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## A BAD MAN IS HARD TO FIND

In January 2003, a young woman named Lavetta Elk got into a car with an Army recruiter whom she had known since she was sixteen. She believed that she had been accepted as an enlistee — her dream was to work eventually as an Army nurse — and that he was taking her for a medical evaluation. Instead, Staff Sergeant Joseph Kopf drove down a deserted road and, once they were miles away from the nearest building, sexually assaulted Elk. Kopf was never prosecuted for his crime in civilian court; his Army court-martial resulted in no prison time.<sup>1</sup> However, because Elk was a member of the Oglala Sioux Tribe and the assault occurred on a Sioux reservation, she had access to an unusual cause of action.

Nine treaties concluded between the United States and various Indian tribes in 1867 and 1868 each contain what is known as a “bad men” provision. Within each of these provisions is a clause in which the United States promises to reimburse Indians<sup>2</sup> for injuries sustained as a result of wrongs committed by “bad men among the whites, or among other people subject to the authority of the United States.”<sup>3</sup>

Although these “bad men among the whites” clauses have rarely been used in the last century and a half, they remain the source of a viable cause of action for Indians belonging to those tribes that signed the nine treaties of 1867 and 1868. In 2009, Lavetta Elk won her action for damages under the Fort Laramie Treaty of 1868, recovering a judgment in the Court of Federal Claims of almost \$600,000<sup>4</sup> from the United States government.<sup>5</sup>

Elk is the first and only plaintiff to take a “bad men among the whites” action through trial and win on the merits. She is unlikely to remain alone in her success. In 2012, the Federal Circuit decided *Richard v. United States*,<sup>6</sup> a case brought by the estates of two Sioux Indians killed by a drunk driver on the Pine Ridge Reservation. The

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<sup>1</sup> See *Elk v. United States*, 87 Fed. Cl. 70, 73–77 (2009).

<sup>2</sup> This Note uses the terms “Indian” and “American Indian” to refer to indigenous peoples of the contiguous forty-eight states. These are the terms most commonly used in federal law. See, e.g., DAVID E. WILKINS & HEIDI KIWETINEPINESIHK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM*, at xvii (3d ed. 2011).

<sup>3</sup> E.g., Treaty Between the United States of America and Different Tribes of Sioux Indians, U.S.–Sioux, art. 1, Apr. 29, 1868, 15 Stat. 635 [hereinafter *Sioux Treaty*].

<sup>4</sup> Elk later settled with the federal government for \$650,000 as the case was pending appeal in the Federal Circuit. See Chet Brokaw, *\$650,000 Settlement in Lawsuit Based on 1868 Treaty*, *NATIVE AM. TIMES* (Jan. 11, 2010, 3:35 PM), <http://www.nativetimes.com/index.php/news/federal/2857-650000-settlement-in-lawsuit-based-on-1868-treaty> (noting that the settlement amount was “larger than the lower court’s award to account for expenses”).

<sup>5</sup> *Elk*, 87 Fed. Cl. at 72.

<sup>6</sup> 677 F.3d 1141 (Fed. Cir. 2012).

United States argued that the driver, a private citizen with no ties to the federal government, was not a “bad man” within the meaning of the Sioux treaty. The Federal Circuit rejected that reading. “[A]ny ‘white’ can be a ‘bad man,’” the court held<sup>7</sup> — leaving unsaid the logical corollary that any “white” can therefore trigger, through his wrongs, a potentially boundless indemnity obligation on the part of the United States.

This Note is the first work of legal scholarship to focus exclusively on the “bad men among the whites” clauses of these nine treaties and to propose an interpretive approach based on the treaties’ historical significance. To situate this approach, Part I of this Note describes the historical context in which these treaties were concluded and provides a textual overview of the “bad men” provisions within these treaties. Part II describes the doctrine interpreting these provisions, identifying both what courts have settled and what remains open or ambiguous. Part III critiques the traditional principles of Indian treaty interpretation as applied to these provisions and, finding courts’ existing interpretive tools to be of limited usefulness, proposes replacing them with a more nuanced approach. Finally, this Note concludes by returning to the idea of opportunity: the uncertain scope of the “bad men” cause of action means that there is still much ground left to explore, and the exigencies of the treaties’ formation provide hope that this unexplored ground is of great potential for the Indian tribes.

## I. THE NINE TREATIES OF THE GREAT PEACE COMMISSION

### A. *Historical Background*

In 1871, on the strength of two sentences buried innocuously between a payment for insurance and a present of farm tools, a centuries-old tradition came to an end. The House of Representatives, tired of the ballooning cost of the nation’s treaty obligations and jealous of the Senate’s monopoly on Indian affairs,<sup>8</sup> added a short rider to the annual Indian appropriations bill<sup>9</sup> that ended all future treaty-making with the Indian tribes.<sup>10</sup> Although the hundreds of existing treaties remained in force, the end of formal treaty-making transformed the United States–tribe relationship from one between sovereign nations, however unequal in practical power, to one of government and governed.<sup>11</sup>

<sup>7</sup> *Id.* at 1152–53.

<sup>8</sup> See U.S. CONST. art. II, § 2 (giving the Senate exclusive power to ratify treaties).

<sup>9</sup> Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2012)).

<sup>10</sup> See COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT 230–31* (2013); *DOCUMENTS OF UNITED STATES INDIAN POLICY 135* (Francis Paul Prucha ed., 3d ed. 2000).

<sup>11</sup> See CALLOWAY, *supra* note 10, at 232. Professor John R. Wunder traces the “legal and political destruction of Indian sovereignty” back to the resolution of 1871, at least partially. John R.

The decade immediately preceding this change was the “most intense era of Indian and United States treaty making” in the young nation’s history.<sup>12</sup> With the Civil War at an end, the nation turned its gaze west;<sup>13</sup> with bloody clashes erupting between white migrants and the Army on one side, and the western tribes on the other, it had reason to do so.<sup>14</sup> Fifty-nine treaties were concluded in that decade, each seeking an end to hostilities and promising peace, but the United States’ repeated failures to meet its obligations led to violent confrontation.<sup>15</sup> Horrific massacres of civilians — of 800 Minnesotan settlers by the Santee Sioux in 1862, of a peaceful village of Cheyenne and Arapaho Indians by the Colorado militia at Sand Creek in 1864 — and a resounding military victory by legendary Sioux leader Red Cloud in 1866 impressed upon both American political leaders and the American public that something had to be done.<sup>16</sup> A comprehensive congressional investigation led by Senator James Doolittle resulted in the 500-page “Doolittle Report,”<sup>17</sup> whose “findings were damning”: “The long litany of violence on the plains was traced in every instance to white hands, often those of the military, but primarily of ordinary people, the pioneers.”<sup>18</sup> In all likelihood, this diagnosis was the impetus for the novel “bad men” provisions in the nine treaties of 1867 and 1868.

The violence in the West was costly in more than lives. Tribes angry at the influx of white settlers and miners onto land promised to their exclusive use retaliated with attacks on travelers and raids on settlements, slowing westward expansion.<sup>19</sup> These depredations extended

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Wunder, *No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands*, in *WORKING THE RANGE* 39, 52 (John R. Wunder ed., 1985). Thirty years later, the Supreme Court recognized Congress’s unilateral power to abrogate the terms of an Indian treaty — “no Indian treaty was safe from the changing whims of Congress.” *Id.* at 53; *see id.* at 52–53 (discussing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)). The United States has since retreated from an absolutist position and, through its policy of Indian self-determination, now recognizes its own “trust responsibility to protect and advance Indian nations [sic] status as governments with inherent sovereignty.” DEP’T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 19 (2013); *see also* Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (July 8, 1970) (articulating President Nixon’s new policy of Indian self-determination).

<sup>12</sup> Wunder, *supra* note 11, at 46.

<sup>13</sup> *See* FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* 261 (1994).

<sup>14</sup> *See* Wunder, *supra* note 11, at 46.

<sup>15</sup> *See id.*

<sup>16</sup> *See* JILL ST. GERMAIN, *INDIAN TREATY-MAKING POLICY IN THE UNITED STATES AND CANADA, 1867–1877*, at 27–29 (2001) (discussing the Santee and Sand Creek massacres); *id.* at 31–33 (discussing Red Cloud’s annihilation of an entire company of U.S. soldiers); Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867–1868*, 22 *GREAT PLAINS Q.* 35, 35–36 (2002).

<sup>17</sup> JOINT SPECIAL COMM. APPOINTED UNDER JOINT RESOLUTION OF MARCH 3, 1865, *CONDITIONS OF THE INDIAN TRIBES*, S. REP. NO. 39-136 (1867).

<sup>18</sup> ST. GERMAIN, *supra* note 16, at 32; *accord* Oman, *supra* note 16, at 35–36.

<sup>19</sup> CALLOWAY, *supra* note 10, at 183; ST. GERMAIN, *supra* note 16, at 29.

to the great transcontinental railroad project; construction faltered and speculators lobbied for relief.<sup>20</sup> Yet the Army, newly freed from the South, nonetheless fell short on manpower as “Civil War enlistments . . . ran out” and much of the predominantly volunteer force returned home.<sup>21</sup> Desperate to “secure the safety of overland transportation routes,” and with little appetite for another expensive war,<sup>22</sup> the United States sought peace.<sup>23</sup>

The Great Peace Commission was born on July 20, 1867.<sup>24</sup> Charged to “remove all just causes of complaint on [the Indians’] part, and at the same time establish security for person and property along the lines of the railroad now being constructed . . . such as will most likely insure . . . peace and safety for the whites,” the Commission set out to end the Plains Wars by convincing the Indians to give up their way of life and accept “civilization.”<sup>25</sup> Over the next fifteen months, its members crossed and recrossed the western frontier, meeting with tribe after tribe, and concluding some of the most significant treaties in the nation’s history.<sup>26</sup> With these treaties, the Commission convinced many of the most troublesome tribes to settle on reservations and establish an agricultural way of life; in exchange for their cooperation, the tribes were promised permanent homelands and generous assistance in the form of annuities, education, tools, and other supplies.<sup>27</sup> The Commission’s greatest coup occurred in late 1868 when Red Cloud himself, having convinced the Army to abandon three forts and a mining trail cutting through Sioux territory, finally agreed to sign and end his war.<sup>28</sup> As Professor Jill St. Germain noted, “[Red Cloud’s acquiescence] was the single episode in United States history where an Indian treaty was signed on Indian terms.”<sup>29</sup>

It is within this difficult historical context that the nine treaties concluded by the Great Peace Commission should be understood. The

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<sup>20</sup> See CALLOWAY, *supra* note 10, at 183–84; ST. GERMAIN, *supra* note 16, at 29; *cf.* 1872 COMMISSIONER INDIAN AFF. ANN. REP. 5 (reporting the difficulties railroad companies had in hiring laborers when hostilities flared up again in the early 1870s).

<sup>21</sup> ST. GERMAIN, *supra* note 16, at 29.

<sup>22</sup> Oman, *supra* note 16, at 37. War with the hostile tribes was understood to be one that the United States would win, but at unacceptable cost: “According to some members of Congress, it cost the government nearly \$1 million for every Indian killed . . . and from \$1 to \$2 million a week just to defend the frontier populations.” *Id.*

<sup>23</sup> CALLOWAY, *supra* note 10, at 185.

<sup>24</sup> See An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 (1867).

<sup>25</sup> See *id.* § 1, 15 Stat. at 17.

<sup>26</sup> Oman, *supra* note 16, at 35, 47–48; see also CALLOWAY, *supra* note 10, at 182 (calling the Treaty of Medicine Lodge “a major event in shaping and implementing the nation’s Indian policy in the aftermath of the Civil War”).

<sup>27</sup> See Oman, *supra* note 16, at 40–41.

<sup>28</sup> *Id.* at 45–46.

<sup>29</sup> ST. GERMAIN, *supra* note 16, at 36.

United States' overriding motivation was to appease the hostile tribes. Critical to this end was a promise that white men would no longer encroach upon Indian lands and, if they did, that the United States would make right any injuries. The diminished political presence of the present-day Indian tribes belies the powerful hold that many tribes exerted over the nation's westward expansion in the mid-nineteenth century. Though the tribes rarely negotiated with peace commissioners from a position of strength, the concessions they received were neither trivial nor perfunctory. The United States desired peace and, in the nine treaties it signed in 1867 and 1868, promised to pay dearly for it.

### B. *Nine Treaties*

By the end of 1868,<sup>30</sup> the Great Peace Commission possessed nine pieces of paper promising eternal peace between the United States and many of the hostile Indian tribes of the West and Southwest. Substantially similar in many respects,<sup>31</sup> these treaties defined the various reservations that the tribes would inhabit and provided for farming equipment, subsistence rations, and instruction in the ways of the white man to ease the tribes' transition to "civilization."<sup>32</sup>

Additionally, within each treaty was a "bad men" provision, all virtually identical in text, containing the same mutual promises between the United States and the Indian tribe. Article I of the treaty with the Northern Cheyenne and Northern Arapaho tribes is typical of these "bad men" provisions:

From this day forward peace between the parties to this treaty shall forever continue. . . . If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and

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<sup>30</sup> Some of the treaties were signed at various points over the course of the two years that the Commission was active as different bands or tribes met at different times with the commissioners. Compare INST. FOR THE DEV. OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, at 105-11 (1975) [hereinafter PROCEEDINGS] (reporting the minutes of the council with the Brulé band on April 28, 1868, during which Brulé chief Iron Shell agreed to sign the Sioux treaty), with Sioux Treaty, *supra* note 3 (recording the mark of powerful warrior chief Red Cloud on November 6, 1868). Indeed, in some instances, commissioners had to wait months while wheedling reluctant but important leaders to the table. See, e.g., EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE 46-50 (1991) (recounting the great efforts taken by the commissioners to coax Red Cloud to Fort Laramie).

<sup>31</sup> See ST. GERMAIN, *supra* note 16, at app. 3 (comparing the substantive terms of the six treaties signed at Medicine Lodge Creek and Fort Laramie); 1 TREATIES WITH AMERICAN INDIANS 107 (Donald L. Fixico ed., 2008) ("The . . . treaties [signed at Fort Laramie] were remarkably formulaic, worded nearly the same as those signed at Medicine Lodge . . .").

<sup>32</sup> See PRUCHA, *supra* note 13, at 277, 280-81, 283; see also An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17, 17 (1867); United States v. Sioux Nation of Indians, 448 U.S. 371, 374-75 (1980).

punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws . . . . And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.<sup>33</sup>

This particular iteration of the “bad men” provision replicates word for word (with minor punctuation differences) the corresponding provisions in the treaty with the Crow<sup>34</sup> and the treaty with the Eastern Band of Shoshones and the Bannock Tribe.<sup>35</sup> Minor differences are present in the treaties with the Sioux,<sup>36</sup> Navajo,<sup>37</sup> Kiowa and Comanche, Cheyenne and Arapaho,<sup>38</sup> and Apache;<sup>39</sup> the treaty with the Ute,

<sup>33</sup> Treaty Between the United States of America and the Northern Cheyenne and Northern Arapahoe Tribes of Indians art. I, May 10, 1868, 15 Stat. 655.

<sup>34</sup> Treaty Between the United States of America and the Crow Tribe of Indians, U.S.–Crow, art. I, May 7, 1868, 15 Stat. 649.

<sup>35</sup> Treaty Between the United States of America and the Eastern Band of Shoshonees and Bannack Tribe of Indians art. I, July 3, 1868, 15 Stat. 673.

<sup>36</sup> In the treaty with the Sioux, the requirement that the Commissioner of Indian Affairs “thoroughly examine[] and pass[] upon” a claim for damages before it is paid is entirely missing. *See* Sioux Treaty, *supra* note 3, at 635–36; *see also* Elk v. United States, 70 Fed. Cl. 405, 407 (2006) (distinguishing the Sioux treaty from the Navajo). That said, the Commissioner of Indian Affairs still plays a role in the treaty with the Sioux, as the requirement that proof of a claim be “made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city” remains. Sioux Treaty, *supra* note 3, at 635.

<sup>37</sup> The Navajo treaty, unique among the nine, contains a forfeiture clause that conditioned the enjoyment of treaty rights on permanent residence on the reservation. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.–Navajo, art. XIII, June 1, 1868, 15 Stat. 667 [hereinafter Navajo Treaty]; *see also* Pablo v. United States, 98 Fed. Cl. 376, 377–78 (2011); Herrera v. United States, 39 Fed. Cl. 419, 420–21 (1997).

<sup>38</sup> The treaty with the Kiowa and Comanche, *see* Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians, Oct. 21, 1867, 15 Stat. 581, and the treaty with the Cheyenne and Arapaho, *see* Treaty Between the United States of America and the Cheyenne and Arapahoe Tribes of Indians, Oct. 28, 1867, 15 Stat. 593, uniquely impose the additional requirement that the Secretary of the *Interior* also examine and pass upon claims for damages. No other ratified treaty obtained by the Great Peace Commission contains this further hurdle to claim payout.

<sup>39</sup> Although the Great Peace Commission entered into nine treaties with the Indian tribes, only eight of these treaties contained the “bad men” language explicitly. After the 1867 treaty with the Kiowa and Comanche was concluded, the Apache wished to be included in it. *See* Treaty Between the United States of America and the Kiowa, Comanche, and Apache Tribes of Indians,

while substantially similar to the others, contains somewhat more significant differences.<sup>40</sup> However, these differences all involve localized variations in language, while the spirit of the “bad men” provisions remains the same: these treaties were meant to “keep the peace.”<sup>41</sup>

## II. JUDICIAL INTERPRETATION OF “BAD MEN” PROVISIONS

“Bad men” have touched the law but lightly.<sup>42</sup> In only a handful of cases since 1868 have any courts seriously engaged with the substance and meaning of “bad men among the whites”; several more courts have discussed these clauses only in passing. As a result, binding precedential interpretations of this clause are superficial and incomplete.<sup>43</sup>

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Oct. 21, 1867, 15 Stat. 589. Thus, the new treaty with the Kiowa, Comanche, and Apache incorporated the previous treaty, and its “bad men” clauses, by “reference.” *Id.* at 589–90.

<sup>40</sup> The treaty with the Ute was not concluded in the field but rather in Washington, D.C., during a late winter visit by the Ute chiefs. *See* Treaty Between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, U.S.–Ute, Mar. 2, 1868, 15 Stat. 619, 619. Every other treaty containing the “bad men” clauses placed those clauses in the first article of the treaty; in contrast, the Ute treaty buried these clauses in Article VI. *See id.* at 620. Moreover, the “bad men” provision of the Ute treaty was not preceded by a declaration of enduring peace. *See id.* The familiar language at the end of the other “bad men” clauses — authorizing the President to make regulations, requiring the Commissioner of Indian Affairs to evaluate claims for damages, and prohibiting lawbreakers from recovering — is entirely missing from the treaty with the Ute. *See id.*

<sup>41</sup> *Janis v. United States*, 32 Ct. Cl. 407, 410 (1897).

<sup>42</sup> *See* Lillian Marquez, Note, *Making “Bad Men” Pay: Recovering Pain and Suffering Damages for Torts on Indian Reservations Under the Bad Men Clause*, 20 FED. CIR. B.J. 609, 609 (2011).

<sup>43</sup> Nor has there been a definitive academic work on the “bad men” clauses. The leading treatise in the field of federal Indian law mentions them only in passing. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 5.01[2], 5.06[4][c][ii], 9.02[1][d][iii], 18.07[3] (Nell Jessup Newton et al. eds., 2012). In a brief 1990 article, Professor Robert Laurence contemplated use of the “bad men” clauses to right modern wrongs after the Federal Circuit’s favorable decision in *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987), but his suggestion that tribes seek reimbursement for the wrongful acts of corporate polluters, unscrupulous lenders, and other bad actors constitutes more of a call to action than a scholarly treatment of the topic. *See* Robert Laurence, “*Bad Men Among the Whites*,” 23 AM. INDIAN L. NEWSL. 7 (1990). The only legal scholarship focusing on the “bad men” clauses occurs in student writing. Two student notes, both published within the last four years, summarize the relevant case law and propose limits on the reach of Indian claims arising from these treaties. *See* Sarah M. Block, Note, *Richard v. United States: Government Contracts, Indian Treaties, and the Federal Circuit’s Evolving Interpretation of “Bad Men” Provisions*, 23 FED. CIR. B.J. 245 (2013) (suggesting that the Federal Circuit’s decision in *Richard v. United States* is inconsistent with principles of government contract law, the Appropriations Clause, and the Anti-Deficiency Act); Marquez, *supra* note 42 (arguing for legislative action to limit the federal government’s potentially unlimited liability). Longer academic articles mention the “bad men” clauses briefly but superficially. *See* Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal↔Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 7–10 (2004) (characterizing the “bad men” clauses as extradition agreements and evaluating their implications for intergovernmental cooperation); Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 78–81 (2006) (raising doubts about the clauses’ applicability to claims arising from emotional neglect suffered by Indian children at mandatory government-managed boarding

It is generally accepted that the purpose of both the “bad men among the whites” and “bad men among the Indians” clauses was to establish a lasting peace, where wrongs on both sides were to be resolved through “intergovernmental cooperation” by way of “extradition and compensation,” rather than through private vengeance.<sup>44</sup> These clauses were reciprocal in their two-way promise of compensation but asymmetrical with respect to extradition: all wrongdoers were to be haled into the courts of the United States.<sup>45</sup> Much of the litigation on the “bad men among the Indians” side has involved Indian plaintiffs seeking to challenge their federal criminal convictions on the ground that the United States failed to comply with the treaties’ promised procedural protections;<sup>46</sup> these challenges have rarely been successful.<sup>47</sup>

In contrast, there has been little litigation on the “bad men among the whites” side. The clauses lay dormant for one hundred years: only starting in 1970 did injured Indian plaintiffs seek to hold the United States to its promise of reimbursement for wrongs committed by “bad men.” The case law on this issue has not been consistent, as early judicial skepticism toward these claims has gradually given way to more liberal interpretations of the scope of the government’s obligation. Nor has it been comprehensive: although the courts have seemingly settled some issues,<sup>48</sup> particularly threshold questions of jurisdiction, many issues have never been raised, have been raised but were never decided, or have been decided but only ambiguously.

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schools); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 835–38 (1992) (reporting the *Tsosie* decision).

<sup>44</sup> Clinton, *supra* note 43, at 8.

<sup>45</sup> See, e.g., *Means v. Navajo Nation*, 432 F.3d 924, 936 (9th Cir. 2005). However, until the Indian Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)), the United States had no criminal jurisdiction over Indians who committed crimes against other Indians on reservations. See *Ex parte Crow Dog*, 109 U.S. 556 (1883); see also Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 558–64 (2009) (providing an overview of complex criminal jurisdictional issues in Indian country); Recent Legislation, 127 HARV. L. REV. 1509 (2014) (updating this account in light of the Violence Against Women Reauthorization Act of 2013).

<sup>46</sup> For instance, some challengers have argued that the treaty language “upon proof made to their agent and notice by him” imposes a requirement on the government to provide notice to their tribes of their impending criminal prosecutions. See, e.g., *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005).

<sup>47</sup> See *United States v. Jacobs*, 638 F.3d 567, 568 (8th Cir. 2011); *Drapeau*, 414 F.3d at 878; see also *Wright v. United States*, No. 11-3032-RAL, 2012 WL 1678984, at \*5 (D.S.D. May 14, 2012) (“The ‘bad men’ clause does not exempt Native American Indians from being held responsible for violation of federal law.”).

<sup>48</sup> It is difficult to state definitively that any issues are “settled,” as the Supreme Court has never heard a “bad men among the whites” claim. This Note makes a judgment on which issues are uncontroversial — and therefore unlikely to be reopened — and which issues remain alive.

### A. Settled Issues

The issues settled by courts primarily implicate threshold considerations. To demand reimbursement from the United States in court,<sup>49</sup> an injured Indian plaintiff must find a forum with jurisdiction to hear her claim and must demonstrate that the United States has waived sovereign immunity. Indian claimants can clear the first hurdle using the Tucker Act, which allows the Court of Federal Claims to hear claims arising under “any express or implied contract with the United States.”<sup>50</sup> In *Hebah v. United States*,<sup>51</sup> the Court of Claims, the predecessor to the Federal Circuit,<sup>52</sup> held that it had jurisdiction to hear “bad men” claims, as Indian treaties could be characterized as contracts within the meaning of 28 U.S.C. § 1491.<sup>53</sup> This holding likewise allowed Indian claimants to clear the second hurdle, as the Tucker Act itself constitutes a waiver of sovereign immunity.<sup>54</sup>

As the most significant early case touching on the “bad men among the whites,” *Hebah* also resolved a host of additional threshold issues: (1) whether the “bad men” clauses created individual rights and thus permitted individual causes of action (they did);<sup>55</sup> (2) whether the

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<sup>49</sup> All of the “bad men” clauses require that proof of injury be “forwarded to the Commissioner of Indian Affairs at Washington city.” *E.g.*, Sioux Treaty, *supra* note 3, at 635; *see supra* pp. 2526–27. Thus, it is possible that this step could result in an administrative remedy, bypassing the need for litigation. For example, in *Begay v. United States*, 224 Ct. Cl. 712 (1980), the Court of Claims reviewed the determination of the Assistant Secretary of the Interior for Indian Affairs that the plaintiff’s “bad men among the whites” claim should be denied. *See id.* at 714. Presumably the Assistant Secretary could also have approved the plaintiff’s claim and awarded compensation through the administrative process.

<sup>50</sup> 28 U.S.C. § 1491(a)(1) (2012).

<sup>51</sup> 428 F.2d 1334 (Ct. Cl. 1970).

<sup>52</sup> Prior to 1982, suits against the United States were heard by the Court of Claims. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.), merged the appellate division of the Court of Claims with the Court of Customs and Patent Appeals to form the United States Court of Appeals for the Federal Circuit. “[T]he trial division of the Court of Claims became the United States Claims Court,” which later was renamed the Court of Federal Claims. UNITED STATES COURT OF FEDERAL CLAIMS 10, available at [http://www.usfc.uscourts.gov/sites/default/files/court\\_info/Court\\_History\\_Brochure.pdf](http://www.usfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf). The substantive holdings of the appellate division of the Court of Claims constitute a body of precedent for the Federal Circuit. *See Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984); *S. Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

<sup>53</sup> *Hebah*, 428 F.2d at 1339. The court noted that the treaty was potentially also an “Act of Congress” but did not pursue that line of reasoning. *Id.* (internal quotation marks omitted); *see also* 28 U.S.C. § 1491(a)(1).

<sup>54</sup> *See Richard v. United States*, 677 F.3d 1141, 1144 (Fed. Cir. 2012); *see also* *United States v. Mitchell*, 463 U.S. 206, 212–16 (1983) (discussing the history and purpose of the Tucker Act).

<sup>55</sup> *See Hebah*, 428 F.2d at 1337–38. Although federal courts closely scrutinize the validity of damages claims brought by Indian tribes alleging a breach of the United States’ trust relationship with them, *see, e.g.*, *United States v. Navajo Nation*, 537 U.S. 488 (2003), courts have consistently distinguished the “bad men” clauses as expressly providing individual tribe members with *personal* rights to compensation, *see, e.g.*, *Chippewa Cree Tribe of Rocky Boy’s Reservation v. United States*, 73 Fed. Cl. 154, 159–60 (2006).

Court of Claims had jurisdiction (it did);<sup>56</sup> and (3) whether an alleged “bad man,” though himself an Indian, could nonetheless be included in the phrase “or among other people subject to the authority of the United States” (he could).<sup>57</sup> These findings have not been seriously challenged since.

Courts have also determined what other procedural hurdles preclude recovery. The “bad men” suit in *Chambers v. United States*<sup>58</sup> was dismissed on an elections-of-remedies theory because the plaintiff, the widow of a murdered tribal police officer, had already opted to “receive compensation under the Federal Employees’ Compensation Act.”<sup>59</sup> Similarly, the claim in *Benally v. United States*<sup>60</sup> ran headlong into 28 U.S.C. § 1500, which stripped the Court of Claims of jurisdiction over any claims also pending in another court; in *Benally*, the plaintiffs had previously filed a claim in district court under the Federal Tort Claims Act.<sup>61</sup> Perhaps because these exclusions are reasonably consistent with procedural barriers to other claims against the federal government, they have not been seriously relitigated.

Yet perhaps the most natural and obvious argument against Indian claims arising under the “bad men among the whites” clauses — that these clauses’ long dormancy either caused or is indicative of their obsolescence — has found no traction in the courts. Indeed, the clauses’ continued viability appears to be settled. In *Tsosie v. United States*,<sup>62</sup> the Federal Circuit held that “[p]rolonged nonenforcement, without preemption, does not extinguish Indian rights.”<sup>63</sup> Absent a “showing [that the treaty right] has expired by its own express or implicit terms, or was abrogated by consent of the parties, or by Congress unilaterally,” the Federal Circuit could not “pronounce *finis*” to it.<sup>64</sup> The Federal Circuit reprised this full-throated defense in *Richard v. United States*, quoting *Tsosie* and expressing considerable concern over the government’s implied bad faith: “That the relative power of the parties to a treaty has changed over time is no ground for the treaty’s modification or dissolution, nor does the Government offer any authority or support for its troubling argument. Treaty rights are not so easily dissolved.”<sup>65</sup> Professor Charles Wilkinson, meditating on the judiciary’s

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<sup>56</sup> See *Hebah*, 428 F.2d at 1338–40; see also *Banks v. U.S. Prob. Dep’t for the W. Dist. of Pa.*, No. 2:13-cv-1199, 2013 WL 5303953, at \*4 (W.D. Pa. Sept. 19, 2013).

<sup>57</sup> See *Hebah*, 428 F.2d at 1340.

<sup>58</sup> 202 Ct. Cl. 1124 (1973).

<sup>59</sup> *Id.* at 1124.

<sup>60</sup> 14 Cl. Ct. 8 (1987).

<sup>61</sup> *Id.* at 10–11.

<sup>62</sup> 825 F.2d 393 (Fed. Cir. 1987).

<sup>63</sup> *Id.* at 399.

<sup>64</sup> *Id.* at 401.

<sup>65</sup> *Richard v. United States*, 677 F.3d 1141, 1151 n.18 (Fed. Cir. 2012).

reluctance to wholly do away with Indian treaty rights, writes that “most judges cannot shake” the sense that these rights “emanate a kind of morality profoundly rare in our jurisprudence.”<sup>66</sup>

This sense of moral duty may have informed the substantive holding in *Richard*, a significant redefinition of “bad men” that for the first time expanded the term beyond governmental actors. In *Richard*, a “bad man” killed two members of the Oglala Sioux Tribe while driving drunk through the Pine Ridge Indian Reservation.<sup>67</sup> The government argued that because the driver was neither an employee nor an agent of the United States, he was not one of the “bad men among the whites, or among other people subject to the authority of the United States.”<sup>68</sup> The Federal Circuit rejected this interpretation, finding instead that “historical evidence . . . generally show[s] that any ‘white’ can be a ‘bad man.’”<sup>69</sup> Moreover, the treaty right extends beyond bad white men to bad men “among other people subject to the authority of the United States.”<sup>70</sup> Before *Richard*, every “bad men” claim arose from wrongs committed by governmental actors;<sup>71</sup> after *Richard*, almost anyone might qualify as a bad actor who subjects the United States to liability for his wrongs.

### B. A World of Uncertainty

Despite these advances in the doctrine, the world of “bad men” remains largely unmapped. On many issues, the courts have never ventured; on others, they have struck out only to retreat, leaving the ground muddied. The question of administrative remedies received the latter treatment. *Hebah* concluded that an exhaustion requirement existed; the plaintiff had satisfied it by sending her claim to the superintendent of the Wind River Indian Agency and the Commissioner of Indian Affairs in Washington.<sup>72</sup> However, the question of what acts satisfied the exhaustion requirement recurred in a series of cases over the next several decades. In *Begay v. United States*<sup>73</sup> (*Begay I*), the

<sup>66</sup> CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 121 (1987).

<sup>67</sup> See *Richard*, 677 F.3d at 1143.

<sup>68</sup> See *id.* at 1145–46.

<sup>69</sup> *Id.* at 1149. Indeed, the Doolittle Report, “*Condition of the Indian Tribes*, . . . supports the position that ‘bad men’ were both those associated with the government and those wholly unassociated.” *Id.* at 1148.

<sup>70</sup> See *id.* at 1152 n.21 (internal quotation mark omitted); accord *Hebah v. United States*, 428 F.2d 1334, 1340 (Ct. Cl. 1970) (“In addition to whites, the treaty provision covers ‘bad men . . . among other people subject to the authority of the United States[,]’ . . . regardless of their race or color.” (first omission in original) (citation omitted)).

<sup>71</sup> *Richard*, 677 F.3d at 1155 (Lourie, J., dissenting) (noting that the “bad men” in previous cases were a federal Public Health Service Hospital employee, teachers employed at a Bureau of Indian Affairs school, an Indian Police Force officer, and a staff sergeant in the U.S. Army).

<sup>72</sup> See *Hebah*, 428 F.2d at 1340.

<sup>73</sup> 219 Ct. Cl. 599 (1979).

Court of Claims departed from its holding in *Hebah*. Though the *Begay I* plaintiffs had likewise provided notice of their claims to the “Director for the Navajo Reservation . . . [and] the Assistant Secretary of Interior” before filing suit,<sup>74</sup> notice was no longer enough. Focusing on “the specific references in Article I [of the treaty] to administrative consideration”<sup>75</sup> — in other words, the treaty requirement that “no such damage shall be adjusted and paid until examined and passed upon by the Commissioner”<sup>76</sup> — the court determined that litigation could not proceed until the Assistant Secretary (the Commissioner’s modern equivalent) had ruled.<sup>77</sup>

The court did not reconcile the clear contradiction between this holding and *Hebah*,<sup>78</sup> but pursuant to this new understanding of the Navajo treaty, it suspended proceedings and set a firm ninety-day window in which the government was to conduct a hearing on the plaintiffs’ treaty claims.<sup>79</sup> After the Department of Interior duly reviewed the evidence and denied the plaintiffs’ claims for lack of proof, the Court of Claims in *Begay v. United States*<sup>80</sup> (*Begay II*) granted the government’s motion for summary judgment filed in light of that administrative decision.<sup>81</sup> *Begay II* appeared to condition court review of a “bad men” claim upon the claimant’s due diligence at the administrative hearing level, holding that plaintiff counsel’s poor performance at the hearing amounted to a failure to exhaust administrative remedies<sup>82</sup> — an approach with very little basis in the text of the treaty.

Though *Begay II*’s harsh exhaustion rule has never been explicitly repudiated, it is unlikely to be considered good law today. In *Tsosie*, the Federal Circuit expressed skepticism of *Begay II*’s standard for reviewing the administrative decision; however, in resolving the case on other grounds, the court refused to make any definitive pronouncement regarding the appropriate procedure.<sup>83</sup> The ambiguous note left by *Tsosie* is the last word on the issue by a federal appellate court.<sup>84</sup>

<sup>74</sup> *Id.* at 600–01.

<sup>75</sup> *Id.* at 602.

<sup>76</sup> Navajo Treaty, *supra* note 37, at 667.

<sup>77</sup> See *Begay I*, 219 Ct. Cl. at 601–02.

<sup>78</sup> See *Hebah v. United States*, 428 F.2d 1334, 1340 (Ct. Cl. 1970) (holding that notice was “the only prerequisite to suit required by the treaty”).

<sup>79</sup> *Begay I*, 219 Ct. Cl. at 602.

<sup>80</sup> 224 Ct. Cl. 712 (1980).

<sup>81</sup> See *id.* at 714, 716.

<sup>82</sup> See *id.* at 715–16.

<sup>83</sup> *Tsosie v. United States*, 825 F.2d 393, 402 (Fed. Cir. 1987).

<sup>84</sup> In *Zephier v. United States*, No. 03-768L (Fed. Cl. Oct. 29, 2004), the plaintiffs alleged that they had been abused at boarding schools overseen by the United States, but because they failed to provide *any* proof to the Indian agent or the Commissioner of Indian Affairs, the Court of Federal Claims granted the government’s motion to dismiss. See *id.*, slip op. at 2, 6, 9, 19.

Few judicial opinions have even reached the intriguing interpretive issues arising from the substantive liability provisions of the “bad men among the whites” clauses. This dearth of case law can be attributed to a number of factors, including the relative obscurity of the clauses, the fact that many cases have been dismissed on procedural grounds, and the likelihood that any cases surviving threshold motions to dismiss would settle.<sup>85</sup>

The only “bad men among the whites” suit to reach final judgment after a full trial on the merits is *Elk v. United States*.<sup>86</sup> *Elk*, which provides the only published judicial opinion interpreting the words “reimburse” and “loss sustained” from the treaty clause, held that the plaintiff could recover compensation for out-of-pocket medical expenses, lost income, pain, suffering, and mental anguish.<sup>87</sup> The Court of Federal Claims, noting that “Indian treaties are ‘not static,’”<sup>88</sup> found that “reimburse” in the “bad men” clauses meant “to make whole,” in both the pecuniary and nonpecuniary senses.<sup>89</sup> However, the court was notably silent on Elk’s request for attorney’s fees.

There is little law beyond the frontier of *Elk* and *Richard*. No case has definitively established the meaning of “wrong”; in *Elk*, the wrong was stipulated,<sup>90</sup> and in *Richard*, the issue was not properly presented.<sup>91</sup> It is clear that an unjustified, intentional homicide would qualify.<sup>92</sup> The Court of Federal Claims is skeptical of claims alleging negligence or breach of contract,<sup>93</sup> while the Federal Circuit has, in dictum,

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<sup>85</sup> On this last point, it is likely that the United States settled with the *Richard* plaintiffs after its loss in the Federal Circuit. See *Richard v. United States*, No. 10-503 C (Fed. Cl. Feb. 5, 2013) (dismissing the action “at the plaintiff’s request”).

<sup>86</sup> 87 Fed. Cl. 70 (2009).

<sup>87</sup> See *id.* at 78–80, 82–83, 91, 95–97.

<sup>88</sup> *Id.* at 81 (quoting *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987)).

<sup>89</sup> See *id.* at 79–83.

<sup>90</sup> *Id.* at 74 n.7.

<sup>91</sup> *Richard v. United States*, 677 F.3d 1141, 1144 n.7 (Fed. Cir. 2012); see also *id.* at 1153 n.22 (declining to opine on the issue and stating that “arguments as to the contours of ‘wrongs’ are to be considered in the first instance by the Claims Court”).

<sup>92</sup> See *Hebah v. United States*, 456 F.2d 696, 704 (Ct. Cl. 1972) (per curiam) (“To an Indian, and undoubtedly to all men, the killing of an Indian without just cause or reason would certainly be a wrong . . .”).

<sup>93</sup> In *Garreaux v. United States*, 77 Fed. Cl. 726 (2007), the Court of Federal Claims held that the “bad men among the whites” clause could not be stretched to encompass a claim for negligence. See *id.* at 737. The decision in *Hernandez v. United States*, 93 Fed. Cl. 193 (2010), reaffirmed the Court of Federal Claims’ earlier conviction that the clause applied only to “affirmative criminal acts” involving “moral turpitude” that “would have threatened the peace that the Fort Laramie Treaty was intended to protect.” *Id.* at 199 & n.5. However, there is reason to be skeptical of both cases as both plaintiffs claimed types of injuries to which courts are traditionally unsympathetic. Yvonne Garreaux made a number of somewhat unspecific allegations against a local housing authority for failure to properly maintain her apartment, see *Garreaux*, 77 Fed. Cl. at

expressed an inclination toward limiting suits to those alleging violations of federal criminal law.<sup>94</sup> Yet there are plausible arguments for finding that certain negligent actions do qualify as wrongs under one or more of the “bad men among the whites” clauses;<sup>95</sup> these arguments may await a suitable vehicle. Furthermore, all of the cases litigated so far have involved “wrong[s] upon the person” of an Indian plaintiff, but the treaties also contemplate wrongs upon property.<sup>96</sup> What types of property crimes qualify as wrongs is entirely unexplored.

The “bad men among the whites” clauses simultaneously represent thrilling potential and profound uncertainty. Case law on these clauses is scarce, and of what little there is, much may be of questionable precedential value. The Court of Federal Claims explores these issues most often, but as a trial court, its determinations are nonbinding<sup>97</sup> — thus, though *Elk* remains the only case to proceed to a trial on the merits, it is merely persuasive authority. Older appellate Court of Claims decisions are technically precedential, but *Tsosie* and *Richard* indicate that the Federal Circuit takes a different view of these clauses.<sup>98</sup> This dearth of precedent presents intriguing opportunities for future “bad men” litigation: new law can and likely will be made.<sup>99</sup>

### III. THE FUTURE OF BAD MEN

#### A. *The Courts’ Interpretive Approach*

Every court to consider the “bad men” provisions invokes traditional principles of Indian treaty interpretation, starting with the oft-used canon that Indian treaties “are to be construed, so far as possible, in the sense in which the Indians understood them.”<sup>100</sup> Courts do rec-

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735; Michael Hernandez was a state prisoner alleging misconduct by employees of the Nebraska criminal justice system during his criminal trial, *Hernandez*, 93 Fed. Cl. at 196.

<sup>94</sup> See *Richard*, 677 F.3d at 1153 n.22 (“[B]ecause the Treaty determines offenders are to ‘be arrested and punished according to the laws of the United States,’ ‘wrongs’ seem to be limited to the criminal jurisdiction of the United States.”).

<sup>95</sup> See *infra* pp. 2539–40.

<sup>96</sup> E.g., *Sioux Treaty*, *supra* note 3, at 635.

<sup>97</sup> John G. Bean, *Rules Clarifying Precedent for the Court of Federal Claims*, 15 FED. CIR. B.J. 705, 706 (2006) (“Decisions of the . . . Court of Federal Claims are not binding precedent.”).

<sup>98</sup> See *supra* pp. 2530–33; *supra* note 71.

<sup>99</sup> Not all such law need be made by courts. It appears that despite the treaties’ invitations to the President to promulgate rules and regulations for ascertaining damages, the executive branch has so far stayed silent. The character of this responsibility is vague (whether the executive may set substantive caps or merely procedural guidelines is unclear and untested), as are its bounds (whether the Department of Interior may establish guidelines beyond the “ascertaining damages” scope named in the text has not been considered by any court).

<sup>100</sup> *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); see, e.g., *Richard v. United States*, 677 F.3d 1141, 1149 n.14 (Fed. Cir. 2012) (applying this canon).

ognize that Indian treaties are not exactly like private contracts<sup>101</sup> and express willingness to “look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties” to determine their meaning.<sup>102</sup> Moreover, to the extent that a treaty term is unclear, additional canons of construction instruct courts to “resolve all ambiguities in the Indians’ favor” and generally to construe Indian treaties “liberally.”<sup>103</sup> In this sense, courts appear to mimic the equitable principle of contract interpretation that construes ambiguous terms against the interests of the drafter; this rule is particularly relevant when the contract is standardized or the parties are of unequal bargaining power.<sup>104</sup> As both of these conditions are met with respect to the nine treaties concluded by the Great Peace Commission, it would appear that these Indian canons of construction work neatly to inform judicial interpretation of the “bad men” provisions.

Yet when it comes to these clauses, usual tricks of treaty interpretation prove inadequate. These clauses were not discussed during the treaty negotiations, and their long dormancy precludes reliance on historical practice. Their text is certainly ambiguous — “bad men” and “wrong” each suggest a universe of possibilities — but a vague directive to construe these terms “liberally” or in the Indians’ “favor” leaves courts with little structure and no limiting principle. As a result, opinions often begin with a formulaic recitation of the canons before proceeding to an analysis that applies them in accordance with the court’s preferred policy outcome — which frequently means that the canons are applied not at all.<sup>105</sup> What is needed is a more nuanced approach inspired by the Indian canons of construction but also extending beyond them.

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<sup>101</sup> See *Choctaw*, 318 U.S. at 431.

<sup>102</sup> *Id.* at 432.

<sup>103</sup> Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1104 (2013) (citing COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 43, § 2.02(1), at 119–20). Courts also apply a canon of construction that “preserve[s] tribal property rights and sovereignty unless a contrary intent is clearly stated” by Congress. *Id.*

<sup>104</sup> See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 401 (1993) (noting that Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), “appeared to view the Indian treaty as a contract of adhesion”). *But see id.* at 406–07 (questioning this theory).

<sup>105</sup> For example, in *Hernandez*, the court decided that a negligent act could never be a “wrong” under the “bad men among the whites” clause by citing a case that interpreted a “bad men among the Indians” clause to exclude wrongs committed by Indians against members of their own tribes. See *Hernandez v. United States*, 93 Fed. Cl. 193, 199 (2010) (citing *Ex Parte Crow Dog*, 109 U.S. 556, 567 (1883)). The issue in *Crow Dog* was whether federal courts had *criminal* jurisdiction over these intratribal crimes, *see* 109 U.S. at 567–68, and perhaps the *Hernandez* court assumed that *Crow Dog*’s discussion of criminal extradition impliedly excluded negligence from the treaty’s scope. See *Hernandez*, 93 Fed. Cl. at 199.

*B. A Broader View of the “Bad Men” Provisions*

To interpret treaties concluded almost a century and a half ago is no trivial task; to make sense of nine separate treaties concluded at different times with different tribes is still more daunting. After all, “Indian treaties, when all is said and done, were a political anomaly.”<sup>106</sup> Father Francis Paul Prucha’s pithy summary maps easily onto the legal. The United States and the Indian tribes enjoy a relationship like nothing else in the American legal structure; correspondingly idiosyncratic is the interpretation of the treaties that bind them. If “the solemn pledge of the United States to its wards is not to be construed like a money-lender’s mortgage,”<sup>107</sup> then a different interpretive approach is needed.

First and foremost, it would be helpful to view these nine treaties as agreements that ought to be understood, and not as collections of sentences to be construed. Courts are consistent in their devotion to text,<sup>108</sup> but these treaties were not negotiated word by word, and moreover, *neither* side was interested in perfecting language to match intent. These tribes had different understandings of the treaty-making councils than did the white peace commissioners, and this difference should cause courts to hesitate to strictly apply the traditional rules of contract interpretation. Professor Raymond DeMallie illustrates exactly how divergent these understandings were:

For plains Indians, the council was an end in itself. What was important was the coming together in peace, smoking the pipe in common to pledge the truthfulness of all statements made, and the exchange of opinions. . . . Thus, from the Indians’ point of view, the council *was* the agreement.

For white Americans, the council with its associated feasts and gift giving was only a preliminary to the real agreement, which was embodied in written form.<sup>109</sup>

Thus, Anglo-American concepts of contract law should not in fairness be applied to the interpretation of Indian treaties. The parole evidence rule, the finality of fully integrated agreements, the tyranny of objective reasonableness in interpretation — these constructs were alien to the tribes. Even the sacred signature — the pledging of one’s word to the agreement — was not understood as such:

<sup>106</sup> PRUCHA, *supra* note 13, at 1.

<sup>107</sup> Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 137 (1960) (Black, J., dissenting).

<sup>108</sup> For instance, the Federal Circuit began its analysis in *Richard* with a complicated and hypertechnical textual analysis that included a discussion of comma placement. See *Richard v. United States*, 677 F.3d 1141, 1145–48 & 1145 n.8 (Fed. Cir. 2012).

<sup>109</sup> Raymond J. DeMallie, *Touching the Pen: Plains Indian Treaty Councils in Ethnohistorical Perspective*, in *ETHNICITY ON THE GREAT PLAINS* 38, 39–40 (Frederick C. Luebke ed., 1980).

“Touching the pen,” the action of the Indian in touching the end of the pen while the scribe marked an X after his name, was frequently objected to by Indian leaders. They . . . felt it unnecessary. . . . For individual Indian leaders, touching the pen apparently signified that they were validating all they had said at a council; in many cases the record of the treaty proceedings makes it clear that the Indian leaders did not realize their signatures committed them to *only* those statements written in the treaty.<sup>110</sup>

What is just as (and perhaps more) important than the written terms of the treaties are the speeches of the tribal chiefs present at the councils.<sup>111</sup> Indeed, the four corners of the document not only fail to reflect the whole perspective of most of the parties, but also may *contradict* what the Indian parties understood to be the agreement.<sup>112</sup>

This concern is especially relevant when considering the formulaic treaties of the Great Peace Commission. The treaty with the Sioux and Arapaho, for example, was first signed by the Brulé Sioux band in April 1868 but not ultimately concluded until the prominent warrior chief Red Cloud’s reluctant agreement on November 6.<sup>113</sup> Yet Red Cloud made his mark upon a dead document, already mummified for months: “The government wished to have Red Cloud’s mark upon the *already prepared treaty*, and consequently they were not willing to negotiate.”<sup>114</sup> Red Cloud was the chief upon whom the entire treaty turned, and yet the commissioners made no written amendments despite two days of council with him.<sup>115</sup> Similarly, the recalcitrant Sitting Bull had sent a delegation of lesser chiefs to Fort Rice in July 1868.<sup>116</sup> At Fort Rice, over twenty chiefs made speeches denouncing the encroachment of the white men and their forts onto Sioux lands, but as the treaty was already written and previously signed by the other bands in April, these speeches had no effect on the written terms.<sup>117</sup>

<sup>110</sup> *Id.* at 40.

<sup>111</sup> See PROCEEDINGS, *supra* note 30, at 6 (“Since most of the chiefs relied upon the oral promises of the Peace Commissioners, the recorded minutes of the treaties should be used when any effort is made to interpret the 1867–1868 treaties.”). However, the speeches only reflect what the speakers themselves desired and do not necessarily reflect an ongoing dialogue toward consensus. See DeMallie, *supra* note 109, at 46 (“Many [of the Indians’] questions went unanswered, and many objections were simply ignored.”).

<sup>112</sup> DeMallie, *supra* note 109, at 40 (“Sometimes . . . treaty commissioners played on [the Indians’] different understanding of the ‘touching the pen’ ceremony] to trick Indians into signing documents containing provisions to which they had not agreed.”).

<sup>113</sup> See *supra* note 30 (recounting the many months that elapsed between the first signing date and the date of Red Cloud’s signature).

<sup>114</sup> Oman, *supra* note 16, at 46 (emphasis added).

<sup>115</sup> See *id.* at 44, 46.

<sup>116</sup> See ROBERT M. UTLEY, THE LANCE AND THE SHIELD 81 (1993).

<sup>117</sup> See *id.* at 81–82. The actions at Fort Rice of Sitting Bull’s chief subordinate, The Man that Goes in the Middle, nicely illustrate the futility of relying on written terms for divining the tribes’ understandings of the treaties they signed:

The commissioners essentially cycled Sioux chiefs in and out of Fort Laramie and Fort Rice throughout 1868, seeking only the formality of the chiefs' marks and forgoing true agreement in the spirit that the Indians understood it. If accuracy is a desired goal in treaty interpretation, reliance on text would defeat it.

Once treaty is unmoored from text, the question that remains is how to determine what the "bad men" clauses *do* mean. And that meaning is not homogeneous. It should be remembered that each of the tribes that signed the nine treaties of the Great Peace Commission was a separate nation and thus, a unique party. Scholars have warned against treating every tribe identically in other areas of federal Indian law,<sup>118</sup> and their insights apply with equal force to treaty interpretation. Current "[f]ederal Indian law, as decided by the Court and described by scholars, forces all tribes into the singular pan-Indian superstructure, resisting a more complex version of federal Indian law that would recognize the unique situation of each tribe."<sup>119</sup> But there is no reason why the Navajo, whose primary reason for agreeing to the 1868 treaty was a desperate desire to escape the appalling conditions of the Bosque Redondo reservation and return to their traditional homeland,<sup>120</sup> should be treated identically with the Oglala Sioux, who in 1868 were freshly victorious in the Powder River War and in the position to demand full U.S. retreat from the three forts it had constructed along the Bozeman Trail.<sup>121</sup> "[A]malgamation does a disservice to tribal individuality and glosses over the different tribal needs and the particular relationship and history that each tribe has with the federal government as well as with the neighboring non-Indian population."<sup>122</sup> The treaties and in particular the "bad men" clauses may have been similar, but the different tribes faced different bad men engaged in (potentially) different wrongs. Thus, "a decision related to

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Having set his own conditions for a treaty, [The Man that Goes in the Middle] sat patiently while twenty other chiefs made their speeches. Then, with the treaty laid on the table, he marched to the front and touched the pen [to a treaty that] . . . addressed no fundamental grievances of [the Hunkpapa, Sitting Bull's band].

*Id.* at 82.

<sup>118</sup> See Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89 (2005) (tribal court jurisdiction); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (plenary power doctrine); cf. Ezra Rosser, *Essay, This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 256–57 (2005) (arguing that because tribes' social customs differ, this diversity must inform analyses of reservation development).

<sup>119</sup> Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141, 142 (2006).

<sup>120</sup> See John L. Kessell, *General Sherman and the Navajo Treaty of 1868: A Basic and Expedient Misunderstanding*, 12 W. HIST. Q. 251, 258–60 (1981).

<sup>121</sup> See Oman, *supra* note 16, at 45–46.

<sup>122</sup> Rosser, *supra* note 119, at 142.

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the relationship of a tribe with the federal government or with non-Indians need not be the final word for all other tribes.”<sup>123</sup>

Liberated from text and the fiction of pan-Indian homogeneity, the work of interpreting these treaties naturally rests on nuanced historical inquiry. They are products of a particular and significant moment in American history. As these nine treaties were made to appease hostile tribes that the United States was reluctant (and unable, without gross expenditure) to subjugate by force, the Indians’ own interpretation of what wrongs would break this fragile peace, and thus require remedial measures, seems particularly pertinent.

For instance, one of the complaints that the Indian tribes made during this period was that white traders entered their reservations and cheated them through dishonest practices. If the wrongs contemplated by the treaties include these types of nonphysical injuries to the property of the Indians, then this conclusion could have significant implications in the present day, as plaintiffs could recover for losses sustained in some analogous set of fraudulent or unethical business transactions. When defining what that analogous set contains, it is important to remember that as each tribe’s experience with the Great Peace Commission was different, different historical contexts will inform different treaties. At the same time, this factfinding inquiry should take into account the general sweep of history in the American West, as records of individual interactions between traders and tribe members may be thin.

As another example, consider again the issue of negligence as a “wrong” covered by the “bad men” provisions. The cycle of violence in the West between Indians and whites was precipitated by white encroachment on the Indians’ lands and hunting grounds. The purpose of the Great Peace Commission treaties was to separate these populations. Violence and retaliation occurred *because of* trespass; indeed, trespass on the Indian lands was itself an act that could result in arrest and removal by the U.S. military.<sup>124</sup> If an injury to an Indian’s person or property were caused by a white man who had no business being on tribal land in the first place, it is conceivable that the “bad men among the whites” clause would reimburse for that consequence of illegal encroachment, even if such consequence was an injury resulting from negligent conduct. Fleshing out this argument would involve a histor-

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<sup>123</sup> *Id.* at 147.

<sup>124</sup> See An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 161, § 10, 4 Stat. 729, 730 (1834); see also, e.g., A.P. JACKSON & E.C. COLE, OKLAHOMA! (1885), reprinted in 13 CHRONICLES OF OKLA. 437, 443–45 (1935) (describing the adventures of Captain David L. Payne, who was arrested by the U.S. Army for “trespassing upon Indian lands,” *id.* at 445).

ical inquiry into, inter alia, what a certain tribe<sup>125</sup> might have considered to be improper trespass, including whether they ever complained about injuries resulting from trespass, and just how “wrong” the tribe considered negligent acts to be.<sup>126</sup> And unlike in the current doctrine, where an interpretation of a term in one treaty more often than not establishes that meaning in all treaties,<sup>127</sup> a court that found sufficient credible evidence to support a negligence-included interpretation of one treaty’s “bad men among the whites” clause would not establish a precedent for the rest.

This nuanced interpretive approach would result in a more fragmented doctrine, as each tribe is considered separately, yet this approach is also a more holistic one, elevating context and historical truth over hidebound principles of contract interpretation. This broad view would perhaps add to the existing internal contradictions within federal Indian law<sup>128</sup> and contribute to the American legal system’s already deep discomfort with its doctrinal incoherence.<sup>129</sup> Yet when considering the nine treaties of the Great Peace Commission and their entirely novel “bad men among the whites” clauses, following Professor Philip Frickey in accepting “the courage of our confusions”<sup>130</sup> may be the only way to give these clauses their due. As the products of an extraordinary time in this nation’s history, these “bad men” provisions are perhaps impenetrable to traditional legal reasoning — faithfulness to the spirit of the original agreements may better serve legal and nonlegal values alike.<sup>131</sup>

#### D. Possible Criticisms of the Proposed Approach

To undergo the type of historically driven, culturally relative, and individualized analysis proposed in this Note is to volunteer courts for

<sup>125</sup> Such an individualized investigation would not be merely pro forma. The real concerns of the Navajo, isolated and facing significant internal hardships on the Bosque Redondo reservation, see GERALD THOMPSON, *THE ARMY AND THE NAVAJO* 123–57 (1976), were distinct from those of the Oglala Sioux, see *supra* p. 2524, which were still different from those of the Hunkpapa, see *supra* note 117 and sources cited therein.

<sup>126</sup> Scholars have documented some tribes’ legal traditions. See, e.g., RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009) (account of Navajo law from insider perspective); K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941) (account of Cheyenne law from outsider perspective).

<sup>127</sup> For example, the Federal Circuit in *Richard* found *Tsosie* to be binding precedent, see *Richard v. United States*, 677 F.3d 1141, 1150 (Fed. Cir. 2012), though *Richard* involved the treaty with the Sioux and *Tsosie* the treaty with the Navajo.

<sup>128</sup> See, e.g., Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 439–40 (1998).

<sup>129</sup> See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434–35 (2005).

<sup>130</sup> *Id.* at 488.

<sup>131</sup> Cf. CALLOWAY, *supra* note 10, at 243 (advocating for treaties’ role not merely as legal documents, but as “instruments of restorative justice and healing”).

a duty that is neither familiar nor easy. Plaintiffs who successfully pursue “bad men” claims based on liberal constructions of those clauses may also draw considerable negative attention to rights that rest on precarious legal ground.<sup>132</sup> Yet these concerns, while certainly reasonable, are not dispositive.

First, an interpretive approach that ranges beyond a treaty’s text would force courts out of their comfort zone. But such an approach would not be unprecedented. Courts have acknowledged that Indian treaties are distinct from all other agreements, and scholars have argued for an approach that views treaties less as contracts and more as constitutions.<sup>133</sup> “Deviati[ng] from textual plain meaning to promote the spirit of the underlying constitutive documents” is work that the courts have done before.<sup>134</sup> Doing so with regard to these nine treaties would serve the interests of accuracy and fairness without generating significantly more arbitrariness than the doctrine currently contains. If these provisions appeared in a contract, courts would be similarly hard pressed to interpret untraditional, uncommon, and assuredly nonlegal terms like “bad men.”<sup>135</sup> Indeed, the confusingly reasoned back-and-forth on the requirement that administrative remedies be exhausted may well be the result of the general lack of structure in the text of these provisions. It is perhaps more productive, then, to interpret these treaties in service of other values.

Second, the proposed interpretive approach requires a significant amount of factfinding, perhaps too much for a busy court. Yet courts have been known to conduct lengthy hearings with expert witness testimony on tribal issues: in *United States v. Consolidated Wounded Knee Cases*,<sup>136</sup> a district court conducted an eleven-day hearing involving “an impressive array of traditional Indians, historians, and anthropologists” on the issue of how the Sioux bands of 1868 understood the concept of sovereignty.<sup>137</sup> Moreover, in the case of “bad men against the whites” claims, the only trial court involved would be the Court of Federal Claims. Concentrating expertise in this one court, with review possible only through the Federal Circuit and Supreme Court, means less administrative hassle and less doctrinal inconsisten-

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<sup>132</sup> See *supra* note 11.

<sup>133</sup> See Frickey, *supra* note 104, at 410–11.

<sup>134</sup> *Id.* at 411.

<sup>135</sup> One particularly poignant colloquial interpretation of “bad men” comes from Chief Little Raven of the Arapaho. After a white man explained to him that all good men go to heaven and all bad men to hell, the chief “laughed heartily” and remarked, “[I]t’s a good notion — heap good — for if all the whites are like the ones I know, when Indian gets to heaven but few whites will trouble him there — pretty much all go to t’other place.” 1868 COMMISSIONER INDIAN AFF. ANN. REP. 19.

<sup>136</sup> 389 F. Supp. 235 (D. Neb. & D.S.D. 1975).

<sup>137</sup> See *id.* at 236.

cy. Finally, the treaties explicitly contemplate the promulgation of regulations by the executive branch to manage “bad men” claims<sup>138</sup> — perhaps an administrative process could be implemented for routine claims, with the Court of Federal Claims available for novel issues of law.

Finally, there is an element of political risk for Indian plaintiffs in drawing negative attention to the “bad men” provisions through litigation victories. A series of judgments against the United States, in cases where the United States has committed no wrong itself, could prompt Congress to abrogate these provisions.<sup>139</sup> Yet it is not clear that the interpretive approach suggested in this Note is necessarily capacious — depending on the historical analysis, a treaty could be interpreted quite narrowly. Furthermore, as very few plaintiffs are currently bringing claims arising from these “bad men” provisions, the risk of losing the cause of action is less threatening, for it was never really developed in the first place.

#### IV. CONCLUSION

Lavetta Elk demonstrated that the “bad men among the whites” clauses can be used by creative plaintiffs to recover damages for losses for which they may otherwise never be compensated. Her example — and her courage — is a bright beacon for members of those tribes that signed the nine Great Peace Commission treaties of 1867 and 1868. Given the difficulties with law enforcement and high rates of crime on today’s Indian reservations, a robust “bad men” cause of action could provide many with much-needed monetary relief from the deepest of deep pockets, the United States government. The potential of the “bad men” provisions waits only for an enterprising plaintiff to unlock it.

<sup>138</sup> See *supra* note 99.

<sup>139</sup> See *supra* note 11. However, creatively framing such an abrogation as destroying the Indian tribe members’ entire cause of action for damages — and thus characterizing it as a taking of a valuable property right — could prompt interesting arguments for compensation under the Fifth Amendment Takings Clause. Cf. JOSEPH WILLIAM SINGER, PROPERTY 102–03, 713–14 (3d ed. 2010) (discussing *Bormann v. Board of Supervisors in and for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), where a state law depriving property owners of their right to be free from nuisances committed on neighboring property — or framed differently, their cause of action for nuisance — was found to be a “*per se* taking of property without just compensation,” *id.* at 103). See generally Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373 (2009) (arguing that legal claims *should* be considered property under the Takings Clause).