



Fall 2013

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### Recommended Citation

James D. Leach, *Bad Men among the Whites Claims after Richard v. United States*, 43 N.M. L. Rev. 533 (2013).  
Available at: <http://digitalrepository.unm.edu/nmlr/vol43/iss2/7>

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# **“BAD MEN AMONG THE WHITES” CLAIMS AFTER RICHARD V. UNITED STATES**

James D. Leach\*

*Two Navajos walk on the side of the road on the Navajo Reservation. A non-Indian drunk driver runs them down, killing them. Can the families of the decedents recover damages from the federal government?*

## I. INTRODUCTION

Almost every lawyer would unequivocally answer this question “no.” After *Richard v. United States*,<sup>1</sup> however, the correct answer is “yes.” *Richard* involved the deaths of two Sioux pedestrians on the Pine Ridge Reservation, located in the southwestern corner of South Dakota. The plaintiffs in *Richard* invoked the “bad men among the whites” (hereinafter “Bad Men”) provision of the 1868 Treaty with the Sioux to recover damages from the federal government.<sup>2</sup> Except for where the deaths occurred, the facts of *Richard* are identical to those in the hypothetical above.

Before *Richard*, Bad Men claims had been brought only where the wrongdoers were federal officers, agents, or employees. *Richard* held that a Bad Men claim is not so limited.<sup>3</sup> Accordingly, an Indian victim who suffers criminal wrongdoing by a non-Indian on his or her reservation has a right to recover damages from the federal government, even where the wrongdoer is not a federal officer, agent, or employee.<sup>4</sup> Further, a Bad Men claim may only be brought in the Federal Circuit, so no circuit split on this issue can ever develop. The claimant, however, must be a member of a tribe that is party to a Bad Men treaty.<sup>5</sup>

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1. *Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012).

2. Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868, 15 Stat. 635. The 1868 Treaty with the Navajo includes a “bad men among the whites” provision that is identical to the “bad men among the whites” provision of the 1868 Treaty with the Sioux. Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

3. *Richard*, 677 F.3d at 1153.

4. *Id.*

5. The United States has nine treaties with “bad men among the whites” provisions. The tribes include the Navajo, Kiowa, Comanche, Cheyenne, Arapahoe, Ute, Crow, Northern Cheyenne, Northern Arapahoe, Eastern Band of Shoshone, and

This article contends that *Richard* provides Indians with exactly what they bargained for and received when their tribes negotiated and signed treaties with the United States. The government is unlikely to return the parties to their pre-agreement status by returning to Indians the lands they gave up in treaties. The right of Indians to receive what the government promised them in exchange for large amounts of tribal land would seem to be beyond moral or legal dispute. But as we will see, even these seemingly self-evident principles are now disputed.

Section II of this article traces the origin of the Bad Men treaty provisions. Section III outlines three early Bad Men cases. Section IV explains *Richard*. Section V describes the administrative remedies that must be exhausted before bringing a Bad Men claim, and Section VI addresses issues that arise in litigating one. Section VII deals with future challenges to Bad Men claims.

## II. ORIGIN OF THE BAD MEN PROVISION

After the Sioux defeated Lieutenant Colonel William Fetterman in 1866 in a conflict called the Battle of the Hundred Slain by the Sioux and called the Fetterman Massacre by the soldiers and settlers, Congress authorized an Indian Peace Commission in 1867.<sup>6</sup> Its principal purpose was to end the Indian wars. The commission was charged with removing "all just cause of complaint" by the Indians and establishing "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."<sup>7</sup>

The commission presented its report to President Andrew Johnson on January 7, 1868. The report used the same Bad Men language found in the 1867 and 1868 Indian treaties. It declared, "Many *bad men are found among the whites*; they commit outrages despite all social restraints; they

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Bannock. The Apache entered a treaty that provides them with all benefits arising from the treaty with the Kiowa and Comanche. Treaty with the Eastern Band of Shoshoni and Bannock art. I, July 3, 1868, 15 Stat. 673; Treaty with the Northern Cheyenne and Northern Arapaho art. I, May 10, 1868, 15 Stat. 655; Treaty with the Crows, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649; Treaty with the Ute, U.S.-Ute, art. VI, Mar. 2, 1868, 15 Stat. 619; Treaty with the Cheyenne and Arapaho art. I, Oct. 28, 1867, 15 Stat. 593; Treaty with the Kiowa and Comanche art. I, Oct. 21, 1867, 15 Stat. 581; Treaty with the Kiowa, Comanche, and Apache, Oct. 21, 1867, 15 Stat. 589.

6. See 15 Stat. 17 § 1 (1867); EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE 38-39, 44-45 (Harper Collins 1991).

7. 15 Stat. 17 § 1 (1867).

frequently, too, escape punishment."<sup>8</sup> The report directly tied war by Indians to "wrongs" (another critical word in the treaties), stating: "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."<sup>9</sup> Providing a system of redress for those wrongs 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."<sup>10</sup>

The Indian Peace Commission identified treaty-making as a way to redress Indian grievances and ultimately establish peace. In making treaties, the commission sought, if possible, "to remove . . . the causes of complaints on the part of Indians."<sup>11</sup> The report was co-authored by Lieutenant General William Tecumseh Sherman, who was a principal negotiator of the 1868 treaties.<sup>12</sup> In short, the historical record reveals that the phrase "bad men among the whites" was part of the Indian Peace Commission Report. The phrase explains that Indians should be provided with redress for "wrongs" done to them to preserve peace and demonstrates the United States' interest in establishing peace with the Indians so as to preserve lives and develop the West. The historical record establishes Lieutenant General Sherman and other members of the Indian Peace Commission as direct human links between the report, which they co-authored, and the phrase "bad men among the whites."

### III. BACKGROUND: *HEBAH*, *BEGAY*, AND *TSOSIE*

Only a few Bad Men cases have ever been decided.<sup>13</sup> The first three cases seeking damages—*Hebah*, *Begay*, and *Tsosie*—bear examination at the outset. The remaining cases are discussed later in this article.

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8. N.G. TAYLOR ET AL., REPORT TO THE PRESIDENT BY THE INDIAN PEACE COMMISSION 49 (1868) (emphasis added), available at <http://eweb.furman.edu/~ben-son/docs/peace.htm> (last visited Apr. 20, 2013).

9. *Id.* at 50.

10. *Id.*

11. *Id.* at 79.

12. *Elk v. United States*, 87 Fed. Cl. 70, 80 (Fed. Cl. 2009). Sherman signed the treaties with the Sioux, Navajo, Crow, Northern Cheyenne and Northern Arapahoe, Eastern Band of Shoshone, and Bannock. See *supra* note 5. The other treaties were signed by at least one person who served with Sherman on the Indian Peace Commission and signed its report.

13. Three nineteenth-century cases address the treaty language "bad men among the whites," but not in damages claims. See *Ex parte Crow Dog*, 109 U.S. 556, 563 (1883) (involving federal criminal jurisdiction); *Janis v. United States*, 32 Ct. Cl. 407,

*Hebah v. United States* arose a full century after the 1868 treaties. According to the U.S. government, it was the first Bad Men claim ever decided.<sup>14</sup> The case involved a Bureau of Indian Affairs police officer who shot and killed a Shoshone Indian on the Wind River Reservation in Wyoming.<sup>15</sup> The court denied the government's motion to dismiss.<sup>16</sup> The trial judge ruled that the shooting was justified, and the Court of Claims affirmed.<sup>17</sup>

In *Begay*, eleven Navajo students at a Bureau of Indian Affairs boarding school, located on the Navajo Reservation, alleged that they were sexually assaulted by federal employees.<sup>18</sup> After the government failed to act on the students' administrative claims, the Court of Claims ordered the government to decide the claims within ninety days.<sup>19</sup> A hearing officer recommended denying the students' claims for lack of proof. An assistant secretary of the Department of the Interior accepted the hearing officer's recommendation. The plaintiffs' attorney failed to object to the hearing format, make objections, or submit proposed findings of fact to the assistant secretary. The court held that the plaintiffs failed to exhaust their administrative remedies and dismissed their petitions.<sup>20</sup> According to the court, "Article I [of the treaty] specifies that the Assistant Secretary's decision determining whether to pay damages shall be final and binding upon the parties."<sup>21</sup>

*Tsosie v. United States* rejected this "final and binding" statement as "an inadvertent error," noting that "[A]rticle I contains no finality language."<sup>22</sup> *Tsosie* focused on the government's contention that the Bad Men language in the 1868 treaties was "no longer in effect because [it was] no longer needed."<sup>23</sup> The court rejected that argument on the ground that "[p]rolonged nonenforcement, without preemption, does not

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410 (Ct. Cl. 1897); *Brown v. United States*, 32 Ct. Cl. 432 (Ct. Cl. 1897) (involving the reach of the "bad men among the Indians" clause that follows the "bad men among the whites" clause).

14. *Tsosie v. United States*, 825 F.2d 393, 399 (Fed. Cir. 1987).

15. *Hebah v. United States*, 428 F.2d 1334, 1336 (Ct. Cl. 1970).

16. *Id.* at 1340.

17. *Hebah v. United States*, 456 F.2d 696 (Ct. Cl. 1972).

18. *Begay v. United States*, 219 Ct. Cl. 599, 600 (Ct. Cl. 1979).

19. *Id.* at 602.

20. *Begay v. United States*, 224 Ct. Cl. 712, 715 (Ct. Cl. 1980).

21. *Id.* at 714.

22. *Tsosie v. United States*, 825 F.3d 393, 397 (Fed. Cir. 1987).

23. *Id.* at 398.

extinguish Indian rights."<sup>24</sup> In summary, *Hebah* and *Tsosie* establish that the Bad Men treaty provisions are still enforceable, and *Tsosie* corrects *Begay*'s erroneous statement that the government's decision on a claim is final.

#### IV. *RICHARD v. UNITED STATES*

##### A. *The meaning of "bad men among the whites"*

Calonnie Randall and Robert Whirlwind Horse, members of the Oglala Sioux Tribe, were walking along a road on the Pine Ridge Reservation when a drunk non-Indian ran them down with his vehicle, killing them.<sup>25</sup> The driver fled the scene but was apprehended.<sup>26</sup> He pleaded guilty to involuntary manslaughter and was sentenced to fifty-one months in federal prison.<sup>27</sup>

After exhausting their administrative remedies, the personal representatives of the decedents' estates sued the United States for damages in the Court of Federal Claims. They relied on the Tucker Act, which waives sovereign immunity for "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States"<sup>28</sup> By itself, the Tucker Act does not create a substantive right to recover damages from the United States.<sup>29</sup> A plaintiff who relies on the Tucker Act may recover only if a statute, regulation, treaty, or the U.S. Constitution expressly allows a claim for damages against the United States.<sup>30</sup> The decedents' estates asserted that the Bad Men provision of the Treaty with the Sioux created the substantive right to recover damages from the United States that the Tucker Act requires.<sup>31</sup>

The treaty provides:

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

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24. *Id.* at 399. The same rule—that nonuse or non-enforcement is not repeal—applies to statutes. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 336 (2012).

25. *Richard v. United States*, 677 F.3d 1141, 1143 (Fed. Cir. 2012).

26. *Id.*

27. *United States v. Hotz*, No. 5:08-CR-50094-001 (D.S.D. Mar. 31, 2009).

28. 28 U.S.C. § 1491(a)(1) (2011).

29. *United States v. Testan*, 424 U.S. 392, 398 (1976).

30. *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998).

31. *See* Complaint ¶ 4, at 2, *Richard v. United States*, 98 Fed. Cl. 278, 279 (Fed. Cl. 2011) *vacated*, 677 F.3d 1141 (Fed. Cir. 2012) (No. 10-503).

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.<sup>32</sup>

The plaintiffs asserted that they were entitled to recover damages from the United States because the killer was a “bad man among the whites” who had committed a wrong against the decedents.<sup>33</sup>

The government moved to dismiss *Richard* for lack of subject matter jurisdiction on the ground that the plaintiffs did not allege the drunk driver was an agent or employee of the federal government.<sup>34</sup> The Court of Federal Claims agreed and dismissed the case.<sup>35</sup> The plaintiffs appealed and the Court of Federal Appeals reversed.<sup>36</sup>

The Court of Federal Appeals explained that the text of the treaty does not limit “bad men” to federal representatives.<sup>37</sup> The Court of Federal Claims had relied on the language that follows the Bad Men clause—namely “or among other people subject to the authority of the United States”—as limiting Bad Men to federal representatives.<sup>38</sup> But the Court of Federal Appeals recognized that “subject to the authority of the United States” is just as or more likely to mean “persons governed by U.S. law.”<sup>39</sup> *Richard* notes that article II of the Treaty with the Sioux, which prohibits non-government representatives from entering the reservation, explicitly uses the words “officer, agents, and employees of the government,” demonstrating that the treaty drafters knew how to refer to government representatives when they intended to do so.<sup>40</sup> *Richard* concludes, “[T]he treaty text unambiguously distinguishes between ‘bad men among the whites’ and government actors.”<sup>41</sup>

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32. Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868, 15 Stat. 635.

33. *Richard*, 98 Fed. Cl. at 279.

34. *Id.* at 279–80.

35. *Id.* at 280.

36. *Richard v. United States*, 677 F.3d 1141, 1142 (Fed. Cir. 2012).

37. *Id.*

38. *Richard*, 98 Fed. Cl. at 284.

39. *Richard*, 677 F.3d at 1146.

40. *Richard*, 677 F.3d at 1147 n.11.

41. *Richard*, 677 F.3d at 1147. The Treaty with the Sioux as published contains a comma between the phrases “bad men among the whites” and “or among other people subject to the authority of the United States.” See Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868, 15 Stat. 635. The comma “effects . . . [a] separation” between the two phrases, indicating that benefits may be paid under either one. *Terry v. Principi*, 367 F.3d 1291, 1294–95 (Fed. Cir. 2004). But the comma does not appear in the same location in what appears to be the original handwritten version which can

The Court of Federal Appeals also rejected the Court of Federal Claims' historical analysis. The lower court had relied heavily on the 1867 *Condition of the Indian Tribes*,<sup>42</sup> popularly known as the Doolittle Commission Report. According to the lower court, the Doolittle Commission Report showed that the purpose of the 1868 treaties was to protect Indians from attacks by federal soldiers, not to restrain others.<sup>43</sup> The lower court, however, did not explain how this purpose was communicated to the Indians who signed the treaties or why the Indians should be assumed to have shared this understanding.

The Court of Federal Appeals rejected the lower court's reliance on the Doolittle Report as "perplexing."<sup>44</sup> The court found that the Doolittle Report had been "selectively" relied upon and that a disinterested historian called the report "incomplete and largely misleading."<sup>45</sup> Further, the court reasoned that the historical evidence, considered as a whole, "supports the position that 'bad men' were both those associated with the government and those wholly unassociated" with it.<sup>46</sup>

Finally, the Court of Federal Appeals ruled that *Tsosie v. United States*<sup>47</sup> had already held that "any 'white' can be a 'bad man.'"<sup>48</sup> *Tsosie* involved a Bad Men claim based on the misconduct of a U.S. Public Health Service employee who posed as a physician and conducted a physical examination of an Indian patient. *Tsosie* held that the Bad Men provision in the Navajo Treaty was not preempted by the 1946 enactment of the Federal Tort Claims Act (FTCA)<sup>49</sup> because the FTCA protects only against unintentional wrongs by government agents and was intended to open courts to federal claims, not close them.<sup>50</sup>

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be found online at the National Archives. See *Teaching With Documents: Sioux Treaty of 1868*, NATIONAL ARCHIVES, <http://www.archives.gov/education/lessons/sioux-treaty/#documents> (last visited Apr. 26, 2013). The Federal Circuit did not rely on the comma. *Richard*, 677 F.3d at 1145–46 n.8. Other treaties do not use the comma consistently. *Id.*

42. See *CONDITION OF THE INDIAN TRIBES: REPORT OF THE JOINT SPECIAL COMMITTEE, APPOINTED UNDER JOINT RESOLUTION OF MARCH 3, 1865. WITH AN APPENDIX* (Government Printing Office 1867), <http://quod.lib.umich.edu/m/moa/abb3022.0001.001/1?view=pdf> (last visited May 28, 2013).

43. *Richard*, 98 Fed. Cl. at 285.

44. *Richard*, 677 F.3d at 1149 n.13.

45. *Id.* (citing Harry Kelsey, *The Doolittle Report of 1867: Its Preparation and Shortcomings*, 17.2 *ARIZONA AND THE WEST* 107, 120 (1975)).

46. *Id.* at 1148.

47. *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987).

48. *Richard*, 677 F.3d at 1150 (citing *Tsosie*, 825 F.2d at 400).

49. *Tsosie*, 825 F.2d at 400–01.

50. *Id.*

The lower court read *Tsosie* as addressing only the “narrow issue” of whether the Bad Men clause was obsolete.<sup>51</sup> The court reasoned that the statement in *Tsosie* that “any ‘white’ can be a ‘bad man’” was mere dictum.<sup>52</sup>

The Court of Federal Appeals ruled that *Tsosie* was controlling in *Richard*.<sup>53</sup> Although the court did not explain why *Tsosie* was controlling, the law supports this conclusion. Dictum is a statement that is “unnecessary to the decision in the case”<sup>54</sup> and includes “a remark made, or opinion expressed, by a judge, in his decision upon a cause, ‘by the way,’ that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument.”<sup>55</sup> *Tsosie* rejected the government’s contention that the FTCA preempted the Bad Men provision of the treaty.<sup>56</sup> This ruling was neither incidental nor collateral, nor was it an illustration, analogy, or argument.

Circuit Judge Lourie, dissenting in *Richard*, wrote:

In the over 144 year history of the Fort Laramie Treaty, neither party, nor the majority has been able to identify a single case brought by an Indian individual against a “white” person who was not an employee, agent, representative of the United States or otherwise acting upon the United States’ behalf that has been found liable and upheld by any appellate or district court.<sup>57</sup>

According to the dissent, this “testifies to a practical construction adopted by the parties over an exceedingly long period of time, evidence that the Sioux and the United States did not intend that this agreement cover persons not affiliated with the United States government.”<sup>58</sup>

The majority answered the dissent’s argument, responding:

given the relative power of the treaty parties and the position of financial and social dependence into which the Sioux Nation was forced, it is questionable, at best, to [argue that] because cases

51. *Richard v. United States*, 98 Fed. Cl. 278, 287 (Fed. Cl. 2011) *vacated*, 677 F.3d 1141 (Fed. Cir. 2012).

52. *Id.*

53. *Richard*, 677 F.3d at 1150.

54. *Co-Steel Raritan, Inc. v. Int’l Trade Comm’n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004) (quoting BLACK’S LAW DICTIONARY 1100 (7th ed. 1999)).

55. *King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996) (quoting BLACK’S LAW DICTIONARY 1072 (6th ed. 1990)).

56. *Tsosie v. United States*, 825 F.2d 393, 400–01 (Fed. Cir. 1987).

57. *Richard*, 677 F.3d at 1155 (Lourie, dissenting).

58. *Id.*

have not been brought against non-governmental actors, the original parties intended the treaty to be so limited.<sup>59</sup>

Indeed, the dissent's position rested on the premise that there was—in its words—"a practical construction adopted by the parties over an exceedingly long period of time."<sup>60</sup> But there is no evidence that any such "practical construction" ever existed. The government did not seek a rehearing or a writ of certiorari, which suggests that it may have been more persuaded by the majority than by the dissent.

Unlike many decisions, *Richard's* construction of the Bad Men treaty provisions can never be disputed in another circuit, because Tucker Act claims may only be brought in the Court of Federal Claims.<sup>61</sup> Accordingly, all claims seeking damages against the United States under the Bad Men language of any treaty may be brought only in the Court of Claims. Thus, no circuit split will ever exist, reducing the possibility that the U.S. Supreme Court will ever address this issue.

### *B. The meaning of "any wrong upon the person or property of the Indians"*

All Bad Men provisions apply to "any wrong upon the person or property of the Indians." For example, the Navajo Treaty provides:

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 punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.<sup>62</sup>

Read in isolation, the "any wrong" provision could extend to a breach of contract or negligence claim. But determining the meaning of a text requires looking to its "language and design . . . as a whole."<sup>63</sup> The sentence that contains the words "any wrong" provides that "the United States will . . . cause the offender to be arrested and punished according to the laws of the United States . . . ." Breaches of contract and negligence,

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59. *Id.* at 1151 n.19 (majority opinion).

60. *Id.* at 1155 (Lourie, dissenting).

61. 28 U.S.C. § 1491(a)(1) (2011).

62. Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667 (emphasis added).

63. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

unlike criminal acts, do not allow anyone to be “arrested and punished according to the laws of the United States.” Only criminal acts so allow.

The government in *Richard* asserted that “any wrong” did not extend to involuntary manslaughter because involuntary manslaughter is “neither intentional nor committed with malice.”<sup>64</sup> Lacking a textual basis for its argument, the government asserted that the Bad Men provision was “intended to curb intentional acts of aggression that frequently led to the outbreak of hostilities between the United States and the Sioux.”<sup>65</sup>

The government’s argument had severe flaws. A treaty provision that applies to crimes against property logically should also extend to crimes against people. Further, involuntary manslaughter requires that the killer “acted with a wanton or reckless disregard for human life, knowing that his conduct was a threat to the lives of others or having knowledge of such circumstances as could reasonably have enabled him to foresee the peril to which his act might subject others.”<sup>66</sup> And involuntary manslaughter allows the offender to be “arrested and punished according to the laws of the United States.” So it is not similar to breach of contract or negligence.

The government’s argument contradicted the “general-terms” canon of statutory construction, which provides that “general words,” such as “any,” must “be accorded their full and fair scope,” not “arbitrarily limited.”<sup>67</sup> The government argued that even though the treaties used general terms (“any wrong”), they addressed a particular, narrow objective.<sup>68</sup> But “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>69</sup> Because “any” must be given its full and fair scope, “any wrong” must be construed broadly.

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64. Corrected Brief for Defendant-Appellee at 47, *Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012) (No. 2011-5083).

65. *Id.*

66. *United States v. Opsta*, 659 F.2d 848, 849 (8th Cir. 1981) (quoting *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980)). The mental state required for conviction is “‘gross’ or ‘criminal’ negligence,” which is “a far more serious level of culpability than that of ordinary tort negligence, but still short of the extreme recklessness, or malice required for murder.” *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992).

67. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012).

68. Corrected Brief for Defendant-Appellee at 48–51, *Richard*, 677 F.3d 1141 (No. 2011-5083).

69. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

Moreover, the government's position that "any wrong" does not include involuntary manslaughter defied common sense. "To an Indian, and undoubtedly to all men, the killing of an Indian without just cause or reason would certainly be a wrong within the meaning of the [Navajo] Treaty of 1868."<sup>70</sup> Also, the government's argument that only some crimes are covered contradicted its position in *Hebah*, where it argued that the "any wrong" requirement is satisfied where a plaintiff has been the victim of a crime.<sup>71</sup>

Finally, the government's position ignored the principle that in negotiating an Indian treaty, the United States as "the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded," bears "a responsibility to avoid taking advantage of the other side."<sup>72</sup> Accordingly, a treaty's words are construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."<sup>73</sup> The Indians who signed the treaties would naturally understand "any wrong" broadly, so those words must be so construed.

The Federal Court of Claims did not address the government's argument that involuntary manslaughter is not a "wrong" under the Bad Men provisions.<sup>74</sup> On appeal the government argued the issue as an alternative ground for affirming the Court of Claims.<sup>75</sup> While the court of appeals did not decide the issue, it suggested that the government's position was incorrect, "because 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>76</sup>

*Richard's* reading of "any wrong" is consistent with prior cases. In *Garreaux v. United States*, a member of the Cheyenne River Sioux Tribe sued for damages based on the government's alleged negligence and breach of contract in failing to provide safe and healthy living condi-

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70. *Hebah v. United States*, 456 F.2d 696, 704 (Ct. Cl. 1972).

71. *Garreaux v. United States*, 77 Fed. Cl. 726, 735 (Fed. Cl. 2007) ("According to Defendant, in order for Plaintiff to state a claim pursuant to the [Fort Laramie] Treaty, Plaintiff must allege that she was the victim of a crime, or at least allege that the perpetrator engaged in some affirmative act.").

72. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979).

73. *Id.* at 676 (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)).

74. *Richard v. United States*, 98 Fed. Cl. 278, 291 n.11 (Fed. Cl. 2011) *vacated*, 677 F.3d 1141 (Fed. Cir. 2012).

75. Corrected Brief for Defendant-Appellee at 46-51, *Richard v. United States*, 677 F.3d 1141 (Fed. Cir. 2012) (No. 2011-5083).

76. *Richard*, 677 F.3d at 1153 n. 22.

tions.<sup>77</sup> The court dismissed the case because negligence and breach of contract are not a “wrong” within the meaning of the treaties.<sup>78</sup> Similarly, *Hernandez v. United States*, a *pro se* case brought by a member of the Rosebud Sioux Tribe, ruled that “mere acts of negligence” are not a “wrong” protected against by the treaties.<sup>79</sup>

After the court of appeals remanded *Richard* to the Court of Federal Claims, the parties briefed whether the “any wrong” requirement of the treaty was met. Before the Court of Federal Claims decided this issue, the case settled.

## V. PRESENTING A BAD MEN CLAIM: EXHAUSTION OF ADMINISTRATIVE REMEDIES

Every treaty with a Bad Men provision says how a claim is raised. Simply stated, “[P]roof [must be] made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city.”<sup>80</sup>

The Treaty with the Navajo contains another provision that has been read—perhaps incorrectly—to establish an additional requirement for such claims. The Navajo Treaty says that “no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs.”<sup>81</sup> Three other treaties have the same language: the Treaty with the Eastern Band of Shoshone and Bannock,<sup>82</sup> the Treaty with the Crow,<sup>83</sup> and the Treaty with the Northern Cheyenne and Northern Arapahoe.<sup>84</sup> Two treaties require that the claim also be passed upon by the secretary of the Interior: the Treaty with the Kiowa and Comanche<sup>85</sup> and the Treaty with the Cheyenne and Arapahoe.<sup>86</sup> And two treaties have no such requirement: the Treaty with the Sioux<sup>87</sup> and the Treaty with the Ute.<sup>88</sup>

77. *Garreaux v. United States*, 77 Fed. Cl. 726, 727–28 (Fed. Cl. 2007).

78. *Id.* at 737.

79. *Hernandez v. United States*, 93 Fed. Cl. 193, 196, 199 (Fed. Cl. 2010).

80. *E.g.*, Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

81. *Id.*

82. Treaty with the Eastern Band Shoshoni and Bannock art. I, July 3, 1868, 15 Stat. 673.

83. Treaty with the Crows, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649.

84. Treaty with the Northern Cheyenne and Northern Arapaho art. I, May 10, 1868, 15 Stat. 655.

85. Treaty with the Kiowa and Comanche art. I, Oct. 21, 1867, 15 Stat. 581.

86. Treaty with the Cheyenne and Arapahoe art. I, Oct. 28, 1867, 15 Stat. 593.

87. Treaty with the Sioux, U.S.-Sioux, Apr. 29, 1968, 15 Stat. 635.

88. Treaty with the Ute, U.S.-Ute, Mar. 2, 1968, 15 Stat. 619.

*Begay v. United States*<sup>89</sup> and *Elk v. United States*<sup>90</sup> read the Navajo Treaty language "no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs"<sup>91</sup> as applying to Bad Men claims. There are two problems with this view. First, the "no such damage" language appears not in the "bad men among the whites" paragraph, but in the separate "bad men among the Indians" paragraph that follows. Second, *Tsosie* squarely read the "bad men among the Indians" paragraph as dealing with "an entirely separate matter,"<sup>92</sup> which was preempted by the Indian Depredation Act of 1891.<sup>93</sup> So *Begay* and *Elk* are, in this respect, inconsistent with *Tsosie*. Regardless of whether *Begay* and *Elk* may later be judged to have misread the treaties, reasonable lawyers will exhaust all potential administrative remedies until and unless it becomes clear that this is no longer necessary.

What are those administrative remedies? All claims from a member of any tribe must satisfy the requirement that "proof [be] made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city."<sup>94</sup> This requirement is fulfilled where a claim is made to the reservation superintendent and a copy sent to the assistant secretary of the Interior for Indian Affairs in Washington, D.C.<sup>95</sup> The claim should contain enough detail and specificity that the government cannot credibly argue it did not have notice of plaintiff's claims. In *Elk v. United States*, the government made exactly such an argument, which the court rejected, noting that "there are no regulations or other guidance defining what Interior believes is the appropriate content of a treaty claim."<sup>96</sup> The court wrote that "Interior waited until after this lawsuit was filed before first indicating to plaintiff that her claim was inadequate."<sup>97</sup> But not every judge will necessarily see the issue the same.

Members of tribes with the "examined and passed upon" language have a second requirement under *Begay* and *Elk*: the requirement that "[N]o such damage shall be adjusted and paid until examined and passed

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89. *Begay v. United States*, 219 Ct. Cl. 599, 602 n.4 (Ct. Cl. 1979).

90. *Elk v. United States*, 70 Fed. Cl. 405, 407 (Fed. Cl. 2006).

91. Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

92. *Tsosie v. United States*, 825 F.2d 393, 398 (Fed. Cir. 1987).

93. *See id.* at 396.

94. *E.g.* Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

95. *Hebah v. United States*, 428 F.2d 1334, 1340 (1970). The assistant secretary of the Interior for Indian Affairs today "stands in the place of the Commissioner of Indian Affairs for these purposes." *Begay v. United States*, 219 Ct. Cl. 599, 601 (Ct. Cl. 1979). *Accord* *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1564 (Fed. Cir. 1997).

96. *Elk v. United States*, 70 Fed. Cl. 405, 411 (Fed. Cl. 2006).

97. *Id.*

upon by the Commissioner of Indian Affairs.”<sup>98</sup> For the Kiowa, Comanche, Apache, Cheyenne, and Arapahoe, a claim must also be examined and passed upon by the secretary of the Interior.

In *Begay*, the plaintiffs filed claims for damages with the superintendent of the Navajo Reservation and sent copies to the assistant secretary of the Interior for Indian Affairs in Washington D.C. Seventeen days later, they filed suit. The government moved to dismiss on the ground that seventeen days was insufficient time for proper administrative consideration.<sup>99</sup> Some cases support the government’s position.<sup>100</sup> Many courts might have granted the government’s motion. Instead, the court criticized the Interior Department for not addressing the claims in the fifteen months after they were filed.<sup>101</sup> The court allowed the government ninety days to decide the claims.<sup>102</sup>

In *Elk v. United States*, the plaintiff, a member of the Oglala Sioux Tribe, sent notice to the Department of the Interior, asserting a claim under the Treaty with the Sioux.<sup>103</sup> After the government failed to act for nine months, she filed suit.<sup>104</sup> The government moved to dismiss, arguing that she had failed to await the department’s decision on her claim.<sup>105</sup> The court denied the motion because the Treaty with the Sioux does not require that a claimant wait for a decision from the government before suing.<sup>106</sup>

No Bad Men case has ruled that a claimant’s pursuit of administrative remedies was so inadequate as to require dismissal. But no reasonable attorney ever takes a chance on how strictly a court may apply an exhaustion requirement. Careful attention to the exhaustion requirements of the particular treaty under which the claim is brought is essential.

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98. All but the Sioux and the Ute treaties have this language. *E.g.*, Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

99. *See Begay*, 219 Ct. Cl. at 601.

100. *See McNeil v. United States*, 508 U.S. 106 (1993) (dismissing Federal Tort Claims Act case because plaintiff filed suit before exhausting administrative remedies); *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989) (dismissing Resource Conservation and Recovery Act case because plaintiffs failed to give statutory notice before filing suit); *Laughter v. Gallup Indian Med. Ctr.*, 425 Fed. Appx. 683 (10th Cir. 2011) (dismissing employment discrimination complaint for failure to exhaust administrative remedies).

101. *Begay*, 219 Ct. Cl. at 601-02.

102. *See id.* at 602.

103. *See Elk v. United States*, 70 Fed. Cl. 405, 406 (Fed. Cl. 2006).

104. *Id.*

105. *Id.*

106. *See id.* at 407.

## VI. LITIGATING BAD MEN CLAIMS

A. *Geographic limitations*

Because all Indian treaties have geographic limitations, Bad Men claims brought under those treaties also have geographic limitations. Some geographic-limitation issues have been decided, but others are unresolved.

Matthew Herrera, a Navajo student who lived off the reservation, was severely beaten by another student at a school located off the reservation.<sup>107</sup> He brought a Bad Men claim.<sup>108</sup> The government moved to dismiss, relying on article XIII of the Treaty with the Navajo, which provides that "if any Navajo Indian or Indians shall leave the reservation herein described. . .he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty."<sup>109</sup> The court agreed and dismissed the case based on these unambiguous terms.<sup>110</sup>

Jennifer Pablo, the mother of a Navajo child who was born and raised on the Rosebud Reservation in South Dakota, brought a Bad Men claim on behalf of her child, who was sexually assaulted by a law enforcement officer on the Rosebud Reservation.<sup>111</sup> She sought to avoid *Herrera* by arguing that "the court should construe the 'bad men' clause of the Fort Sumner Treaty [with the Navajo] together with the 'bad men' clause of the Fort Laramie Treaty [with the Sioux] so as to afford the protections of either treaty to any Indian person, including [her child], who is within the boundaries of the reservations recognized by either treaty."<sup>112</sup> The court rejected her argument, reiterating its conclusion in *Herrera* that the Treaty with the Navajo is unambiguous and "clearly strips a Navajo of the rights conferred by the bad men clause if he or she permanently settles outside the boundaries of the reservation recognized by the Treaty."<sup>113</sup>

None of the other treaties with Bad Men provisions use the same language as Article XIII of the Treaty with the Navajo. Four treaties provide that the tribes "will relinquish all right to occupy permanently the territory outside their reservation," or say the same thing in slightly dif-

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107. *Herrera v. United States*, 39 Fed. Cl. 419, 420 (Fed. Cl. 1997), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998).

108. *Id.* at 419.

109. Treaty with the Navaho, U.S.-Navajo, art. XIII, June 1, 1868, 15 Stat. 667.

110. *Herrera*, 39 Fed. Cl. at 421.

111. *Pablo v. United States*, 98 Fed. Cl. 376, 377 (Fed. Cl. 2011).

112. *Id.* at 381.

113. *Id.* at 382.

ferent words.<sup>114</sup> Three treaties provide that the tribes “will regard [their] reservation [as] their permanent home, and they will make no permanent settlement elsewhere.”<sup>115</sup> Given this language, it seems evident that Bad Men claims may be brought only by an Indian who is harmed on his or her own reservation.

No case has addressed whether Bad Men protection extends to Indians who reside in areas that were part of the reservation when the treaty was entered but are no longer within reservation boundaries. The Great Sioux Nation, as recognized in the Ft. Laramie Treaty of 1868, eventually atomized into nine reservations that include a fraction of the original territory. The argument in favor of liability in such areas would look to the original terms of the treaty. The argument against liability would assert that the Bad Men provisions apply only to reservations and that liability must shrink if the reservation has shrunk.

### B. *No racial or gender limitations*

Bad Men provisions could have been limited to protecting Indians from whites. In the nineteenth century, racially restrictive provisions were enacted and upheld. An 1834 statute provided that the United States would reimburse a “friendly Indian” for property damage committed by a “white person” in Indian Country.<sup>116</sup> In 1880, the U.S. Supreme Court ruled that the statute did not apply to damage committed by an African-American man, because Congress “meant just what the language [‘white person’] conveys to the popular mind.”<sup>117</sup> But the Bad Men provisions protect Indians from “bad men *among* the whites,” [emphasis added] not just from “whites.” And *Richard’s* reading of “subject to the authority of the United States” as “persons governed by U.S. law”<sup>118</sup> makes clear that the protection does not have a racial requirement.

114. Treaty with the Kiowa and Comanche art. XI, Oct. 21, 1867, 15 Stat. 581; Treaty with the Cheyenne and Arapahoe art. XI, Oct. 28, 1867, 15 Stat. 593. The Treaty with the Ute provides that the Indians “relinquish all claims and rights in and to any portion of the United States or Territories” outside their reservation. Treaty with the Ute, U.S.-Ute, art. III, Mar. 2, 1868, 15 Stat. 619. The Treaty with the Northern Cheyenne and Northern Arapahoe provides that they “relinquish, release, and surrender. . . all right, claim, and interest” outside the reservation. Treaty with the Northern Cheyenne and Northern Arapahoe art. II, May 10, 1868, 15 Stat. 655.

115. Treaty with the Sioux, U.S.-Sioux, art. XV, Apr. 29, 1868, 15 Stat. 635; Treaty with the Crows, U.S.-Crow, art. IV, May 7, 1868, 15 Stat. 649; Treaty with the Eastern Band of Shoshoni and Bannock, art. IV, July 3, 1868 15 Stat. 673.

116. *United States v. Perryman*, 100 U.S. 235, 235 (1880).

117. *Id.* at 237–38.

118. *Richard v. United States*, 677 F.3d 1141, 1146 (Fed. Cir. 2012).

Although no case has ever addressed this issue, there is no doubt that a woman can be a "bad man." Even in the nineteenth century, unless the context required otherwise, "men" was a generic term that included women.<sup>119</sup> At oral argument in the court of appeals in *Richard*, the government conceded that a woman's misconduct can create governmental liability under the Bad Men provisions.<sup>120</sup>

Who, if anyone, cannot be a "bad men among the whites, or among other people subject to the authority of the United States"?<sup>121</sup> In 1868, the people most likely excluded were Indians of the same tribe residing on the same reservation. In *Ex parte Crow Dog*, the U.S. Supreme Court held that the "bad men among the Indians" provision did not give the United States criminal jurisdiction—"authority," in the language of the treaty—over a Sioux Indian on the reservation for a crime against another member of the tribe.<sup>122</sup> But the lack of authority that *Crow Dog* confirmed was remedied by the passage of the Major Crimes Act in 1885.<sup>123</sup> So are wrongs committed by Indians on a reservation against other members of the same tribe now compensable because those Indians are "subject to the authority of the United States?" No case has addressed this question. The answer most likely will be "no," for two reasons. First, it would be contrary to the original provisions of the treaties, which exclude wrongs by such persons. Second, it would include everyone in the potential "bad men" category, which would make the provision meaningless, contrary to the principle that no term of a document should be read to lack meaning.<sup>124</sup>

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119. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (s.v. *he* (4)) ("*He*, when a substitute for *man* in its general sense, expressing mankind, is of common gender, representing, like its antecedent, the whole human race."); PETER BULLIONS, THE PRINCIPLES OF ENGLISH GRAMMAR (13th ed. 1845) ("[T]he masculine term has also a general meaning, expressing both male and female, and is always to be used when the office, occupation, profession, etc., and not the sex of the individual, is chiefly to be expressed."). Both quotations are found in ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 129 n.1 (2012).

120. Oral Argument, *Richard*, 677 F.3d 1141 (No. 2011-5083), available at <http://www.cafc.uscourts.gov/oral-argument-recordings/2011-5083/all/richard.html> (last visited May 5, 2013).

121. Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

122. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

123. Major Crimes Act, 11 U.S.C. §1153 (1885).

124. *Moskal v. United States*, 498 U.S. 103, 109 (1990).

### C. Statute of limitations

No case has ever addressed the statute of limitations for a Bad Men claim, but the law seems clear. As noted above, jurisdiction for Bad Men cases is provided by the Tucker Act, which requires that claims be brought in the Court of Federal Claims.<sup>125</sup> The statute of limitations for such actions is six years.<sup>126</sup> A claim on behalf of a person who was under a legal disability, such as minority, when the claim accrued may be filed within three years after the disability ends.<sup>127</sup> A claim accrues when “all events have transpired that ‘fix the Government’s alleged liability, entitling the claimant to demand payment and sue . . . for his money.’”<sup>128</sup>

### D. No right to a jury trial

No plaintiff has the right to a jury trial in any action against the United States.<sup>129</sup> Accordingly, all Bad Men cases are heard by a judge of the Court of Federal Claims.

### E. Measuring damages

Every treaty with a Bad Men provision sets the same measure of damages: the United States must “reimburse the injured person” (or “persons” in some treaties) “for the loss sustained.”<sup>130</sup> But what does that mean?

The only case to address this issue is *Elk v. United States*.<sup>131</sup> The plaintiff in *Elk*, a member of the Oglala Sioux Tribe, was sexually assaulted by a military recruiter.<sup>132</sup> The government unsuccessfully argued that “reimburse . . . for the loss sustained” means that she could only recover “out-of-pocket expenditures,” with nothing for loss of income or the grievous impact of the sexual assault on her life.<sup>133</sup> The court disagreed, ruling that she could recover the same damages as in a tort action, including medical costs, lost income, pain and suffering, and emotional distress.<sup>134</sup>

125. 28 U.S.C. § 1491(a)(1) (2011).

126. 28 U.S.C. § 2501 (2004).

127. *Id.*

128. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.06[5], at 444 (Neil Jessup Newton ed., 2012) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966)).

129. 28 U.S.C. § 2402 (1997).

130. *E.g.*, Treaty with the Navaho, U.S.-Navajo, art. I, June 1, 1868, 15 Stat. 667.

131. *Elk v. United States*, 87 Fed. Cl. 70 (Fed. Cl. 2009).

132. *Id.* at 70.

133. *Id.* at 79.

134. *Id.*

The government cited dictionary definitions of "reimburse" that refer to "paying back or restoring an amount paid." The court responded with other dictionary definitions, closer in time to the treaties, that define "reimburse" as including "to indemnify or make whole."<sup>135</sup> The court found that "reimburse" is subject to both potential meanings, and that the rest of the sentence, which refers to "the loss sustained," shows that the treaty drafters likely intended the broader meaning.<sup>136</sup> In addition, the court cited laws from the 1860s that use "reimburse" and the broader term "indemnify" interchangeably.<sup>137</sup> The court noted that the secretary of the Interior previously interpreted "reimburse" as including physical pain, suffering, and mental anguish.<sup>138</sup> And the court cited the rule that ambiguities in Indian treaties are resolved in favor of the Indians.<sup>139</sup> Given the strength of the court's analysis, it seems likely that other courts will follow *Elk*'s view that "reimburse the injured person for the loss sustained" allows normal tort damages to be awarded in Bad Men cases.

In *Elk*, the court examined evidence from the plaintiff, members of plaintiff's family, forensic psychiatrists, and a forensic economist to determine damages. Ultimately, the court assessed \$590,755.06 in monetary damages: \$23,321.58 for future medical costs, \$318,635 for past and future lost income, and \$248,798.48 for past and future pain, suffering, and emotional distress.<sup>140</sup>

## VII. FUTURE CHALLENGES

Even before *Richard* was decided, a 2011 law review article proposed legislation to restrict Bad Men claims.<sup>141</sup> The article recommended limiting claims to those arising from misconduct by federal agents.<sup>142</sup> This proposal ignored the principle that an Indian treaty is a contract between a tribe and the United States.<sup>143</sup> The article assumed that the government should simply eliminate treaty rights that it no longer wishes to fulfill—

135. *Id.*

136. *Id.*

137. *Id.* at 81 n.17.

138. *Id.* at 82.

139. *Id.* at 81.

140. *Id.* at 91–98.

141. Lillian Marquez, *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 (2011).

142. *Id.* at 630–31.

143. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.").

without, of course, returning the land that tribes gave up in exchange for the government's promises. The article further argued, amazingly, that what it termed "antiquated treaty promises" should be narrowed to help tribes toward "independence" and "self-sufficiency."<sup>144</sup>

Lawyers with no experience in Indian law will likely wonder how the government, any more than a private individual, could have the legal authority to withdraw unilaterally from its own agreement, with no compensation to Indians. The short answer is that the government can do so because the courts say it can do so. "The courts have upheld national power to establish the parameters of the government-to-government relationship with tribes. This power includes the power to recognize and terminate tribal relations with the United States . . . ."<sup>145</sup>

Congress's authority concerning Indian affairs has often been termed "plenary."<sup>146</sup> The plenary power doctrine has been subject to "extensive scholarly criticism and commentary."<sup>147</sup> Nonetheless, it appears to be today's law.<sup>148</sup> Ultimately, the fate of all Indian treaty rights, including the Bad Men treaty right, lies in the court of public opinion and within the power of the United States Congress.

Many non-Indians see treaties as relics of a bygone era. They do not appreciate how much Indians gave up in the treaties, or they believe this no longer matters, or they simply assert that "everyone should be treated alike." In the end, their position is that promises that no longer are convenient to honor may be disregarded. But many others believe that when our country makes promises in exchange for land, we should keep those promises, at least until we are ready to return the land.

## VIII. CONCLUSION

*Richard v. United States* holds that a Bad Men claim may arise from the wrongdoing of a private citizen. It secures to Indians who are members of a tribe that has such a treaty, and who are injured on their reservation by the criminal wrongdoing of a non-tribal member, the right to recover for their loss even when the wrongdoer is not a federal officer, agent, or employee.

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144. Marquez, *supra* note 141, at 631.

145. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §5.02[3], at 392–93 (Nell Jessup Newton ed., 2012).

146. *Id.* §5.02[1], at 391.

147. FRANK POMMERSHEIM, BRAID OF FEATHERS 40 n.25 (Univ. of Cal. 1995).

148. *But see id.* at 46–50.