concealed*** until the aforementioned reporting ***revealed that United States officials and employees knew of the danger posed to Native American children and did not act.***
> 27. The causes of action detailed herein did not accrue until within six years from the bringing of this action because Plaintiffs were not, and could not have been, aware of the existence of the facts that fix ***the liability of the United States*** and entitle the Plaintiffs to institute an action.

Plaintiffs' Complaint (emph. added).

Each Plaintiff has averred that they did not know, and were unable to know, that unknown agents and employees of the Indian Health Services discovered that Dr. Weber was a pedophile, and failed to act to protect Plaintiffs, until after encountering the reporting by Frontline and/ or the Wall Street Journal in 2019. (Appendix at pp. 317-9, Martin Aff. ¶¶4-5 (did not discover the involvement of IHS employees and officials until watched the report in June of

2020)), (*id at* 320-2, Red Cloud Aff. ¶¶3-4 (did not know until watched the report in early 2019)), (*id* at 323-5, Gayton Aff. ¶¶3-4 (did not know until watched the report in early 2019)), (*id* at 326-9, True Blood Aff. ¶¶6-7, (*id* at 330-2, Hunts Horses Aff. ¶¶ 3-4).

B. Dr. Stanley Patrick Weber is a bad man because he abused, assaulted and battered Plaintiffs and they have only recently become aware or should have been aware of the causal connection between their injury and its cause.

Daniel Joseph Martin

Daniel Martin was born in 1986. Between approximately 1995 and 2000 and the approximate ages of 9 to 13 or 14, Daniel Martin was sexually abused by Dr. Weber. The abuse began in a clinical setting at the Indian Health Services hospital with Weber and Daniel alone behind a closed curtain. (App. at pp. 47-52, Tr. Tran. 323:14-328:12). After fondling Denial's testicles, Dr. Weber inserted his finger into Daniel's anus with an ungloved hand while rubbing his inner thighs. (App. at pp. 49-51, Tr. Tran. 325:8-327:14). Daniel never asked why this was done and did not tell anyone. (App. at pp. 51-2, Tr. Tran. 327:22-328:5). A short time later, another incident occurred in a clinical setting when Daniel was alone with Weber behind a closed door. This time Weber inserted fingers into Daniel's anus and was moving them he then began stroking Daniel's penis until Daniel ejaculated. (App. at pp. 52-9, Tr. Tran. 328:16-335:23). Daniel didn't understand what had happened to him because this was his first sexual experience. (App. at p. 59, Tr. Tran. 335:12-23). The next visit to the IHS hospital all pretext of legitimate medical examination was abandoned by Weber. (App. at pp. 60-7, Tr. Tran. 357:18-364:15). Weber used a lubricant and anally raped Daniel. (*Id*). On another occasion, Daniel was seen at the hospital by Weber for a physical. (App. at p. 69, Tr. Tran. 366:12-21). This time, Weber performed oral sex on Daniel. (App. at pp. 69-71, Tr. Tran. 366:12-368:11). Weber abused Daniel, mostly with oral sex, every time he went to IHS thereafter. (App. at pp. 71-2, Tr.

Tran. 368:12-369:4). Daniel didn't question what was happening because Weber was a doctor. (App. at pp. 52, 59, Tr. Tran. 328:2-7, 335:4-23). When Daniel had cause to re-evaluate what had happened to him he was ashamed as if he had done the wrong and kept it a secret. (App. at pp. 72, Tr. Tran. 369:5-16). Daniel did not come to understand that he had been injured by the conduct of Dr. Weber, nor did he have cause to do so, until approximately spring of 2017 when he disclosed the abuse to his wife and concluded: "I'm fucked up, I'm mentally fucked up." (App. at pp. 317-8, Martin Aff. ¶3).

Psychologist Dr. Jeffery King, PhD. has opined:

> It is my opinion as a professional licensed clinical psychologist that to a reasonable degree of certainty that the difficult life trajectory for D.J. Martin came about primarily as a result the sexual abuse by Dr. Weber. It is also my professional opinion based on the clinical interview, as well as cumulative psychological studies, that a reasonable person in D.J.'s position would have utilized forgetting or dissociating from the abuse as a means to avoid facing the reality of his sexual abuse injuries. As he stated, these memories only surfaced when he was extremely drunk. Further, he would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently when he was exposed to others in the community when they began addressing the issue. It was at this time that he began to remember what happened to him.

(Appendix at 356-7, Declaration of Dr. Jeff King, PhD in Support of Opposition to Motion to Dismiss, Ex 5).

Henry Delore Red Cloud

Henry Delore Red Cloud was born in 1989. When Henry was between the approximate ages of 11 to 13 or 14, and approximate years of 2000 to 2003, he was sexually abused, assaulted and battered by Dr. Weber on multiple occasions, the last of which was in approximately 2003. Three incidents occurred in Weber's medical exam room at the Pine Ridge Indian Health Service facility and another occurred at Weber's Indian Health Service housing. (App. at pp. 320-1, Red Cloud Aff. ¶2). As a child, Henry didn't know that Dr. Weber's conduct was wrong and thought it was medical treatment until he was questioned in relation to the Weber criminal case in

approximately 2017. (App. at 320-1, ¶5). In the time following his interview, Henry realized that Weber's action had led to his injury. (*Id)*.

Psychologist Dr. Jeffery King, PhD. has opined:

> It is my opinion as a professional licensed clinical psychologist that to a reasonable degree of certainty that the destructive life trajectory for Henry Red Cloud came about primarily as a result the sexual abuse by Dr. Weber. It is also my professional opinion based on the clinical interview, as well as cumulative psychological studies, that a reasonable person at Henry's age and disposition would have utilized forgetting or dissociating from the abuse as a means to avoid facing the reality of his sexual abuse injuries. As he stated, these memories only surfaced during the Christopher Weaver investigation and when his friends told him about their abuse. Further, he would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently. It was at this time that he began to remember what happened to him.

(Appendix at 349-50, Declaration of Dr. Jeff King, PhD in Support of Opposition to Motion to Dismiss, Ex 2).

Fredrick Louis Gayton

Fredrick Louis Gayton was born in 1991. Between the approximate years of 2003 to 2004 and the approximate ages of 11 to 13, Fred was sexually abused by Dr. Weber. (App. at pp. 324-5, Gayton Aff. ¶2). Weber had Fred come into the IHS exam room alone and had Fred take his pants off. (App. at pp. 143, Tr. Tran. 511:4-25). Then Weber grabbed Fred's penis and testicles. (App. at pp. 144, Tr. Tran. 512:16-23. Weber rubbed Fred sexually. (App. at pp. 144-5, Tr. Tran. 512:24-513:2. Weber took photos of Fred's erect penis and claimed they were for recording his progress. (App. at pp. 146-7, Tr. Tran. 514:1-515:9. Afterward, Weber told Fred not to tell anyone, it was their "little secret." (App. at pp. 147-8, Tr. Tran. 515:19-516:6. On another occasion, Fred went to IHS for a flu shot. (App. at pp. 148-9, Tr. Tran. 516:14-517:2. Weber brought Fred into the exam room alone and closed the door. (App. at pp. 149, Tr. Tran. 517:7-24. Claiming that a penis exam was part of the process, masturbated Fred until Fred ejaculated. (App. at pp. 150-2, Tr. Tran. 518:3-520:7. Weber smiled and told Fred to "tell nobody". (App. at

pp. 151, Tr. Tran. 519:20. When Fred was approximately 13, Weber asked him to come to his house to make $30 when Fred was at an appointment at IHS. (App. at pp. 152-3, Tr. Tran. 520:8-521:12. Fred went to Weber's IHS housing and cleaned Weber's basement for a time until Weber offered him a beer. (App. at pp. 153-4, Tr. Tran. 521:13-522:14. Weber sat on the couch next to Fred and told him he had to earn his money by performing oral sex on Weber. (App. at pp. 154-5, Tr. Tran. 522:24-523:14. Fred performed the act until Weber ejaculated. (App. at pp. 155-6, Tr. Tran. 523:15-524:13. Weber paid Fred $100 and told him if he ever needed more money to ask and to keep the events secret. (App. at pp. 156, Tr. Tran. 524:17-25. Because he was a child, because the conduct began in the medical setting, and because of the statements of Weber, Fred did not understand the wrongfulness of the abuse. (App. at pp. 146-7, 151, Tr. Tran. 514:15-515:21, 519:20; (App. at pp. 324, Aff. Gayton ¶6). At some point, Fred blamed himself for letting the abuse happen. (App. at pp. 324, Aff. Gayton at ¶6). He concluded that he himself was at fault for willingly taking the alcohol from Weber and willingly remaining with Weber. Id. Fred didn't want anyone to know and was ashamed of himself. (App. at pp. 148, 155, 158-9, Tr. Tran. 516:7-13, 523:11, 526:19-527:2. He buried and forgot about the abuse and did not revisit his conclusion that he was the wrongdoer until he was called to Great Falls Montana in 2018 for the criminal trial of Weber there only then did he identify aspects of his life that Weber, as the wrongdoer, had injured. (App. at pp. 324, Aff. Gayton ¶6).

Psychologist Dr. Jeffery King, PhD. has opined:

> It is my opinion as a professional licensed clinical psychologist that to a reasonable degree of certainty that the difficult life trajectory for Fred Gayton came about primarily as a result the sexual abuse by Dr. Weber. It is also my professional opinion based on the clinical interview, as well as cumulative psychological studies, that a reasonable person in Fred's position would have utilized forgetting or dissociating from the abuse as a means to avoid facing the reality of his sexual abuse injuries. As he stated, these memories only surfaced when "the cops came asking about it." Further, he would have failed to appreciate the impact of the childhood sexual abuse on any of his symptoms and

behaviors until these memories surfaced.

(Appendix at 358-9, Declaration of Dr. Jeff King, PhD in Support of Opposition to Motion to Dismiss, Ex 6).

Paul Harold True Blood

Paul Harold True Blood was born in 1987. Between the approximate years of 1999 to 2008, and the approximate ages of 12 to 21, Paul was sexually abused assaulted and battered by Dr. Weber about once a week. (App. at pp. 326, Aff. True Blood ¶ 2). The duration of the abuse and the extent of psychological control of Dr. Weber of Paul was significant. Paul True Blood was essentially orphaned after the death of his grandmother. (App. At pp. 81-2, 133-4, Tr. Tran 401:19-402:24,463:11-464:1). Paul True Blood, as a child, grew to love Weber in a twisted quasi-parental-incestuous way: Weber was the only person on earth that cared about Paul. (App. at pp. 88-90, 99-101, 108-9, 113, 115-122, Tr. Tran. 408:20-410:5, 419:21-421:9, 428:2-3, 428:15-429:8, 433:14-17, 435:13-442:19). Weber expressed his care and love for Paul to him. Id at 419:18-25. Weber even discussed adopting Paul. (App. at pp. 134-5, Tr. Tran. 464:3-465:3). Paul first encountered Weber as a pediatrician when he was about 12. (App. at pp. 83-4, Tr. Tran. 403:14-404:7). At some point Weber had Paul working for him mowing his yard. (App. at pp. 8486, Tr. Tran. 404:8-19, 406:25-408:4). Paul desperately needed the money for food because he provided for himself. (App. at pp. 89, Tr. Tran. 409:5-14). Weber first experimented with touching Paul's thigh at the IHS hospital. (App. at pp. 90, Tr. Tran. 410:6-14). That escalated to fondling Paul's genitals through his pants at Weber's IHS housing, where Weber masturbated Paul until he ejaculated. (App. at pp. 90-92), Tr. Tran. 410:15-412:22). At about 12 or 13, this was Paul's first sexual experience and he was confused. (App. at pp. 92-3, 98-9, 110, Tr. Tran. 412:23-413:17, 418:19-419:1, 430:19-23). In subsequent encounters, compensation to

Paul increased in amount, up to $200, and kind, including food, clothes, drugs, and alcohol. (App. at pp. 93-4, Tr. Tran. 413:18-414:4). The type of sexual encounter changed as well, including requiring Paul to perform anal and oral sex on Weber. (App. at pp. 97, 98, Tr. Tran. 417:4-18, 418:7-11). Paul did not initiate the sex with Weber but needed the money. (App. at pp. 97-8, Tr. Tran. 417:17-418:6). At the time this abuse began, Paul was about 12 or 13. (App. at pp. 98, Tr. Tran. 418:12-18). Paul began staying at Weber's house once or twice a week. (App. at pp. 100, Tr. Tran. 420:17-25). In one instance for which there is some documentation, Weber checked Paul out of the Rapid City Juvenile Sanctions Center to have sex with him and then allowed him to escape custody. (App. at pp. 101-108, Tr. Tran. 421:17-428:14). Paul continued to have a sexual relationship with Weber well into adulthood, it was how he stayed fed and housed when he was not incarcerated. (App. at pp. 115-6, Tr. Tran. 435:13-436:3). Dr. Weber continued to correspond and subsidize Paul even during Paul's incarceration. (App. at pp. 116-122, Tr. Tran. 436:4-442:19). Paul's confusion and dependency on Weber was only increased with supplies of Vicoden and Percocet, an addiction which Weber introduced Paul to when he was 13 or 14. (App. at pp. 138-9, Tr. Tran. 493:24-494:6).

Paul did not tell anyone about the abuse he was undergoing and, in fact, it was inconceivable that he was being abused at all by a person he loved and trusted, the only person on the planet that cared for him and supported him. (App. at pp. 326-7, Aff. True Blood ¶ 3). As a child, Paul did not know that the abuse was wrong. (App. at pp. 326-7, Aff. True Blod ¶3-4). Paul specifically recalls a Law and Order SVU episode in approximately 2018 dealing with childhood sexual abuse and having a moment where he exclaimed "mother fucker, I got got". (App. at pp. 327, Aff. True Blood ¶4).

Paul did disclose abuse by Stanley Patrick Weber of some sort in 2006 when he was very

intoxicated. (App. at pp. 114-5, Tr. Tran. 434:10-435:2). Paul did not recall disclosing the abuse at all because of intoxication until he was reminded of it and explained at trial: "I don't know. I -- I don't specifically remember it, but the only thing I think of is like my subconscious, something inside or -- I don't know. But something was just –." (App. at pp. 114-5, Tr. Tran. 434:10-435:2). Paul in fact, continued having a sexual, emotional, and basically familial relationship with Weber following his drunken disclosure all the way until approximately 2008. (App. at pp. 136, Tr. Tran. 479:7-11). Paul continued to speak with Weber until at least summer of 2012, when Weber sent him money. (App. at pp. 122-3, Tr. Tran 441:11-442:19). To Paul, Weber was a father figure and lover, whom he trusted and relied upon. (App. at pp. 327, Aff. True Blood ¶5).

Psychologist Dr. Jeffery King, PhD. has opined:

> It is my opinion as a professional licensed clinical psychologist that to a reasonable degree of certainty that the difficult life trajectory for Paul True Blood came about primarily as a result of his experience of sexual abuse with Dr. Weber. It is also my professional opinion based on the clinical interview, as well as cumulative psychological studies, that a reasonable person in Paul's position would have utilized forgetting or dissociating from the abuse as a means to avoid facing the reality of his sexual abuse injuries. Further, he would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently when he was exposed to others who had suffered similarly and interviewed by Chris Weaver. This explains why he reacted so strongly ("I just went crazy…") after making the connection that he was abused by Dr. Weber.

(Appendix at 351-2, Declaration of Dr. Jeff King, PhD in Support of Opposition to Motion to Dismiss, Ex 3).

Eugene Hunts Horses III

Eugene Hunts Horses III was born in 1995. Between the approximate years of 2008 to 2010 and approximate ages of 13 and 15, Stanley Patrick Weber sexually abused assaulted and battered Eugene. Aff. Hunts Horses ¶ 2. The abuse began when Eugene was seen at IHS for a physical. (App. At pp. 169-170, Tr. Tran. 599:18-600:10). After the exam was complete, Weber

approached Eugene and grabbed his testicles. (*Id*). Eugene felt awkward. Id. On another occasion, Eugene encountered Weber in the hospital and Weber offered him ten dollars but held the money in front of his groin so Eugene couldn't take it without touching Weber's groin. (App. at pp. 171-4, Tr. Tran. 601:23-604:1). The abuse escalated when Weber invited Eugene to his IHS supplied house. (App. at pp. 177-180, Tr. Tran. 607:10- 610:7). Weber sat close to Eugene and put his arm around him. (*Id*). Weber proceeded to take off both his own, and Eugene's, pants. (*Id*). Weber then masturbated Eugene until Eugene ejaculated. (*Id*). Weber paid Eugene money after the incident. (*Id*). On another occasion, Weber demanded Eugene get in his car at a gas station. (App. at pp. 180-187, Tr. Tran. 610:12-617:15). Once at Weber's home, Weber gave Eugene alcohol and two pills. (*Id*). After watching some television, Weber asked Eugene to give him oral sex. (*Id)*. After Eugene refused, Weber became aggressive. (*Id*). As intoxication set in on Eugene, Weber took him to his room and proceeded to anally rape him despite Eugene's pleas for him to stop. Id. Weber gave Eugene $600.00 after the incident. (App. at pp. 187, Tr. Tran. 617:13).

The first time that Eugene told anyone that Dr. Weber had sexually abused him was the investigator who came to interview him for the Weber criminal case. (App. at pp. 188, 196-7, Tr. Tran. 618:21-2, 626:22-627:3). Eugene had been identified as a potential victim because he had been receiving prescription medication at an unusual frequency from Dr. Weber. (App. at p. 249, Tr. Tran at 941:6-20). Eugene had forgotten about the abuse until that time and he was forced to address it. (App. at pp. 331, Aff. Hunts Horses ¶5). Eugene is ashamed and fearful of disclosing his abuse. Id at ¶6. Although he had previously told a girlfriend that "bad things" had happened to him as a child, (App. at p. 196, Tr. Tran. 626:12-21), he did not connect his abuse and injury until speaking with Muller. (App. at pp. 331, Aff. Hunts Horses ¶6). This testimony is reinforced

by the fact that Eugene continued seeing Dr. Weber as a pediatrician until 2016. (App. at pp. 168, Tr. Tran. 598:1-5).

Psychologist Dr. Jeffery King, PhD. has opined:

> It is my opinion as a professional licensed clinical psychologist that to a reasonable degree of certainty that the current emotional, cognitive, and behavioral difficulties for Eugene Hunts Horses III came about primarily as a result the sexual abuse by Dr. Weber. It is also my professional opinion based on the clinical interview, as well as cumulative psychological studies, that a reasonable person in Eugene's position would have utilized forgetting or dissociating from the abuse as a means to avoid facing the reality of his sexual abuse injuries. As he stated, these memories only surfaced when Curt Muller was investigating Dr. Weber.

(Appendix at 353-4, Declaration of Dr. Jeff King, PhD in Support of Opposition to Motion to Dismiss, Ex 4).

LEGAL STANDARD

Whether the Court has jurisdiction to decide the merits of a case is a threshold matter.[41] See *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1365 (Fed. Cir. 2007). When deciding a Rule 12(b)(1) motion to dismiss, a court must assume all the undisputed facts in the complaint are true and draw reasonable inferences in the non-movant's favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016). Further, the plaintiff bears the burden of establishing facts sufficient to invoke this Court's jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv*., 846 F.2d 746, 748 (Fed. Cir. 1988). In determining whether a plaintiff has met this burden, courts may look "beyond the pleadings and 'inquire into jurisdictional facts' in

[41] The jurisdictional nature of 28 USC 2501 has been described as "anomalous" with other bodies of law. *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 138 (2008). It would be odd to require Plaintiffs to prove their case before giving them the very tools required to make that proof. The concealment exception to accrual is especially impossible to establish under a strict interpretation of the jurisdictional bar. As a policy matter, a strict interpretation of the jurisdictional bar promotes government malfeasance.

order to determine whether jurisdiction exists." *Lechliter v. United States*, 70 Fed. Cl. 536, 543 (2006) (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). When jurisdictional facts are in dispute, jurisdictional discovery is appropriate. See e.g. *Oppenheimer Fund, Inc. v. Sanders*, 437 US 340, fn. 13 (1978); *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 50 (2013) (citing *Samish Indian Nation v. United States*, No. 2-1383L, 2006 WL 5629542, at *4-6 (Fed. Cl. 2006); *E. Trans-Waste of Md., Inc. v. United States*, 27 Fed. Cl. 146, 148 n.1 (1992)).

ARGUMENT

Plaintiffs' claims accrued within six years of bringing suit because (1) the claims against the "bad men" who discovered Weber was a pedophile and covered it up or failed to act were inherently unknowable: Plaintiffs could not know of the acts of these people and still cannot identify the wrongdoers, and (2) the child sexual abuse claims against Weber as a "bad man" were inherently unknowable and they are blamelessly ignorant: Plaintiffs did not know of their injury, and/ or the acts and the connection thereof, and a reasonable person in Plaintiffs' position would not have been on notice.

It is generally stated that a claim "first accrues" when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action. See, e.g., *Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373 F.2d 356, 358, 178 Ct.Cl. 630, cert. denied, 389 U.S. 971, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967). However, despite the apparent unavailability of waiver or estoppel, the statute of limitations can be tolled in proper circumstances, even in suits against the government. See, e.g., *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (equitable tolling due to defendant's fraudulent concealment "is read into every federal statute of limitation"); *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed.Cir.), cert. denied, 474 U.S. 826, 106 S.Ct. 83, 88 L.Ed.2d 68 (1985); *Barrett v.*

United States, 689 F.2d 324, 329-30 (2d Cir.1982), cert. denied, *Cattell v. Barrett*, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983). Thus, the statute of limitations does not accrue where the government fraudulently or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim. *Welcker*, 752 F.2d at 1580 ("the statute of limitations is tolled only so long as the plaintiff is unaware of the wrong committed"). Furthermore, a claim does not accrue unless the claimant knew or should have known that the claim existed. see *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (statute tolled if injury was "inherently unknowable"). It should also be noted that this "Accrual Suspension Rule" "includes an intrinsic reasonableness component." *Holmes v. US, 657 F. 3d 1303, 1320-1* (Fed. Cir. 2011).

1. THE CLAIMS INVOLVING THE ACTS OF "BAD MEN" WHO DISCOVERED WEBER WAS A PEDOPHILE AND COVERED IT UP OR FAILED TO ACT ON THE INFORMATION WERE INHERENTLY UNKNOWABLE

In the present case, unknown agents and employees of the Indian Health Services discovered that Dr. Weber was a pedophile prior to his 1995 transfer to Pine Ridge and continued to receive such knowledge. Plaintiffs were unable to discover the acts of the unknown agents and employees of the Indian Health Services because (1) it was actively concealed and (2) the information was exclusively in the possession of Defendant.

All agents and employees of the United States that had criminal reporting duties and discovered that Weber was a perpetrator prior to the abuse of Plaintiffs caused a "wrong upon the person of an Indian" under the treaty and are, therefore, bad men. See 42 U.S.C. § 13031 (Duty to Report Suspected Child Abuse), 18 U.S.C. § 2258 (criminal penalty for failure to report child abuse), 18 U.S. Code § 4 (Misprison of a Felony). See also 18 U.S. Code § 242 ("willful"

deprivation of rights under color of law). All agents and employees of the United States that discovered criminal activity and covered it up caused a "wrong upon the person of an Indian" under the treaty and are, therefore, bad men. 18 U.S. Code § 2 (aiding, abetting, counseling, etc.), 18 U.S.C. § 3 (accessory after the fact), 18 U.S.C. § 1152 (state law incorporation), South Dakota Codified Laws (SDCL) §§ 22-3-3 (aiding and abetting or advising), 22-3-5 (Accessories to crime--Misdemeanors excepted), 22-22-46 (Assisting, harboring, concealing, or providing false information about sex offender--Felony.), 22-22-24.3 ("knowingly" permitting sexual exploitation of a minor). Plaintiff expects additional crimes to be uncovered through discovery.[42]

The abuse in these cases took place behind closed doors in a medical setting or at Weber's residence. Daniel and Henry have alleged abuse at the IHS hospital. Fred has alleged abuse at both the hospital and Weber's IHS housing. For Paul and Eugene, the hospital provided Weber's initial access to them but the most significant abuse occurred at Weber's home. For those abused in a clinical setting, it was confusing for a child to conclude that the conduct was wrongful at all given Weber's claims of clinical necessity and the context of the abuse. Furthermore, mere abuse alone and behind a closed door at a hospital does not provide notice that any other person knew of the abuse or Weber's proclivities. For those abused in Weber's home, notice that IHS officials and employees knew of the abuse or Weber's proclivities is even harder to come by. The children had no way to even suspect that unknown IHS employees and officials could have acted to prevent this abuse. Each of these children believed they were the only victims and each of them blamed themselves for the abuse. Authorities and news reporters

[42] Apart from the specific offenses directed at criminalization of failing to report or allowing child abuse, all crimes cited existed at the signing of the Fort Laramie Treaty. See e.g. Revised Statutes of 1874 (available at https://www.loc.gov/law/help/statutes-at-large/43rd-congress/c43-revised-statutes.pdf, accessed 12/3/2020).

had the benefit of information that these children were not alone. Only then was anyone able to piece together the trail and discover that IHS officials and employees knew ***before the abuse of Plaintiffs occurred and could have prevented it***.

To make matters even more inherently unknowable, the IHS acted to conceal internal knowledge. Dan Foster, the psychologist from Montana testified in the Montana criminal trial that he was ostracized and transferred for raising concerns about Weber. The clinical director from the time admitted that IHS swept it under the rug and offloaded the problem. Dr. Butterbrodt, the other Pine Ridge pediatrician believes he was terminated for calling Weber a pedophile. There is also indication that other officials were covering for Weber because the person charged with investigating Weber was convicted of child porn possession soon after and the Pine Ridge Hospital CEO was charged with failing to report a sizeable "gift" from Dr. Weber himself. Plaintiffs should, at a minimum, be allowed to conduct discovery on this information that is in the exclusive custody and control of the United States. At the bare minimum officials and employees had criminal duties to report their discovery that Weber was a pedophile. Plaintiffs cannot be expected to have discovered any of this information; it is inherently unknowable because it was concealed from them.

Even assuming hypothetically if a suspicion could have been raised by these Plaintiffs about the conduct and knowledge of officials and employees of the IHS sometime prior to their viewing of the Wallstreet Journal/ Frontline reporting, any claim by the United States that Plaintiffs should have inquired sooner, or been aware of, the potential knowledge of IHS officials of Weber's proclivities logically requires a lack of trust of the United States government and officials in exercising their duties to protect against and to report sexual abuse. Perhaps, with the benefit of hindsight, trust in the United States is misplaced. However, such a claim fails given

the fact that "government officials are presumed to act in good faith." *Savantage Financial Services, Inc. v. US*, 595 F.3d 1282, 288 (Fed. Cir. 2010). See also *Holmes v. US, 657 F. 3d 1303, 1321* (Fed. Cir. 2011) (presumption of governmental good faith applied despite past breach of agreement). As it applies to these Native American children, the United States was in a position of *parens patriae*. See e.g. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831)(the Indians "are more correctly…denominated domestic dependent nations…[t]heir relations to the United States resemble that of a ward to his guardian."),

Furthermore, the government continued to deny knowledge of reports that Weber was a pedophile as late as July of 2016, when they answered a Freedom of Information Act Request to that effect in the negative. (See Appendix 369-72, Declaration of Journalist Joe Flood). Even assuming hypothetically that Plaintiffs had discovered the causal connection between their abuse and injury, and took the logical leap to blame officials and employees of the United States, any such inquiry directed to IHS was a dead end resulting from the continued concealment of the United States.

Any claim that Plaintiffs should have inquired into those suspicions is further demonstrated as completely futile given the current position of the IHS in releasing information on the internal investigation into the IHS handling of the Stanley Patrick Weber case. IHS claims that medical peer review law protects the release of information related to Stanley Patrick Weber and have refused to release it.[43] The United States is ***shamefully*** using protections of their internal knowledge as both a sword and a shield. "WE THE PEOPLE" deserve to hold our

[43] See Weaver, C., Frosch, D. "Indian Health Service Declines to Release Report on Sexual Abuse" Wall Street Journal (Feb. 20, 2020) https://www.wsj.com/articles/indian-health-service-declines-to-release-report-on-sexual-abuse-11582222349 (accessed 12/11/2020).

government accountable.

With respect to the unknown officials and employees, this case is analogous to *L.S.S. Leasing Corp. v. United States*, 695 F.2d 1359 (Fed.Cir.1982), In that case, a lessor of a facility sought recovery of rent for overtime use by the United States outside of the six year limitations period. The court found that limitations period had not accrued because the government had taken control of after-hours access to the leased facility and was tasked with reporting its overtime use to the lessor. This case is identical with respect to the control the United States had over the information. The government had exclusive custody and control over the information that Weber was declared to be a pedophile while in Montana, and that accusations and suspicions grew to near certainty, if not knowledge, while in South Dakota.

In *Holmes v. US*, 657 F. 3d 1303, the plaintiff and the US Navy had entered into several settlement agreements over a period of years related to allegations of discrimination. Two agreements required expungement of negative information in the plaintiff's file. The plaintiff requested his employment file after the first agreement and found the Navy had not complied. The plaintiff then entered into the second agreement with another expungement provision. The Navy again failed to expunge the record. The court found that a claim of breach of the second agreement, though filed beyond the six-year limitations period, had not accrued because the Navy had partially performed some of the terms of the second agreement and the plaintiff was able to obtain employment after the signing of the agreement. Given these facts, the court found that the plaintiff was not "on 'inquiry notice' that the Navy had breached the [second] Agreement." *Id* at 1322. In arriving at the conclusion the court held that: "the 'concealed or inherently unknowable' test, which has been used interchangeably with the 'knew or should have known' test,… includes an intrinsic reasonableness component." *Id* at 1320. Applying this, the

court reasoned: "we are not prepared to say that, as far as the 'inherently unknowable' standard is concerned, Mr. Holmes acted unreasonably in not doublechecking the Navy's contract performance earlier." *Id* at 1321.

Applied to the case at hand, Plaintiffs had every reason to conclude that no other person on the planet, other than Weber, knew of the abuse. Furthermore, IHS officials and employees had civil and criminal duties to care for and protect them. It was not unreasonable that they did not question whether IHS officials and employees had complied.

Plaintiffs were unable to discover, and were not on notice, of the crimes alleged. Without the evidence uncovered by journalists, it was impossible to conclude that unknown agents and employees of the United States other than Weber had any means of preventing the abuse; ***let alone knew and covered it up***. Plaintiffs would have been perfectly justified in believing for years that they were all alone in their pain; that theirs were isolated incidents and that no other living soul knew of Weber's proclivities.

2. THE CLAIMS INVOLVING THE ACTS OF WEBER WERE INHERENTLY UNKNOWABLE UNDER THE RULE OF URIE AND THE FACTS OF EACH PLAINTIFF'S CASE

"[F]or the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians v. US*, 855 F. 2d 1573, 1577-8 (Fed Cir. 1988) (citing *Kinsey v. United States*, 852 F.2d 556, 557 n. * (Fed.Cir.1988) ("a claim does not accrue unless the claimant knew or should have known that the claim existed").) Cases demonstrating accrual suspension show this "routinely is allowed" while equitable tolling "rarely is". *Id* at

1578.

The so-called Accrual Suspension Rule recognized and cited in *Hopland*, *supra*, was first articulated by the United States Supreme Court in *Urie v. Thompson*, 337 U.S. 163 (1949).[44] As recognized in *Hopland*, an appeal from the United States Claims Court, the rule was applied as one of liberality, rather than restriction: it is "routinely allowed". The *Urie* case involved a plaintiff that acquired silicosis by exposure to silica dust in misconfigured sanders over a period of nearly forty years. The plaintiff did not file until November of 1941 and the court would have been jurisdictionally barred if the claim had accrued before November of 1938 under the existing statute of limitations. The court found that the plaintiff had become too ill to work in May of 1940 and a diagnosis was acquired in the following weeks. The Court reasoned:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.
> …
> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion

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[44] Defendant concedes that the accrual suspension rule is available but claims that the rule of *Urie* is limited to tort situations. See Def. Br. P. 7 and fn. 2. Defendant neglects to inform the court that rule of *Urie* ***is*** the accrual suspension rule, they are one and the same. See e.g. *Ingrum v. US*, 560 F. 3d 1311, 1314-5 (Fed. Cir. 2009) (citing *Japanese War Notes Claimants Association v. United States*, 178 Ct.Cl. 630, 373 F.2d 356, 358-59 and fn. 4 (1967)(citing *Urie v. Thompson*, 337 U.S. 163, 169, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949)) for the proposition that "Plaintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was "inherently unknowable"). Plaintiff is not asking the court to adopt a new rule in this case, *Urie* ***is*** the rule. Furthermore, the Bad Man Clause of the Fort Larmie Treaty essentially is a tort cause of action. See *Elk v. United States*, 87 Fed. Cl. 70, 78–83, 90 (2009) (concluding that the United States intended to provide tort damages under the Bad Man Clause).

> of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. 'It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves … Accordingly we agree with the view expressed by the Missouri Supreme Court on the first appeal of this case, that Urie's claim, if otherwise maintainable, is not barred by the statute of limitations.

Urie v. Thompson, 337 U.S. at 169-171 (citations omitted).

The cases before the court are more aggravated than that of *Urie*, where the Plaintiff knew of the long-term exposure to a substance, crystalline silica dust, known since the days of Egyptian pharos to cause occupational illness. In *Urie*, the level of manifestation of these growing issues was held to be *debilitating manifestation* not mere hints of manifestation: the court held the accrual from the date the symptoms became so bad the plaintiff could not work and he received a diagnosis. Surely the plaintiff in *Urie* had signs of silicosis prior to his total debilitation and diagnosis. But the court found that *Urie* could not be "charged with knowledge of the slow and tragic disintegration of his lungs". The court rejected an argument that "a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability."

Even more so than the silicosis in *Urie*, childhood sexual abuse is a phenomena that involves delayed discovery *by its very nature*.[45] The crime is perpetrated on children, who, by the

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[45] (Appendix at 367-8 (discussing Elliot & Briere, 1995: Journal of Traumatic Stress, Vol. 8, No. 4, pp. 629-647). See also Terry, K.J., et al, "The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010" p. 27 (United States Conference of Catholic Bishops 2011) (Acknowledging: "A delay, or time lag, in the reporting of sexual abuse cases is typical." Citing D.W. Smith et al., "Delay in Disclosure of Childhood Rape: Results from a

very innocence of a child, are "blamelessly ignorant" of sexuality itself and the wrongfulness of an adult using a child's body for perverse pleasure. For the Plaintiffs Weber was their first sexual experience and they were confused by what occurred. The blamelessness in these cases is increased by the conduct and position of the perpetrator. Their blameless ignorance is increased because Dr. Weber was from a profession given utmost trust, a pediatrician and the abuse began or occurred in the clinical setting. His conduct was shrouded in a sense of normalcy, goodness, or duty. For example, Fred was told that some of what happened was part of the process of medical care and that the abuse was their "little secret". All of these Plaintiffs indicated they didn't understand the wrongfulness of the abuse at the time it happened. And because of the position of trust held by Dr. Weber, who would have believed these Plaintiffs if they had disclosed the abuse? Further, the *Urie* decision found that the plaintiff brought suit reasonably after receiving a diagnosis, were these Plaintiffs supposed to seek such a diagnosis from the very institution that spawned Weber? These victims were groomed based on the relative safety of choosing them as a victim. In Paul's case, he was an easy target because he was essentially orphaned. In Eugene's case, he was especially pliable because of his unique susceptibility. As to the other Plaintiffs' discovery will help establish what Dr. Weber might have identified to establish them as easy targets. Dr. Weber also employed tactics of positive reinforcement of silence by providing favors and gifts that could be impliedly cut off for disclosure. Fred, Paul, and Eugene reported receiving money, drugs, and support in exchange for sex acts. In fact, Eugene was identified by investigators as a potential victim because of the frequency with which

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National Survey." Child Abuse & Neglect 24 (2000): 273-87; M. Sauzier, "Disclosure of Child Sexual Abuse," Psychiatric Clinics of North America 12 (1989): 455- 69; M.A. Reinhart, "Sexually Abused Boys," Child Abuse & Neglect 11 (1987): 229-35)).

he was prescribed medication. Paul's case exhibits extreme confusion because he loves Weber even now because he would have frozen to death or starved without the basic necessities Weber provided. Paul's emotional relationship with Weber continued right up until the Office of Inspector General Investigator came to interview him in 2017 in the sense that Paul still cared for Weber deeply and believed the relationship was normal. Further, Paul became addicted to drugs supplied by Weber, which undoubtedly contributed to his lack of coherent ability to recall or make sense of his abuse and injury.

Plaintiffs, then, did not realize that a harm had been done them that was festering inside their psyche and could not have so realized until the filth bubbled to the surface as the fruit of the spoiled tree Weber planted. See e.g. *Japanese War Notes Claimants Association v. United States,* 373 F.2d at 359 (citing 1 Williston on Sales, § 212(a) (Rev. ed. 1948) for the example of an erroneously delivered fruit tree that went undiscovered until the tree bore fruit). Such delayed discovery is a normal response of victims of child sexual abuse and is readily apparent in statistical data from studies of the phenomena.[46] One court described the phenomena as follows:

> Imagine being pricked on the arm with a pin. At first, such an intrusion would be disturbing, but with time might seem uneventful. Now imagine the pin carried a dreaded affliction, only discoverable after years of incubation. Such is often the nature of childhood sexual abuse. Many children only realize years later the true significance of the abuse they endured, especially in cases where the molestation occurred at the hands of family members or other trusted individuals. For some children, sexual violation is so traumatic it becomes psychologically self-concealing, if only to preserve sanity.

Stratmeyer v. Stratmeyer, 1997 SD 97, ¶ 13, 567 NW 2d 220, 222-3 (SD 1997)

The United States' argument in this case, that a cause of action related to childhood sexual abuse accrues at age 18, involves "magical thinking". Such an unscientific position

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[46] See *id*.

reinforces the egregiousness of the wrong done to Plaintiffs and exposes how inept this government is at protecting native children as they are obligated to do by virtue of treaty and their undertaking to provide medical care. Defendants' position neglects the "reasonableness" component of the *Urie* rule as confirmed in *Holmes*.

In this case the Plaintiffs were *children*. Plaintiffs have testified to not understanding the wrongfulness of the abuse, self-blame or plain repression. Like *Urie* "no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time". Plaintiffs here can only "be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." The symptoms must have "reasonably obtruded onto consciousness". The facts in the present case are analogous to those in *Urie*. The Plaintiffs, having been exposed to a dangerous circumstance, the abuse, were faced with the slow and tragic disintegration resulting from that abuse.[47] It had not yet "obtruded on consciousness". These Plaintiff's would be given a delusive remedy.[48] The accrual suspension rule first articulated in

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[47] It is fitting that *Urie* be applied in this situation as that case was the source of a nationwide examination of the treatment of sexual abuse survivors under the applicable statutes of limitations. See e.g. Susan D. Glimcher, Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?, 43 U. Pitt. L. Rev. 501, 516-7, fn. 13 (1982) (citing *Urie* for the concept of "blameless ignorance"); Camille W. Cook Pamela Kirkwood, Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest, 26 U. Rich. L. Rev. 1, 14–15 (1991)(same); Ann Marie Hagen, Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse, 76 Iowa L. Rev. 355 (1991)(pointing out that these adult survivors of child sexual abuse are "blamelessly ignorant" of their injuries and should not be re-victimized by allowing their abuser to hide behind a statute of limitation); and Rosemarie Ferrante, The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress, 61 Brook. L. Rev. 199, 201–03 (1995)(tracing the rule to *Urie*).

[48] As a policy matter, recognition of the development of children and the natural response to childhood sexual abuse through application of the rule of *Urie* is imperative to the protection of our nation's youth. The present case is a prime example of the need to expose our nation's

Urie is well established. These cases have far more merit than the *Urie* situation due to the innocence and the developmental state of a child's mind, the concealing efforts of Weber, and the far greater confusion posed by the conduct of a person of authority. These cases, of course, are not *Urie*, they have far more merit than an adult, who knew he was exposed to a substance widely known to be harmful, waiting over 40 years to make a claim.

CONCLUSION

Plaintiffs request that this court deny the motion to dismiss filed by Defendant. Plaintiffs have demonstrated that they have raised non-frivolous claims of the inherent unknowability and concealment of acts that caused wrongs upon their person were committed by two groups of "bad men" under the treaty (1) unknown agents and employees that discovered Dr. Weber was a pedophile, failed to act on the knowledge, and/ or concealed their knowledge and (2) Dr. Stanley Patrick Weber.

In the alternative, Plaintiffs request the opportunity to conduct jurisdictional discovery and/or leave to amend their complaint.

DATED this 13 day of December, 2020.

LAW OFFICES OF GREGORY A. YATES
s/ Michael Shubeck, Esq.
550 North 5th Street
Rapid City, SD 57701
(605) 718-2069

Gregory A. Yates, Esq.
16830 Ventura Blvd. STE 250
Encino, CA 91436
(310) 858-6944
Of Attorney for Plaintiffs

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secrets for the protection of our people, not conceal that information. The IHS in this case knew Weber was a pedophile before they even sent him to Pine Ridge. Accountability in this case will help prevent the future cases.