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STANDING ROCK, THE SIOUX TREATIES, AND THE LIMITS OF THE SUPREMACY CLAUSE

CARLA F. FREDERICKS* & JESSE D. HEIBEL**

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INTRODUCTION

The controversy surrounding the Dakota Access Pipeline (DAPL) has put the peaceful plains of North Dakota in the national and international spotlight, drawing thousands of people to the confluence of the Missouri and Cannonball Rivers outside of Standing Rock Sioux Reservation for prayer and peaceful protest in defense of the Sioux Tribes' treaties, lands,

* Director, American Indian Law Program; Associate Clinical Professor and Director, American Indian Law Clinic, University of Colorado Law School. We thank Helen Norton and participants in the 2017 Rothgerber conference. We also wish to gratefully acknowledge Chairman David Archambault II, Jodi Gillette, Councilman Chad Harrison, Dean Depountis, Martin Wagner, Jan Hasselman, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, Chairman Harold Frazier, The Yankton Sioux Tribe, Chairman Robert Flying Hawk, Faith Spotted Eagle, Tom Fredericks, Conly Schulte, Thomasina Real Bird, Nicole Ducheneaux, Jennifer Baker, Sarah Krakoff, United Nations Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz, Rebecca Adamson, and Nick Pelosi for their tireless work on the issues described herein. Any errors are ours alone.

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cultural property, and waters. Spanning over seven months, including the harsh North Dakota winter, indigenous leaders and communities from around the world gathered in arguably the largest gathering of indigenous peoples in the United States in more than 100 years.

Implicated in this fight are the 1851 and 1868 Treaties entered into by the United States and the Great Sioux Nation. The pipeline route, which was chosen without input from the Tribes, runs directly through the heart of treaty lands secured to the Great Sioux Nation in the 1851 Treaty of Fort Laramie, lands to which the Sioux Tribes continue to have strong cultural, spiritual, and historical ties.[1] Furthermore, the construction and operation of an oil pipeline directly upstream from the Tribes' current reservations not only threatens their hunting and fishing rights expressly reserved in the 1868 Treaty (which have been affirmed in numerous subsequent acts of Congress), but also their reserved water rights pursuant to the *Winters* Doctrine.[2]

The Tribe and their attorneys battled for injunctive relief to halt the pipeline in federal court, but the Treaties were largely absent in the pleadings and court opinions. However, the district court's June 14, 2017, ruling squarely put the Treaties as the crux of the surviving argument.[3] This presents problems for the court in both their applicability in the face of Congress's plenary power over Indian tribes and diminished trust responsibility as well as the appropriate remedy for the Tribes when and if these treaty rights are violated. Accordingly, the case provides an opportunity to analyze the truth and lies surrounding the constitutional place of Indian treaties in federal courts.

Article VI, Clause 2 of the Constitution states, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

1. Complaint for Declaratory and Injunctive Relief at 1–2, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 2017 WL 2573994 (D.C. Cir. 2017) (No. 16-1534) [hereinafter Complaint].

2. *See* Fort Laramie Treaty of 1851, Sept. 17, 1851, ch. 250, 11 Stat. 749; *see infra* text accompanying note 167 (discussing the Sioux Treaties and subsequent legislation); *see infra* note 169 for a more detailed explanation of the *Winters* Doctrine.

3. Memorandum Opinion at 41–42, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 239 [hereinafter Memorandum Opinion].

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[4] Known as the "Supremacy Clause," this constitutional provision has serious implications in federal Indian law. Of particular importance is whether treaties made with Indian tribes can be considered the "supreme Law of the Land."[5] The current litigation and historic indigenous uprising against DAPL, the route of which lies within recognized tribal treaty boundaries, provides a contemporary example of the limitations of the Supremacy Clause.[6] This Article places the Standing Rock and other Sioux Tribes' legal battle to halt DAPL against the historical background of Indian treaties and treaty rights. It offers a contemporary example of how federal courts' application of Indian treaty rights and the limits of the Supremacy Clause fail to ensure Indian treaties and treaty rights are respected as the "supreme law of the land."

This Article is comprised of seven parts. In Part I, we provide a brief overview of the foundational relationship between Indian tribes and the United States as set forth in the Constitution. Specifically, we describe bilateral, consent-based treaty-making as the constitutionally mandated process governing relations with Indian tribes. Part II discusses how the end of treaty-making and the adoption of the plenary power doctrine resulted in a policy transition toward unilateral treaty abrogation and the diminishment of tribal treaty rights. In Part III, we further explore how tribal claims for treaty abrogation and land cession have been dealt with by federal courts, highlighting the inadequacy and unsatisfactory resolution of these claims. In Part IV, we analyze the Sioux Treaties in their historical context, in subsequent acts of Congress that implicated the treaties and the rights they preserve, and in major claims cases brought against the United States for land cession and abrogation of the Sioux Treaties. Parts V and VI look at how the federal courts have addressed Sioux land claims in the past. Finally, in Part VII, we set the background of the treaty rights against the Sioux Tribes' legal efforts to halt construction of the Dakota Access Pipeline.

4. U.S. CONST. art. VI, cl. 2.
5. *Id.*
6. Complaint, *supra* note 1, at 11–12.

I. INDIANS IN THE CONSTITUTION

The United States ratified its first Indian Treaty with the Delaware Nation in 1778.[7] The Delaware Treaty sought to allow for the passage of the United States Army through the territory of the Delaware Nation.[8] In doing so, the language of the treaty explicitly recognized Indian ownership of the land and the authority of the Delaware to govern their territory.[9] An integral component of this treaty was "a paradigm for tribal federal relations that can only be described as one of international self-determination."[10] Indeed, this first treaty—along with subsequent treaties, the Constitution, and early congressional dealings with Indians—evidences a relationship between tribes and the federal government based on the United States' recognition of tribes' status as politically distinct sovereign nations existing alongside the United States.[11]

For example, Article IX in the Articles of Confederation explicitly addressed the United States' relationship with Indian tribes by granting Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indian tribes, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[12] Trade agreements entered into under the Articles of Confederation establish that the power delegated in Article IX "constituted an authority to regulate the non-Indians who traded with the tribes, not an authority to regulate the tribes themselves."[13]

However, the Framers of the Constitution saw the Articles of Confederation's grant of authority in Indian affairs as deficient.[14] Importantly, the nascent constitutional objection to the Articles' treatment of Indians was not the lack of power

7. Treaty with the Delawares, Delaware Nation–U.S., Sept. 17, 1778, 7 Stat. 13.

8. *Id.*; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 118–19 (2002).

9. Clinton, *supra* note 8, at 119.

10. *Id.* at 120.

11. *Id.*

12. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (emphasis added).

13. Clinton, *supra* note 8, at 128.

14. *Id.*; *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985) ("Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation and urged adoption of the Indian Commerce Clause.").

imposed over tribes, but the ability of states to interfere in the foreign affairs of another sovereign.[15] To the Framers, Indian tribes were foreign nations with sovereignty over their lands and their governance, and any powers the states retained in dealing with Indian tribes would undermine what the Framers saw as the federal government's exclusive right to manage political affairs with sovereign governments.[16]

The text of the ratified Constitution made clear that there would be little change in the status of Indian tribes as political entities existing outside of the United States government.[17] The Constitution recognized tribes as sovereign nations in two ways. First, as tribes were not present at the Constitutional Convention and did not ratify the Constitution, and thus owed no political allegiance to the United States beyond their existing treaty obligations, Indians were excluded from the census and political participation by the "Indians not taxed" clause.[18] Second, Indian tribes are expressly included in the Commerce Clause alongside two other sovereigns—foreign nations and the states.[19]

The Indian Commerce Clause employs exactly the same word choice used in the Foreign Commerce Clause: "Commerce . . . *with* the Indian Tribes."[20] By granting the federal government the exclusive right to regulate dealings "*with*" Indians, and not "*of*" Indians, the Indian Commerce Clause granted the federal government broad Indian affairs powers but did not purport to affect the powers or sovereignty of the Indian tribes.[21] This fundamental aspect of the Indian Commerce Clause, reflected by the widespread use of treaties,

15. Clinton, *supra* note 8, at 128, 149.

16. *Id.*; *see also* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 548–49 (2007); Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 49 (2005).

17. Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 49 (2012).

18. *Id.* at 50–51.

19. Clinton, *supra* note 8, at 130.

20. *Id.* at 131. By employing the same language, the Indian commerce power was meant to have the same meaning and scope as the foreign commerce power—that is, the regulation of the United States' political and economic dealings with a separate sovereign. *Id.* Accordingly, while tribes were not characterized as states or foreign nations under the Constitution, they were certainly regarded as governments whose economic and political dealings with the United States were significant enough to warrant inclusion in the Constitution alongside two other sovereigns. *Id.*

21. *Id.*

shows that although the federal government was undoubtedly concerned about regulating Indians, it simultaneously realized that the constitutionally proper method for creating such regulations was through bilateral treaties rather than unilateral congressional action. Thus, Congress viewed itself as having no constitutional basis to exercise authority over Indian tribes without consent through treaty, as evidenced by the United States maintaining and expanding treaty relationships with tribes.[22]

The behavior of Congress for almost a century after adoption of the United States Constitution further reflects an understanding of the limited power granted in the Indian Commerce Clause and the constitutional necessity of treaty-making with Indians.[23] During this period, Congress passed no law directly regulating an Indian nation or its members in any fashion.[24] While the Trade and Intercourse Acts clearly invoked the Indian Commerce Clause, the statutory restraints contained in the legislation focused on the regulation of non-Indians conducting business with Indians and did not regulate tribes or their members. Even the Removal Act of 1830, which promoted the removal of tribes to west of the Mississippi, expressly required tribal consent through treaty for any removal.[25]

As congressional actions following ratification of the Constitution conformed to understanding tribal-federal relations based on bilateral treaty-making, so too did the decisions of the early United States Supreme Court. In *Johnson v. M'Intosh,* Chief Justice John Marshall discussed at length the nature of aboriginal title and described the so-called Doctrine of Discovery, which provided an Indian "aboriginal right of occupancy" and exclusive preemptive rights of first purchase or acquisition in favor of the United States.[26] The

22. *See* Fletcher, *supra* note 17, at 58–59.

23. Clinton, *supra* note 8, at 135.

24. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729.

25. *See* Clinton, *supra* note 8, at 136 n.60 (explaining that the Removal Act of 1830 only applied to "such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there"); *see generally* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188 (1999) (invalidating a removal order for lack of tribal consent).

26. 21 U.S. 543 (1823).

decision held that conveyances of Indian land to non-Indians could not be valid without the assent of the government holding preemptive rights to the land. The Court also noted the Tribe's independent power to make and enforce their own laws, precluding federal law from otherwise binding the Tribe.[27] Thus, according to *M'Intosh,* federal supremacy applied to citizens entering into agreements with tribes, but did not apply to Indian tribes as separate "domestic" nations.

The "Cherokee Removal" cases provided the Supreme Court another opportunity to analyze the constitutionally defined limits to the federal government's powers as they related to dealing with Indian tribes.[28] The Court ultimately ruled that it lacked jurisdiction to hear the case, as the Constitution only authorized the Court to hear cases brought by foreign nations. In the opinion, Chief Justice Marshall undertook to explain the treaty relationship between the Cherokee and the United States in acknowledging that the treaties put the tribe under the protection of the United States, signifying "that the Cherokees were then dependents."[29]

But as Robert N. Clinton observed,

> In *Cherokee Nation*, Chief Justice Marshall employed the term dependent, not as a statement of political inferiority or a statement of federal supremacy, but, rather, as an implied criticism of the political branches of the United States government which had failed to enforce the treaty

27. *Id.* at 593. The Court explained that:

> Admitting [tribal] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, *by a title dependent on their laws*. The grant derives its efficacy from their will; and, if they choose, to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; *holds their title under their protection, and subject to their laws.* If they annul the grant, we know of no tribunal which can revise and set aside [their decision].

Id. (emphasis added).

28. Clinton, *supra* note 8, at 138. In 1828 Georgia passed a series of laws diminishing the sovereignty of the Cherokee Nation by claiming jurisdiction over Indian lands. *Id.* After failed attempts to gain redress from the federal government, the Tribe filed an injunction to prevent Georgia from executing the laws. *Id.*

29. Cherokee Nation v. Georgia, 30 U.S. 1, 40 (1831).

> obligations of protection to the Cherokee Nation. Thus, dependence for Chief Justice Marshall was not a source of federal authority over the Cherokee Nation. Rather, it constituted the description of a relationship created by treaty in which the federal government owed the Cherokee certain obligations of protection: it was a source of rights as promised in the treaties.[30]

In *Worcester v. Georgia*, the Court reached the merits of the laws at issue in *Cherokee Nation* when two non-Indians appealed convictions under a Georgia statute that prohibited their presence on Indian lands without a license.[31] The Court ultimately found the Georgia statute invalid, largely based on the reasoning that it violated the sovereignty of the Cherokee Nation as secured in their Treaty.[32] In noting that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection," Chief Justice Marshall laid the foundation for an understanding of Indian tribes' "dependence" without diminishment of their sovereignty.[33] According to Justice Marshall, Congress could act in relation to Cherokee lands only if confirmed by the consent of the Cherokee Nation through a treaty.[34] Thus, not only did the state of Georgia have no power to legislate over the Indians, neither did Congress, as the exclusive federal power over Indian affairs was limited to regulating the activities of nonmembers in their dealings with Indian tribes.

During the 1880s, the Supreme Court would continue to support the view of Indian tribes as sovereigns located within the boundaries of the United States but not subject to its governance.[35]

In *Ex parte Crow Dog*, an Indian was tried and convicted in the Territory of Dakota for the murder of another Indian.[36] In his appeal, Crow Dog argued that the federal court lacked jurisdiction to impose the sentence because the crime

30. Clinton, *supra* note 8, at 141.
31. 31 U.S. 515, 537, 561–62 (1832).
32. Clinton, *supra* note 8, at 141.
33. *Worcester*, 31 U.S. at 560–61.
34. *Id.* at 561.
35. Clinton, *supra* note 8, at 143.
36. 109 U.S. 556, 557 (1883).

was committed on tribal land, and both the attacker and the victim were Native American. The Supreme Court referred to the codified version of the 1834 Trade and Intercourse Act, and held that it expressly prohibited federal jurisdiction. The Court granted Crow Dog's writ of habeas corpus and ordered his release, declaring that "to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians."[37]

A number of Congressional actions in the late nineteenth century laid the foundation for the fundamental change to consent-based treaty-making Indian policy.[38] In 1871, Congress decided to end treaty-making with Indians.[39] Previously, Indian Commissioners and the Executive Branch had primarily undertaken treaty-making with advice and consent from the Senate as prescribed by the treaty provision of the Constitution.[40] Many in the House of Representatives, who were left in the shadows of treaty-making except for their routine appropriations, wanted a seat at the Indian policy table. The House ultimately achieved its demands in an appropriations rider which gave the House power to change and approve "agreements" with tribes.[41]

By the end of treaty-making, more than 200 Indian treaties had been negotiated by the executive branch and ratified by the Senate.[42] Despite Congress's decision to stop treating with Indian tribes, treaties between the United States and tribes remain the cornerstone of the legal relationship between Indian tribes and the federal government.[43] In fact, the passing of the 1871 statute itself merely evidences the negative view of tribal sovereignty, which until this point had necessitated consent-based treaty-making for the regulation of tribes and their members.[44]

37. *Id.* at 572.

38. Clinton, *supra* note 8, at 164.

39. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (codified as amended at 25 U.S.C. § 71 (2012)).

40. U.S. CONST. art. II, § 2, cl. 2.

41. Indian Appropriation Act of March 3, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2000)).

42. Fletcher, *supra* note 17, at 59 (citing CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 8 (1987)).

43. *Id.* at 60 (citing Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 974–79 (1996)).

44. Clinton, *supra* note 8, at 168. The constitutionality of this Act, which

"There can be no greater expression of sovereign respect between the United States and another political entity than that of a treaty relationship under the Constitution."[45] Thus, the main constitutional provision that governed the United States' relationship with Indian tribes was not the Indian Commerce Clause, which was used to pass legislation regulating non-Indian conduct in relation to tribes, but rather the Supremacy Clause, which gave effect to Indian treaties by barring state or private interference with the Indian peoples' land and their sovereign control.

As treaties became the primary instruments for carrying out federal Indian policy, they also became the main source of rights for tribes under the Constitution, deriving from their place as law under the Supremacy Clause.[46] The treaties between the United States and the Indians constitute a critical recognition and guarantee of tribal rights to land, resources, and sovereignty over their own affairs and governance.[47]

II. THE END OF TREATY-MAKING AND THE CREATION OF PLENARY POWER

After the end of treaty-making in 1871, Congress moved to reinvent Indian policy by expressly asserting, for the first time, direct control over Indian tribes' sovereign right to self-government in the Major Crimes Act.[48] Passed in 1885, this Act gave federal courts jurisdiction over Native Americans for seven enumerated crimes committed against non-Indians.[49] Placed within the broader history of Indian policy, this Act

fundamentally poses a separation of powers issue as it takes powers reserved in the Constitution for the executive and places it squarely in the Congress, has never been challenged. *Id.*

45. Fletcher, *supra* note 17, at 59 (citing Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L. J. 793, 797–98 (1989)).

46. Clinton, *supra* note 8, at 141.

47. *Id.*

48. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153); Clinton, *supra* note 8, at 170.

49. Major Crimes Act § 9 ("That immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said territory relating to said crimes.").

followed the Indian assimilation ideals that garnered wide acceptance and support among the public and government in the 1880s.[50] As the Act constituted the first effort to assert direct legislative power over tribal autonomy, the subsequent legal challenge in *United States v. Kagama* would provide the first case to test the power of Congress to depart from the treaty-based understandings of the limitations of federal authority under the Constitution.[51]

Kagama involved murder and accomplice indictments against two Indians for the killing of another Indian occurring on an Indian reservation.[52] The United States claimed jurisdiction under the new Major Crimes Act, and argued the constitutionality of the Act rested in part on the Indian Commerce Clause.[53] However, Justice Miller, writing for a unanimous Court, summarily rejected the Indian Commerce Clause as a source of congressional authority to directly regulate Indians, holding that the clause did not allow for "a system of criminal laws for Indians living peaceably in their reservations."[54]

Instead, without a constitutional basis to assert jurisdiction over Indians on Indian lands, the Court took it upon itself to undertake an "extra-constitutional" endeavor to uphold the Act.[55] Noting that Tribes were territorially within the bounds of the United States, the Court pointed to the status of Tribes as "wards of the nation . . . dependent on the United States" for the assertion that the federal government's duty to protect the rights of Indians, as secured through bilateral treaties, additionally granted Congress the unfettered authority to regulate away the sovereignty of tribes.[56]

The Court's decision in *Kagama* relied on Justice

50. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 803–05 (2006).

51. Clinton, *supra* note 8, at 171.

52. 118 U.S. 375 (1886). The Court framed the question of the case as "[w]hether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe . . . said crime having been committed upon an Indian reservation." *Id*. at 375.

53. *Id.* at 378.

54. *Id.*

55. Clinton, *supra* note 8, at 181.

56. *Kagama*, 118 U.S. at 383–84 ("These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for the political rights.").

Marshall's opinion in *Cherokee Nation* as the justification for these powers. However, as one commentator has noted, the "Court's reading of protection [as a source of power over Indian tribes] reversed the concept's earlier meaning. Crafted to prevent Native alliances and forestall warfare, the principle of sole federal protection of Indians originally stemmed from Native power, not weakness."[57] By claiming the "dependency" of Indian tribes as a justification of the imposition of congressional power upon them, the Court upended the relationship arising from a treaty-based federal obligation to protect sovereignty in *Cherokee Nation*.[58] For the Court in *Kagama*, "wardship" of Indian peoples did not link to federal treaty obligations securing the protection of tribal sovereignty, but rather became a vehicle to express the assumed racial and cultural inferiority of tribes.[59]

Thus, instead of relying on a textual delegation of authority over Indian tribes, which the Court itself found did not exist, the Court relied simply on the duties and protections secured through the treaty-making process. One scholar has described this as "a tour de force in judicial constitutional creativity" and a "major departure from the established norms of constitutional interpretation."[60] While not expressly providing for the broad plenary power espoused by today's Court, the judicial gymnastics that allowed for the abandonment of stare decisis in *Kagama* opened the door for the rise of unilateral congressional divestiture of Indian tribes' treaty-secured rights and lands.[61] In fact, almost all federal policy decisions relating to Indians could now be justified by using the Court's newly constructed plenary power doctrine, which disposed of the historical consent-based relationship in favor of direct and unfettered governance of Indians outside of treaty-making.[62]

Congress further dispensed with the traditional understanding of tribal sovereignty and separatism under the

57. Gregory Ablavsky, *Beyond The Indian Commerce Clause*, 124 YALE L.J. 1012, 1081 (2015).

58. Clinton, *supra* note 8, at 175.

59. *Id.*

60. *Id.* at 172.

61. Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations,* 22 HARV. C.R.-C.L. L. REV. 507, 529 (1987).

62. Clinton, *supra* note 8, at 182.

Constitution in the General Allotment Act of 1887.[63] The general purpose of the Act was to push for the assimilation of tribes through the reduction of the reservation land base by allotting land in severalty to individual Indians.[64] The allotted lands were held in trust by the federal government for a period of twenty-five years, during which the Indians were to embrace agriculture, Christianity, and all the other ideals accompanying citizenship in the United States.[65] At the end of this period individual Indians would receive the land in a fully alienable patent in fee, often subject to the civil and criminal laws of the state.[66] However, the trust period was "short-lived," ending in 1906 when Congress authorized the early issuance of patents to individual Indians if they had been determined "competent" by Indian Agents, who were generally government officials authorized to interact with Indians on behalf of the federal government.[67]

The allotment policies described in the General Allotment Act and its amendments had a devastating effect on the communal reservation land base of Indian tribes. As Judith Royster has explained:

> Thousands of Indian owners disposed of their lands by voluntary or fraudulent sales; many others lost their lands at sheriffs' sales for nonpayment of taxes or other liens. By the end of the allotment era, two-thirds of all the land allotted—approximately 27 million acres—had passed into non-Indian ownership.[68]

While the practical effects of the General Allotment Act were devastating to tribal lands and cultures, the legal challenge mounted against the Act would prove equally as damaging. Just as the Court used the challenge of the Major Crimes Act to reformulate the basic treaty-based understanding of tribal federal relations, the first major challenge to the General

63. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 24 U.S.C. §§ 331–358, 381 (1994)).

64. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995).

65. *Id.*

66. *Id.*

67. *Id.* at 10–11; *see also*, Burke Act of 1906, ch. 2348, 34 Stat. 182 (amending § 6 of the General Allotment Act) (codified as amended at 25 U.S.C. § 349 (2015)).

68. Royster, *supra* note 64, at 12.

Allotment Act in *Lone Wolf v. Hitchcock* would provide the Court with the chance to cement the plenary power doctrine in its jurisprudence.[69] *Lone Wolf* presented the Court with the opportunity to critically rethink the constitutional relationship between Indian tribes and the federal government prescribed in *Kagama*.[70] Instead, the Court focused on the narrow question of whether Congress could unilaterally abrogate a treaty between the federal government and an Indian tribe, rather than the broader underlying question of what precipitated the changing legal relationship of the two sovereigns.[71]

In *Lone Wolf,* the Court held that Congress had both the power to assert criminal jurisdiction over Indians on their own lands and the broad power to unilaterally abrogate Indian treaties.[72] At issue in the case was Article 12 of the Treaty of Medicine Lodge Creek between the Kiowas and Comanches and the United States, which set aside a reservation and expressly provided that any further land cessions from the Tribes would not be valid without the approval of at least three-fourths of all adult males occupying the reservation.[73] However, in 1900, Congress passed an "agreement," which provided for further cessions that opened up a large part of the reservation for occupancy of non-Indian homesteaders.[74]

The Tribes argued that the "agreement" was obtained by fraud and lacked the three-fourths consent required by the treaty.[75] As such, the legislation opening up the reservation for settlement under the Allotment Act amounted to a unilateral abrogation of their treaty-guaranteed property rights, which they argued violated their due process.[76] Although it was clear that Congress had blatantly and unilaterally breached the

69. Frank Pommersheim, Lone Wolf v. Hitchock*: A Little Haiku Essay on a Missed Constitutional Moment*, 38 TULSA L. REV. 49, 52 (2002).

70. *Id.* at 52.

71. *Id.* at 50.

72. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

73. Treaty with the Kiowa and Comanche arts. 2, 12, Oct. 21, 1867, 15 Stat. 581. This type of provision was common in many of the removal treaties signed with tribes and caused problems for the federal government in the efforts to secure land necessary to support the rapid western settlement. *See* Clinton, *supra* note 8, at 182–83 n.203.

74. Act of June 6, 1900, ch. 813, 31 Stat. 676.

75. *Lone Wolf*, 187 U.S. at 567.

76. *Id.* at 567–68.

treaty, the Court rejected the due process argument and thereby avoided the question of the validity of the "agreement."[77] Instead, the Court relied on the extra-constitutional "ward" theory employed in *Kagama* to validate the congressional divestment of treaty-reserved lands.[78] The Court stated that "Congress [possesses] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and . . . such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."[79] The Court went on to claim that Congress's plenary authority over the Indians was a political one, which had been wielded by Congress "from the beginning."[80]

In a relatively short passage, the Court made a number of assertions that would prove to haunt the constitutionally rooted understanding of tribal-federal relations based on consensual treaty-making. Not only did the Court fail to cite a textual delegation of this authority from the Constitution, it erroneously claimed that this unilateral plenary power over Tribal affairs had been exercised by Congress throughout history.[81] This simply was not true given that the Major Crimes Act was the first instance of Congress regulating the affairs of Indian tribes. Moreover, the Court went beyond the necessary justification in claiming that Congress's plenary power over Native American affairs precluded the courts from exercising judicial review over congressional acts asserting control over tribes.[82]

Ultimately, the *Lone Wolf* decision marked the end of consent-based, treaty-oriented Indian policy by replacing the government-to-government relationship set forth in the Constitution, previously accepted by the Supreme Court and practiced by Congress, with the judicially created plenary

77. *Id.* at 557 (indicating that Congress knew it had not obtained the requisite signatures of three-fourths of the adult males on the reservation).

78. *Id.* at 565.

79. *Id.*

80. *Id.*

81. *Id.* at 568.

82. *Id.*

> [A]s Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.

Id.

power doctrine.[83] Under this doctrine, Congress was now unbeholden to the multitude of treaties signed with Indian nations, and free to diminish Indian lands without consent.[84]

The modern Supreme Court continues to utilize the plenary power doctrine to justify the regulation and continued diminishment of tribal sovereignty.[85] However, over time, it has fundamentally changed the justification for such authority over Indian tribes in an effort to sanitize the doctrine from the racialized roots embedded in the wardship theory.[86] The Court officially dispensed with its reliance on the colonial "ward" theory in favor of a source of textual delegation in the Constitution in *McClanahan v. Arizona State Tax Commission*.[87] In footnote seven, the Court found a textual delegation in the Constitution, stating that "the source of federal authority over Indian matters . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty-making."[88] This statement is perplexing, especially considering that the Court in *Kagama* expressly rejected the Indian Commerce Clause as a justification for plenary power.[89]

The shift away from the colonial-ward paradigm perhaps also signals the Court's understanding of a need to base such authority on a textual delegation.[90] As commentators have noted, in *Cotton Petroleum Corp. v. New Mexico*, the Court doubled down on its footnote in *McClanahan* when it held that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of

83. Pommersheim, *supra* note 69; Clinton, *supra* note 8, at 185 ("[I]t was the *Lone Wolf* decision itself that marked the real beginning of consistent unilateral congressional action in governing Indian tribes.").

84. Clinton, *supra* note 8, at 185.

85. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005).

86. Clinton, *supra* note 8, at 195; *see also* Ablavsky, *supra* note 57, at 1082.

87. 411 U.S. 164 (1973).

88. *Id.* at 172 n.7.

89. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

> While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause which may have a bearing on the subject before us.

Id.

90. Clinton, *supra* note 8, at 196.

Indian affairs."[91] Additionally, as recently as 2004, the Court pointed to the Indian Commerce Clause as one source of Congress's plenary power.[92] Nevertheless, while the modern Court explicitly cites textual justifications for the plenary power doctrine, its roots in the colonial and racist beliefs exemplified in the "ward theory" continue to limit tribal assertion of rights and lands secured through bilateral treaties with the United States government.[93]

The negotiation of bilateral treaties with the United States had, since the time of discovery, been the primary means by which Indians had protected their sovereignty and their lands. The Court's holdings in *Kagama* and *Lone Wolf* turned this historical method of dealing on its head by recognizing, absent a textual delegation, broad congressional plenary power over Indian affairs.[94] Thus, Indian tribes were forced to find a new way to preserve their treaty rights and resources from "judicially unfettered" congressional power.[95] The tribes knew after *Lone Wolf* that the courts would not stop the unilateral abrogation of Indian treaties, but they could hold the government responsible to compensate them for land takings.[96]

With the advent of the New Deal policies in the 1930s came a shift in Indian policy as well. The Roosevelt administration dispensed with Allotment Era policies of the nineteenth century in its New Deal for Indian tribes.[97] Additionally, a judicial reconsideration of the government's dealings with Indians, specifically in the context of land cessions, was about to unfold.[98]

91. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

92. United States v. Lara, 541 U.S. 193, 200 (2004).

93. *See generally* WILLIAMS, *supra* note 85.

94. Fletcher, *supra* note 17, at 90.

95. *See id.*; Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 466 (1998).

96. Cross, *supra* note 95, at 468.

97. GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934–45, at 1–16 (U of Neb. Press, 1980); The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.); *see also* G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578–89 (2009).

98. Cross, *supra* note 95, at 466–67.

III. TRIBAL CLAIMS IN FEDERAL COURTS

This Part documents how the federal courts have dealt with Tribal claims for treaty abrogation and land cession. It begins by outlining the early caselaw developed regarding the compensability of tribal land and treaty claims. It then discusses the Indian Claims Commission Act while highlighting the provisions and loopholes which hampered the effective resolution of many Indian claims based on violation of their treaties.

Despite the long and well-documented history of abuse and misdealing, Indian tribal claims against the federal government occupy a relatively marginalized position in domestic law.[99] But as sovereign nations preexisting the Constitution with internationally binding treaties ratified by Congress, tribal governments who wish to bring claims for violation of treaty rights or land claims against the federal government are "relegated to the jurisdiction of the Court of Federal Claims, and lumped in with the pleas of fired civil servants, disgruntled taxpayers, and defense contractors."[100] As Nell Jessup Newton has summarized, "The claims stories, when broken from the dry legal recitation of the facts in the cases and placed in context, reveal powerfully the inadequacies of the dominant group's stories."[101]

Historically, there were three statutory methods under which Indian tribes could seek money damages against the federal government: special jurisdictional acts,[102] the Indian Claims Commission Act, and the Tucker Act.[103] "In each case,

99. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 755 (1992) (citing Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 686 (1989)).

100. Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States,* 44 AM. U. L. REV. 537, 541 (1994). The Court of Federal Claims was established by Congress in 1855 for the purpose of determining private claims against the United States federal government. Throughout its history, the Court of Federal Claims has gone through many changes in its form, procedures, and scope of jurisdiction, but maintains its place as the sole judicial remedy for private citizens seeking monetary redress from the federal government. Newton, *supra* note 99, at 755.

101. Newton, *supra* note 99, at 760.

102. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; Act of Mar. 3, 1863, ch. 92 § 9, 12 Stat. 765.

103. For a more detailed discussion on each of these methods of claims, see Newton, *supra* note 99, at 768.

the claims were usually tried in an Article I court, either the Indian Claims Commission or the trial court of the old Court of Claims."[104]

While the primary purpose for the creation of the Court of Claims in 1855 was to open the doors to citizen suits against the government, any hope that Indians had of using the Court of Claims to seek redress was summarily dashed in 1863 when Congress amended the 1855 Act to specifically exempt claims "growing out of or dependent on any treaty stipulation entered into . . . with Indian tribes."[105] With this amendment, Indians had to petition Congress for special legislation waiving sovereign immunity and granting jurisdiction to the Court of Claims to sue for wrongdoing, including land cession and treaty violations.

One such act was used to initiate the case *United States v. Shoshone Tribe*, which would prove to be one of the first times the Supreme Court would address Indian land claims and outline the judicial protections against the unilateral taking of Indian lands.[106] The facts in *Shoshone* were straightforward and painted a picture ripe for compensation under the Fifth Amendment. The federal government had settled another tribe on the Shoshone Reservation without their consent, in conflict with the Fort Bridger Treaty of 1868, which provided the land was "set apart for the absolute and undisturbed occupation of the Shoshone."[107] Thus, the Shoshone sought to be

104. *Id.* at 769.

105. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765; *see* California v. United States, 119 F. Supp. 174, 177–81 (Ct. Cl. 1954), *cert. denied*, 347 U.S. 1016 (1954). Further:

> Because section 9 of the 1863 Act denied jurisdiction of claims arising out of Indian treaties, Indians had to continue to petition Congress for special grants of jurisdiction to gain a forum for their claims against the government. Thus, before Indian tribes were granted general access to the Court of Claims for claims based on treaty title, 28 U.S.C. § 1505 (1946), they were limited in their suits by the language of the congressional jurisdictional acts. These provisions merely removed the bar of sovereign immunity to suit; the tribes still had to base their claims on an independent substantive cause of action or legal theory . . . .

Daniel G. Kelly, Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 664 n.84 (1975).

106. An Act Authorizing the Shoshone Tribe of Indians of the Wind River Reservation in Wyoming to submit claims to the Court of Claims, ch. 302, 44 Stat. 1349 (1927); United States v. Shoshone Tribe, 304 U.S. 111 (1938).

107. *Shoshone*, 304 U.S. at 113 (quoting Treaty with the Eastern Band Shoshoni and Bannock, 1868 art. 2, July 3, 1868, 15 Stat. 673).

compensated for the taking, including the valuable timber and mineral resources that were exploited on the reservation.[108]

The Court agreed, and held that the government's taking of tribal interest in land made them liable for payment of just compensation due to the Tribe's right of use and occupancy recognized in the Treaty.[109] In doing so, the Court limited its holding in *Lone Wolf*, insofar as Congress had the power to pass laws regulating alienation of land through descent, but that this power, stemming from the federal government's guardianship of the "ward" Indian tribes, did nothing to the Tribe's ownership of the land.[110]

After *Shoshone,* and throughout most of the 1940s and 1950s, the Supreme Court continued to struggle to develop a clear framework of Indian land claims that could square the Supremacy Clause against Congress's absolute plenary power and the Fifth Amendment permission of takings with just compensation.[111] Instead of developing a modern Indian takings regime, they largely categorized claims into two groups: those that had a protected class of "recognized" Indian title based on federal recognition, often through treaty dealings or other agreements with the government; and those that held "unrecognized" Indian title-based claims for compensation through Indian title on aboriginal use and occupancy.[112]

The Court would draw a bright-line distinction between these two categories of claims and take a step towards limiting compensation for Indian land claims generally in *Tee-Hit-Ton v. United States*.[113] *Tee-Hit-Ton* concerned a takings claim by a small community of Indians for the sale of timber within the Tongass National Forest in Alaska. The Indians claimed title based on the aboriginal use of the area, and sued for compensation of the value of the timber based on the demonstrated use and government recognition of their title to the land at issue. The Court, relying on the lack of official recognition of their use and occupancy of the land, and the Indians' failure to move beyond a "hunting and fishing stage of civilization," found no recognized title to the land as in

108. *Id.* at 112–13.
109. *Id.* at 117.
110. *Id.* at 118.
111. Cross, *supra* note 95, at 469.
112. *Id.* at 470.
113. 348 U.S. 272 (1955).

Shoshone, but rather only "claims to rights to use identified territories."[114] The Court went on to hold that Indian occupation of land alone, without specific governmental recognition of said ownership, did not create a right against taking or extinction by the United States that would be protected under the Fifth Amendment.[115]

As one commentator opined, after *Tee-Hit-Ton*,

> Indians were entitled to just compensation for a taking of their lands only if they could meet two conditions. First, they had to show that Congress had taken deliberate action to recognize their *permanent* use and occupancy rights. . . . [This was] usually embodied in an authoritative treaty, statute, or a demonstrated congressional course of conduct . . . . Second, they had to show that Congress had not acted in its *Lone Wolf* garb as Indian guardian when it took their lands.[116]

Despite the Court's discrete distinction limiting Indian land claims, the decision in *Tee-Hit-Ton* must be read against the creation of the Indian Claims Commission, which operated as Congress's solution to the Indian land claim problem.[117]

The plenary power of Congress to abrogate treaties notwithstanding, the Court's indecision regarding the compensability and status of Indian land claims incited concern among the non-Indian occupants of former Indian lands.[118] As worries mounted, so did the pressures on Congress to enact a title-clearing mechanism that would finally remove potential Indian title claims from their lands.[119] There was also a contingent who supported the settling of Indian claims based on the historical wrongs perpetrated by the federal government and the contributions of Indians to World War II efforts.[120]

Congress created the Indian Claims Commission by the Act of August 13, 1946 to hear claims of "any Indian tribe, band, or other identifiable group of American Indians against

114. *Id.* at 287.
115. *Id.* at 285.
116. Cross, *supra* note 95, at 473 (emphasis added).
117. *Id.*
118. Newton, *supra* note 99, at 771.
119. Cross, *supra* note 95, at 473.
120. *Id.* at 474.

the United States."[121] The Act provided for review of decisions to the Court of Claims, followed by certiorari review to the Supreme Court. The Act provided broad grounds for recovery, including claims based on "unconscionable consideration" for tribal lands which were taken and "claims based on fair and honorable dealing not recognized by any existing rule of law or equity."[122] But underneath this seemingly magnanimous intent was another motive. A major goal of the legislation was to remove clouds from land titles so as to facilitate the continued expansion and settlement of the American West.[123] Thus, the Act served to permanently settle Indian tribes' land claims in order to "prepare them for the termination of their special status under United States law."[124]

Perhaps this is why the Act, as interpreted by the Court, created a new cause of action for all Indian claims, *not* only those of sound legal nature, but also those "of a purely moral nature not cognizable in courts of the United Sates under any existing rules of law or equity."[125] Specifically, the Act created five broad classes of claims for Indian tribes:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress . . . ; (4) claims arising from the taking by the United States . . . of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are

121. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (codified as amended at §§ 70–70w (1976)), *repealed by* Act of Oct. 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990.

122. *Id.* § 2.

123. Cross, *supra* note 95, at 473.

124. *Id.*

125. Kelly, *supra* note 105, at 676 (quoting Otoe v. United States, 131 F. Supp. 265, 275 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 848 (1955)).

> not recognized by any existing rule of law or equity.[126]

Specifically, class four has been used to recover against the United States for outright taking of aboriginal title lands since the language of that clause covers takings by treaty "or otherwise" of Indian owned or "occupied" lands.[127] Conversely, when a treaty is at issue, tribes have based claims under clause three, including arguments that the "treaty was secured by fraud or duress or that the Government paid an unconscionably low consideration for the lands ceded."[128] Additionally, clause five's considerably broad language addressing "fair and honorable dealings" has been used as the basis for claims whether or not a treaty is involved and it has augmented claims based on clause three or four recovery.[129]

Despite the various causes of action under the Act, there were many barriers to successful and just resolution of what factually seemed to be straightforward property claims. The primary obstacle for Indian claims was posed by the formation of the body envisioned in the Act itself. The legislation allowed for the creation of two distinctly different models to hear and decide Indian claims—a cooperative model, which hinged on the creation of an investigative division charged with investigating facts and submitting findings to the Commission, and an adversarial model—which modeled the Court of Claims in many respects, including more formalized procedures and a focus on monetary reimbursement.[130] In the end, the Commission, composed of commissioners who had no experience in Indian law, adopted an adversarial model and eventually transformed the Commission into a claims court.[131] In doing so, the court "viewed its remedial arsenal as restricted to money damages, a view that seems consistent with the legislative intent."[132] This adversarial court procedure also meant that tribes would face considerable evidentiary issues

126. Indian Claims Commission Act § 2.

127. Kelly, *supra* note 105, at 676 (citing United States v. Fort Sill Apache Tribe, 480 F.2d 819 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 993 (1974); United States v. Pueblo De Zia, 474 F.2d 639 (Ct. Cl. 1973); Plamondon v. United States, 467 F.2d 935 (Ct. Cl. 1972)).

128. Kelly, *supra* note 105, at 677.

129. *Id.*

130. Newton, *supra* note 99, at 772.

131. *Id.*

132. *Id.* at 773.

proving control of the exact land at issue, government coercion, and unfair dealings in the treaty process.[133]

Unfortunately for the tribes, proving how unconscionable the Government's actions were in the dealings and land grabs was only the beginning of the problem.[134] In addition to entering the courts to fight an arsenal of highly trained government attorneys, tribes also "had to walk through a minefield of liability-limiting rules."[135] Two of those rules engrained in the Indian Claims Commission Act (which would play a major role in the Sioux land claims brought before the federal courts) included the disallowance of interest on claims and the inclusion of gratuitous offsets.[136]

One of the major concerns in settling Indian claims was the huge amount of interest potentially owed to tribes for land cession claims based on events decades before. In that regard, the government favorably viewed the limiting of recovery to the Indian Claims Commission Act and its disallowance of interest awards.[137] Because Congress had not submitted itself to the liability of interest awards in the Act, the courts used a strict construction of limiting liability to find the Act did not allow it. Instead, bound by congressional intent that reparations be paid for Indian title takings, the courts undertook to determine just rewards for land cession while avoiding the huge accrued interest payments due if recovery was based on traditional Fifth Amendment jurisprudence.[138] This made the government liable for interest on an Indian claim only if and when there was a statute, contract, or constitutional claim because of the no-interest rule.[139]

133. For an overview of the evidentiary burdens facing tribes, see generally Leonard A. Carlson, *What Was It Worth? Economic and Historical Aspects of Determining Awards in Indian Land Claims Cases*, *in* IRREDEEMABLE AMERICA: THE INDIANS ESTATE AND LAND CLAIMS 87 (Imre Sutton & Ralph Leon Beals eds., 1985).

134. *Id.* at 88–89.

135. Newton, *supra* note 99, at 773.

136. *Id.*; s*ee also* Carlson, *supra* note 133, at 96.

137. Kelly, *supra* note 105, at 677–78 (citing Fort Berthold Reservation v. United States, 390 F.2d 686, 690 (Ct. Cl. 1968)).

138. Typical takings brought under the Fifth Amendment are eligible for interest payments. *See* Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

139. *See* Nooksack Tribe of Indians v. United States, 162 Ct. Cl. 712, 718 (1963), *cert. denied*, 375 U.S. 993 (1964); *see also* Loyal Band or Group of Creek Indians v. United States, 97 F. Supp. 426, 431 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 813 (1951); 28 U.S.C. §2516(a) (1988). *See generally* Howard M. Friedman,

In the end, the process of settling Indian claims would outlast the Indian Claims Commission, which would prove to be simply an element in the grand scheme.[140] During its time, however, the "bureaucratically oriented" nature of the Commission bred deep discontent among Indians, climaxing with its rule of money payments in lieu of land restoration.[141] For some, the Commission did not fulfill its purpose of liquidating Indian rights or even Indian title, rather it "updated the legal parity" of the land purchases the United States had made.[142] As Vine Deloria Jr. has argued, the Commission worked "merely to clear out the underbrush and allow the claims created by the forced political and economic dependency during the last century to emerge."[143]

IV. THE SIOUX TREATIES OF 1851 AND 1868—THEN AND NOW

Beginning in 1804, when the Sioux made first contact with Lewis and Clark's expedition, numerous treaties were entered into between the United States and bands of the *Oceti Šakowin*, the "Seven Council Fires" or the Great Sioux Nation.[144] However, despite demarcations of Indian lands in these treaties, settlers and the burgeoning fur trade led to a continued push into Sioux territories and culture.[145] This eventually prompted Congress to take action to secure safe traveling routes between the Missouri River frontier and the emerging settlements on the West Coast.[146] In 1850 Congress began a concerted effort to establish peace treaties with the Plains Indians, including the Sioux.[147] The 1851 Fort Laramie

Interest on Indian Claims: Judicial Protection of the Fisc, 5 VAL. U. L. REV. 26 (1970).

140. Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission, in* IRREDEEMABLE AMERICA: THE INDIANS; ESTATE AND LAND CLAIMS 35, 63 (Imre Sutton ed., 1985).

141. *Id.* at 63–64.

142. *Id.* at 64.

143. VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES 227 (1974).

144. EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 8 (1991).

145. *Id.* at 10.

146. *Id.* at 16. As discussed in Part I, Article II, Section 2, Clause 2 includes the "Treaty Clause," which vests the power in the Executive "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

147. Fort Laramie Treaty of 1851, Sept. 17, 1851, ch. 250, 11 Stat. 749.

Treaty (1851 Treaty) purported to do just that. Under the Treaty, several of the Great Plains Indian tribes, including the Sioux, established peace with the United States and vowed to keep peace among the traditionally warring tribes of the region.[148] In return, the United States agreed to protect Indians from the increasing number of homesteading pioneers and, perhaps more importantly, agreed to compensate the Indians through $50,000 payments each year for fifty years.[149]

The 1851 Treaty also included demarcations of tribal boundaries in order to keep peace among the Indians.[150] The Sioux's land under the Treaty stretched to some sixty million acres, including the Black Hills.[151] With boundaries marked by the Missouri River, the Platte River, and the Heart River, the Sioux's land under the Treaty encompassed large swaths across North and South Dakota, Montana, Wyoming, and Nebraska.[152] These boundaries were contentious to many Sioux present at the treaty negotiations as they gave both the Powder River and Big Horn Country—land which the Sioux had held since 1822—to the Crow and Kiowa, traditional enemies of the Sioux.[153] The government is said to have placated the Sioux's reluctance by clarifying that the boundaries established by the Treaty were principally to achieve peace and did not represent forfeitures of land for any tribe party to the Treaty.[154]

Upon the terms of the deal reaching Congress, however, the government quickly and unilaterally altered the Treaty by reducing the annuity payments down from fifty years to ten.[155] The government also capitulated in enforcing the terms of the

148. *Id.*
149. *Id.* art. 3.
150. *Id.* art. 5.
151. *Id.*
152. *Id.* More specifically:

> The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River, thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

Id.
153. *Id.*
154. LAZARUS, *supra* note 144, at 18.
155. *Id.*

Treaty against the swell of the gold rush miners and settlers.[156] As Lazarus notes,

> [T]he necessity of the undertakings (signing of the treaty) seemed terribly remote back in Washington, two thousand miles from the changing western landscape . . . . If the passing whites slaughtered the buffalo and deprived the tribesmen of their subsistence, the government would compensate them at least for the next decade. In the absence of a more immediate crisis few politicians thought beyond that.[157]

The unilateral revision to the Treaty and establishment of arbitrary boundaries, along with the continued encroachment from settlers and the resulting destruction of the buffalo, worked together to ensure that the peace envisioned in the 1851 Treaty would never materialize.[158] Skirmishes and retaliations tested the tensions of all those involved, eventually festering into outright war.[159] From around 1865 to 1868, the United States and Great Sioux Nation fought in the Powder River War, which was a series of battles in which the Sioux Tribes fought to protect the integrity of the Treaty lands against the incursion of white settlers and the construction of the Powder River Road.[160]

Seeking an end to the violence on the plains and signaling a shift in Federal Indian policy, on July 20, 1867, Congress authorized the Indian Peace Commission to make peace with the plains tribes in hopes of establishing discrete reservations on which all whites would be excluded.[161] The United States, acting under the auspices of the newly established Commission, sought to establish a second treaty, this time to end the war with the Sioux and facilitate the settling of the West.[162] The Treaty Commission travelled up the Missouri River to meet with the leaders of the Great Sioux Nation,

156. *See generally* United States v. Sioux Nation, 448 U.S. 371, 376–82 (1980).
157. LAZARUS, *supra* note 144, at 19–20.
158. *Id.* at 24–27.
159. *Id.*
160. *Id.* at 39–40.
161. An Act to Establish Peace with Certain Hostile Indian Tribes, July 20, 1867, ch. 32, 15 Stat. 17.
162. *Id.*

where they negotiated the 1868 Sioux Nation Treaty.[163]

Because each band of the Sioux Nation signed the Treaty at different times, the end result was documents that reflected conflicting narratives.[164] For the Sioux, the 1868 Treaty was a peace made on their terms, as they had seemingly won on every point.[165] The government, on the contrary, saw the conditions in the Treaty, which would lead to the eventual settlement of the Sioux within the strict bounds of a permanent reservation, as necessary steps preceding full assimilation of the natives.[166]

In the Treaty of 1868, the Sioux Nation reserved the Great Sioux Reservation for their "absolute and undisturbed use and occupancy," lands encompassing the western half of what is currently South Dakota.[167] Along with these lands the Sioux also secured hunting and fishing rights in the appurtenant lands and waters.[168] Under the *Winters* Doctrine, the 1868 Treaty also maintained the Sioux's rights in waters flowing through the originally defined boundaries established by the Treaty. This doctrine spawns from the Supreme Court case *Winters v. United States*,[169] which held that in creating an Indian reservation, the United States implicitly reserved water rights for the Indians in the amount necessary to fulfill the

163. LAZARUS, *supra* note 144, at 45.

164. *Id.* at 48.

165. *Id.*

166. *Id.* at 51.

167. *See generally* Fort Laramie Treaty of 1868, art. 2, April 29, 1868, 15 Stat. 635.

168. *Id.* art. 11, 16; United States v. Dion, 476 U.S. 734, 738 (1986) (holding that Indian tribes enjoy exclusive hunting and fishing rights within reservation boundaries and that these rights need not be expressly mentioned in the treaty); Winters v. United States, 207 U.S. 564, 577 (1908).

169. *Winters*, 207 U.S. at 577 (1908). For a contemporary explanation of *Winters* Rights and the Doctrine, see generally Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169, 174–75 (2000). Royster explains:

> The basis of this principle is simple: neither the tribes nor the federal government would have intended to settle Indian societies on confined tracts of land—too small to support the largely nomadic hunting way of life practiced by most tribes—without providing sufficient water to sustain the communities in their new life. The proposition is so fundamental that it is implicit in the reservation of the land itself. No statement of an intent to reserve water is necessary; in fact, an express disclaimer of water rights would probably be required to defeat the reservation of water that accompanies the reservation of land.

Id.

purposes for which the reservation was created.[170] These reserved rights exist as of the date the reservation was created and need not be expressly reserved in the language of the Treaty.[171]

Another important provision of the 1868 Treaty was included in Article XVI. Under this Article, certain lands to the northwest of the reservation boundaries were designated as "unceded Indian territory."[172] These were lands that had not been settled by whites, and as such, no white persons were allowed to settle or occupy any portion of the territory without consent of the Indians.[173] This included the Powder River Country west of the Great Sioux Reservation, the same territory that certain bands of Sioux had issue with being given back to the Crow in the 1851 Treaty.[174]

The government's rationale behind designating this land was to appease a certain contingent of the Sioux who were more hostile to the idea of confinement posed by a permanent reservation.[175] In doing so, "Indians who wished to live by the chase rather than by government dole might continue to reside in this tract. That neatly postponed a dispute over going to the reservation, but government officials confidently looked to the day when the extinction of the buffalo would eliminate the issue."[176]

For some, the choice to accept the Treaty and move onto the reservation came not from a desire to abandon their traditional lifestyle, but rather out of pure necessity.[177] With the buffalo long since gone from their traditional lands to the south and a well-rationed United States army patrolling the countryside, the Brule, for example, had no choice but to make

170. *Winters*, 207 U.S. at 567.
171. *Id.*
172. Fort Laramie Treaty of 1868, *supra* note 167, art. 16.
173. *Id.*
174. *Id.*
175. H. EX. DOC. NO. 97-2, at 19 (1868) ("If the hostile Sioux cannot be induced to remove from the Powder River, a hunting privilege may be extended to them for a time . . . . To prevent war, if insisted on by the Sioux, the western boundary might be extended . . . for the present."); *see also* Alexandra New Holy, *The Heart of Everything That Is: Paha Sapa, Treaties, and Lakota Identity*, 23 OKLA. CITY U. L. REV. 317, 322 (1998) (citing ROBERT M. UTLEY, THE LANCE AND THE SHIELD: THE LIFE AND TIMES OF SITTING BULL 115 (1993)).
176. UTLEY, *supra* note 175, at 82.
177. LAZARUS, *supra* note 144, at 53.

their way to the reservation.[178] According to one historian,

> [d]uring these years, the hunting bands followed the buffalo in the unceded territory, [while] the agency culture took root and bloomed. The two factions drifted even farther apart, separated not only by distance but also by thought, habit, relationship to the government, and above all by patterns born of dependence and independence.[179]

From the outset, the United States and the non-treaty bands ranging in the North failed to honor the Treaty.[180] Congress failed to appropriate the funds needed to fulfill the promised rations and annuities provisions of the Treaty.[181] The Sioux who were living near the agencies on the reservation "suffered without the blankets, clothes, knives, kettles, and other goods they had been promised, and they suffered from their new diet—too short on meat, too long on flour (which they did not know how to use), and altogether lacking in quality."[182]

What the Sioux could not have known at the time was that, although the signing of the 1868 Treaty would be the last true voluntary cession of land, over the next several decades their territory would be withered away by congressional acts.[183] In 1874, at the behest of frontiersmen who had advocated throughout the 1860s to open up the Black Hills for mining, lumbering, and settlement, the United States Army undertook an exploratory expedition into the Black Hills.[184] Led by Lieutenant Colonel George Armstrong Custer, the expeditions sought to establish a military outpost from which to control the northern bands of Sioux who had not accepted the terms of the Fort Laramie Treaty, as well as investigate claims of gold in the Black Hills.[185] In a month the Army was in the Black Hills, and by August they had confirmed the presence of gold. The discovery of gold was widely reported and the expeditions' descriptions of mineral and timber resources were met with an increased cry from the Dakota Territory to

178. *Id.* at 54–55.
179. UTLEY, *supra* note 175.
180. LAZARUS, *supra* note 144, at 53.
181. *Id.* at 54.
182. Holy, *supra* note 175, at 325.
183. LAZARUS, *supra* note 144, at 68.
184. *Id.* at 67.
185. *Id.* at 72–73.

Washington, D.C., demanding the opening of the Hills for settlement.[186] The only obstacle, of course, were the Sioux and their 1868 Treaty.[187]

Beginning in earnest in 1875, the United States went to great lengths to strike a deal for purchasing the Black Hills from the Sioux Nation.[188] Though the efforts began with a diplomatic invitation for a Sioux delegation to visit Washington and meet with President Grant, it eventually evolved into the "sell-or-starve" tactics employed by Congress, which cut off food rations to the reservation agencies until the Sioux Nation agreed to sell the Black Hills.[189] By 1877, the United States had had enough. On February 28, 1877, with the coerced signatures of roughly ten percent of the adult male Sioux, well short of the three-fourths required by the 1868 Treaty, Congress passed a statute which took large portions of the Great Sioux Reservation, including the Black Hills.[190] Under the statute, all of the lands outside the newly established reservation boundary, which did not include the Black Hills, were ceded to the United States along with lands in the 1868 Treaty's Article XVI unceded Indian Territory.[191]

In 1889, Congress enacted another statute that would further diminish the Sioux's 1868 Treaty lands.[192] This Act dissolved the Great Sioux Reservation once and for all, splintering the Tribe's land base into several distinct and smaller reservations, including the current reservations of the Standing Rock and Cheyenne River Sioux Tribes.[193] The 1889 Act set forth to preserve all the provisions of the previous treaties with the Sioux that were "not in conflict with" the new statute.[194] The Act also set the eastern boundaries of the Standing Rock and Cheyenne River Reservations as the "center of the main channel" of the Missouri River.[195]

186. *Id.* at 75.
187. *Id.*
188. *Id.* at 77–79.
189. *Id.* at 90–91.
190. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254 [hereinafter Act of 1877]; U.S. v. Sioux Nation, 448 U.S. 371, 388 ("[A] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history . . . .") (citation omitted). *See generally*, LAZARUS, *supra* note 144, at 91–95.
191. Act of 1877.
192. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 [hereinafter Act of 1889].
193. *Id.*
194. *Id.* at 896.
195. *Id.* at 889.

In 1944, Congress again took aim at diminishing Sioux land holdings when it enacted the Flood Control Act.[196] The Act authorized the construction of various dams along the Missouri River, and specifically authorized attendant takings of Sioux land. Seven subsequent statutes further authorized the taking of Indian lands for the dam projects.[197]

Two of these statutes provided for the acquisition of land from the Cheyenne River and Standing Rock Sioux Tribes for the newly created Oahe Reservoir.[198] Collectively these tribes lost over 160,000 acres of the fertile lands along the Missouri River, which supported the tribes' subsistence, forcing the relocation of families, buildings, and burial sites.[199] The legislation contained important provisions, however, guaranteeing the tribes' hunting, fishing, and grazing rights on the taken land as well as access to the Oahe Reservoir.[200]

Overall, the Pick-Sloan Act has been the direct cause of more damage to Indian land and resources than any other public works legislation, with the Oahe Dam specifically destroying more Indian land than any other infrastructure project in American history.[201] "The payments authorized" under the various acts were often belated and "based on hasty appraisals," with "[c]ongressionally-directed mitigation measures, such as the reconstruction of hospitals and government offices as well as the relocation of cemeteries," never materializing.[202] Congress did not revisit the question of compensation to the tribes until a generation later.[203]

196. Pub. L. No. 78-534, ch. 665, 58 Stat. 887 (1944) (codified in scattered sections of 16, 33, 43 U.S.C).

197. *Id.*; *see also* Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 (8th Cir. 1983); Cross, *supra* note 95.

198. Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958) [hereinafter Standing Rock Oahe Act]; Cheyenne River Oahe Act, Pub. L. No. 81-776, 68 Stat. 1191 (1954) [hereinafter Cheyenne River Oahe Act].

199. Peter Capossela, *Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. ENVTL. L. & LITIG. 143, 165–66 (2015).

200. Standing Rock Oahe Act at 1764; Cheyenne River Oahe Act at 1193; South Dakota v. Bourland, 508 U.S. 679, 689 (1993).

201. MICHAEL L. LAWSON, DAMMED INDIANS: THE PICK SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944–1980, at 134. (1982).

202. Capossela, *supra* note 199, at 168. The co-author's father, Kenneth Fredericks, was relocated as part of the Pick-Sloan project along with his family.

203. *See generally id.* at 169–79 (discussing the subsequent compensatory legislation for the Tribes on the Missouri River).

Unfortunately,

> the process by which the Missouri River Tribes obtained additional compensation for the taking of their valuable riparian land was as piecemeal and problematic as the legislative process for the original taking acts during the termination era of the 1950s. Consequently, some tribes have continued to petition the Congress for land restoration or additional compensation.[204]

As recently as 2007, "the Senate Committee on Indian Affairs conducted a hearing on unresolved Tribal claims under Pick-Sloan" in which testimony presented by the General Accounting Office "established ranges of recommended compensation for each of the Missouri River Tribes," including a suggestion that "the Standing Rock Sioux, may be entitled to additional compensation."[205]

Altogether, there have been over seventy lawsuits filed in state and federal courts, and courts of special jurisdiction that have construed and analyzed the Fort Laramie Treaty of 1868 and its various provisions.[206] While the claims in these cases have ranged from determining the government's obligations to furnish supplies to jurisdiction over hunting and fishing regulations, the cases generally illustrate the limited availability of tribal remedies for abrogation of their treaties, resulting in losses of lands and attendant devastation to their way of life.[207] Two of the most relevant and well-known legal cases brought under the Sioux Treaties are *Sioux Tribe of Indians v. United States* and *United States v. Sioux Nation.*

V. *SIOUX TRIBE OF INDIANS V. UNITED STATES*

In 1950, shortly after the establishment of the Indian Claims Commission presented the first method of legal redress for treaty violations, the Sioux Nation filed a claim for various

204. *Id.* at 179.

205. *Id.* (citing *Impact of the Flood Control Act of 1944 on the Indian Tribes Along the Missouri River: Hearing before the S. Comm. on Indian Affairs*, 110th Cong. 11–12 (2007) (statement of Robin Nazarro, Director Natural Res. Div., Gov't Accountability Office)).

206. Barbara J. Van Arsdale, Annotation, *Construction and Application of Fort Laramie Treaty of 1868,* Apr. 29, 1868, 15 Stat. 635, 59 A.L.R Fed. 2d 243 (2011).

207. *Id.*

land cessions under the 1868 Treaty of Fort Laramie and the Act of February 28, 1877 (the 1877 Act).[208] The Commission separated the claims under the 1868 Treaty from those under the 1877 Act, giving rise to two separate lines of cases. As a result of persistent land dispossession and federal policies aimed at assimilation, the Great Sioux Nation had effectively dissolved in the 1890s, causing the eight present-day Sioux Tribes to bring the lawsuits in a representative capacity.[209]

The Commission determined that the Sioux Nation had aboriginal title to the land obtained by the United States under the 1868 Treaty.[210] It also found that the value of the land at the time of cession in 1869 was $45,685,000.[211] The Commission disallowed all offsets requested by the government and, after making certain adjustments, awarded the Indians $43,949,700.[212]

The government appealed, and the Court of Claims reversed the Commission's denial of offsets, holding that the 1868 Treaty was not a treaty of peace as the Commission had held, but was rather a treaty of cession.[213] Due to this distinction, the payments and services the government supplied to the Sioux could be considered as compensation for the ceded land. The government was thus entitled to produce evidence accounting for the payments and services under the treaty as "payments . . . on the claim."[214]

Prior to the Court of Claims remand regarding the allowance of offsets, in October 1979 the government had made an offer to the Sioux Tribe's attorneys to settle the offset issue for $4,200,000, resulting in an award of $39,749,700.[215] The attorneys for the Sioux Tribes accepted the offer subject to conditions, which the government rejected.[216]

208. *See* Sioux Nation of Indians v. United States, 33 Ind. Cl. Comm. 151, 152–53 (1974).

209. Sioux Tribe of Indians v. United States, 862 F.2d 275, 277 (Fed. Cir. 1988).

210. Sioux Tribe v. United States, 23 Ind. Cl. Comm. 419, 424–25 (1970), *aff'd,* 500 F.2d 458, 470–72 (Ct. Cl. 1974).

211. Sioux Tribe v. United States, 38 Ind. Cl. Comm. 469, 532 (1976).

212. Sioux Tribe v. United States, 42 Ind. Cl. Comm. 214, 257 (1978).

213. United States v. Sioux Tribe, 616 F.2d 485, 487 (Ct. Cl. 1980).

214. *Id.*

215. *Id.*

216. *Id.* at 488.

> In 1983, the government again offered to settle the offset issue for $4,200,000, but the eight member-tribes . . . refused to consider the settlement. The Claims Court, the successor to the Trial Division of the Court of Claims, then ordered the Sioux Tribe's counsel formally to present the settlement offer to the tribes, and further directed the tribes, through their governing bodies, to consider and act upon the offer.[217]

Two of the tribes accepted the settlement, four of the tribes explicitly denied the settlement in favor of seeking return of the lands ceded under the 1868 Treaty, and two of the tribes implicitly rejected it by failing to respond to the settlement.[218]

Ultimately, in 1985, the Claims Court concluded that the litigation had become "an uncontrolled quagmire" and that

> the simple fact that four of the reservation tribes are refusing to accept any settlement or award of this Court, which does not include the return of their land, is indicative of the plaintiff's [sic] refusal to comprehend, after thirty-five years of litigation, that this Court can only award money judgments.[219]

Thus, the court terminated the litigation and awarded the Sioux Tribes $39,749,700 as fair and equitable compensation for its claims of land cession under the 1868 Treaty.[220] The Federal Court of Appeals held that the Claims Court had improperly imposed upon the parties a settlement to which they had not consented, and accordingly vacated the award and remanded the case to the Claims Court for further proceedings to resolve the claim.[221]

"On July 29, 1987, seven months later, the parties filed . . . a Stipulation of Facts 'regarding the offsets of the government in this case' and a joint motion 'to enter judgment in accordance with the Stipulation of Facts.'"[222] In part, the

217. Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1048–49 (Fed. Cir. 1986).
218. *See* Sioux Tribe of Indians v. United States, 8 Cl. Ct. 80, 84, 86–90 (1985).
219. *Id.* at 85.
220. *Id.* at 90–92.
221. *Cheyenne River Sioux Tribe*, 806 F.2d at 1050–52.
222. Sioux Tribe of Indians v. United States, 862 F.2d 275, 278 (Fed. Cir. 1988)

Motion for Judgment stated: "The parties move the Court to approve the Stipulation of Facts and to enter judgment in accordance with the Stipulation of Facts in the amount of $40,245,807.02 which represents the gross award of $43,949,700 less stipulated offsets of $3,703,892.98."[223] The Claims Court agreed and issued judgment for the Sioux Tribe, authorizing a recovery from the United States of $40,245,807.02.[224]

Two months later the Oglala and Rosebud Sioux Tribes filed a motion seeking relief from the judgment, arguing that the attorney of record had no authority to enter a motion which formed the basis for the final judgment and that the "substantial legal, moral and political interests of the Tribes would be harmed if not vacated."[225] In acknowledging Congress's plenary power over Indian affairs and the Court's limited available remedies, the Claims Court declined to vacate its judgment on the ground that "[i]t is not for this Court to say whether the Congress of the United States will ever decide to return some or all of the Sioux land."[226]

In *Sioux Tribe of Indians v. United States*, the court of appeals ended thirty-eight years of litigation by affirming the Court of Claims award for land ceded by the 1868 Treaty. [227] In doing so, the court agreed that the Sioux Nation had aboriginal title to approximately fourteen million acres of land east of the Missouri River which were ceded to the United States by the 1868 Treaty.[228] However, the court of appeals also held that the Claims Court did not abuse its discretion in denying the two Sioux Tribes' motion for relief from the judgment and that counsel for the Sioux Tribes "had authority to enter the stipulation of facts that resulted in the final judgment."[229] Finally, the court of appeals found that the tribes' request to vacate the judgment, and award them compensation for the treaty violations, and to allow them to seek dismissal and thereby deny them the benefits of the award, was untimely and thus could not be allowed.[230]

223. *Id.*
224. *Id.*
225. Sioux Tribe of Indians v. United States, 14 Cl. Ct. 94, 100, 105 (1987).
226. *Id.* at 105.
227. 862 F.2d 275, 276–77 (Fed. Cir. 1988).
228. *See id.*
229. *Id.* at 279–80.
230. *Id.* at 281.

VI. *UNITED STATES V. SIOUX NATION*

The Sioux's claim for the taking of the Black Hills would take a somewhat more complicated path. After Congress passed the Act, the Sioux made consistent claims that they regarded the 1877 Act as a breach of the 1868 Treaty.[231] However, Congress failed to enact a mechanism under which the Sioux could litigate their claims against the United States until 1920, when a special jurisdictional act was passed after years of lobbying by the Sioux.[232] The Sioux brought suit under this Act in the Court of Claims, "alleging that the Government had taken the Black Hills without just compensation in violation of the Fifth Amendment."[233] The Court of Claims dismissed the case in 1942, holding the 1920 Act did not authorize adjudication of whether the compensation afforded the Sioux in the 1877 Act was adequate, and that the Sioux's claim was a "moral" one not protected by the Fifth Amendment's just compensation clause.[234]

Upon enactment of the Indian Claims Commission Act in 1946, the Sioux resubmitted their claim to the Indian Claims Commission along with their claim for land ceded under the 1868 Treaty.[235] After bifurcating the claims, the Commission held that the 1942 Court of Claims decision did not bar the Sioux's taking claim and in fact, the Sioux were entitled to just compensation because the 1877 Act constituted a taking.[236] On appeal, the Court of Claims affirmed the Commission's holding and ultimately found the Sioux were entitled to an award of at least $17.5 million, without interest, for the lands surrendered

231. United States v. Sioux Nation, 448 U.S. 371, 383–84 (1980) ("The Sioux thus affected have not gotten over the talking about that treaty yet, and during the last few years have maintained an organization called the Black Hills Treaty Association, which holds meetings each year at the various agencies for the purposes of studying the treaty with the intention of presenting a claim against the government . . . for territory ceded under it.") (quoting FRANK FISKE, THE TAMING OF THE SIOUX 132 (1917)).

232. Act of June 3, 1920, 66 Cong. ch. 22, 41 Stat. 738 (Sioux Jurisdictional Act authorizing the Sioux Nation to bring suit for the alleged Fifth Amendment taking of the Black Hills).

233. *Sioux Nation*, 448 U.S. at 384.

234. Sioux Tribe v. United States, 97 Ct. Cl. 613, 681–84, 689 (1942), *cert. denied*, 318 U.S. 789, 63 S. Ct. 992 (1943).

235. *See* Sioux Nation of Indians v. United States, 33 Ind. Cl. Comm. 151, 152–153 (1974).

236. United States v. Sioux Nation, 518 F.2d 1298 (Ct. Cl. 1975).

under the 1877 Act and for resources taken by trespassing settlers prior to passage of the Act.[237] However, the court also held that the merits of the takings claim had been reached in its 1942 case brought under the 1920 jurisdictional statute and that, whether resolved "rightly or wrongly," the present claim was thus barred by res judicata.[238] The court also noted that only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest.[239]

On March 13, 1978, Congress passed an act providing for de novo review by the Court of Claims of whether the 1877 Act effected a taking of the Black Hills, without regard to res judicata, and authorizing the consideration of new evidence.[240] In its review, the Court of Claims applied the *Fort Berthold* test[241] to distinguish between a taking for which interest is owed and a mere breach of trust for which no interest is owed.[242] Upon consideration, the court affirmed the Commission's holding the 1877 Act as a taking in exercise of Congress's power of eminent domain over Indian property.[243] Accordingly, the court held that the Sioux were entitled to an award of interest at an annual rate of five percent dating from 1877 on a principal compensation sum of $17 million.[244]

The government unsurprisingly filed for appeal before the Supreme Court in 1979, asking the Court to review the constitutional question of whether ceded Indian lands are compensable takings under the Fifth Amendment.[245] The Court granted certiorari in what would become perhaps the most important Indian takings case decided by the Court.[246]

237. *Id.*
238. *Id.* at 1306.
239. *See id.*
240. Act of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153.
241. Under the *Fort Berthold* test, a good faith, but incompetent, effort to pay the tribe insulates the government from Fifth Amendment liability. This test directs the court to assess whether Congress was acting as a trustee by merely transmuting the tribe's land into money or as a sovereign confiscating tribal land. *See* Three Affiliated Tribes of the Ft. Berthold Reservation v. United States, 390 F. 2d 686, 691 (Ct. Cl. 1968).
242. Sioux Nation of Indians v. United States, 601 F.2d 1157, 1159, 1162 (Ct. Cl. 1979).
243. *Id.* at 1170.
244. *Id.* at 1183–84 (Bennett, J., dissenting).
245. *See* United States v. Sioux Nations, 444 U.S. 989 (1979).
246. Clinton, *supra* note 8, at 201–02.

In *United States v. Sioux Nation*, the Supreme Court affirmed the Indian Claims Commission's holding that the government's 1877 acquisition of the Black Hills constituted an unjust taking under the Fifth Amendment.[247] In concluding such a violation had taken place, the Supreme Court similarly invoked the *Fort Berthold* test to determine whether the government made a good faith effort to provide full value to the Tribe.[248] As discussed by the Court, the *Fort Berthold* test had been designed to reconcile two lines of cases that were seemingly in conflict with one another.[249]

The first line of cases centered wholly on *Lone Wolf's* invocation of plenary power and Congress's "paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."[250] The second line followed the Court's decision in *Shoshone*, which conceded Congress's paramount power over Indian property, but held that "[t]he power does not extend so far as to enable the Government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation."[251]

In distinguishing the case from *Lone Wolf*, the Court held the 1877 Act did not alter the investment of Indian tribal property, but constituted a taking of tribally owned property which had been given to the Sioux for their exclusive occupation.[252] Because the Act constituted a taking, it required the government to pay just compensation to the Sioux Nation.[253]

247. 448 U.S. 371, 423–24 (1980).

248. *Id.* at 416–21.

249. *Id.* at 408.

250. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

251. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937) (citing United States v. Creek Nation, 295 U.S. 103, 109–10 (1935)) (internal quotations omitted).

252. United States v. Sioux Nation of Indians, 448 U.S. 371, 423–24 (1980).

253. *Id.* at 423 (internal citations omitted). The Court explained:

> In every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a

These cases and the Court's reasoning demonstrate that "when it finally became possible" to legally address the expropriation of the treaty lands under the 1868 Treaty and 1877 Act, "the only legally cognizable claim, in light of [Congress's plenary power as espoused in] *Lone Wolf*, was a [Fifth Amendment] takings claim, the remedy for which was a cash payment . . . rather than" specific performance of the treaty and "return of [the treaty-protected] lands."[254] After almost a half-century of litigation, the land cessions imposed on the Sioux Nation had resulted in a "squabble over money," regardless of the assurance of the Supremacy Clause that their treaties constituted the "law of the land."[255]

Enforcement of the takings clause in *Sioux Nation* left the federal government in possession of the Black Hills, a result of the limited remedial regime for Indian taking claims under United States law.[256] After *United States v. Sioux Nation*, Indians can finally get just compensation for federal takings of the treaty-reserved lands or resources if they can show an unjust result and Congress's bad intent, but otherwise are limited in securing the return of lands and resources once expropriated.[257] As the Court of Claims stated in *Sioux Indian Tribe v. United States*, "[i]t is not for this Court to say whether the Congress of the United States will ever decide to return some or all of the Sioux land."[258]

To truly understand what is at stake for the Tribes and their members, the fight against DAPL must be viewed against this intricate and checkered historical context. For the Sioux Tribes engaged in this historic battle, the present is inextricably linked with the past, and despite the voluminous litigation and claims settlement, the 1851 and 1868 Treaties survive as the truest representation of their status as independent sovereign nations.

guardianship and to pertinent constitutional restrictions." *Id.* at 415 (citing *Creek Nation*, 295 U.S. at 109–10).

254. Clinton, *supra* note 8, at 202–03.

255. *Id.* at 202.

256. *Id.*

257. 448 U.S. 371.

258. 14 Cl. Ct. 94, 105 (1987).

VII. THE FIGHT AGAINST THE DAKOTA ACCESS PIPELINE

Today, the Standing Rock Sioux Tribe is waging a historic battle against DAPL, a 1,168-mile-long oil and gas pipeline that will carry 570,000 barrels of crude oil daily from the Bakken region of North Dakota across four states to refineries in southern Illinois.[259] The pipeline intersects the 1851 Treaty reservation and traditional territories of the Tribes, lands to which the Tribes continue to have strong cultural, spiritual, and historical ties.[260]

The abrogation and unilateral "settlement" of the treaty by the convoluted Indian claims regime and the Supreme Court in *United States v. Sioux Nation* has limited the Standing Rock Sioux Tribe's legal remedies against the United States for activities taking place on its treaty lands and impacting its treaty resources. Because of the fact that the pipeline path lies within the boundaries of the 1851 Treaty and on lands that contain Standing Rock's vital cultural, spiritual, and physical resources, the case shows the utter failure of the Supremacy Clause to ensure the original treaty be respected as the "supreme Law of the Land."

In June 2014, Dakota Access, the entity charged with building the pipeline, notified the Army Corps of Engineers (Army Corps) of its intent to construct DAPL underneath Lake Oahe.[261] In October of the same year, Dakota Access sought to obtain multiple authorizations needed to begin construction, including verifications that it complied with Nationwide Permit 12 under the Clean Water Act, permission under the Rivers and Harbors Act, and an easement under the Mineral and Leasing Act.[262] In December 2015, the Army Corps published and sought comment on a Draft Environmental Assessment (EA) that evaluated the environmental effects of DAPL's proposed crossing at Lake Oahe.[263]

The Standing Rock Sioux Tribe submitted comments to the Draft EA that highlighted a number of concerns about the

259. Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. July 27, 2016).

260. *Id.*

261. Motion for Partial Summary Judgment Memorandum Opinion at 7, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-01534-JEB (D.D.C. June 14, 2017) [hereinafter Partial Summary Judgment Opinion].

262. *Id.*

263. *Id.* at 8.

Draft EA's inadequacy. In particular, the Tribe was concerned that it failed to consider the potential harm to the Tribe's rights resulting from the construction and operation of the pipeline, to acknowledge the proximity to the Standing Rock Reservation, and to consider environmental justice concerns.[264] The Cheyenne River Sioux Tribe submitted comments on the Draft EA expressing similar concerns.[265]

The Tribes were not the only entities that expressed concern with the Draft EA. The Department of the Interior (DOI), the Environmental Protection Agency (EPA), and the Advisory Council on Historic Preservation all submitted comments to the Army Corps. Their comments highlighted the lack of analysis on DAPL's impact on treaty and trust resources, specifically the impact on water resources.[266] Nonetheless, on July 25, 2016, the Army Corps published a Final EA and Mitigated Finding of No Significant Impact.[267] Under this Final EA, the Corps provided Dakota Access with verifications of compliance with Nationwide Permit 12 and granted permission under the Rivers and Harbor Act necessary for construction under Lake Oahe, while assuming the Corps did not grant an easement under the Mineral Leasing Act.[268]

Two days later, on July 27, 2016, Standing Rock filed suit against the Army Corps seeking declaratory and injunctive relief in the United States District Court for the District of Columbia.[269] In its complaint, the Tribe claimed the Corps violated multiple federal statutes in its approval of the construction and operation of DAPL. Specifically, the Tribe brought claims for relief under the National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), Clean Water Act, and Rivers and Harbors Act.[270] On August 10, the Cheyenne River Sioux Tribe successfully

264. *Id.*
265. *Id.*
266. *Id.* at 8–10*; see also* Letter from Reid J. Nelson, Dir., Office of Federal Agency Programs Advisory Council on Historic Pres., to Colonel John W. Henderson (Mar. 15, 2016); Letter from Philip Strobel, Dir. of Nat'l Envtl. Prot. Act Compliance & Review Program, Envtl. Prot. Agency, to Brent Cossette (Mar. 11, 2016); Letter from Lawrence Roberts, Acting Assistant Sec'y for Indian Affairs, Dep't of Interior, to Brent Cossette (Mar. 29, 2016).
267. Partial Summary Judgment Opinion, *supra* note 261, at 10.
268. *Id.* at 11.
269. *Id.*
270. *Id.*

intervened as a plaintiff and subsequently filed its own complaint which plead claims under the same four statutes.[271]

On August 4, 2016, Standing Rock filed a motion for preliminary injunction based solely on violations of the NHPA.[272] Specifically, the motion focused on violations of Section 106 of the Act, which requires consultations with Tribal governments where a project has the potential to impact sites of cultural and historic relevance to the Tribe.[273] In its motion, the Tribe cited a survey prepared by a Dakota Access consultant which identified dozens of historical and archaeological sites in the pipeline's path, many of which had been deemed "unevaluated."[274]

On September 2, Standing Rock submitted to the court the recent discovery of stone features and graves that were immediately adjacent to the pipeline's right-of-way, approximately two-to-four miles away from the Lake Oahe crossing.[275] The very next day, Dakota Access moved construction equipment to the previously undisturbed tract of land identified by the Tribe in the September 2, 2016 filing, and began to grate over the exact parcels of land identified in the filing as having archeological and burial remains.[276] In response, on September 4, 2016, Standing Rock and Cheyenne River filed motions for a temporary restraining order (TRO) in response to the deliberate destruction of historic and religious sites in the pipeline's path.[277] The TRO intended to halt

271. *See* Intervenor-Plaintiff Cheyenne River Sioux Tribe's First Amended Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 37 [hereinafter Cheyenne River Sioux Tribe's First Amended Complaint].

272. Motion For Preliminary Injunction Request For Expedited Hearing at 12, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 5.

273. *Id.*; 36 C.F.R. § 800.2(c)(2) (2017); 54 U.S.C. § 3027076 (2014) (properties "of traditional religious and cultural importance to" a tribe may be included on the National Register, and federal agencies "shall consult with any Indian Tribe . . . that attaches religious or cultural significance" to such properties).

274. Motion For Preliminary Injunction Request For Expedited Hearing, *supra* note 272, at 36.

275. Plaintiff's Motion for Leave to File Supplemental Declaration, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-1534-JEB), ECF No. 29.

276. Emergency Motion for Temporary Restraining Order at 4, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 30.

277. *Id.*

construction in areas east of State Highway 1806 where the demolition took place, and within twenty miles on either side of Lake Oahe.[278]

After hearing oral arguments on September 6, 2016, the court issued an order granting in part and denying in part the Tribe's motion.[279] The court ordered that no construction activity on DAPL may take place between Highway 1806 and twenty miles to the east of Lake Oahe. Construction activity to the west of Highway 1806 was allowed to continue.[280]

On September 8, 2016, Cheyenne River filed an amended complaint which alleged the Corps' authorizations of DAPL violated the United States' trust relationship with the Tribe as well as the Tribe's treaty and statutorily protected property right in the water of the Missouri River.[281] Specifically, the Tribe argued that their reserved water right equaled a vested property right which is held in trust by the United States.[282] The Tribe went on to argue that by issuing authorizations without "engaging in a government-to-government consultation with tribes on actions that could impair tribal trust resources," and "without a full EIS to address concerns about the safety of the Tribe's water" breached the Corps' trust responsibility to the Tribe.[283] The court denied Cheyenne River's amended complaint, instead urging Cheyenne River to work with Standing Rock on a consolidated amended complaint.[284]

Just one day later, on September 9, 2016, the court issued an Order denying Standing Rock's motion for preliminary injunction.[285] In its order, the court summarized the Tribe's arguments against the permitting of the pipeline, focusing four arguments on the NHPA and Section 106 determinations. The court also noted that "Standing Rock Sioux do not claim that a potential future rupture in the pipeline could damage their reserved land or water. Instead, they point to . . . the likelihood

278. *Id.*
279. Minute Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 33.
280. *Id.*
281. Cheyenne River Sioux Tribe's First Amended Complaint, *supra* note 271.
282. *Id.* at 54.
283. *Id.* at 54–55.
284. Minute Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 44.
285. Memorandum Opinion, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 39.

that DAPL's ongoing construction activities . . . might damage sites of great cultural or historical significance."[286] The court focused on the fact that the majority of sacred sites identified by the Tribe were located on private land, outside of the jurisdiction of the Army Corps.[287] Thus, the court found that the Tribe could not demonstrate how an injunction against the Army Corps could prevent the harm to cultural sites from construction on private land.[288]

The court also found problematic the Tribe's definition of its ancestral lands as "wherever the buffalo roamed,"[289] stating "there is at least some evidence in the record that [ancestral lands] do not traverse the entirety of DAPL."[290] According to the Order, this broad and ubiquitous definition of ancestral lands would lead the court to have to guess as to whether an interest of the Tribe would be affected at certain points of the pipeline, an exercise it refused to undertake.[291] Without identifying the specific location and resources that would be affected by construction (the sites destroyed on September 3 notwithstanding, as "for those sites, the die is cast"),[292] the Court found that Standing Rock had failed to carry their burden in identifying a likely irreparable injury and denied the preliminary injunction.[293]

Within moments of the court's denial of the Tribe's motion, the Department of Justice, DOI, and the Department of the Army issued a joint statement announcing suspension of all additional permitting relating to the pipeline's crossing at Lake Oahe due to "important issues raised by the Standing Rock Sioux Tribe and other tribal nations."[294] The statement also

286. *Id.* at 50.
287. *Id.* at 51.
288. *Id.*
289. *Id.* at 53.
290. *Id.* (citing to a letter from the Tribe's current Tribal Historic Preservation Officer claiming "*[m]ost* of the DAPL pipeline route crosses Lakota/Dakota aboriginal land") (emphasis added).
291. *Id.* at 54 ("The Court, again, cannot guess that at some undefined locations there might be harm to the Tribe.").
292. *Id.* at 55.
293. *Id.* at 54–56.
294. Press Release No. 16-1034, U.S. Dep't of Justice, Office of Pub. Affairs, Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing [https://perma.cc/BQ8J-PWMF].

provided that construction on federal lands bordering Lake Oahe would be halted while officially calling on Dakota Access to suspend all construction within twenty miles of the crossing.[295]

The next day the Tribes filed an appeal of the district court's order to the Court of Appeals for the District of Columbia. On September 12, 2016, Standing Rock filed a motion seeking an emergency injunction pending appeal of the district court's order denying the preliminary injunction.[296] On October 9, 2016, the court of appeals issued an order denying the Tribe's motion and dissolving the administrative injunction that was holding off construction of the pipeline within twenty miles of the river.[297] The court cited a necessary easement that the government had yet to issue in finding the Tribe had not "met the narrow and stringent standard governing this extraordinary form of relief."[298]

On October 19, 2016, the district court granted Cheyenne River's request for reconsideration and filed the Tribe's amended complaint.[299] Cheyenne River's complaint placed consideration of the impact of the Treaties of Fort Laramie and the trust responsibility of the United States to the Tribes squarely before the court. It is important to note, however, that while the Tribe's amended complaint sought relief under breach of the Federal Trust responsibility, the Tribe did not claim relief under either the 1851 or 1868 Treaties.

After the United States halted construction, Standing Rock sent multiple letters to the Army Corps expressing concerns regarding the Final EA's lack of consideration of a potential spill's impact on hunting, fishing, and other treaty rights.[300] With these and other submitted materials in hand, on November 14, 2016, the Army and DOI issued a joint statement which found that after a review of the available information, further analysis was warranted before granting

295. *Id.*

296. Emergency Motion for Injunction Pending Appeal, Standing Rock Sioux Tribe v. US Army Corps of Eng'rs, No. 16-05259 (D.C. Cir. filed Sept. 12, 2016).

297. Order, Standing Rock Sioux Tribe v. US Army Corps of Eng'rs, No. 16-05259 (D.C. Cir. filed Oct. 9, 2016).

298. *Id.*

299. Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 48.

300. Memorandum Opinion, *supra* note 3, at 12.

an easement for the pipeline crossing.[301]

Standing Rock then engaged in discussions with the Corps concerning the mitigating conditions and easement for the crossing that would reduce risk and "otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights."[302] During these discussions, Standing Rock provided further comments on DAPL's potential harm to their water, hunting, fishing, and gathering rights.[303] It was during this additional review phase that the Army Corps also sought the opinion of the DOI in determining whether the Tribe's treaty rights "weigh[ed] in favor or against" granting the final easement necessary to construct DAPL underneath Lake Oahe.[304]

The treaty claims continued to lurk in the background of the case, and on December 4, 2016, the Solicitor for DOI issued a memorandum extensively analyzing the Tribes' treaty rights implicated by the construction and operation of DAPL.[305] In her memorandum, the Solicitor comprehensively discussed both the 1851 and 1868 Treaties, as well as the litany of legislation abrogating these rights.[306] In addition to finding that Standing Rock and Cheyenne River retain their preexisting on-reservation hunting and fishing rights in the lands used to create Lake Oahe, the Solicitor's memorandum also pointed to the Tribes' reserved water rights under the *Winters* Doctrine as requiring consideration.[307] Ultimately, the Solicitor concluded that because of the treaty rights at issue, the Army Corps had "ample legal justification to decline to issue the proposed Lake Oahe easement on the current record."[308] She further determined that the Army Corps would be "equally justified in suspending or revoking the existing Section 408 [Rivers and Harbors Act] permit."[309] The Solicitor

301. *Id.* at 12.
302. *Id.* at 13 (citing Letter from Jo-Ellen Darcy, Nov. 14, 2016).
303. *Id.* at 14.
304. *Id.* (citing Memorandum from Hilary C. Tompkins, Solicitor of the U.S. Dep't of Interior, M-37038 (Dec. 4, 2016)).
305. Tompkins, *supra* note 304.
306. *Id.* at 9–12.
307. *Id.* at 15 (noting that although the Tribes' federal reserved water rights have not been specifically adjudicated or settled that they still remain as the paramount water rights on the Missouri River).
308. *Id.* at 5.
309. *Id.* at 4.

went on to urge the Corps to delay a decision on the easement pending consultations with the Tribes and a full Environmental Impact Statement (EIS), which "adequately evaluates the existence of and potential impacts to tribal rights and interests."[310]

The same day, the Army Corps issued its own memorandum that announced it would deny the final permit needed to construct the pipeline underneath Lake Oahe, pending a full EIS.[311] The Army Corps memorandum went on to acknowledge the checkered history of the United States' dealings with the Great Sioux Nation in inviting the Tribe to engage in discussions surrounding the pipeline's path and safety.[312]

The results of the 2016 election rendered consideration of DAPL's impact on the Tribes' treaty rights short-lived. On January 24, 2017, four days after assuming office, President Trump issued a presidential memorandum that called on the Army Corps to "review and approve in an expedited manner . . . requests for approvals to construct and operate the DAPL."[313] On February 3, 2017, the Army Corps abruptly ended the ongoing EIS and comment period, and found the Final EA satisfied the requirements under federal law.[314]

On February 9, the Tribes responded, with Cheyenne River filing motions for a preliminary injunction and TRO.[315] Cheyenne River also filed their second amended complaint.[316] The amended complaint sought relief under the Religious

310. *Id.*

311. Press Release, U.S. Dep't of the Interior, Dep't of the Army, Statement Regarding the Dakota Access Pipeline (Nov. 14, 2016), https://www.doi.gov/pressreleases/statement-regarding-dakota-access-pipeline [https://perma.cc/6W6E-6GQT].

312. *Id.*

313. Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, The White House, Office of the Press Sec'y, Presidential Memorandum (Jan. 24, 2017).

314. Memorandum Opinion, *supra* note 3, at 16.

315. Intervenor-Plaintiff Cheyenne River Sioux Tribe's Motion for Preliminary Injunction, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 98; *see also* Intervenor-Plaintiff Cheyenne River Sioux Tribe's Ex Parte Motion for Temporary Restraining Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 99.

316. Intervenor-Plaintiff Cheyenne River Sioux Tribe's Motion to Amend Complaint, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 97.

Freedom Restoration Act (RFRA) and the First Amendment in addition to citing both the 1851 and 1868 treaties as they conferred an obligation on the Army Corps to manage the waters of the Missouri River and Lake Oahe.[317] The motions focused solely on the RFRA claims. The next day, Standing Rock joined Cheyenne River's motion for preliminary injunction and filed their own amended complaint, this time including claims under the RFRA, the Mineral Leasing Act, and the Administrative Procedure Act.[318]

After the hearing on February 13, 2016, the Court denied Cheyenne River's TRO request and required that Dakota Access provide an update on every Monday thereafter as to the likely date that oil would begin to flow beneath Lake Oahe.[319]

The next day, on February 14, 2017, Standing Rock filed a motion for partial summary judgment alleging that the Army Corps authorizations, including the easement, violated its duties under NEPA by failing to consider DAPL's effects on tribal treaty rights and environmental-justice considerations; that its February decision to grant the easement was arbitrary and capricious in violation of the Administrative Procedure Act; and, that the Army Corps had violated the Clean Water Act by finding the pipeline satisfied Nationwide Permit 12.[320]

Standing Rock's motion asserted that its treaty rights should be considered, specifically arguing that the EA's failure to consider the effects of DAPL on the Tribe's treaty rights was improper. The Tribe also asserted that its treaty rights should be considered as part of NEPA, which requires the Army Corps to assess the range of risks posed by DAPL to the "full range of Tribe's Treaty rights, in the context of the Army Corps'

317. *Id.*

318. Standing Rock Sioux Tribe's First Amended Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 106.

319. Minute Order, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB). On March 16, the court ordered the cases brought by the Standing Rock Sioux Tribe (16-1534), the Cheyenne River Sioux Tribe, the Oglala Sioux Tribe (17-267) and the Yankton Sioux Tribe (16-17-267) be consolidated. Filed on September 8, 2016, the Yankton Sioux Tribe's complaint was similar to those filed by the Standing Rock and Cheyenne River Tribes.

320. Standing Rock Sioux Tribe's Memorandum in Support of Its Expedited Motion For Partial Summary Judgment at 2, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 117.

heightened trust responsibility."[321] The Tribe specifically highlighted the potential impact to water, hunting, and fishing rights reserved to them in the treaties.[322] Cheyenne River joined Standing Rock's motion and filed its own motion for partial summary judgment.[323]

On June 14, 2017, the court issued an opinion on the Tribes' motions for summary judgment.[324] Despite holding that the Army Corps substantially complied with its statutory responsibilities in the permit process, importantly, the court held that the Final EA adopted by the Army Corps "did *not* adequately consider the impacts of an oil spill on fishing rights [and] hunting rights."[325]

Although the court did not hold that the EA's analysis of spill impacts on water satisfied NEPA, the EA mentioned Standing Rock's reserved water rights in passing, but completely omitted Cheyenne River's water rights.[326] Instead, the EA discussed a potential spill's impact on water resources of Lake Oahe only generally, noting that "Standing Rock Sioux have an intake structure within the river downstream of the Lake Oahe project area."[327] Thus, despite extensive evidence in the record, the EA displayed a complete lack of analysis of the impact specifically on the Tribes' reserved water rights.[328] The court also found that the EA "adequately discusses the impacts of [an oil spill] on water—but not on hunting or aquatic—resources."[329]

The treaty claims ultimately were persuasive to the court, as it found that acknowledgement of, or attention to, the impact of an oil spill on the Tribe's fishing and hunting rights

321. *Id.* at 24.
322. *Id.*
323. Memorandum Opinion, *supra* note 3, at 18.
324. *Id.*
325. *Id.* at 2 (emphasis added).
326. Plaintiff-Intervenor Cheyenne River Sioux Tribe's Memorandum in Support of Its Motion for Partial Summary Judgment and Motion to Join Plaintiff Standing Rock Sioux Tribe's Motion for Partial Summary Judgment at 34, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F. Supp. 3d. 4 (D.D.C. 2016) (1:16-cv-01534-JEB), ECF No. 131.
327. Memorandum Opinion, *supra* note 3, at 41.
328. Plaintiff-Intervenor Cheyenne River Sioux Tribe's Memorandum in Support of Its Motion for Partial Summary Judgment and Motion to Join Plaintiff Standing Rock Sioux Tribe's Motion for Partial Summary Judgment, *supra* note 326, at 34.
329. *Id.*

would be required for the assessment to be adequate.[330] Pointing to the "cursory nod" given to the potential effects of an oil spill on these resources, the court found that the Army Corps must go beyond acknowledging the potential risks in the EA by taking steps to identify the risks an oil spill would pose to wild and aquatic life, which are resources implicating the Tribe's treaty rights.[331]

The court's emphasis on "inadequate *consideration*" points to the limited nature of relief available for the Tribes under United States law. Specifically, NEPA requires the government to *consider* impacts on the Tribes' treaty rights, but as construed by the court, it does not require the government to take any actions to avoid or minimize DAPL's impacts on the Tribes' rights and resources.[332] In fact, the court stated that it could not demand the Army Corps undertake a full analysis of the Tribes' treaty rights, instead requiring only that the Army Corps undertake to "consider" impacts: "The Tribe contends that the Army Corps had to address Treaty rights *qua* Treaty Rights, whereas the Army Corps asserts that it *needed only to consider* the effects on the resources implicated by the Treaty rights—i.e. water, fish and game."[333] The court went on to side with the Army Corps, finding that "it is sufficient that the agency adequately analyze impacts on the resource covered by a given treaty."[334]

The court also stated:

> Standing Rock may be right that the construction and operation of DAPL under Lake Oahe could affect its members in the broad and existential ways it details, but it offers no case, law, statutory provisions, regulations, or other authority to support its position that NEPA requires such a sweeping analysis.[335]

Finally, despite acknowledging the inadequacy of the EA, the court failed to order the pipeline operators to stop operations, citing the "serious consequences" that would transpire if the

330. *Id.* at 43.
331. *Id.* at 42.
332. *See* Memorandum Opinion, *supra* note 3, at 37–38.
333. *Id.* at 37.
334. *Id.* at 38.
335. *Id.* at 37.

pipeline were forced to stop.[336] Thus, despite acknowledging the inadequacy of the EA's consideration of the Tribes' treaty rights, the court implicitly valued the profits of a corporation over the terms of a treaty that was signed between sovereign nations and declared the law of the land by the Supremacy Clause.

The court's analysis denies consideration of the rights conferred in the 1851 and 1868 Treaties as the ultimate authority requiring the government to accordingly tailor its actions that may threaten and implicate treaty rights. The court's analysis here directly contravenes the constitutional promise that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[337]

Under United States law, the only historic remedies for the taking of a Tribe's ancestral land and resources, whether provided under statute or the Constitution, has been monetary compensation. But as Standing Rock and the Sioux Tribes' battle against DAPL has made very clear, these colonial-based legal mechanisms have left unresolved many fundamental issues relating to Indian tribes—including their rights to ancestral land and the enforcement of surviving treaty rights in the context of unilateral land cessions. As former United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya has stated, "What is now needed is a resolve to take action to address the pending, deep-seated concerns of indigenous peoples, but within current notions of justice and the human rights of indigenous peoples."[338]

The fundamental concepts of justice and human rights for indigenous peoples that former Special Rapporteur Anaya refers to can be fairly summarized in the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration embodies the norms and standards by which actors can protect the rights of indigenous people, primarily through employing the practice of Free Prior and Informed Consent.[339]

336. *Id.* at 66–67.

337. U.S. CONST. art. VI.

338. JAMES ANAYA, A/HRC/21/47/ADD.1, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES, THE SITUATION OF INDIGENOUS PEOPLES IN THE UNITED STATES OF AMERICA ¶ 78 (2012).

339. *See generally* Carla F. Fredericks, *Operationalizing FPIC*, 80 ALB. L. REV. 429 (2017).

But within the broader context of increased international attention to the rights of indigenous people, a particular focus has largely been placed on the protection of indigenous peoples' rights over traditional lands and natural resources.[340] Moreover, the international standards and norms that have developed in relation to indigenous peoples and rights to land and resources often go beyond the existing international and domestic treaty obligations.[341] As former Special Rapporteur Anaya and co-author Rob Williams explain:

> Domestic legal developments are not necessarily sufficient to protect indigenous peoples in the enjoyment of their land and resource tenure. And, of course, those domestic legal advances already achieved remain far from fully implemented and translated into reality for indigenous peoples. Nonetheless, these developments signify a clear trend in the direction of the relevant international practice, and they constitute legal obligations for state officials under domestic law and give rise to expectations of conforming behavior on the part of the international community.[342]

In many ways the controversy surrounding DAPL has highlighted the insufficiencies in the United States domestic legal framework to protect tribal lands and resources. Moreover, this framework not only includes domestic legal advances discussed by Anaya and Williams, such as the consultation regime enshrined in various federal statues, executive orders, and regulations, but existing obligations and rights guaranteed in bilateral treaties with Indian tribes.[343]

Thus, for Indian treaty rights to be given life and meaning in United States courts, there must be a continued shift towards the developing international norms relating to Indigenous rights, including a reexamination of the domestic framework relating to ancestral land and resource claims to

340. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

341. *See generally* Exec. Order No. 13175, 65 Fed. Reg. 67249 (2000); 16 U.S.C. § 470 Section 101(d)(6)(B)); 36 C.F.R. § 800 (2017); 16 U.S.C. § 470aa–mm; 16 U.S.C. § 1996; 25 U.S.C. § 3001; 40 C.F.R. § 1500 (2017).

342. Anaya & Williams, *supra* note 340, at 58–59.

343. *Id.*

include measures of land restoration and general reconciliation. While there can be a number of ways reconciliation-based mechanisms for Native land and resource concessions could be implemented in the existing United States system, former U.N. Special Rapporteur James Anaya provided an outline for such implementation when he posited that,

> Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples' capacities to maintain connections with places and sites of cultural or religious significance . . . .[344]

CONCLUSION

Although the Sioux Tribes' legal actions in the fight against the DAPL are still pending, the court has, to date, denied numerous requests that would have barred construction and operation of the pipeline pending resolution of the Tribes' legal claims. The dearth of judicial protections has allowed construction to occur underneath Lake Oahe in direct opposition to the Tribes' requests and in violation of their treaty rights.

In addressing the Tribes' treaty rights implicated by DAPL, the courts have thus far failed to rule that the treaty rights alone create a legal basis to challenge the actions of the Army Corps in its approval of the project. This reading of treaty rights as cabined within judicial doctrine diminishes the status of treaty rights as law, as explicitly set forth in the Supremacy Clause.

Under the fundamental understanding of a treaty, the obligations conferred constitute contractual rights between sovereign nations that should be honored.[345]

344. ANAYA, *supra* note 338, at ¶ 90.

345. *See* Clinton, *supra* note 8, at 115. As Clinton asserts:

> While some scholars have invoked international law constraints to arrive at similar conclusions, many Americans too readily dismiss such exogenous standards in favor of their own constitutional principles. The purpose of this essay is to invite discussion of whether the basic American constitutional principles, history, and legal structure of this

Further, under *United States v. Sioux Nation*, the only remedy for violations of these rights is monetary compensation. Through the application of the Fifth Amendment Takings Clause and the "settling" of Indian claims through the Indian Claims Commission and Court of Claims, the caselaw has diminished the only constitutionally recognized claims for Indians—treaty claims—limiting Tribes' attempts to protect their lifeways, their ancestral and treaty-reserved lands and resources to the existing "consultation" and other procedural provisions in various federal statutes.[346]

For Indian tribes whose cultures and sovereignty are inextricably tied to land ownership, the current constitutional doctrines create a no-win scenario for treaty tribes in situations where Congress possesses unilateral power to abrogate treaties and Indian claims are considered "settled" by the just compensation regime. Further, the struggle undertaken at Standing Rock made two things clear: first, human rights implications are inherent in the difficulties encountered by tribes to maintain rights to their ancestral homelands and resources, once expropriated; and second, the lack of a rights-based framework and attendant remedies under federal law.

The current lack of a rights-based mechanism to ensure

> country require the same result. This essay challenges the federal government and, most notably, the federal judiciary, to honor American legal traditions by abiding by the nation's own founding principles with respect to the nation's first people. Thus, the essay offers primarily a historically-derived immanent, rather than an external, critique of American constitutional law applied to Indian affairs. It challenges the American legal structure to rethink its colonialist past and to revisit its concern for democracy, local control, consent, and territorial sovereignty in application to the nation's Indian tribes . . . .

Id.

346. *See generally* Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies,* 39 TULSA L. REV. 355, 360 (2013); Wood explains that:

> Unlike historical times, there is now a detailed statutory environmental scheme to control actions that harm the environment—a scheme that includes the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, the Endangered Species Act, the National Environmental Policy Act, and more. This federal statutory structure obscures the role of the trust doctrine in protecting native lands and resources, because there is a tendency to assume that the multitude of environmental laws will protect Indian country.

Id.; *see also* Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion,* FED. INDIAN LAW. Fall 2010.

performance of tribal treaty obligations illustrates the fallacy of the Supremacy Clause. The situation faced by the Great Sioux Nation begs reconsideration of the deference tribal treaties are due under the text of the Constitution.