# THE BEST CAUSE OF ACTION YOU NEVER HEARD OF:
# THE BAD MEN CLAUSE OF THE 1868 FT. LARAMIE TREATY

By James D. Leach

In May 2008, the Court of Federal Claims, sitting in Rapid City, tried a case brought by a member of the Oglala Sioux Tribe against the United States under the Bad Men clause of the 1868 Ft. Laramie Treaty. The Bad Men clause 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 reimburse the injured person for the loss sustained."

Lavetta Elk, the plaintiff, who lived in Wounded Knee, South Dakota, on the Pine Ridge Indian Reservation, claimed that she was recruited to join the U.S. Army by Sergeant Joseph P. Kopf. She claimed that Sergeant Kopf later made an unannounced visit to her home, said that she needed to travel to Sioux Falls, then drove her to an isolated area and assaulted her. Elk filed a Federal Tort Claims Act claim against the Army, and a separate claim based on the Bad Men clause of the 1868 Treaty. The Army denied her FTCA claim. The Department of the Interior did not respond to her treaty claim. She sued based solely on the Bad Men clause of the treaty. The federal government moved to dismiss, alleging that she had failed to exhaust her administrative remedies. The Court of Federal Claims denied the government's motion to dismiss, ruling that she had sufficiently exhausted her administrative remedies. The decision mentions no argument by the government that she lacked a cause of action. *Elk v. United States*, 70 Fed. Cl. 405, 2006 U.S. Claims Lexis 101.

According to *Elk*, the first damage claim under a Bad Men Treaty clause was *Hebah v. United States*, 428 F.2d 1334, 192 Ct. Cl. 785 (1970). *Hebah* was brought by a then-obscure Wyoming lawyer, G. L. Spence, on behalf of a widow for the death of her husband, a Native American, at the hands of a tribal policeman on the Wind River Indian Reservation. Spence sued under the 1868 Treaty between the United States and the Eastern Bank of Shoshonees and the Bannack Tribe, which contains a Bad Men clause identical to the Bad Men clause in the 1868 Ft. Laramie Treaty. The government argued that Spence had no cause of action under the Bad Men clause. The Court of Claims disagreed.

The first words of the Bad Men clause in *Hebah*, like the first words of the Bad Men clause in the 1868 Ft. Laramie Treaty, refer to "bad men among the whites, or among other people subject to the authority of the United States." The government argued that the case must be dismissed because the tribal policeman was a Native American, thus not a "bad men among the whites." The court rejected this argument, citing the "other people subject to the authority of the United States" language, and stating: "Members of the Indian Police Force are appointed by and subject to the Department of the Interior (25 C.F.R. ' ' 11.301-11.306), and are therefore within this provision regardless of their

race or color." 428 F.2d at 1340.

Another Bad Men case is *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987). *Tsosie* was brought under the Bad Men clause of the 1868 Navaho Treaty. The plaintiff, a Navaho, was admitted to a Public Health Service hospital on the Navajo Reservation. She claimed that a laboratory technician, posing as a doctor, conducted a physical examination of her. She alleged physical and emotional injury. She filed an administrative claim under the Federal Tort Claims Act, which the government rejected based on the exemption from liability for assault and battery, and on its denial that it had been negligent in employing the technician. She then filed an administrative claim with the Department of the Interior under the Bad Men clause. The Department rejected her claim on the ground that the Bad Men clause is "obsolete, is no longer needed, and is therefore no longer in effect." 825 F.2d at 397.

The Court of Claims squarely rejected the government's argument: "Essentially, we are asked to pronounce *finis* to a treaty right, with no showing it has expired by its own express or implicit terms, or was abrogated by consent of the parties, or by Congress unilaterally. It is an inappropriate role for the judiciary: *Lone Wolf*, 187 U.S. at 567, says it is a function of the 'legislative power'." 825 F.2d at 401.

*Tsosie* addresses an important question unanswered in *Elk* and *Hebah*: can the federal government be liable under a Bad Men clause based on the misconduct of an Indian nonmember of the Tribe? *Tsosie* suggests that the answer is "yes". "The literal text of article I and the 'legislative history' of the treaty show that any 'white' can be a 'bad man' plus any nonwhite 'subject to the authority of the United States', whatever that means, but most likely Indian nonmembers of the Navaho tribe but subject to United States law." 825 F.2d at 400.

Bad Men claims under the 1868 Ft. Laramie Treaty offer the possibility of recompense to Native Americans who may have no other recourse. The law is clear that these claims are viable. All that remains is for lawyers to educate themselves about this cause of action and to start bringing these claims.