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Julie Combs, Cherokee Nation

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Bad Men Among the Whites Claims in the *Mni Wiconi* Age

Julie Combs*

ABSTRACT

In a series of nine treaties with Native Nations in the late 1860s, the United States promised to reimburse Indigenous people for wrongs committed by “bad men among the whites, or among other people subject to the authority of the United States.” In the century and half that followed the signing of these nine treaties, “bad men among the whites” claims have been litigated in the Federal Circuit with some success by Indigenous plaintiffs, and courts have shaped the meaning of the clause and the remedies a successful plaintiff may receive. This comment explores the Bad Men clause in the Mni Wiconi – Water is Life – Age. Mni Wiconi is an Indigenous movement which began in earnest in 2016 at the Dakota Access Pipeline protests on the Standing Rock Sioux Reservation, and seeks to address the harms done to Indigenous peoples and their lands and waters because of extractive industries.

This comment begins with a background of the nine treaties that have Bad Men clauses, and surveys settled legal principles of Bad Men litigation. Next, it explores recent Bad Men cases which have had an impact on the scope of the clause. The comment then re-examines an approach to judicial interpretation of the Bad Men clause first proposed in a 2014 Harvard Law Review Student Note entitled, “A Bad Man is Hard to Find.” Finally, the comment provides an overview of how Indigenous peoples have invoked treaty rights post-Standing Rock, and anticipates how the Court of Federal Claims might view Bad Men claims related to resource extraction including disruption of Indigenous religious practice, pollution and damage to sacred waters, and sexual violence against Indigenous women.

*Citizen of the Cherokee Nation, J.D. (2021), University of Tulsa College of Law.

INTRODUCTION

With the advent of westward expansion, in a series of nine treaties with Native Nations conducted under the management of Lieutenant General William Tecumseh Sherman, the United States sought to “remove . . . the causes of complaints on the part of the Indians” and establish a lasting peace for the white man.¹ Each of the nine treaties contains what is known as a Bad Men clause.² These clauses provide that the United States will reimburse Indians 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.”³ Although a century and a half has passed since the first of the nine treaties was signed, Bad Men claims remain viable causes of action for Indians belonging to those tribes that signed treaties with Sherman’s Great Peace Commission.⁴ All of the Bad Men cases litigated thus far have involved depredations against Native persons, despite the fact the clause states “person *or* property.”⁵

Because Bad Men claims have only been addressed in a handful of cases over the last fifty years, the horizon for what constitutes a “wrong” by a “bad man” against Indians or Indian property remains fairly expansive.⁶ Scholarship on the clause has also been limited. Perhaps the single greatest contribution thus far to Bad Men scholarship is the 2014 Harvard Law Review student note, “A Bad Man is Hard to Find.”⁷ As well as providing background and context for understanding Bad Men clauses, the 2014 Note surveys Bad Men litigation through 2014 and discusses a proposed approach to judicial interpretation which rejects a pan-Indian superstructure,

¹ N.G. TAYLOR ET AL., REPORT TO THE PRESIDENT BY THE INDIAN PEACE COMMISSION 49 (1868), <http://history.furman.edu/~benson/docs/peace.htm>.

² See e.g., Treaty with the Sioux, U.S.-Sioux art. I, Apr. 29, 1868, 15 Stat. 635; 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.

³ Treaty Between the United States of America and the Kiowa and Comanche Tribes of Indians, art. I, Oct. 21, 1867, 15 Stat. 581.

⁴ 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).

⁵ See e.g., Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868 (emphasis added).

⁶ Note, *A Bad Man is Hard to Find*, 127 HARV. L. REV. 2511, 2522 (2014).

⁷ *Id.*

arguing that generalizations about the Bad Men clauses fail to capture each Native Nation's individual interpretation.⁸

Since the Note's publication, the *Mni Wiconi* ("Water is Life") Age—an age of Indigenous resistance to increased destruction by extraction on Native lands and sacred sites—has presented Native Nations with new challenges to sacred lands. The Bad Men clause may be a useful tool in combatting some of the most pressing harms to Native people and lands as a result of natural resource extraction. In 2015, Acting Chairman Kevin Wright of the Lower Brule Lakota Sioux Tribe stated in a press release that his Tribe was invoking the Bad Men clause against TransCanada (now TC Energy) because of harm to tribal ancestral lands caused by the Keystone XL Pipeline project.⁹ Despite the fact that no significant litigation ever came of this invocation, treaty rights such as the Bad Men clause may be of use in facing the new harms of the *Mni Wiconi* age.

Despite settled principles in the Bad Men jurisprudence, it is unclear what effect a Bad Men claim may have against a corporate actor such as a pipeline company or what "wrongs" the clause might cover.¹⁰ Part I of this comment begins with a brief background of the nine treaties, and describes settled principles from Bad Men litigation between 1967 and 2012. Next, it explores three Bad Men cases of consequence decided after the publication of the 2014 HLR Student Note. Part II re-examines the HLR Student Note's proposed approach to judicial interpretation and discusses how this method of interpretation could prove useful to Native plaintiffs litigating harms resulting from resource extraction on or near Native lands. Part III discusses how the Indigenous understanding of treaty rights has evolved post-Standing Rock and summarizes the Standing Rock litigation. Finally, Part IV examines how, in light of its recent holdings, the Court of Federal Claims might view Bad Men claims related to resource extraction such as the disruption of Native religious practice, pollution and damage to sacred waters, and sexual violence against Native women.

⁸ *Id.* at 2530.

⁹ Emerson Urry, *Lakota Sioux Tribe Invokes Bad Men Treaty Clause Over Keystone Pipeline*, TRUTHOUT (May 10, 2015), <https://truthout.org/articles/lakota-sioux-tribe-invokes-bad-men-treaty-clause-over-keystone-pipeline/>.

¹⁰ See generally James D. Leach, Note, *Bad Men Among the Whites Claims After Richard v. United States*, 43 N.M.L. REV. 533 (2013).

I. Origins of the Bad Men Clause and its Treatment in the Federal Circuit

A. Background

Early English settlers in the seventeenth century first made treaties with Native nations, and assumed that the Indigenous population had actual ownership of the land.¹¹ This principle of negotiating with Native nations as sovereigns through the bargained-for-exchange process carried over into early American treaties with tribes.¹² Formal authority for treaty-making between the United States and tribal nations arises out of the Constitution.¹³ Between 1778 and 1868, over 367 treaties between tribes and the U.S. were negotiated by the President and ratified by the Senate under Article II of the Constitution.¹⁴

The Treaty of Hopewell, signed with the Cherokee Nation in 1785, bears early marks of a “bad men amongst the whites” clause.¹⁵ As opposed to later dealings with the Cherokee, the Treaty of Hopewell reflected a greater U.S. interest in improving peace and trade rather than facilitating land cessions.¹⁶ Peace and trade relations would also serve as the impetus later on for the work of the Great Peace Commission.¹⁷ The treaty provided that if any citizen of the United States commits a robbery, murder, or capital crime on a Cherokee, then they will be punished in the presence of Cherokees in the same manner as they would have been if the crime had been committed on a U.S. citizen.¹⁸ Though never ratified,¹⁹ the Treaty of Hopewell represents early treaty agreements between the U.S. and

¹¹ Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784-1911*, 56 AMERICAN JOURNAL OF POLITICAL SCIENCE 84, 86 (2012).

¹² *Id.*

¹³ It is helpful to note the Indian Trade and Intercourse Act established that only the federal government could purchase land from Native nations. *See* Act of July 22, 1790, ch. 33 § 4, 1 Stat. 137, 138, codified as amended at 25 U.S.C. § 177 (1982).

¹⁴ *See* Spirling, *supra* note 11, at 86; *see generally* U.S. CONST. art. II § 2.

¹⁵ *See* Treaty of Hopewell, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

¹⁶ Greg O’Brien, *The Conqueror Meets the Unconquered: Negotiating Cultural Boundaries on the Revolutionary Southern Frontier*, 67 THE JOURNAL OF SOUTHERN HISTORY 39, 47–48 (2001).

¹⁷ *See generally* An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 (1867).

¹⁸ Treaty of Hopewell, art. VII, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

¹⁹ Not all southern states agreed to adhere to the treaty, and ultimately, the Continental Congress failed to hold a vote on it. *See* O’Brien, *supra* note 16, at 48.

Native nations which ensured that non-Natives who harmed Native peoples would be turned over and punished by U.S. authorities.

In response to increased hostility between white settlers and Native peoples in the western United States,²⁰ Congress authorized a Great Peace Commission on July 20, 1867 to put an end to the Indian wars.²¹ The name of the Commission is somewhat deceptive—its aim was not to negotiate peace with Native Nations, but likely to “insure” their “civilization” and remove Native “causes of complaints” while making “peace and safety for the whites” in the western territories.²² Irrespective of the settler-minded purpose of the Great Peace Commission, there was no doubt that in the late 1860s, unprecedented violence was occurring on the plains as a result of white encroachment on Native lands.²³ Ultimately, the Commission reached nine treaty agreements with Native nations and bands, each of which contains a Bad Men clause. The tribes that are privy to the rights of these treaties include the Kiowa, Comanche, Apache, Cheyenne, Arapahoe, Crow, Navajo, Northern Cheyenne, Northern Arapahoe, Ute, Eastern Shoshone, Bannock, and tribes of the Sioux Nation.²⁴

Each of the nine treaties contains a Bad Men clause; some are textually identical, while others have minor differences from the general phrasing of the clause.²⁵ For example, in contrast with the Sioux treaty’s less stringent language pertaining to administrative review,²⁶ the treaties with the Kiowa, Comanche, Cheyenne, and Arapaho have the additional requirement that the Secretary of the

²⁰ See EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE* 44–45 (1991).

²¹ An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 (1867).

²² *Id.*

²³ Kerry R. Oman, *The Beginning of the End: The Indian Peace Commission of 1867-1868*, 22 *GREAT PLAINS QUARTERLY* 35, 35–36 (2002).

²⁴ Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868, 15 Stat. 635; 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. It is worth noting that the Apache have all benefits of the Kiowa and Comanche treaty by virtue of an incorporation clause found in their 1867 treaty. See Treaty with the Kiowa, Comanche, and Apache, Oct. 21, 1867, 15 Stat. 589.

²⁵ See *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2525-27.

²⁶ Compare the requirements of Treaty with the Sioux, U.S.-Sioux, art. I, Apr. 29, 1868, to Treaty with the Crows, U.S.-Crow, art. I, May 7, 1868, 15 Stat. 649, which requires the Assistant Secretary to “thoroughly examin[e] and pas[s] upon” the claim.

Interior also examine and pass upon the claim for damages.²⁷ It is crucial to note that these minor differences refer only to the text of the treaties—there are significant differences in interpretation among the distinct Native nations, and each nation’s interpretation should be given its own individual review in litigation, as discussed in more detail in Part II of this comment. The commission’s final report to President Andrew Johnson in January of 1868 reiterated the devastating effect of white encroachment on western Native lands: “Many bad men are found among the whites; they commit outrages despite all social restraints; they frequently, too, escape punishment.”²⁸

B. Bad Men Claims in the Federal Circuit, 1967-2012 (*Hebah* through *Richard*)

There are three main established issues from Bad Men case law between 1967 and 2012: 1) dormancy of the treaties is not indicative of the obsolescence of the Bad Men clause;²⁹ 2) Native plaintiffs must elect the Bad Men clause as their remedy;³⁰ and 3) government agents qualify as “bad men among the whites.”³¹ Each of these “settled issues” (as referred to in the 2014 HLR student note³² and a few others) are crucial to understanding how a court might view a claim by a Native plaintiff for “wrongs” of Bad Men related to the extraction of natural resources on or near Native lands and sacred sites.

In the first few Bad Men opinions, the court determined Bad Men claims arose from Indian treaties, which fell within the meaning of contracts with the United States under 28 U.S.C. § 1491, thus giving the Federal Circuit jurisdiction over these claims.³³ The first Bad Men claim arose in 1969 when Bureau of Indian Affairs (BIA) policeman Norman Moss killed Robert Hebah, a Shoshone, on the Wind River Reservation in Wyoming. His widow brought a Bad Men claim against the United States, alleging the killing violated the 1868 treaty between the United States and the Shoshone.³⁴ As matters of first impression, the Court of Federal Claims addressed three

²⁷ 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.

²⁸ TAYLOR ET AL., *supra* note 1, at 46.

²⁹ See *Tsosie v. United States*, 825 F.2d 393, 396 (Fed. Cir. 1987); see also *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019); *United States v. Dion*, 476 U. S. 734, 738–740 (1986); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

³⁰ See *Chambers v. United States*, 202 Ct. Cl. 1124, 1124 (U.S. 1973).

³¹ *Tsosie*, 825 F.2d at 397; *Begay v. United States*, 219 Ct. Cl. 599, 599 (1979); *Hebah v. United States*, 192 Ct. Cl. 787, 787 (1970).

³² *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2529.

³³ See *Hebah v. United States*, 428 F.2d 1334, 1340 (Ct. Cl. 1970).

³⁴ *Tsosie*, 825 F.2d at 393-94 (Fed. Cir. 1987); *Hebah*, 428 F.2d at 1335.

questions: “(1) Was Norman Moss a bad man in the sense of the treaty? (2) Did he commit a wrong on the person of Hebah, and if both of the foregoing are answered in the affirmative; then, (3) What sum will ‘reimburse the injured person for the loss sustained?’”³⁵

Hebah established a few foundational principles which “have not been seriously challenged since.”³⁶ First, the Court of Federal Claims has jurisdiction over Bad Men claims.³⁷ Second, these claims create causes of action for individual Indians.³⁸ Finally, though the alleged “bad” actor was himself an Indian, that fact alone did not bar the plaintiff from bringing a bad men claim as the officer was “subject to the authority of the United States.”³⁹

Nearly a decade passed between *Hebah* and the next significant holding in bad men jurisprudence. In *Begay v. United States*, the Court of Claims found that the Native plaintiff’s attorney failed to properly object to the decision of the Assistant Secretary-Indian Affairs (AS-IA) recommending the Bad Men claims be dismissed and, therefore, the Native plaintiff did not exhaust all administrative remedies.⁴⁰ This holding is characterized in Bad Men scholarship as a “harsh exhaustion rule” that has never been explicitly retracted, and which could be a cause of the “relative obscurity” of the clause.⁴¹ The harsh exhaustion rule could pose one of the most significant hurdles to litigating a successful bad men claim against any sort of actor, not just against a corporate actor.

From *Tsosie v. United States* in 1987, through the next twenty years, few bad men cases arose. In 2007, the Court of Claims held a Bad Men claim under the 1868 Fort Laramie Treaty could not be broadened to incorporate claims for negligence in *Garreaux v. United States*.⁴² There, the plaintiff was an enrolled member of the Cheyenne River Sioux Tribe who sought to use the treaty to recover for damages under a lease with the Department of Housing and Urban Development.⁴³ The court found a “wrong” did not encompass a claim for negligence, nor a breach of contract claim under the treaty.⁴⁴

In reaching this decision, the court distinguished the “wrong” claimed by the Lakota plaintiff from the “affirmative criminal acts,”

³⁵ *Hebah*, 428 F.2d at 1335-36.

³⁶ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2530.

³⁷ *Hebah*, 428 F.2d at 1335.

³⁸ *Id.* at 1337-38.

³⁹ *Id.* at 1340.

⁴⁰ *Begay v. United States*, 219 Ct. Cl. at 602.

⁴¹ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2532.

⁴² *Garreaux v. United States*, 77 Fed. Cl. 726, 726-27 (2007).

⁴³ *Id.* at 734.

⁴⁴ *Id.* at 737.

which were the alleged “wrongs” in *Hebah*, *Tsosie*, and *Begay*,⁴⁵ despite the fact the three prior cases interpreted different treaties (Shoshone and Navajo, respectively) than the Treaty of Fort Laramie. Last, the factual circumstance of *Garreaux* (unspecified claims against a local housing authority) indicates the type of injury courts are “traditionally unsympathetic to.”⁴⁶ This aspect could have weighed significantly in the court’s decision not to consider breach of contract claims in the Bad Men analysis.⁴⁷ This holding is crucial to an understanding of why a plaintiff may not be successful in a claim based on wrongs which are common effects of the extraction industry such as frustration of religious practice or poor hiring practices.

The first major victory for a Native plaintiff in the history of Bad Men claims was in 2013, with *Elk v. United States*.⁴⁸ To date, the only plaintiff to take a Bad Men action through trial and win on the merits is Oglala Lakota member Lavetta Elk.⁴⁹ In 2003, Elk was sexually assaulted by an Army recruiter on a secluded road on the Pine Ridge Reservation in South Dakota.⁵⁰ Looking primarily to *Hebah* and *Begay*, the Government’s chief argument in *Elk I* was that Elk had failed to exhaust all administrative remedies.⁵¹ The Court of Federal Claims found this argument unconvincing, and stated: “[I]mportantly, those orders did not involve the Sioux Treaty, but rather the [differently-worded] Navajo Treaty” which contained the proviso that the AS-IA has to examine and pass on claims submitted.⁵² In *Elk II*, the Court of Federal Claims reviewed the case on the merits and found Elk was entitled to damages totaling over \$590,000 for the actions of the “bad man.”⁵³ The 2009 opinion was the first time a court had the occasion to consider the meaning of “reimburse” and “loss-sustained” under the Fort Laramie Treaty.⁵⁴ To make Lavetta Elk “whole,” the court granted her the same damages she could have recovered in a tort action, including pain and suffering, lost wages, medical bills, and more.⁵⁵ The *Elk II* decision was a turning point in Bad Men jurisprudence, as it created a precedent for individuals to recover under

⁴⁵ *Id.* at 736-37.

⁴⁶ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2533 n.93.

⁴⁷ *Id.*

⁴⁸ *Elk v. United States*, 87 Fed. Cl. 70 (2009).

⁴⁹ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2533.

⁵⁰ *Elk*, 87 Fed. Cl. at 74.

⁵¹ *Elk v. United States*, 70 Fed. Cl. 405, 407 (2006).

⁵² *Id.* at 410.

⁵³ *Elk*, 87 Fed. Cl. at 98.

⁵⁴ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2533.

⁵⁵ *Id.*

their treaty rights for wrongs against them, even if all other methods of relief had failed.⁵⁶

In 2012, the Federal Circuit again examined the effect of the Treaty of Fort Laramie's Bad Men clause in *Richard v. United States*.⁵⁷ In *Richard*, two Oglala Lakota tribal members were killed by a non-Indian drunk driver on the Pine Ridge Reservation.⁵⁸ On appeal, the Court of Federal Appeals held that Bad Men claims under the Fort Laramie Treaty were not limited to allegations against government actors, but also included "wrongs" by non-Indian civilians.⁵⁹ Of course, it is natural that the government actors would be included. The history of the litigation suggests that when viewing the treaties as bargained-for exchanges between two sovereign powers, it makes sense to include federal government employees—agents of the United States—among those who could trigger the government's liability by breaking the terms of the treaty.⁶⁰ But the court decided that the bad men referred to in the clause are not just these agents. The court was skeptical of the lower court's acceptance of the government's characterization of the treaty's purpose (that the treaty was so-limited), which relied on the Doolittle Report,⁶¹ calling the assertions "historically and factually inaccurate."⁶² The court instead looked to historical documents produced by the Native appellants which examined the Lakota intent at the time of signing more holistically,⁶³ finding an intent to include those "wholly unassociated" with the government in the Bad Men clause.⁶⁴

These cases show that early on in Bad Men cases, the government sought to lean heavily on the argument that Bad Men

⁵⁶ Marquez, *supra* note 4, at 624.

⁵⁷ *Richard v. United States*, 677 F.3d 1141, 1143 (Fed. Cir. 2012).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1149.

⁶⁰ See 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, 79 (2006); see also *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

⁶¹ The Doolittle Report of 1867 was a comprehensive congressional investigation led by Senator James Doolittle which resulted in the 500-page "Doolittle Report" that contained damning reports of violence on the plains and fundamental disagreements between Native nations and white settlers. See generally JOINT SPECIAL COMM. APPOINTED UNDER JOINT RESOLUTION OF MARCH 3, 1865, CONDITIONS OF THE INDIAN TRIBES, S. REP. NO. 39-136 (1867).

⁶² *Richard*, 677 F.3d at 1148.

⁶³ This holding is consistent with the canons of Indian treaty construction, first issued in *Worcester v. Georgia*, which will be discussed at length in Part IV. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁶⁴ *Richard v. United States*, 677 F.3d at 1148.

clauses had no effect and were “virtually dead letters” because they were scarcely used.⁶⁵ No court has ever adopted this “dormancy” argument, as it is inconsistent with the long-held notion there must be “[c]lear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”⁶⁶ Because courts have never found specific congressional intent to abrogate any of the nine treaties, none of the clauses or provisions within them can be deemed obsolete.

C. Limited Success Post-Elk: *Jones, Hernandez and Cheyenne & Arapaho Tribes* (2017-2020)

i. *Jones v. United States* and *Hernandez v. United States*

Importantly, there have been three significant Bad Men cases in the Court of Federal Claims since the publication of “A Bad Man is Hard to Find” in 2014. These are *Jones v. United States*,⁶⁷ *Hernandez v. United States*,⁶⁸ and, most recently, *Cheyenne & Arapaho Tribes v. United States*.⁶⁹ In 2017, in *Jones*, the Court of Federal Appeals considered the validity of a Bad Men claim brought by the representative of a deceased Ute man who was shot during a police pursuit that ended on the Ute reservation. Jones alleged police misconduct off the reservation as well, at sites such as the Medical Center and mortuary, where the police allegedly covered up the on-reservation killing.⁷⁰ The court considered three main issues: “(1) the nature of the cognizable wrongs, (2) the universe of applicable ‘laws of the United States,’ and (3) the geographic location of the wrongs.”⁷¹ As to the first notable ruling, the court deferred to *Tsosie* in holding that affirmative criminal acts are “cognizable” as “wrongs” under the Navajo treaty and interpreted the Ute treaty the same.⁷² However, the court noted it lacked the “historical analysis” to conclude criminal acts of omission are not cognizable.⁷³ *Jones* is an important case for a

⁶⁵ See *Tsosie v. United States*, 825 F.2d at 396.

⁶⁶ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202–203 (1999) (quoting *United States v. Dion*, 476 U. S. 734, 740 (1986)), quoted in *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); see also *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

⁶⁷ 846 F.3d 1343 (Fed. Cir. 2017).

⁶⁸ 141 Fed. Cl. 454 (2019).

⁶⁹ No. 20-143, 2020 U.S. Claims LEXIS 2542, (Fed. Cl. Dec. 9, 2020).

⁷⁰ *Jones*, 846 F.3d at 1343.

⁷¹ *Id.*

⁷² *Id.* at 1358.

⁷³ *Id.*

second reason: the appellate court determined that the jurisdiction of a Bad Men claim was not limited to wrongs occurring wholly on reservation land.⁷⁴ Though the court declined to issue a bright-line standard for off-reservation claims, it held “the bad men provision may take cognizance of off-reservations activities that are a clear continuation of activities that took place on-reservation.”⁷⁵

Two years later, the Court of Federal Claims in *Hernandez* considered a Bad Men claim brought by an individual tribal citizen against the Bureau of Indian Affairs. The plaintiff, a member of the Rosebud Sioux Tribe, alleged that the BIA breached its fiduciary duty towards him as a citizen of a Native nation in orchestrating conspiracies against him.⁷⁶ The court held there was nothing to suggest a criminal conspiracy to violate the plaintiff’s rights and the plaintiff failed to state a claim under the Fort Laramie Treaty because he did not allege a wrong consistent with the holding in *Jones*.⁷⁷ The court also narrowed the geographic limitations standard in *Jones*, now defining the requisite “nexus” between off-reservation alleged wrongs and on-reservation wrongs as a clear continuation of off-reservation and on-reservation activities.⁷⁸

ii. Cheyenne & Arapaho Tribes Raise Bad Men Clause in Response to Opioid Crisis

Most recently, on December 9, 2020, the Court of Federal Claims dismissed a suit brought by the Cheyenne & Arapaho Tribes against the United States for lack of jurisdiction where the Tribes asserted a Bad Men claim against the government as a result of wrongful acts of “corporate pharmaceutical opioid manufacturers, distributors, and their agents” who caused harm to the Tribes via a “civil conspiracy” to produce opioid addiction in individuals “within the economic proximity of the Tribe,” including the tribal community.⁷⁹ *Cheyenne & Arapaho Tribes* is the first of its kind in Bad Men jurisprudence: it is a suit brought by a tribe, not an individual, and is argued as both a claim by a tribal government and alternatively as a *parens patriae* claim on behalf of its members for off-reservation corporate wrongs

⁷⁴ *Id.* at 1359.

⁷⁵ *Id.* at 1360.

⁷⁶ *Hernandez v. United States*, 141 Fed. Cl. 454, 456 (2019).

⁷⁷ *Id.* at 462.

⁷⁸ *Id.* (“[H]e asserts no facts that would establish a nexus between the acts of which he complains and activities that occurred or began on the Rosebud Indian Reservation.”).

⁷⁹ *Cheyenne & Arapaho Tribes v. United States*, No. 20-143, 2020 U.S. Claims LEXIS 2542, at *2, 4 (Fed. Cl. Dec. 9, 2020).

with “proximity” to the tribe.⁸⁰ As more fully discussed in Section III, this Bad Men case is instructive in what it teaches about how a court might treat a claim by a tribe or group of tribal members against the United States for the actions of a corporate actor in the extraction industry.

The specific substance of the *Cheyenne & Arapahoe Tribes’* Bad Men claim is that under the Medicine Lodge and Fort Laramie treaties, the “Opioid Bad Men” in “reckless disregard for the consequences, increased prescription drug marketing and sales, and flooded the Tribe and tribal communities with prescription opioids.”⁸¹ Plaintiffs sought reimbursement under the treaty provision for losses sustained, including the costs of medical care, welfare and foster care for families affected by the crisis, and law enforcement costs of policing the crisis, among other named costs.⁸² In its Motion to Dismiss, the government argued three main deficiencies with the Tribes’ Bad Men claim: (1) the clause was intended to create a cause of action only for individuals; (2) the tribe failed to meet the procedural requirement of exhausting administrative remedies; and (3) the tribe did not meet the elements of a Bad Men claim⁸³ (identification of “bad men,” and a cognizable wrong with proximity to the reservation).⁸⁴

The Court found the Tribes’ Bad Men claim unsuccessful in part because it was unconvinced by the argument that the canons of construction should be applied liberally to the treaties, giving the tribal government a cause of action under the clause, and alternatively, that the Tribes had prudential standing to bring suit on behalf of its members under *parens patriae*.⁸⁵ The Court held that there was no need to apply the canons of construction where there was “no ambiguity in the Treaties’ text” which both state “the injured *person* [will be compensated] for the loss....”⁸⁶ In support of this holding, the court noted that in *Hebah I*, the court “was faced with interpreting an identical ‘bad men’ clause in another tribe’s treaty” and found the clause created a cause of action for individuals—the *Cheyenne* court thus rejected the Tribes’ argument that *Hebah I* did not “explicitly preclude” tribal governments from filing a Bad Men claim.⁸⁷ The *Cheyenne* court (perhaps because it declined to apply the canons of

⁸⁰ *Id.* at *6.

⁸¹ *Id.* at *5.

⁸² *Id.* (citing Complaint at 29).

⁸³ *Id.* at *10.

⁸⁴ *See id.* at *19.

⁸⁵ *See id.* at *11-14.

⁸⁶ *Id.* at *12 (quoting Treaty with the Cheyenne Indians, art. 1, Oct. 28, 1867, 15 Stat. 593 (1867) (“*Medicine Lodge Treaty*”); Treaty with the Cheyenne Indians, art. 1, May 10, 1868, 15 Stat. 635 (1868) (“*Fort Laramie Treaty*”).

⁸⁷ *Id.* at *13.

construction) did not feel the need to explain why a different treaty signed by a different tribe is “identical” in content and meaning to provisions in the Cheyenne & Arapaho Tribes’ treaties. Finally, the prudential standing doctrine of *parens patriae* was similarly unavailable because under precedent, the tribe did not assert a “quasi-sovereign interest,” but instead attempted to litigate “the rights of individual tribe members.”⁸⁸

Ultimately, apart from defects with the Tribes’ standing arguments, the court found the plaintiff also failed to meet the elements of a bad man claim with its argument of harm by “Opioid Bad Men” with “economic proximity” to the tribal community.⁸⁹ In walking through the elements of the treaty claim, the court borrowed frequently from its prior decisions in *Jones* and *Hernandez*. The court was not persuaded by the plaintiffs’ arguments during oral argument that a Bad Men claim based upon actions of a corporate entity was proper because entities are under the direction of a person. Instead, the court held under *Hernandez* that a corporate entity, like a court (the entity argued by the plaintiff in *Hernandez*), is not cognizable as a “bad man.”⁹⁰ The court did not elaborate on the plaintiffs’ arguments because it declined to expound upon an argument that was not included in the Tribes’ Complaint and Response.

Next, the court determined that the “wrong” alleged by the Tribes did not meet the *Jones* standard of acts “prosecutable as criminal wrongdoing” which would include on-reservation wrongs and off-reservation wrongs that were directly connected.⁹¹ The Tribes pointed to Purdue Pharma’s 2007 criminal and civil settlement as evidence of a wrong that meets this standard, but the court agreed with the government that this purported wrong did not involve the requisite on-reservation nexus prescribed by *Jones* and *Hernandez*.⁹² The court was skeptical, at best, of the Tribes’ “economic proximity” argument—that the “Opioid Bad Men” engaged in economic activity, purposefully exasperating the opioid crisis on and near tribal lands—curtly stating “*economic proximity* of the Tribe, whatever that means.”⁹³ Curiously, in a footnote, the court briefly addressed an argument by the Tribes that the wrongs of the “Opioid Bad Men” *did* meet the nexus standard of *Jones* because on-reservation doctors over-prescribed the drugs as a direct result of their actions.⁹⁴ Still, the Court

⁸⁸ *Id.* at *14, 16 (quoting Defendant’s Motion to Dismiss at 13).

⁸⁹ *Id.* at *25-25.

⁹⁰ *Id.* at *20.

⁹¹ *Id.* at *21 (quoting *Jones v. United States*, 846 F.3d at 1355).

⁹² *Id.* at *22-24.

⁹³ *Id.* at *24 (internal quotation marks and citation omitted) (emphasis in original).

⁹⁴ *Id.* at *22 n.7.

again declined to engage with this argument because it was not included in the Complaint and Response.⁹⁵

The Court of Federal Claims' decisions in *Hernandez* and *Cheyenne & Arapaho Tribes*, which leaned heavily on the Federal Circuit's decision in *Jones*, are representative of continued reluctance by courts to accept a Bad Men claim. The three decisions all feature a relatively new nexus-to-the-reservation requirement for these types of claims, and each shows a continued trend in the jurisprudence of interpreting all bad men treaties the same, even though they are agreements between different tribes and the United States. As section III discusses, *Cheyenne & Arapaho Tribes* is an outlier in the Bad Men case history because of its distinctive facts, and represents a glimpse as to how a Bad Men claim based upon wrongs of a corporate actor in the extraction industry might be treated in the Court of Federal Claims.

II. Proposed Approach to Judicial Interpretation

The 2014 HLR Student Note contains a framework for judicial interpretation of the clause which is helpful to examine in the context of a potential claim by a Native plaintiff or plaintiffs based on wrongs caused by resource extraction on or near Native lands.⁹⁶ The proposed approach to the interpretation of Bad Men clauses builds upon the Indian law canons of construction. The Supreme Court's decision in *Worcester v. Georgia* expounded the fundamental rules of treaty interpretation, foremost among them, "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."⁹⁷ Further, it is the tribe's perspective *at the time of signing* which is relevant to interpretation. Where these canons⁹⁸ have been applied, Native nations have seen tremendous victories in federal courts,⁹⁹ but where courts have chosen to "disregard" them, it has made a significant difference

⁹⁵ *Id.*

⁹⁶ See *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2536-42.

⁹⁷ *Worcester v. Georgia*, 31 U.S. 515, 582 (1832).

⁹⁸ *Cohen's Handbook of Federal Indian Law* counts four canons of construction: "(1) interpret Indian treaties 'as the Indians would have understood them,' (2) construe them 'liberally . . . in favor of the Indians,' (3) resolve all ambiguities in the Indians' favor, and (4) preserve tribal property rights and sovereignty unless a contrary intent is clearly stated." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 119-20 (Nell Jessup Newton et al. eds., 2005).

⁹⁹ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196, 200; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

in the outcome of the case.¹⁰⁰ In general, as Professor Philip Frickey has noted, the canons of construction protect “values rooted in the spirit of Indian treaties,” an observation that reflects an extrapolation beyond the express language of treaties to capture the essence of the interpretive rules established by the foundational *Worcester* case.¹⁰¹

First, the Note discusses relevant work on the “pan-Indian superstructure,” so coined by Professor Ezra Rosser in his 2006 article for the same journal.¹⁰² A pan-Indian approach favors homogeneity in treaty interpretation and can lead to *ad hoc* decision making detrimental to the cultural autonomy of the 574 Native nations.¹⁰³ The Supreme Court, in particular, has a reputation for using a homogenous approach in Native treaty interpretation,¹⁰⁴ meaning the Court does not always afford each sovereign Nation the benefit of interpreting their treaties with the United States in a tribe-specific manner, as opposed to their frequent practice of making interpretive assumptions regarding Native cultures and government structures as a group. The oft used “homogenous approach” would not serve a Native plaintiff well if a Bad Men claim is ever before the highest court.

In Bad Men case history, *Garreaux v. United States* is particularly representative of an occasion where the Court of Claims used a more homogenous approach to the detriment of the Native plaintiff. The court leaned on earlier decisions in *Hebah*, *Tsosie*, and *Begay* interpreting the Shoshone and Navajo treaties to distinguish the Lakota treaty and find the “wrong” claimed by the Lakota plaintiff was

¹⁰⁰ See *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting in part).

¹⁰¹ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 417 (2001) (arguing that judicial “vigilance” in interpreting congressional acts as not abrogating Indian treaties “is a natural extension of Chief Justice Marshall’s work in *Worcester*” and reflects recognition that “the Indian treaty abrogation doctrine protects against all but clear repeals of values rooted in the spirit of Indian treaties”).

¹⁰² See *A Bad Man is Hard to Find*, supra note **Error! Bookmark not defined.**, at 2538-40; see also Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141, 142 (2006).

¹⁰³ One of the original articles raising this issue was Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 589 (1985). See also Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 459 (2005).

¹⁰⁴ Professor Saikrishna Prakash aptly describes the Supreme Court’s interpretation problem: “The Justices of the U.S. Supreme Court are an enlightened group who generally do not lump together people of the same background . . . Instead of determining how individual Indian tribes are differently situated, the Court treats the Indian tribes as wholly fungible.” Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1070 (2004).

not an “affirmative criminal act.”¹⁰⁵ This is troubling because the Shoshone, Navajo, and Lakota have vastly different cultures, religions, and government structures—a point missed entirely when the court defined a “wrong” against a Lakota plaintiff based upon how it previously interpreted Navajo and Shoshone treaties. This homogenous approach entirely avoids the necessary work of building out from a knowledge base of what a “wrong” would have meant to the Lakota, and the Lakota alone, at the time of treaty signing. Most recently, the *Cheyenne & Arapaho Tribes* court applied the same criminal wrongdoing standard from *Jones*,¹⁰⁶ even though the treaty at issue in *Jones* concerned the Ute Tribe and *Cheyenne* concerns the Cheyenne & Arapaho Tribes which are not parties to the Treaty with the Ute.¹⁰⁷

The one-size-fits-all solution of the pan-Indian interpretive approach can only lead to detrimental outcomes for Native plaintiffs bringing Bad Men claims. Viewing treaty terms as homogenous across treaties could be especially detrimental when a court is interpreting a portion of the Bad Men clause for the first time, as would be the case with a court seeking to interpret a “wrong” to “property” in the case of harm to Native sacred sites and waters. If a court were to determine, for instance, that under the Treaty with the Ute the Ute signatories did not intend for “property” to include waters or sacred sites, and then, in a separate case, apply this same finding to the Treaty of Fort Laramie, it would effectively deny a plaintiff with treaty rights under the Treaty of Fort Laramie the benefit of construing the clause in accordance with their own tribe’s worldview and customs. The same could be said of the interpretation of the “wrong” standard in the context of harms caused by the extraction industry: at the time of signing, “different tribes faced different bad men engaged in (potentially) different wrongs.”¹⁰⁸

To combat this harmful type of judicial interpretation, the HLR Note proposes what is essentially a necessary splintering of the Bad Men legal doctrine and a fact-intensive inquiry into the culture and custom of each individual Native nation.¹⁰⁹ “Splintering” the doctrine will primarily represent a return to a more Indigenous view of treaty-making (a nation-to-nation, not nation-to-all-nations relationship), and will encourage courts to follow the canons of construction issued in

¹⁰⁵ *Garreaux v. United States*, 77 Fed. Cl. 726, 737-38 (2007).

¹⁰⁶ *Cheyenne & Arapaho Tribes v. United States*, 2020 U.S. Claims LEXIS 2542, at *8.

¹⁰⁷ *See Treaty with the Ute*, Mar. 2, 1868, 15 Stat. 619.

¹⁰⁸ *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2538.

¹⁰⁹ *See id.* at 2540-42.

Worcester that bend toward the tribe's view of the text.¹¹⁰ This framework could be highly beneficial to Native plaintiffs in the context of harms caused by extractive industries. When examining issues such as (1) how far to extend liability under the clause for wrongs of corporate actors, (2) what qualifies as a sufficient "nexus" to on-reservation activity, and (3) what a "wrong" to "property" might encompass, this new judicial framework could be crucial in building a record which takes a broad view of what Native signatories might have envisioned for their Native nation in securing the treaty right.

Some of the possible criticisms of this new judicial framework include judicial hardship,¹¹¹ decreased scholarly productivity,¹¹² and a costly discovery process. Courts would likely be reluctant about this prospect as it is much easier to cite to precedent than to do a deep analysis into a detailed issue of federal Indian law such as a particular tribe's understanding of whether or not a sacred site is "property," as that word is included in a Bad Men clause. It is foreseeable that adopting a fact-intensive approach will lead to a less efficient discovery phase. Each party would have to give the historical record the time it deserves to develop arguments which are soundly built on the canons of construction. This could take a long time, but such a record for each Native nation could be beneficial moving forward.

The Bad Men litigation process could aid in producing a historical record which could be of use in future assertions of treaty rights and which would benefit those arguing on behalf of Native nations and the U.S. government alike. Possible criticisms of the proposed judicial interpretation framework ultimately do not outweigh the benefit of returning to a more Native-centric view of treaty-making and treaty provisions. A return to Nation-specific interpretation would be vital for plaintiffs to see success on a Bad Men claim for wrongs resulting from resource extraction in the *Mni Wiconi* age. The next section of this comment discusses what a claim of that nature might look like.

¹¹⁰ See generally *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹¹¹ See *A Bad Man is Hard to Find*, *supra* note **Error! Bookmark not defined.**, at 2541.

¹¹² Rosser, *supra* note 102, at 145.

III. The Unexplored Territory of Wrongs on Property and the Lakota Invocation Against TC Energy

*Ask anyone in this camp and they will tell you the same thing. All the prophecies end here.*¹¹³

All of the Bad Men cases thus far have involved deprivations against Native persons, but it is crucial to recognize the clause also addresses wrongs against Native property. The 2016 protest of the Dakota Access Pipeline at the Standing Rock Sioux Reservation ushered in a new era of Indigenous resistance to the destruction of Native lands and waters. The increase of extraction sites near reservations—particularly in the west—is not only concerning because of destruction to Native sacred sites and pollution of valuable water resources, but also because of the rise in cases of Missing and Murdered Indigenous Women (“MMIW”) near these sites. There is an acute need for alternative means of accountability for the extraction industry for causing these catastrophic harms. This section begins with an overview of the Standing Rock litigation and the Lakota invocation of the Bad Men clause against TC Energy over the Keystone XL pipeline. Next, this section explores how a treaty and tribe-specific interpretation of the Bad Men clause may be an avenue for addressing wrongs caused by extractive industries in the areas of disruption of Native religious practice, damage to Native sacred sites, and sexual violence against Native women.

A. Treaty Rights Post-Standing Rock and the Lakota Invocation of the Bad Men Clause Against TC Energy

Current legal frameworks are insufficient to resolve recent disputes over harm to Native lands. Beginning in August of 2016, thousands descended on the Sacred Stone and *Oceti Sakowin*¹¹⁴ camps

¹¹³ Ben Mali Macfadyen, *The Mythos We Live By: The Black Snake and the Row of Flags*, DARK MOUNTAIN PROJECT (March 17, 2017) (recalling the words of “Dorothy,” an Oglala Sioux elder, in which she described the cultural significance of Standing Rock), <https://www.resilience.org/stories/2017-03-17/mythos-live-the-black-snake-row-flags/>.

¹¹⁴ “The Seven Council Fires [*Oceti Sakowin*] are composed of the Dakota-, Lakota-, and Nakota-speaking peoples. The Council Fires are formed from four that are [Santee] Dakota—*Sissetonwan*, *Wahpetonwan*, *Wahpekute*, and *Mdewakantonwan*; two that are Nakota—*Ihanktonwan* (Yankton) and *Ihanktowana* (Little Yankton); and one that is Lakota—*Tetonwan*.” Angelique Townsend EagleWoman (Wamdi A. WasteWin), *U.S.—Dakota War of 1862: Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the*

on the Standing Rock Sioux Reservation in North Dakota to protest the construction of the Dakota Access Pipeline (DAPL) across and under ancestral Lakota lands.¹¹⁵ For ten months, demonstrators, Indigenous and non-Indigenous alike, protested DAPL under the Lakota call of *Mni Wiconi*—“Water is Life.”¹¹⁶ This call came to symbolize more than a battle cry for protestors at Standing Rock: it grew into a symbol of “prefigurative politics” for a new era of environmental protest looking to Indigenous values for answers.¹¹⁷

Concurrent with the “#NoDAPL” movement, in July of 2016, the Standing Rock Sioux Tribe (SRST) brought an action in the United States District Court for the District of Columbia against the Army Corps of Engineers for permitting DAPL activities in violation of the National Historic Preservation Act’s consultation requirements.¹¹⁸ In September of 2016, the court denied the Tribe’s motion to enjoin the pipeline’s construction, finding “the Tribes were unlikely to prevail on their NHPA claims that the construction process desecrated sacred lands adjoining Lake Oahe.”¹¹⁹ Although Standing Rock’s National Historic Preservation Act and Religious Freedom Restoration Act claims were unsuccessful, in 2017, the court remanded the Tribe’s National Environmental Protection Act claims to the Corps concerning “(1) whether the project’s effects were likely to be ‘highly controversial’; (2) the impact of a hypothetical oil spill on the Tribe’s fishing and hunting rights; and the (3) environmental-justice effects of the project.”¹²⁰

Despite persistent protest, and these legal challenges, the Trump administration approved the pipeline to cross ancestral Lakota

United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms, 39 WILLIAM MITCHELL L. REV. 486 (2013) (footnote omitted).

¹¹⁵ Mary Kathryn Nagle, Note, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. F. 667, 668 (2018); see also Danielle Delaney, Note, *Under Coyote’s Mask: Environmental Law, Indigenous Identity, and #NoDAPL*, 24 MICH. J. RACE & L. 299, 300-01 (2019).

¹¹⁶ Delaney, *supra* note 115, at 300.

¹¹⁷ Alexander Zaitchik, *On Native Grounds: Standing Rock’s New Spirit of Protest*, 34 THE BAFFLER 102, 106 (2017) (“Geared toward stopping a pipeline, [the encampment] . . . functioned as an exercise in prefigurative politics—a community, in the words of L.A. Kauffman, ‘working to build a new world in the moment, whatever [the] concrete impact.’”), available at <https://thebaffler.com/salvos/on-native-grounds-zaitchik>.

¹¹⁸ *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

¹¹⁹ *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, 440 F. Supp. 3d 1, 10 (D.D.C. 2020).

¹²⁰ *Id.* at 11 (citations omitted).

waters, and it became operational in May of 2017.¹²¹ In March 2020, U.S. District Court Judge James. E. Boasberg considered summary judgment motions filed by Plaintiffs Standing Rock Sioux Tribe, Oglala Sioux Tribe, and Yankton Sioux Tribe, as well as Plaintiff-Intervenor Cheyenne River Sioux Tribe, and ordered that the Corps must prepare an environmental impact statement addressing the “health, safety, and treaty concerns of the Dakota Access Pipeline.”¹²² This process will allow stakeholders, including tribes and Indigenous nonprofit organizations, to submit comments on health and safety concerns, but the pipeline’s future remains uncertain. One positive outcome of the pending litigation is that in an accompanying memorandum opinion in July of 2020, Judge Boasberg ordered the pipeline to be emptied during the remand process due to the “seriousness of the Corps’ deficiencies.”¹²³

Though these recent wins in the U.S. District Court, District of Columbia are significant for Indigenous communities, looking forward, a new legal framework is needed in the *Mni Wiconi* age which can address the grievances issued by the “#NoDAPL” movement as well as the broad spectrum of harms extractive industries can cause to tribes and individual citizens with respect to spiritual practice, water resources, and sexual violence. Treaty rights can serve as a potent mechanism of justice for Indigenous communities in this pursuit. In *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, Mary Kathryn Nagle posits that the initial failure of the SRST filings (challenging the Army Corps of Engineers’ decision to grant the pipeline permits) to gain any traction in federal court is representative of the larger issue of the failure of the environmental law framework to protect Native lands and water from irreparable harm.¹²⁴ Nagle argues that, post-*Standing Rock*, a new framework is needed to protect land and sacred sites—a framework cognizant of both inherent Indigenous sovereignty and Indigenous stewardship over the natural resources which has existed “since time immemorial.”¹²⁵ The *Standing Rock* filings and the “#NoDAPL” protest diverge in a critical way: the tribe sought an injunction on the basis of its interest

¹²¹ DAVID TREUER, *THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT* 432 (2019).

¹²² *NIWRC Supports Federal Court Decision Ordering Full Environmental Impact Statement on Dakota Access Pipeline*, NATIONAL INDIGENOUS WOMEN’S RESOURCE CENTER (Mar. 26, 2020), <https://www.niwrc.org/news/niwrc-supports-federal-court-decision-ordering-full-environmental-impact-statement-dakota>; *see also Standing Rock Sioux Tribe*, 440 F. Supp. 3d at 20.

¹²³ *Standing Rock Sioux Tribe v. United States Army Corps of Eng’rs*, No. 16-1534 JEB, 101, 147 (D.D.C. July 6, 2020).

¹²⁴ Nagle, *supra* note 115, at 667.

¹²⁵ *Id.* at 683.

in preserving the sacred sites, whereas the protesters protested the very existence of the pipeline.¹²⁶

The Lower Brule Lakota Sioux Tribe of South Dakota believes the Treaty of Fort Laramie is the way for tribes of the *Oceti Sakowin* (Great Sioux Nation) to recover for the harms that tar sands pipeline companies have caused their ancestral lands. In response to alleged unethical business practices by tar sands pipeline company TC Energy, Acting Chairman of the Lower Brule Tribe Kevin Wright stated in a 2015 press release that his people were invoking the Bad Men clause in observance of the 124th anniversary of the Treaty of Fort Laramie.¹²⁷ In the press release dated April 29, 2015, the Chairman declared, “We see them as ‘Bad Men’ as defined by our treaties with the United States government. We feel that TransCanada (these bad men) needs to be removed from our aboriginal and treaty territory.”¹²⁸ Curiously, this invocation occurred a year prior to the beginning of the protests at Standing Rock. While the Lower Brule never filed any Bad Men claims against TC Energy or the United States, other Lakota Nations continued to use provisions of the Treaty of Fort Laramie to fight the tar sands company and the Trump administration, as seen in the Standing Rock litigation.¹²⁹

2019 filings by the Rosebud Sioux Tribe and the Fort Belknap Indian Community against the Trump administration and TC Energy alleged the Keystone XL pipeline will cause irreparable harm to Lakota lands. The Keystone XL Pipeline is a proposed addition to the Keystone Pipeline which would carry tar sands oil from Canada across the Great Plains to Nebraska.¹³⁰ This route would take the pipeline through both sovereign and treaty lands of *Oceti Sakowin* nations.¹³¹ The plaintiffs made the tribes’ rights under the Treaty of Fort Laramie the center of their argument.¹³² Plaintiffs Rosebud Sioux Tribe and Fort Belknap Indian Community alleged that TC Energy did not obtain the consent required by treaty to cross Rosebud territory,¹³³ and their First Amended Complaint specifically referenced Article 17 of the

¹²⁶ TREUER, *supra* note 121, at 438.

¹²⁷ See Urry, *supra* note 9.

¹²⁸ *Id.*

¹²⁹ See generally Combined Response to Defendant’s Mot. to Dismiss, Rosebud Sioux Tribe, et. al., Plaintiffs, v. Donald J. Trump, et. al., Defendants, No. 4:18-cv-00118-BMM, (D. Mont. 2019).

¹³⁰ Cindy S. Woods, *The Great Sioux Nation v. the “Black Snake”*: Native American Rights and the Keystone XL Pipeline, 22 BUFF. HUM. RTS. L. REV. 67, 68 (2016).

¹³¹ *Id.*

¹³² Combined Response to Defendant’s Mot. to Dismiss, Rosebud Sioux Tribe, et. al., Plaintiffs, v. Donald J. Trump, et. al., Defendants, No. 4:18-cv-00118-BMM, at 3 (D. Mont. 2019).

¹³³ *Id.*

Treaty of Fort Laramie as having “the effect of . . . creat[ing] a new process—the ‘Bad Men Clause’ process—to compensate tribes for damages claims, and to repeal the old damages provision.”¹³⁴ Ultimately, the Tribes argued the United States ignored its treaty obligations to protect Rosebud and Fort Belknap in approving the Keystone XL pipeline and the tribes suffered “procedural harm” as a result.¹³⁵

On October 16, 2020 Judge Brian M. Morris of the United States District Court for the District of Montana granted defendant and defendant-intervenors’ motion for summary judgment in part, finding that the plaintiff Tribes failed in part to meet the preliminary injunction standard by showing irreparable injury as a result of the permits and that the presidential permit did not violate treaty mineral and jurisdictional rights.¹³⁶ The Court did not elaborate on the Tribes’ treaty claims, remarking briefly that “[t]he 2019 Permit does not authorize pipeline construction across tribal land, however, and so Plaintiffs’ mineral and treaty claims fail.”¹³⁷ In the Rosebud case, while treaty claims were at the forefront of the Tribes’ filings, the Bad Men clause (though referenced in the Plaintiffs’ Amended Complaint) was not litigated or explored in relation to the pipeline company’s presence on treaty lands and impact on surrounding natural resources and communities.

The Lower Brule invocation and the Plaintiffs’ filings in *Rosebud Sioux v. Trump* illustrate the creative legal horizons which Native nations, particularly in the Bakken region,¹³⁸ have turned to in order to fight pipeline companies in the courts.¹³⁹ Standing Rock has produced an Indigenous population which is both newly awakened to the harms of pipelines on their lands and newly interested in the power of treaties to combat those harms. Significantly, the 1868 Treaty of Fort Laramie formed the basis for the Standing Rock Tribe’s assertion of express rights over the lands affected by pipeline—the same treaty

¹³⁴ [Proposed] First Amended Complaint for Declaratory and Injunctive Relief, Rosebud Sioux Tribe, et. al., Plaintiffs, v. Donald J. Trump, et. al., Defendants, No. 4:18-cv-00118-BMM, at ¶ 73 (D. Mont. 2019).

¹³⁵ *Id.* at 16.

¹³⁶ Rosebud Sioux Tribe v. Trump, No. 4:18-CV-00118-BMM, 2020 WL 6119319, at *3-5 (D. Mont. Oct. 16, 2020).

¹³⁷ *Id.* at *5.

¹³⁸ See Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 155 (2013) (noting “the Bakken Shale in North Dakota is a 25,000 square mile sheet of embedded oil. It is estimated to have 11 billion barrels of oil recoverable with current technology, an estimate that keeps increasing . . .”).

¹³⁹ See Delaney, *supra* note 115, at 332.

which contains the Bad Men clause.¹⁴⁰ There is a need for a legal framework that looks to treaty rights in order to address the multitude of harms arising out of extractive projects like DAPL.¹⁴¹ If existing environmental law statutory frameworks such as the National Environmental Policy Act and the National Historic Preservation Act fail to hold pipeline companies accountable, the Bad Men clause—with its compensation and extradition provisions—may be a suitable alternative for some Native nations to redress the variety of harms which result from extraction on and near tribal lands in the *Mni Wiconi* age. This warrants a deeper dive into how successful Bad Men claims might be in three key areas related to the impact of extraction industries on Native resources and people: disruption of Native religious practices, pollution and damage to sacred waters, and sexual violence against Native women.

B. Bad Men Who Pollute and Disrupt Native Spiritual Practice on Traditional Waters

At first glance, there may appear to be a disconnect between the subject matter of earlier Bad Men claims (violence against Native women, abuse of Native children, police brutality) and the Lakota invocation against a pipeline company. But, when examined through a fact-intensive inquiry of traditional Lakota customs and religious practices, it is plain the Lakota have never distinguished between harm to Native peoples and harm to Native lands. The Indigenous view of “property” diverges significantly from the Anglo-American interpretation of the term. First Nations scholar Julian Brave NoiseCat notes, “For indigenous people, land and water are regarded as sacred, living relatives, ancestors, places of origin or any combination of the above.”¹⁴² The Lakota invocation of the Bad Men clause against a pipeline company for wrongs on property does not signal a significant divergence in the Bad Men jurisprudence, but instead marks a wholistic, culturally-consistent view of treaty rights.

At the time Chief Red Cloud “washed his hands with the dust of the floor” and signed the 1868 Treaty of Fort Laramie,¹⁴³ he would have known the ancient Lakota prophecy of the black snake.

¹⁴⁰ Andrew Rome, *Black Snake on the Periphery: The Dakota Access Pipeline and Tribal Jurisdictional Sovereignty*, 93 N.D. L. REV. 57, 81 (2018).

¹⁴¹ *Id.* at 440.

¹⁴² Julian Brave NoiseCat, *The Western Idea of Private Property Is Flawed. Indigenous Peoples Have It Right*, THE GUARDIAN (March 27, 2017), <https://www.theguardian.com/commentisfree/2017/mar/27/western-idea-private-property-flawed-indigenous-peoples-have-it-right>.

¹⁴³ Oman, *supra* note 23, at 46.

According to the prophecy, there would be a black snake which would one day slither above the land and then move underground, destroying sacred sites, poisoning sacred waters, and ultimately, destroying the earth itself.¹⁴⁴ When Native protestors, the Lakota population in particular, convened at Standing Rock in 2016, a common sentiment emerged—the pipeline protest era is the era in which the Lakota must combat the black snake.¹⁴⁵

Despite the existence of strong Lakota religious practices in and along the waters of the Missouri River, in the Standing Rock litigation, the Cheyenne River Sioux Tribe had no success in arguing that the Army Corps' approval of DAPL violated Lakota religious freedom rights under the Religious Freedom Restoration Act (RFRA).¹⁴⁶ The Tribe argued that the spiritual contamination of “the only ritually pure water available for Lakota ceremonies” would effectively prohibit the practice of their religion.¹⁴⁷ The Court did not agree, finding that under Free Exercise Clause case law (the standard which the Court applied to the Tribes' RFRA claim), the government's action in granting an easement to Dakota Access had “an incidental, if serious, impact on a tribe's ability to practice its religion because of spiritual desecration of a sacred site” which did not “likely violate RFRA.”¹⁴⁸ As scholarship has noted, the court's decision is in line with how many courts have construed Native religious practice claims; in fact, these claims often fail where courts have “consistently misrecognized claims to collective religious obligations and duties advanced by tribes themselves and flattened them into mere practices of an interiorized, subjective, and individual spiritual fulfillment—spiritual, not religious.”¹⁴⁹

Though RFRA and Free Exercise claims have not had great success, it is possible that individual and collective Native groups

¹⁴⁴ See Lauren P. Phillips, *Killing the Black Snake: The Dakota Access Pipeline's Fate Post-Sierra Club v. FERC*, 30 GEO. INT'L ENVTL. L. REV. 731, 732 (2018); see also Jeff Brady, *For Many Dakota Access Pipeline Protestors, The Fight Is Personal*, ALL THINGS CONSIDERED (Nov. 21, 2016), <https://www.npr.org/2016/11/21/502918072/for-many-dakota-access-pipeline-protesters-the-fight-is-personal>.

¹⁴⁵ See Phillips, *supra* note 144, at 732; see also Rome, *supra* note 140, at 59; Woods, *supra* note 130, at 69.

¹⁴⁶ *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs* [hereinafter “*Standing Rock I*”], 239 F. Supp. 3d 77, 88 (D.D.C. 2017).

¹⁴⁷ Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 BYU L. REV. 2015, 282 (2019); see Cheyenne River Sioux Tribe's Motion for Preliminary Injunction at 34, *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017); *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, 239 F. Supp. 3d 77, 89 (D.D.C. 2017).

¹⁴⁸ *Standing Rock II*, 239 F. Supp. at 93.

¹⁴⁹ McNally, *supra* note 147, at 288.

could see some success in bringing a Bad Men claim against the government for approving a corporation's pipeline which disrupts Native religious practice (or perhaps an action based on the activities of the corporation itself), but it may be a difficult pursuit. First, as previously discussed, the most recent jurist to review a Bad Men claim in the Court of Federal Claims held that the clause provides a cause of action only to "individuals, not tribal governments."¹⁵⁰ Based upon this holding, a tribal government is not likely to be successful in bringing a Bad Men claim on behalf of its Nation for disruption to collective religious practice caused by a pipeline running through or near sacred waters. Still, this aspect of the holding alone would not prevent individuals or groups of individuals from bringing a claim based upon the treaty right.

Second, an action based upon significant harm to religious practice might not satisfy the "wrong" requirement imposed by courts that have reviewed Bad Men claims. Indigenous plaintiffs might have a couple of different avenues to argue "wrong" to waters based on religious practice. One route would be to argue that a "wrong" under the clause has been committed via harm to the practitioner, that is, the presence of the pipeline has harmed the individual by blocking access to religious practice on spiritually pure waters. Based upon the Court of Federal Claims' rulings in *Jones*, *Hernandez*, and *Cheyenne & Arapaho Tribes*, it is unlikely a court would find this type of wrong to be cognizable on a motion to dismiss. In *Cheyenne*, the court upheld the "prosecutable as a criminal wrongdoing" standard from *Jones*, a standard which would be very difficult to satisfy based upon a "wrong" centered on a corporate actor's frustration of religious practice.¹⁵¹

Another route would be to frame the "wrong" as a wrong to *property*, that the pipeline disrupts the water as an irreplaceable religious artifact. This type of claim would be frustrated by the fact that Native sacred sites have long been disrespected as compared to their Anglo-Saxon religious counterparts. In 2019, when the Notre Dame Cathedral in Paris was partially destroyed in a fire, Indigenous activists expressed frustration that the outpouring of grief displayed by those around the world at the destruction of the famed Cathedral was nowhere to be found when Native sacred sites were desecrated by

¹⁵⁰ *Cheyenne & Arapaho Tribes v. United States*, 2020 U.S. Claims LEXIS 2542, at *11, 12 (citing *Hebah*, 428 F.2d 1334, 1338 (Ct. Cl. 1970) and noting, "[h]ad the treaty-parties intended to create a tribal interest, the Treaties' text would reflect such intention").

¹⁵¹ *Id.* at *21 (quoting *Jones v. United States*, 846 F.3d 1343, 1355 (Fed. Cir. 2017)).

extractive industries.¹⁵² It is not just predominantly non-Native public perception which contributes to the undervaluing of Native sacred sites like the Missouri River; the undervaluing is written directly into the law itself. In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court ruled the construction of a proposed road over an area of significant religious importance to Native practitioners did not violate the First Amendment because practitioners would, in the Court's opinion, not be forced to violate their beliefs or be denied equal rights even though an Environmental Impact Study revealed the construction would be severe and irreparable.¹⁵³

A Bad Men claim based upon a "wrong" to a sacred site as "property," might more readily satisfy the "wrong" requirement because a court has never interpreted the standard of "wrong" for harm to property under the clause. We know from prior decisions the standard for a "wrong" against a person is likely to be action that rises to the criminal level. It is unclear that this same threshold would apply to a "wrong" against property. Certainly, a plaintiff would have an argument that under the canons of construction, a criminal standard should not be read into the clause where it is not explicitly agreed to in the treaty. Where this type of claim could face difficulty is in satisfying the "property" threshold to begin with. Although under the canons of construction treaties should be liberally construed in favor of what the Native signatories would have understood at the time, Native plaintiffs would still likely face difficulty in convincing a court that sacred sites (such as certain sites along the Missouri River) not held in trust for the tribe are in fact to be considered "property" under the clause. Plaintiffs could argue in response that at the time a treaty was signed those sites were considered the sacred lands of the tribe, and still are today under the tribe's view of "property." Still, no court has ever directly interpreted the meaning of "property" under the Bad Men clause, so it uncertain how a court might view this type of claim.

Lastly, the "nexus" requirement, that the "wrong" committed by the "bad man" must either occur on-reservation or begin on-reservation and continue off-reservation, discussed at length by the *Jones* court,¹⁵⁴ could also frustrate a claim based upon harm to sacred property and contamination of sacred water. In *Cheyenne*, the court was entirely unpersuaded by the plaintiffs' "economic proximity"

¹⁵² Li Zhou, *Native American activists: The fire at Notre Dame is devastating. So is the destruction of our sacred lands*, VOX, (Apr. 17, 2019), <https://www.vox.com/identities/2019/4/17/18412307/notre-dame-native-american-activists-sacred-lands>.

¹⁵³ See *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 447, 452-53 (1988).

¹⁵⁴ See *Cheyenne & Arapaho Tribes*, 2020 U.S. Claims LEXIS 2542, at *23-24.

argument.¹⁵⁵ A claim based upon frustration to religious practice which must occur at a specific site, off-reservation, would likely face similar opposition to the *Cheyenne* plaintiffs' claim that off-reservation Opioid Bad Men caused harm to those consuming opioids on-reservation. Still, a claim that on-reservation waters are polluted as a result of extraction, and that these waters—polluted by “bad men”—affect the health and welfare of the plaintiffs, could be an example of a tighter nexus to on-reservation harm. This could perhaps be strengthened by an argument that on-reservation government officials knowingly permitted the polluted water to flow through water resources to the detriment of Native plaintiffs.

All requirements of the Bad Men clause considered, it is unclear if a claim by a Native plaintiff, or group of Native individuals, based on a “wrong” to traditional waters as property, or to the plaintiffs themselves through frustration of religious practice, would be successful in the Court of Federal Claims. The court's prior decisions indicate that all aspects of the claim will be closely scrutinized, and that a liberal interpretation of aspects such as “property,” “wrong,” and a connection to on-reservation harm is not guaranteed. Plaintiffs could benefit from the simple fact that a court has yet to weigh-in on what “property” encompasses under the clause, and the Indigenous view of property has always been more expansive, but whether “property” would be interpreted broadly enough by a court to include lands not held in trust is doubtful. In this instance, Native plaintiffs could argue for a Native-centric judicial interpretation, in line with the canon of construction, to bolster their arguments that harm to Native sacred sites and waters is indeed within the scope of the clause.

C. Bad Men Who Perpetrate Sexual Violence Against Native Women Near Extraction Sites

Just as the Native fight against wrongs done to sacred sites by Bad Men in the extraction industry has come to the forefront in the *Mni Wiconi* age, so too has the Native struggle against Bad Men who commit violence against Native women. Since it first began transporting oil, the Dakota Access Pipeline has increased oil extraction and production in the Bakken region by around 40%.¹⁵⁶ The advent of numerous “man camps” near extraction sites, concurrent with the increase in extraction in the Bakken Region, has contributed significantly to violence against Native women in the region, a

¹⁵⁵ *Id.* at *24.

¹⁵⁶ *Dakota Access Pipeline Facts*, ENERGY TRANSFER LP, <https://dapipelinefacts.com> (last visited Jan. 19, 2020).

problem which the United States itself has even acknowledged.¹⁵⁷ Although the 2013 passage of the Violence Against Women Act saw the return of limited tribal criminal jurisdiction over non-Indian offenders who harm Native women, tribes still have no jurisdiction over strangers who assault Native women on Native lands.¹⁵⁸ As a result, non-Indian offenders are often never held accountable for their acts of violence on Native lands.

In 2019, the U.S. Bureau of Justice Statistics (“BJS”) released a study which examined the rise in numbers of oil workers in the Bakken region alongside the rates of violent victimization known to law enforcement.¹⁵⁹ The study found Native Americans experienced a 24% increase in their rate of violent victimization during this time period, with an overall increase of 47% across all races in “serious stranger violence—murder, rape, sexual assault, aggravated assault, and robbery.”¹⁶⁰ These grim statistics are not shocking considering the careless hiring practices of pipeline companies which “allow for rapid intake of laborers during extraction booms.”¹⁶¹

The link between harm to Native lands and harm to Native women has never been tenuous. This is the holistic, indigenous context in which the wrongs referred to in the Bad Men clause are to be understood. In the Lakota tradition, for example, there are not sharp boundaries between human life—women—and all other forms, animate and inanimate, in the universe: “all relations” refers to

¹⁵⁷Summer Blaze Aubrey, *Violence against the Earth Begets Violence against Women*, 10 ARIZ. J. ENVTL. L. & POL’Y 34, 44-45 (2019); see also U.S. DEP’T OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, 2013 TRIBAL RESPONSIBLE RESOURCE DEVELOPMENT AND PREVENTION OF SEX CONSULTATION REPORT 3 n.2 (2013) (noting “[b]ecause of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes”).

¹⁵⁸Aubrey, *supra* note 157, at 45. See generally Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 18 U.S.C., 22 U.S.C. and 42 U.S.C.); *Introduction to the Violence Against Women Act*, TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/title_ix.htm (last visited Jan. 20, 2020).

¹⁵⁹ Kimberly Martin et al., Natl. Crime Stats. Exchange, VIOLENT VICTIMIZATION KNOWN TO LAW ENFORCEMENT IN THE BAKKEN OIL-PRODUCING REGION OF MONTANA AND NORTH DAKOTA, 2006–2012, at 3 (Feb. 2019), <https://www.ncjrs.gov/pdffiles1/bjs/grants/252619.pdf>.

¹⁶⁰ *Id.* at 9, 11.

¹⁶¹ Lily Grisafi, *Living in the Blast Zone: Sexual violence Piped onto Native Land by Extractive Industries*, 53 COLUM. J.L. & SOC. PROBS. 509, 535 (2020), <http://jlsplaw.columbia.edu/wp-content/uploads/sites/8/2020/08/Vol53-Grisafi.pdf>.

humans, lands, and waters alike.¹⁶² Further, there are similarities between the acts of “bad” offenders who commit violence on Native individuals, and the acts of “bad” corporate actors. As Professor Sarah Deer and Dean Elizabeth Ann Kronk Warner note, “Indeed, many of the most devastating extractive projects that have damaged mother earth are couched in the same tactics used by sexual predators.”¹⁶³

Many Native women who are harmed at the hands of non-Indian offenders near “man camps” may be similarly situated to Lavetta Elk. Elk successfully litigated a Bad Men claim and received compensation from the United States for the violence perpetrated against her by an army recruiter where all other criminal and civil actions against the offender failed.¹⁶⁴ A Bad Men claim based upon a “wrong” by a “bad man” (who could be an employee or contractor of a pipeline company) has the potential to see greater success than a claim based upon a wrong to sacred property or sacred religious practice because of Elk’s success. To be sure, this type of claim may still face the hurdle of the “nexus” requirement if the harm did not occur or begin on-reservation. This could be an issue for crimes against Native women which occur in border towns.

Where this type of claim diverges from Lavetta Elk’s successfully litigated claim is that in *Elk* the harm was waged by a government actor, in that case, an army recruiter.¹⁶⁵ We know from *Richards* that it is not required that the “bad man” be a government actor,¹⁶⁶ but *Jones* instructs that a plaintiff must identify “particular ‘bad men.’”¹⁶⁷ In *Cheyenne*, the court expressed skepticism, and declined to discuss in depth arguments that corporate entities have personhood for the purposes of the clause.¹⁶⁸ Based upon these holdings, it could be easier for a Native plaintiff to identify a particular employee or contractor of a pipeline company who has committed a wrong against a Native woman for the purposes of a Bad Men claim than it would be to identify bad corporate actors, who have, for example, engaged in reckless hiring practices leading to a rise in violence by man-camp workers. Still, a court has never had this particular type of claim before it, and if the treaty provision is to be

¹⁶² See Richard Pemberton Jr., *I Saw That It Was Holy: The Black Hills and the Concept of Sacred Land*, 3 LAW & INEQ. 287, 292-93 (1985), <http://scholarship.law.umn.edu/lawineq/vol3/iss2/4>.

¹⁶³ Sarah Deer & Elizabeth Kronk Warner, *Raping Indian Country*, at 4 (Univ. of Utah College of Law Research Paper No. 344), <https://ssrn.com/abstract=3497007>.

¹⁶⁴ See *Elk v. United States*, 70 Fed. Cl. 405 (2006).

¹⁶⁵ See *id.*

¹⁶⁶ See *Richard v. United States*, 677 F.3d at 1145-47.

¹⁶⁷ *Jones v. United States*, 846 F.3d at 1352.

¹⁶⁸ *Cheyenne & Arapaho Tribes v. United States*, 2020 U.S. Claims LEXIS 2542, at *20.

given a liberal interpretation, and be construed in the plaintiff's favor, then a claim against corporate actors for the crimes of a worker they recklessly hired is not entirely out of the question.

A claim based upon a "wrong" of a particular bad man is also likely to fare better on a motion to dismiss with respect to the threshold requirements of a cognizable "wrong." Certainly, violence against a Native woman is more likely to meet a criminal standard than frustration of religious practice. It is unclear whether or not an *underlying* criminal harm would satisfy "wrong" or if the criminal activity must extend to a corporate "bad man" who may be only tangentially responsible for the violence. All things considered, this type of Bad Men claim presents a promising route for Native plaintiffs to see some remedy (where all others have failed) for violence committed against them by "bad men" in the extraction industry. Because this type of claim has never been heard before, there are several unknowns as to how a court might view a claim against corporate actors for recklessly hiring a "bad man" who then committed violence on-reservation. Again, Native plaintiffs could use a Nation nation-specific interpretive framework to their advantage, alongside the canons of construction, in arguing before a court that the clause is indeed broad enough to encompass this type of claim.

Harm to Native sacred waters, frustration of Native religious practice, and violence against Native women near oil-rich regions are some of the most pressing issues facing Native Nations in the *Mni Wiconi* age. The "bad men among the whites" clause, found in nine treaties signed with Native Nations, can serve as an additional framework in addressing these difficult issues.

IV. Conclusion

This comment explores how a nuanced and holistic approach to interpreting and invoking the "bad men among the whites" clause found in nine treaties signed between the United States and Native nations might aid Native plaintiffs in bringing a Bad Men claim for wrongs committed as a result of extraction on and near Native lands. Though over a century and a half has passed since the Great Peace Commission first signed a treaty containing a Bad Men clause with a Native nation, the passage of time has not rendered the clause obsolete. Native plaintiffs have litigated Bad Men claims in federal courts for over fifty years, with more recent cases showing a trend toward stricter requirements for showing a "wrong" and nexus to on-reservation activity under the clause.

In the era of pipeline construction and increased sexual violence near extraction site "man camps," the Bad Men clause is an

increasingly vital avenue for Native plaintiffs to explore an alternative remedy for the wrongs committed against Native persons and property. Though Native populations grieve over what was lost due to broken treaty promises, and grieve because of “joy that was denied our ancestors and, for that matter, the world,”¹⁶⁹ the treaty rights themselves remain to this day. The best way for plaintiffs to successfully recover under the clause is for courts to apply a treaty interpretation approach which rejects a pan-Indian superstructure, and instead favors a nuanced, Nation-specific approach built from the canons of construction. Though Native plaintiffs are likely to face significant hurdles if bringing a claim based upon harm to Native sacred sites and waters, and frustration of religious practice, there is reason to be optimistic that the clause could be used to address “wrongs” such as the increase in sexual violence against Native women in extraction-heavy regions. Ultimately, interpreting the Bad Men clause in a Native nation-specific way will move toward better judicial understanding of the nine Great Peace Commission treaties and honor the culture and custom of the Native Nations who have persisted in fighting wrongs against their people and lands from time immemorial to present.

¹⁶⁹ Suzan Shown Harjo, *Introduction to NATION TO NATION: TREATIES BETWEEN THE UNITED STATES & AMERICAN INDIAN NATIONS* 8 (Suzan Shown Harjo ed., 2014).