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-KCD **PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF JURISDICTION**

Pursuant to this Court's order, Plaintiffs submit this sur-reply to Defendant's Motion to Dismiss Plaintiffs' Complaint. See Order, ECF No. 20, June 24, 2021, Def. Reply, ECF No. 15, Feb. 3, 2021, Pls. Opp'n, ECF No. 11, Dec. 14, 2020; Def. Mot., ECF No. 7, Sept. 14, 2020; Compl., ECF No. 1, May 15, 2020.

ARGUMENT

This Court has ordered that a sur-reply addressing "the issue of whether any mandatory administrative remedy tolled the statute of limitations on Plaintiffs' claims".

In identifying areas requiring exhaustion, the rule has been stated as follows:

> [A] statute or other Congressional enactment creates an independent duty to exhaust only when it contains "'sweeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim."

Elk v. U.S. 70 Fed.Cl. 405, 407 (2006) (citations omitted). However, "if a dispute is subject to mandatory administrative proceedings, the plaintiff's claim does not accrue until the conclusion of those proceedings." *Martinez v. United States*, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (citations omitted).

The Bad Man Clause of the Fort Laramie Treaty provides the administrative pre-requisites to suit as follows:

> 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 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.

15 Stat. 635, ratified Feb. 16, 1869, proclaimed Feb. 29, 1869, Art. 1 (the "Treaty").

I. The Treaty Requires Minimal Exhaustion By Submission Of A Claim

The most in-depth discussion of an exhaustion requirement under the Treaty is found in *Elk* where the court found only claim submission was required by the Treaty, reasoning that "both the terms of the Treaty and the absence of any regulations thereunder suggest that neither the Congress nor the Executive Branch has 'meaningfully addressed the appropriateness of requiring exhaustion in this context,'…, at least in terms of clearly requiring a claimant to await a decision from interior before filing suit." *Elk*, 70 Fed.Cl. at 407-8 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 149, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992)). The *Elk* court found the treaty with the Sioux distinguishable from other treaties that require that a claim be "thoroughly examined and passed upon by the Commissioner of Indian Affairs". See *Elk v. United States*, 70 Fed. Cl. 405, 407 (2006)(quoting *Begay v. U.S.*, 219 Ct.Cl. 599, 602 n. 4, 1979 WL 10173 (1979)).

The *Elk* court acknowledged that exhaustion may be judicially imposed if the interests required, but found that the "potential for delay here, and the concomitant possibility of prejudice, outweigh the interests favoring further exhaustion." *Id* at 409. The court distinguished the case of *Zephier v. U.S.,* No. 03-7681 (Fed.Cl. Oct. 29, 2004) on the basis that a claim was not submitted before bringing suit. *Id* at 411. Accord *Flying*

Horse v. United States, 696 F. App'x 495, 497 (Fed. Cir. 2017); *Kenyon v. United States*, 683 F. App'x 945, 949 (Fed. Cir. 2017).

Based on the cases considering the Fort Laramie Treaty's Bad Man Clause, submission of a claim is the only administrative prerequisite to suit.

II. *Arguendo* A Bad Man Cause Of Action Does Not Accrue Until The Administrative Prerequisites Of Submission Of A Claim And Punishment Of The Offender Is Accomplished

The Bad Man Clause refers to proof, arrest, and punishment as prerequisites. Notably, no time limitation is imposed by the treaty for making proof.[1] Under the rule of *Martinez*, Plaintiffs' claims did not accrue until sentencing of Dr. Weber, which occurred on February 10, 2020, and submission of these claims.[2]

III. Alternatively, Plaintiffs' Claims Were Tolled Between the Time the Claims were Submitted and the Time Interior Unequivocally Indicated That It Would Not Be Adjudicating The Bad Man Act Claims After Repeated Attempts by Plaintiffs' Counsel

By letter dated December 31, 2019, Plaintiffs' counsel submitted claims for Red Cloud, Hunts Horses, and Trueblood. See Dec. of Michael Shubeck In Support Of Mot. To Strike ("Decl. Shubeck"), Ex. A (ECF 18-1). By letter dated February 28, 2020, Plaintiffs' counsel submitted claims for Martin and Gayton. *Id* at Ex. B (ECF 18-2). By that same letter, Plaintiffs' counsel identified the December 31, 2019 claims as related claims. *Id*. In both the December 31, 2019 and February 28, 2020 letters, the Department

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[1] The *Elk* decision observed that suit was only brought after receiving "a decision not to prosecute the alleged perpetrator from the Department of Justice." *Elk*, 70 Fed.Cl. 411.
[2] Under this theory, a state law time limitation may be borrowed. See e.g. *Chattanooga Foundry v. Atlanta,* 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906); *Campbell v. Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895)*;* 28 U.S. Code § 1652*;* See also South Dakota Codified Laws §§ 26-10-25, 22-24A-13.

of Interior was placed on notice that "claims are being made under the Federal Tort Claims Act, *Bivens*, and Article I of the Treaty with the Sioux dated April 29, 1868." *Id* at Exs. A, B. Each individual claim specifically alleged violation of the Bad Man Clause of the Fort Laramie Treaty. See *id* at Exs. A, B.

By letter dated March 4, 2020, Patricia J. Reedy, Assistant Solicitor, Division of General Law Torts Practice Branch for the United States Department of the Interior wrote that the claims presented to the Department of Interior by plaintiffs Martin and Gayton were being transferred pursuant to the federal regulations pursuant to a Federal Tort Claims Act claim. See *id* at Ex. C (ECF 18-3).[3] By letter dated March 6, 2020, in response to Ms. Reedy's letter, Plaintiffs' counsel addressed the "Administrative Claims of Daniel Joseph Martin and Fredric Louis Gayton, as well as Henry Red Cloud, Eugene Hunts Horses III, and Paul True Blood". See *id* at Ex. D (ECF 18-4). The letter re-sent copies of all of Plaintiffs' claims and pointed out that the claims also presented treaty claims to which Interior had an obligation to respond, pointing out that the claims indicated:

> "In allowing Dr. Weber to continue abusing children on the Pine Ridge Reservation, the United States has breached the Treaty with the Sioux of April 29, 1868, an Act of Congress as well as an express or implied contract with the United States…
> The "bad men" clause found in the Sioux Treaty applies to both agents and employees of the United States as well as others. See e.g. *Elk v. US*, No. 05-186L (CFC 2009) and *Richard v. US*, No 2011-5083 (CFC 2012)."

Id at p. 1. The letter pointed out that the procedure of combining the FTCA and Bad Man Clause claims, comported with the procedure accepted in *Elk v. United States*, 70 Fed.Cl.

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[3] FTCA exhaustion cannot be a prerequisite to a Bad Man Clause claim because of the priority rule laid down by *US v. Tohono O'Odham Nation*, 563 U.S. 307, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011).

405, 406 (April 20, 2006)(the notice of claim asserted both FTCA and treaty claims).

In her response dated March 31, 2020, Ms. Reedy refused to act on the Bad Man Clause claims, stating that: "As stated in our March 4, 2020 letter, the actions alleged by your clients Daniel Martin and Fredrick Gayton do not fall under the U.S. Department of the Interior". Decl. Shubeck, Ex. E (ECF 18-5).

Even if some action by Interior was required for administrative exhaustion, the response of the Department of Interior constituted a denial sufficient for Plaintiffs to seek remedy in this Court. See e.g. *Bendure v. U.S.*, 213 Ct.Cl. 633 (1977) (Positions taken by the Air Force and Civil Service commission as to their ability to adjudicate Environmental Differential Pay classification challenges made resort to the administrative process futile). See also *Elk* 70 Fed.Cl. at 408 (Noting exceptions to requiring exhaustion, notably, where the agency has predetermined the issue before it). In the event that some action was required by Interior, Plaintiffs' claims were tolled between the time of submission and the March 31, 2020 response of Ms. Reedy.

CONCLUSION

Plaintiffs maintain that this court has jurisdiction and the United States' motion to dismiss should be denied because: The claims had not accrued until within six years of filing suit, and, in the alternative, the claims were tolled between submission of the claims and Interior's refusal to consider them.

If this Court is inclined to decide that exhaustion of a full administrative process is required, Plaintiffs request the procedure followed in *Begay*. See *Begay v. U.S.*, 219 Ct.Cl. 599, 603, 1979 WL 10173 (1979) (ordering the Assistant Secretary of Interior to render an opinion on the claims within 90 days).

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Respectfully submitted,

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