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United States V. Sioux Nation: Congressional Abdication of Plenary Power and Lakota Resistance

Mark Greer
Illinois State University, mark.greer89@gmail.com

UNITED STATES V. SIOUX NATION: CONGRESSIONAL ABDICATION OF PLENARY POWER AND LAKOTA RESISTANCE

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This thesis will examine how the United States Congress abdicated their plenary power over Indian affairs in the Black Hills claim that culminated in *United States v. Sioux Nation*. In *Sioux Nation*, the Supreme Court admitted to governmental misconduct in taking the Black Hills. Nevertheless, the Court awarded a monetary settlement instead of returning the land-based on sovereign treaty rights as the Lakota desired. The Court's ruling codified Congress's plenary power to perform such actions. However, the Supreme Court was upholding a verdict from the Court of Claims, which was upholding a ruling from the Indian Claims Commission (ICC). Congress created both the Court of Claims and the ICC. Congress effectively abdicated their plenary power over Indian affairs when they made these judicial organs and only empowered them to grant financial restitution for losses. This thesis will prove that *Sioux Nation* should have taken place in the halls of Congress rather than the slow machinations of the judicial system where a justice of more than a financial outcome could have been achieved. Congressional abdication of plenary power has elongated the struggle, poverty, and historical trauma of the Lakota people brought on by the illegal abrogation of the Fort Laramie Treaty of 1868.

KEYWORDS: Lakota, Lakota Resistance, Sioux Resistance, Sioux, Sioux Nation, Black Hills, Black Hills Claim, Supreme Court, Lone Wolf, Congressional Abdication, Treaty Abrogation

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MARK GREER

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MARK GREER

COMMITTEE MEMBERS:

Linda Clemmons, Chair

Kyle Ciani

Patrice Olsen

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CONTENTS

INTRODUCTION

Stories of how the American West was won by the taming of the "savage" Indian filled books, movies, and newspapers around the world throughout the nineteenth and early twentieth century. Myths of "Custer's last stand" at the battle of Little Big Horn have been sensationalized for over a century. The military resistance of the Lakota, commonly referred to as the Sioux, has been considered the last significant hold-out to America's hope of achieving Manifest Destiny. It was not until the latter part of the twentieth century that a greater awareness by the general public came forward regarding the atrocities committed against American indigenous peoples and their communities. While these more recent histories point out the atrocities faced by the Lakota, many historians still culminate their writings about Indian resistance with the massacre at Wounded Knee in 1890.[1] If authors cover the modern period, it was only to add snippets of contemporary resistance to oppression within their introduction or conclusions.

The history of the Lakota did not end at Wounded Knee in 1890. Instead, they adeptly united in changing their strategy with hopes of reclaiming the land which federal treaties had guaranteed. Regardless of Lakota's efforts, the Supreme Court upheld the congressional seizure of the Black Hills through its ruling in *United States v. Sioux Nation* by granting only a financial settlement as restitution. The courts have consistently ruled that Congress has plenary power over Indian affairs. Regardless, when faced with the opportunity to right the historical wrongs they had committed, Congress abdicated their responsibility by creating more courts. Congress hobbled their judicial creations by only allowing the court rulings to hand out financial

[1] Prominent examples include: *The Long Death: The Last Days of the Plains Indians* by Ralph K. Andrist, *Indian Yell: The Heart of an American Insurgency* by Michael Blake, *The Earth Is Weeping: The Epic Story of the Indian Wars for the American West* by Peter Cozzens, *Red Cloud and the Sioux Problem* by James C. Olson, *The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee* By Jeffrey Ostler, and *Bury My Heart at Wounded Knee: An Indian History of the American West* by Dee Brown

settlements as a means of justice as if money could compensate for historical trauma and systemic poverty that came from land seized by the government. This thesis will show that the Executive Branch was guilty of using the army to displace the Lakota to smaller reservations and the Judicial Branch was complicit in granting Congress plenary power over Indian affairs. Historians have copiously documented the army's guilt. However, congressional plenary power over Indian affairs and their abdication of justice towards the Lakota has not been studied. This thesis will prove that Congress abdicated their congressional plenary power over Indian affairs to judicial bodies, which they created, regarding the Black Hills claim.

The Lakota have a long history of resisting federal authority using military and non-military means. As early as 1887, members of the Lakota leadership came together to discover non-military means of recovering the land which had been taken contrary to the terms of the Fort Laramie Treaty of 1868.[2] The initial 1887 meeting began a lengthy legal battle that culminated, close to a hundred years later, in the *United States v. Sioux Nation* decision of 1980. This thesis will show steadfast resistance from the Lakota in their fight to uphold their rights from the Fort Laramie Treaty of 1868. This thesis will focus on the Black Hills claim that culminated in the 1980 ruling by the Supreme Court, which will heretofore be known as *Sioux Nation*.

While this thesis will focus on the Black Hills claim, it will not emphasize specific players. This thesis will add a new focus on congressional guilt regarding the abrogation of the Fort Laramie Treaty that came from the *Sioux Nation* ruling. The Supreme Court upheld Congress's plenary authority over Indian sovereignty regardless of treaty status through its ruling. Even though the Lakota ostensibly won in *Sioux Nation*, the Supreme Court justified

[2] Edward Lazarus, *Black Hills White Justice: The Sioux Nation Versus the United States, 1775 to Present* (Lincoln: University of Nebraska Press, 1999), 122.

taking the Black Hills as eminent domain. With the justification, the Court offered monetary compensation to the Lakota as though that would be appropriate restitution for the attempted destruction of their very way of life and the continued historical trauma in which they live today. The monetary compensation applied by the Supreme Court was due to the legal process which Congress mandated when they created the claims process through the Court of Claims and the Indian Claims Commission (ICC). Congress abdicated their plenary power over Indian affairs to judicial organs that they created then used those courts to blame as a reason for not granting justice beyond a financial settlement.

Late nineteenth-century newspapers and lawyer Edward Lazarus present a possible counter-argument to the thesis that Congress abdicated their plenary power. Both contend that the financial settlement was justice. Non-Indian sources argued that the Lakota should take the monetary compensation awarded by the Supreme Court. Lawyer Edward Lazarus claimed that if the Lakota took the monetary award, they could invest it and make a considerable return as well as become politically powerful.[3] Newspapers from the late nineteenth century echoed Lazarus' sentiments by writing that the award might "finance businesses and create jobs."[4] Statements such as these argue that the Lakota should have accepted the Supreme Court's monetary award. Stances such as these solidified the twentieth century argument that the ICC's role was one of reparations, and, ultimately, justified the illegal taking of land against treaty guarantee. Furthermore, they argued that the Court was only authorized to hand out a financial award as the suit filed was an appeal from the United States government against an initial ruling from the ICC. The ICC was set up due to P.L. 79-726 in August of 1946 to resolve all long-standing

[3] Lazarus, *Black Hills White Justice*, 432-433.
[4] Marc Goldstein, "Sioux Drum Up Support to Regain Title to Black Hills," *Detroit Free Press*, August 10, 1984, https://www.newspapers.com/image/99097150/, (accessed on 9/3/21).

treaty issues from Indians. According to P.L. 79-726, the ICC could only hand out monetary awards for claims filed by Indians against the government.

On the other side, powerful arguments have been presented against taking the monetary award from Lakota scholars like Historians Vine Deloria Jr. and David Treuer. Vine Deloria Jr. best summarized the problem with giving monetary awards. Deloria Jr. discusses that the basic idea behind claims is that a political power structure can injure a smaller political entity or person without punishment and cancel the injury with monetary compensation.[5] David Treuer agreed with Deloria, stating that the Claims Commission monetized damages as a form of reparations without granting justice to the historical trauma caused.[6] Treuer further argued that this narrow sense of reparations that Congress created with the ICC only addressed economic loss. He wrote that the ICC was commissioned in such a way as to address only economic loss without taking accountability for the loss of culture, land, and even life.[7] In the same vein, Deloria wrote that financial settlements by the ICC were pointless without changes in federal laws and their applications toward the Lakota that would foster not only economic growth but tribal sovereignty as well.[8] The Lakota may have technically won the *Sioux Nation* case. However, they had lost in the long run by being granted a solution that was only a monetary award.

After their victory in *Sioux Nation*, members of the Lakota leadership quickly filed a lawsuit to stop the distribution of the claim. Historian Nick Estes wrote that "in 1980, the US

[5] Vine Deloria Jr., "Reflections on the Black Hills Claim," *Wicazo Sa Review* 4, no. 1 (Spring 1988): 34, https://doi.org/10.2307/1409084, (accessed on 6/20/21).
[6] David Treuer, *The Heartbeat of Wounded Knee: Native America from 1890 to the Present* (New York: Riverhead Books, 2019), 253.
[7] Treuer, *The Heartbeat of Wounded Knee*, 254.
[8] Deloria Jr., "Reflections on the Black Hills Claim," 37.

Supreme Court confirmed the Lakota's claim that the Black Hills had indeed been stolen. … As a result, the court awarded a $106 million settlement. The Lakota win responded nearly unanimously under a popular slogan: 'The Black Hills are not for sale!'"[9] The settlement was delayed and has not been disbursed to this day. Frank Pommersheim, a professor specializing in Indian law, wrote that the "1980 judgment of the Supreme court for $17.1 million-plus interest remains undistributed, gathering dust (plus continuing interest) in the United States Treasury."[10]

The distribution of claim settlements is controlled by the Distribution of Judgment Funds Act of 1973. The Act of 1973 mandates that the Secretary of the Interior prepare a distribution plan with tribal input within a year that the judgment was entered. The distribution plan requires a floor award of up to twenty percent for tribal needs, and up to eighty percent may be allotted for per capita disbursement. Forty-one years after the *Sioux Nation* judgment, no distribution plans have been prepared by Congress. According to Pommersheim, "all eight participating tribes (the Rosebud, Oglala, Cheyenne River, Standing Rock, Lower Brule and Crow Creek Sioux of South Dakota and the Santee Tribe of Nebraska and Fort Peck Sioux of Montana – the original signatories of the Fort Laramie Treaty of 1868) have passed tribal resolutions in opposition to any distribution of the money judgment.[11] Taking those resolutions, the Lakota pursued and acquired federal court injunctions prohibiting the Secretary of the Interior from submitting any plans to Congress.[12]

[9] Nick Estes, *Our History is the Future: Standing Rock Versus the Dakota Access Pipeline and the Long Tradition of Indigenous Resistance* (New York: Verso, 2019), 242.
[10] Frank Pommersheim, "The Black Hills Case: On the Cusp of History," *Wicazo Sa Review* 4, no. 1 (Spring 1988): 21, https://doi.org/10.2307/1409076, (accessed on 6/20/21).
[11] Pommersheim, "*The Black Hills Case*," 21-22.
[12] Pommersheim, "*The Black Hills Case*," 21-22.

Historiography

Historiographies are mostly silent concerning the intricacies of the Black Hills claim and its impact on the Lakota. Countless historiographies have been written concerning the military resistance of the Lakota and their allies until 1890. Writings that focus on modern Indian resistance tend to spotlight Indian activist organizations such as the American Indian Movement (AIM) or National Indian Youth Council (NIYC).[13]

Even recent books that mention *Sioux Nation* do so in passing within their introductions or conclusions. For example, historian Pekka Hämäläinen released an excellent book titled *Lakota America: A New History of Indigenous Power* in 2019 that dedicated only a paragraph in its over 540 pages to the Black Hills claim.[14] Likewise, historian David Treuer's *The Heartbeat of Wounded Knee: Native America from 1890 to the Present* (2019) included very little regarding the Black Hills claim and did not mention *Sioux Nation* even though the author explicitly wanted to move Lakota history beyond 1890.[15] Treuer ignored *Sioux Nation*, while Hämäläinen, like so many historians, brushed off the case as a further injustice towards the Lakota. Historian Richmond L. Clow explains that "most scholars have not shown any interest in tribal land claims except to dismiss them as further evidence of the national government's continuing injustice toward the Native American."[16]

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[13] Prominent examples include: *Native Activism in Cold War America: The Struggle for Sovereignty* by Daniel M. Cobb, *Red Power Rising: The National Indian Youth Council and the Origins of Native Activism* by Bradley G. Shreve, *Ojibwa Warrior: Dennis Banks and the Rise of the American Indian Movement* by Dennis Banks and Richard Erdoes, and *Encyclopedia of the American Indian Movement* by Bruce E Johansen

[14] Pekka Hämäläinen, *Lakota America: A New History of Indigenous Power* (New Haven: Yale University Press, 2019), 389.

[15] Lazarus, *Black Hills White Justice*, 319.

[16] Richmond L. Clow, "A New Look at Indian Land Suits: The Sioux Nation's Black Hills Claim as a Case for Tribal Symbolism," *Plains Anthropologist* 28, no. 102 (November 1983): 315, https://www.jstor.org/stable/25668394, (accessed on 6/20/21).

Edward Lazarus' *Black Hills White Justice: The Sioux Nation Versus the United States, 1775 to the Present* has become a definitive book on *Sioux Nation*. Lazarus provided details of the nineteenth century taking of the Black Hills and quickly described the intricacies of the Black Hills claim. Though *Black Hills White Justice* is rich with facts regarding the Black Hills claim, Lazarus is tarnished with bias because his father, Arthur Lazarus Jr., was the lead counsel for the Lakota during *Sioux Nation*. Edward Lazarus dedicated *Black Hills White Justice* to his Mother and Father and admitted asking his father "thousands of questions on a thousand different days."[17] The time spent with his father showed in different commentary throughout the book. Lazarus's bias was mainly demonstrated in how he inserted his thoughts on why the Lakota should have taken the financial award, a stance his father long-held.[18] Further bias can be noted due to the silence of Lakota voices speaking against the *Sioux Nation* settlement in Lazaus' book.

Very little historiography has been written on the Black Hills claim and its significance regarding modern congressional involvement, specifically the abdication of their plenary power to present justice to the Lakota people. Most writings concerning this subject matter come from political scientists and legal scholars. There is one notable exception. In 2011, Lakota historian Jeffrey Ostler published *The Lakotas and the Black Hills: The Struggle for Sacred Ground*. Ostler not only wrote of the illegal abrogation of the Fort Laramie Treaty of 1868 but he also detailed modern settler-colonialism perpetrated by Congress. Though only one chapter was dedicated to the Black Hills claim, Ostler was correct in pointing towards Congress as having both the power to right historical wrongs and its blame in allowing them. Ostler wrote that "the ultimate obstacle was not Lakota disunity, but non-Lakota Unity. The Lakotas regaining of the

[17] Lazarus, *Black Hills White Justice*, xii.
[18] Lazarus, Black *Hills White Justice*, 432.

Black Hills would likely require a further change in mainstream American thought about the history of the United States and its responsibility to address past injustices."[19] Ostler's statement aligns perfectly with the accenting opinion from *Sioux Nation.* The Supreme Court blamed Congress for illegally abrogating the Fort Laramie Treaty of 1878.[20] Where Congress is elected from the people of the United States, a shift in sentiment towards the Lakota and their history could sway congressional representatives to perform their plenary power obligations to grant justice to the Lakota people.

Chapters

Historians have largely ignored the seminal case of *Sioux Nation* and its importance as a case study in the modern abdication of congressional responsibility. This thesis will fill that gap. It will contain three chronological chapters and a conclusion. All chapters will illustrate the federal government's disregard for sovereign treaty rights in pursuit of plenary power over the Lakota. Each chapter will also include admissions of guilt to the illegal abrogation of the Fort Laramie Treaty of 1868 as the government marched forward with a policy of congressional plenary power without pursuing justice beyond monetary settlement.

Chapter I will follow the two historical timelines set forth by the Supreme Court Majority Opinion from *Sioux Nation*. The first historical timeline detailed malfeasance on the part of the Executive and Legislative branches of the government in the taking of the Black Hills. The Majority Opinion proved President Grant's duplicitous stance on keeping peace with the Lakota. Immediately after signing the Fort Laramie Treaty of 1868, the army was told to keep white

[19] Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (New York, Penguin Books, 2011), 187.
[20] Harry A. Blackmun and Supreme Court Of The United States, *U.S. Reports: United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), 381-382, https://www.loc.gov/item/usrep448371/, (accessed on 6/20/21), hereafter cited *United States v. Sioux Nation of Indians*.

trespassers out of the Black Hills. However, in practice, President Grant quietly ordered the military to stand down and allow illegal squatting and looting of natural resources when the Lakota refused to sell or lease the Black Hills. This thesis will prove that President Grant intentionally forced conflict upon the Lakota people to subjugate them onto smaller reservations. Grant's plan of dominance was neither approved nor even mentioned to Congress as they had their own grievance to bear out with the Lakota.

Chapter I will also prove that Congress grew tired of the treaty process with the Native American peoples. Therefore, Congress passed a law abolishing new treaty processes and forced both congressional houses to approve any new arrangements concerning Indian affairs in 1871. This chapter will show how Congress grew tired of paying subsistence rations to the Lakota people at the same time they lusted after the Black Hills that was reported to be filled with gold. Along with the conflict between Lakota military resistance and the United States army came the embarrassing nationalistic setback of the Battle of Little Bighorn (Greasy Grass). As retribution against the Lakota for winning that battle, Congress issued a "sell or starve" missive that would cut off assistance if the Lakota people did not sell the Black Hills. After not acquiring the necessary Lakota signatures to attain the Black Hills land, Congress unilaterally abrogated the Fort Laramie Treaty of 1868 and confiscated the Black Hills with the Act of 1877.

The second timeline of the Majority Opinion within Chapter I will follow the Black Hills claim against the United States government. Shortly after Congress took the Black Hills, Lakota leaders used non-military efforts in the court system to regain their illegally taken lands. These lands were guaranteed by the Fort Laramie Treaties of 1851 and 1868. Chapter I will include a historical look at the courts and why the Black Hills claim struggled. According to the courts, the two main factors in which the Black Hills claim failed to succeed were on jurisdictional and

moral grounds. Political scientists David E. Wilkins and Heidi Kiiwetinepinesiik Stark wrote that "federal Indian affairs and indigenous political status have been dominated by the confluence of actions by the Supreme Court (which have been extremely deferential to congressional enactments, never having invalidated a single Indian-related law as being beyond Congress's authority, congressional committees, the states, and the BIA, which has been delegated much of its authority by Congress, but which has also, by a process of 'jurisdictional aggrandizement,' empowered itself to act sometimes in ways destructive of tribal interests but usually as a paternalizing influence that refuses to allow tribes to act on their own behalf)."[21] This chapter will show the Court's increased deference towards Congress by granting them unlimited plenary power over tribal sovereignty in land claims cases. Ultimately, Congress intervened, and the Black Hills claim was adjudicated up to the Supreme Court, where they ruled in the Lakota's favor with a financial settlement.

Chapter II will follow the oral arguments of *Sioux Nation* while being expounded upon by the rulings from the Majority Opinion. This chapter will prove that Congress was intimately involved with the Black Hills claim even though this was a court case. Congressional abdication of its responsibility toward Indian affairs included the creation of the Court of Claims and ICC with authority only to allow financial restitution. Also, Congress passed two Lakota-specific resolutions to the Black Hills claim that ensured a financial only ruling. This chapter will prove that all legal parties in *Sioux Nation* agreed that Congress could and perhaps should have rectified this issue and that the Black Hills claim should not have been in the court system. Though the Supreme Court trial of *Sioux Nation* was over whether or

[21] David E. Wilkins and Heidi Kiiwetinepinesiik Stark, *American Indian Politics and the American Political System* (New York: Rowman & Littlefield Publishers, Inc., 2011), 88.

not the Lakota people would receive interest on the lower court's ruling of $17.1 million, the case proves congressional malfeasance in the past and their modern abdication of responsibility to dispense true justice.

Chapter II will examine testimony by both government and Lakota attorneys as well as Supreme Court commentary that indict the government on their past actions. The second part of this chapter supports this proving with rulings from the Majority Opinion related to the oral arguments. Furthermore, the Supreme Court was clear in delineating the branches and responsibilities of government during *Sioux Nation*. This delineation is extremely important in deciphering culpability in the illegal taking of the Black Hills and the continued historical trauma to the Lakota people as they fight to reclaim land continued into the next chapter.

Chapter III focuses on Lakota resistance to the Supreme Court ruling that included only monetary compensation in the wake of *Sioux Nation*. By the 1980 *Sioux Nation* ruling, the Lakota people had been segregated onto smaller reservations including the Pine Ridge, Standing Rock, Rosebud, Standing Rock, Crow Creek, and Yankton Reservations. Some of these reservations ranked in the highest poverty rates in the United States at the time of the *Sioux Nation* ruling. Many reservations were so economically oppressed that they did not even have a financial institution within their borders. For example, the Pine Ridge Reservation is approximately 3,500 square miles and was without a financial institution until the twenty-first century.[22] Monetary restitution for the illegal taking of their treaty guaranteed lands may appear like justice to those outside Lakota communities. The truth is that much of Lakota poverty can be traced to the taking of the resources that lie on the land in which the government confiscated.

[22] "Credit Union Possible on Pine Ridge," *Rapid City Journal*, December 20, 2011, https://www.newspapers.com/image/529213601/, (accessed on 2/13/22).

Furthermore, many of the sites that the Lakota people deemed religiously sacred were on grounds the government seized. For these, and many other reasons, Lakota leaders continued to strive for land repatriation after the *Sioux Nation* ruling.

Chapter III will show Lakota resistance in the wake *Sioux Nation's* financial restitution for the taking of the Black Hills by the Act of 1877. Lakota resistance was an attempt to get congressional attention for the restoration of parts of the Black Hills. During the late twentieth century, Congress made a series of moves that granted land back, in some fashion, to several other native communities. After the *Sioux Nation* ruling, Lakota leaders filed several lawsuits to keep the Black Hills claim alive. During this time, Lakota activists took to the Hills and staged encampment protests to get not only congressional attention but also to bring awareness to the non-native community. By the late nineteenth century, Lakota leaders from each tribe came together and forged legislation and presented it to Congress. Chapter III will follow these examples of resistance and how Congress used their plenary power to grant land back to other Indian nations but hid behind the courts they created regarding the Lakota. In short, after *Sioux Nation* Congress continued to abdicate their role to bring justice to historical wrongs they had committed to the Lakota. Instead, Congress used the *Sioux Nation* verdict as an excuse to claim that justice was rendered without taking complete accountability for past wrongs committed against the Lakota people. The financial settlement alone would not be enough to pull the Lakota people out of the economic and cultural oppression Congress forced upon them by the confiscation of their land. The courts made it clear that only Congress had the power to correct these issues. Therefore, the Lakota were forced to seek other means to reclaim their treaty guaranteed land.

The Conclusion shows how historical efforts to raise awareness of illegal native land takings, such as the one exhibited in *Sioux Nation*, emerged as the primary source of Lakota resistance for land reclamation. The fight to repatriate the Black Hills continues today. Since most of the Black Hills is owned by the federal government, the *Sioux Nation* ruling does not preclude Congress from working with the Lakota people to present a final solution that does not only include a financial settlement.

Sources

Newspaper articles will provide a clear perspective of popular non-Indian thought while helping to maintain a linear timeline. These articles will also give Indian reactions to the Black Hills claim throughout the chronology of this thesis. Newspaper articles prove crucial as Lakota voices were mostly silenced by the legal process. By closing the Black Hills claim within a room with two sets of non-Lakota attorneys and non-Lakota judges, Lakota voices were muted from the process and left to be represented by those not directly vested in the problems caused by Congress taking the Black Hills. Opinion pieces from court cases will be heavily used to show congressional abdication of plenary power to grant justice to the Lakota, malfeasance of Indian affairs towards the Lakota, the duplicity of the governmental branches, and much more. Congressional documents were consulted to bolster the facts behind congressional abdication of plenary power. Judicial and congressional documents indict the very party responsible for neglecting their duty, Congress.

Terms

The term "plenary power" will be a common theme throughout this thesis. In this case, plenary power will be utilized in the context that the United States Congress has complete control over a particular area without limitations, particularly Indian tribes. *Lone Wolf v.*

Hitchcock, a Supreme Court case decided in 1903, solidified that Congress has plenary power with assumed "good faith" on behalf of Congress with legislation passed. In *Lone Wolf*, "the Court went beyond its prior rulings to make clear that Indian tribes had no constitutional rights, and that the Court would infer no constitutional limits upon congressional authority over tribal affairs."[23]

Nonetheless, a shift came about in the *Fort Berthold* case (*Three Tribes of Fort Berthold Reservation v. United States* 1968) with the application of a new test. In short, the *Fort Berthold* test stated that the Government could not act with legislative authority while still claiming administrative authority as trustee-to-ward. Thus, the *Fort Berthold* test came to be known as the "two hats" test. Plenary power is still applied to Congress, but rather the appearance of limitations was placed by the *Fort Berthold* test. Nonetheless, whether the outcome of the test results in legislative authority being applied or administrative authority as one would see in a trustee, Congress still has absolute power over Indian tribes.

The term "Sioux" is a settler-colonial term for the Lakota, Dakota, and Nakota nations. For this thesis, when the term "Sioux" or "Sioux Nation" is used, it will be in the context of citation. I will apply the term Lakota when speaking of the collective tribes, and the Black Hills claim. Individual tribal names will be used when referring to individual tribes within the Lakota nation. The Lakota nation is divided into seven bands: Oglala, Sicangu or Brulé, Mnicoujou, Hun'kpapa, Itazipo or Sans Arc, Oohenumpa, and Sihasapa.

The term "government" is utilized frequently in this thesis and many Native American writings. However, using the word "government" can be quite ambiguous when specifying an

[23] Editors, "Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation," *University of Pennsylvania Law Review* 131, no. 1 (November 1982): 241, https://doi.org/10.2307/33118833, (accessed on 6/20/21).

errant action or actions. This thesis attempts to differentiate which part of the American government failed the Lakota people and how these different organs of the government were responsible. Only by holding individual branches and offices of the government responsible can we have an accurate historical account. The use of the word "government" is too generic and allows individual actors or organs of the government to escape accountability from the people they serve.

When using the word "Congress," this thesis will mainly imply both houses of Congress. This thesis will speak of individual houses as either the House of Representatives or the Senate when necessary. If not specified, the term "Congress" should be implied as both houses of Congress, as in the Legislative Branch of the United States government.

Author's Context

As a white citizen of the United States, I am not writing on behalf of or for any Native American community. The drive behind this thesis is purely my own and not due to any political affiliation, educational indoctrination, activist organization, or personal pressure whatsoever. All content is based upon researched facts derived by study and pursuit of understanding regarding the complete context of historical data compiled from multiple sources that are not reliant on any one-sided bias.

Conclusion

By utilizing multiple primary sources and the correct context of terms, this thesis will argue that Congress abdicated their plenary power over Indian affairs and neglected to bring justice to the Lakota people after taking the Black Hills. Chapter I will show Lakota attempts to make peace through treaties with the government and the military's role in creating conflict that brought about the Agreement of 1876. In Chapter II, the oral arguments will prove that Congress

abdicated its plenary power over Indian affairs to their court creations and refused to provide justice beyond a financial settlement. Chapter III will illustrate the many methods of resistance that the Lakota utilized to repatriate the Black Hills in the wake of the financial settlement of *Sioux Nation*. The Conclusion will reiterate the chapters and also take a quick look at Lakota efforts to reclaim the Black Hills into the twenty-first century.

The Lakota are feeling the effects of *Sioux Nation* to this date. Efforts are currently underway to throw off the yoke that the Supreme Court has allowed Congress to place on the Lakota people. The *Sioux Nation* ruling included essential admissions of guilt on the part of the United States Congress by the Supreme Court. By investigating the history of this case, this thesis will show that the Supreme Court placed Congress's plenary power as a higher law than Indian treaty rights. Though the Supreme Court upheld Congress's complete authority over Indian affairs, Congress quickly worked to shirk their responsibilities. This thesis will prove that Congress abdicated its role in Indian affairs by creating courts to grant only financial settlements in the twentieth century. At the same time, they continued to abdicate their role in the twenty-first century by relying on past court rulings.

CHAPTER I: SUPREME COURT OVERVIEW OF THE BLACK HILLS CLAIM

The Fort Laramie Treaty of 1868 guaranteed that the Great Sioux Reservation, which included the sacred Black Hills, would forever belong to the Lakota people.[24] Article XII of the Fort Laramie Treaty of 1868 cemented this promise by stating that "no treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all adult male Indians, occupying or interested in the same."[25] Nonetheless, by a single statute of Congress, the Fort Laramie Treaty of 1868 was abrogated with the Act of 1877. This statute was allowed due to Title 25, U.S.C., § 71 (Title 25), passed in 1871. Title 25 prohibited the creation of new treaties with Indian tribes and allowed both houses of Congress to have plenary rule over Indian affairs by merely passing a statute.[26]

Shortly after being stripped of their treaty-guaranteed land, the Lakota took to the courts to reclaim their lands. This chapter analyzes the historical chronology of the Supreme Court Majority Opinion, written by Justice Harry A. Blackmun in 1980, which admitted that the Executive branch used the army to forcibly displace the Lakotas off their land. The Opinion presented convincing evidence that Congress was entirely liable for the illegal taking of the Black Hills from the Lakota people. While Justice Blackmun meant his chronology to be detailed and complete, he left quite a bit of history out between the deployment of military forces in the spring of 1876 and the Battle of Little Big Horn (Greasy Grass). Furthermore, Justice

[24] Stephen L. Pevar, *The Rights of Indians and Tribes* (New York, Oxford University Press: 2012), 49.
[25] Indian Treaties, 1789-1869, Ratified Indian Treaty 369: Sioux (Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee) and Arapahoe – Fort Laramie, Dakota Territory, April 29, 1868, 1789-1869 (National Archives Microfilm Publication M668, roll 16), Record Group: 11, General Records of the United States Government, 1778 – 2006, https://catalog.archives.gov/id/299803, (accessed on 9/1/21).
[26] *Agreements with Indians*, Title 25, U.S.C., § 71, https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter3&edition=prelim, (accessed on 10/5/21).

Blackmun's statement about the Lakota surrender should not be taken as though the military was the means of Lakota subjugation. Regarding the military campaign against the Lakota, historian Jeffrey Ostler argues that "the United States had so far failed miserably to achieve its goal of subjugating the militants, it was making much better progress with its other war aim: gaining fictive legal title to the Black Hills."[27] Where the United States failed to make progress against resistant Lakotas, Congress starved the people out of their possession of the Black Hills.

By focusing on histories written by scholars of Lakota history, we see that Blackmun's Supreme Court Majority Opinion gives a high-level overview of the oppression imposed by the government towards the Lakota people. Historiographical focus helps fill in the gaps where Blackmun left out important details. Accounts from local newspapers and analysis of court cases brought by the Lakota also highlight the absence of key events from Majority Opinion.

Blackmun's Historical Chronology

As early as the 1890s, Lakota tribal leaders filed suits in the Court of Claims regarding the illegal taking of the Black Hills.[28] In the late nineteenth century, Congress created the Court of Claims. Nevertheless, any claim by Indians needed to have the approval of Congress. Once Congress approved a tribe's claim, the Office of Indian Affairs (later known as the Bureau of Indian Affairs) had to agree with the tribe's selection of attorneys.[29] For Congress to approve an Indian suit to go to the Court of Claims, tribes had to obtain a Special Jurisdictional Act that

[27] Jeffrey Ostler, *The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee* (New York, Cambridge University Press: 2004), 66.
[28] Wilkins and Stark, *American Indian Politics*, 204.
[29] The Office of Indian Affairs (OIA) was created in 1824 and was under the authority of the War Department. In 1849 the OIA was placed under the authority of the U.S. Department of the Interior. In 1947 the OIA changed their name to the Bureau of Indian Affairs (BIA). In context, the older moniker of the OIA is referred to as the "bureau" or BIA to keep continuity in many historical writings. This piece attempts to maintain the original monikers as it traverses the timeline.

defined the scope of claims the court would hear. The Office of Indian Affairs (OIA) brokered applications for the Special Jurisdictional Acts. Lawyer Edward Lazarus wrote that "with no intention of advancing what it considered to be unfounded claims, the bureau (OIA) placated the disgruntled Sioux by letting them hold frequent councils, but it made no effort to help these wards of the nation attain a hearing for their grievances in court."[30] Finally, in June of 1920, the Lakota received a Special Jurisdictional Act which allowed them to proceed with the Black Hills claim.

For over half a century, Lakota faced continual defeat to their Black Hills claim. It was not until 1980 that the Black Hills claim concluded with a Supreme Court ruling. In the majority opinion of *United States v. Sioux Nation* (1980), Justice Harry A. Blackmun put forward a timeline for the taking of the Black Hills and a history of the case. Justice Blackmun explained the necessity of the case's timeline: "litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting."[31] Justice Blackmun emphasized the Fort Laramie Treaty of 1868 as the cornerstone legal agreement that was violated. Blackmun listed four points that were central issues to be presented in *Sioux Nation*.[32] First, the Fort Laramie Treaty created the Great Sioux Reservation. The United States agreed that no unauthorized persons should pass over, reside, or settle on the territory.[33] Second, the United States allowed Lakota members to select lands for cultivation and promised to assist them with necessary services and materials along with four years of subsistence rations.[34] Third, the Lakota

[30] Lazarus, *Black Hills White Justice*, 124-125.
[31] *United States v. Sioux Nation of Indians*, 374.
[32] *United States v. Sioux Nation of Indians*, 374.
[33] See Article II of Indian Treaties, 1789-1869.
[34] See Articles VI, VII, and X of Indian Treaties, 1789-1869.

would abrogate their treaty rights from September 17, 1851, and live in reservation territory but be allowed to hunt on unceded Indian land while buffalo were in such numbers to justify a hunt. Also, the Lakota would agree not to oppose railroad construction that did not pass over reservation land and established roads and military forts south of the North Platte River.[35] Finally, the Fort Laramie Treaty ensured that there would not be any cessation of the Great Sioux Reservation without the agreement of at least three-fourths of all adult male Indians covered in the Treaty.[36] After listing the four points of the Fort Laramie Treaty he found "central to the issues presented in the case," Justice Blackmun proceeded with a timeline that indicted the United States in its dealings with the Lakota people.[37]

After signing the Fort Laramie Treaty of 1868, there was a short-lived period of relative peace. Historian Pekka Hämäläinen wrote that "the winter counts for 1867-68 memorialize the Treaty of Fort Laramie as a happy occasion where Lakotas received many flags and blankets and new denim canvas from the Americans, where many chiefs were recognized, and where much medicine – conciliation and mutual healing – was made."[38] Hämäläinen's characterization was in line with Justice Blackmun's opinion. Blackmun wrote that "the years following the treaty brought relative peace to the Dakotas, an era of tranquility that was disturbed, however, by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver."[39] This period of peace, however, quickly ended

[35] See Article XI of Indian Treaties, 1789-1869.
[36] See Article XII of Indian Treaties, 1789-1869.
[37] *United States v. Sioux Nation of Indians*, 374-378.
[38] Hämäläinen, "*Lakota America,"* 293.
[39] *United States v. Sioux Nation of Indians*, 376.

when, as historian David Treuer commented, the "terms of the treaty were violated by the United States shortly thereafter, when gold was discovered in the Black Hills."[40]

The lust for gold was intense. In early 1874, an article in the *Bismarck Tribune* noted, "Who has not heard of the Black Hills and the rich treasures of gold and other precious metals supposed to exist there … as the Christian looks forward with hope and faith to that land of pure delight, so the miner looks forward to the Black Hills, a region of fabulous wealth, where the rills repose of beds of gold and the rocks are studded with precious metals."[41] These sorts of reports from miners may have led Justice Blackmun to move directly from writing about a "relative peace" after the signing of the Fort Laramie Treaty to General George Armstrong Custer's expedition to the Black Hills in 1874.

Setting out from Fort Abraham Lincoln on July 2, 1874, Custer's expedition consisted of 10 companies of the 7th Cavalry, two companies of infantry, a battery of three Gatling guns, and several eminent scientists.[42] By mid-August, Custer confirmed the existence of gold in the Black Hills. According to Justice Blackmun, "Custer's florid descriptions of the mineral and timber resources of the Black Hills, and the land's suitability for grazing and cultivation, also received wide circulation, and had the effect of creating an intense popular demand for the 'opening' of the Hills for settlement."[43] The *Racine Journal* wrote that "enthusiastic reports continue to be received from Custer's expedition. Gold discoveries were confirmed, and the natural beauty and advantages of the Black Hills Country in regard to vegetation, water, pasturage, and climate fully

[40] Treuer, *The Heartbeat of Wounded Knee*, 2.
[41] "Gold! Gold!! Two Expeditions for the Black Hills," *Bismarck Tribune*, May 27, 1874, https://chroniclingamerica.loc.gov/lccn/sn84022127/1874-05-27/ed-1/seq-1/, (accessed on 10/21/20).
[42] "Custer," *Bismarck Tribune*, June 24, 1874, https://chroniclingamerica.loc.gov/lccn/sn84022127/1874-06-24/ed-1/seq-1/, (accessed on 8/30/21).
[43] *United States v. Sioux Nation of Indians*, 371.

substantiated."[44] Justice Blackmun added that "the only obstacle to 'progress' was the Fort Laramie Treaty that reserved occupancy of the Hills to the Sioux."[45]

When Custer returned from his expedition into the Black Hills, he was interviewed by a reporter from the *Bismarck Tribune*. Custer not only endorsed the newspaper reports about the vast quantities of gold in the Hills, but he stated that the articles underrepresented the amount of gold. When asked by the reporter about the difficulties the military was having with white intruders into the Black Hills, Custer agreed that U.S. forces were somewhat powerless in stopping the trespassing. "This is true to some extent," Custer explained, "but until Congress authorizes the settlement of the country, the military will do its duty."[46] Custer made it clear that the military would keep trespassers out of the Black Hills until ordered differently. Custer went on to state that "when the Indian title is extinguished, the military will aid the settlers in every possible way. I shall recommend the extinguishment of the Indian title at the earliest moment practicable for military reasons."[47] Custer's commanding officer, General Sheridan, shared the same sentiments.

In September 1874, General Sheridan sent a letter to Brigadier General Alfred H. Terry. The *New North-West* posted a copy of the letter commanding Terry to "burn the wagon trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country."[48] Sheridan further stated that if whites reached the interior, Terry had the authority to

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[44] "Latest News," *Racine Journal*, August 26, 1874, https://www.newspapers.com/image/343586727/, (accessed on 10/5/21).
[45] *United States v. Sioux Nation of Indians*, 371.
[46] "Custer Interviewed," *Bismarck Tribune*, September 2, 1874. https://www.newspapers.com/image/77711146/, (accessed on 10/6/21).
[47] "Custer Interviewed," *Bismarck Tribune*.
[48] "Sheridan's Black Hills Order," *New North-West*, September 12, 1874, https://www.newspapers.com/image/171620982/, (accessed on 10/5/21).

take whatever cavalry he deemed fit to pursue and apprehend those trespassing on Lakota territory.[49] Nonetheless, Sheridan concluded his orders by adding that if Congress decided to "open up the country for settlement by extinguishing the treaty and rights of the Indians, the undersigned will give a cordial support to the settlement of the Black Hills."[50]

By the spring of 1875, gold lust had set in, and the Commissioner of Indian Affairs, Edward Smith, reported that "the occupation and possession of the Black Hills by white men seems now inevitable."[51] Smith sent a commission, chaired by Senator William B. Allison, to negotiate with the Lakota. The Allison Commission offered the Lakota people $400,000 per year to lease the Black Hills or $6 million for final purchase of their land.[52] The Lakota refused the Allison Commission's offer for the purchase of the Black Hills portion of the Great Sioux Reservation. After the Lakota refused the offer, the Allison Commission advised Congress to take initiatives in acquiring the Black Hills.[53] Historian Jeffrey Ostler wrote that "Allison recommended that the government name a price for the Black Hills, present it to the Indians 'as a finality,' and tell them that rejecting this price would 'arrest all appropriates for their subsistence from the future.' They would have to sell – or starve."[54]

Starting in the winter of 1875, President Grant appeared to put into motion a series of events that would create conflicts between the Lakota and the military, forcing Congress to act. Justice Blackmun wrote that "in the winter of 1875-76, many of the Sioux were hunting in the

[49] "Sheridan's Black Hills Order," *New North-West*.
[50] "Sheridan's Black Hills Order," *New North-West*.
[51] Edward P. Smith, *Annual Report of the Commissioner of Indian Affairs to the Secretary of Interior for the Year 1875* (Washington D. C., Government Printing Office: 1875), 7, https://babel.hathitrust.org/cgi/pt?id=mdp.39015009286561&view=1up&seq=17&skin=2021&q1=allison, (accessed on 10/5/21).
[52] Smith, *Annual Report of the Commissioner of Indian Affairs*, 190.
[53] Smith, *Annual Report of the Commissioner of Indian Affairs*, 199-200.
[54] Ostler, *The Lakotas and the Black Hills*, 92-93.

unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty."[55] In November 1875, Sheridan wrote to Terry about a meeting he had with President Grant, the Secretary of Interior, and the Secretary of War. Sheridan informed Terry that the President decided that the military would not attempt to stop the miners from occupying the Black Hills. Grant hoped this would provoke the Lakota to attack trespassers, thus serving as a pretext for a military campaign against the nontreaty bands.[56] The ultimate goal of this plan was to force Congress to demand the "agency Lakotas to sell the Black Hills at a nonnegotiable price and threaten them with starvation if they refused."[57] Furthermore, Sheridan informed Terry to quietly enforce these orders and keep them confidential.[58]

In a decree set forth on December 6, 1875, Commissioner of Indian Affairs Edward P. Smith, "for reasons that are not entirely clear," ordered Indian agents to notify all Indians off Lakota reservations to report to their agencies no later than January 31, 1876 or they would face military action.[59] On February 1, 1876, the Secretary of the Interior notified the Secretary of War that the time had expired for the "hostile Indians" to return to their agencies and that he was handing them over to the military to proceed as they deemed fit. The War Department authorized General Sheridan to commence military operations against the "hostile Sioux" on February 7, 1876. The very next day, General Sheridan ordered generals Crook and Terry to begin preparations for military operations in Powder, Tongue, Rosebud, and Bighorn River regions.[60]

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[55] *United States v. Sioux Nation of Indians*, 371.
[56] Ostler, *The Lakotas and the Black Hills*, 94.
[57] Ostler, *The Lakotas and the Black Hills*, 94.
[58] Ostler, *The Lakotas and the Black Hills*, 378.
[59] Ostler, *The Lakotas and the Black Hills*, 379.
[60] Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York: Picador, 2007), 284-285.

Grant's plan worked, but at a cost. Justice Blackmun succinctly wrote that "the Army's campaign against the 'hostiles' led to Sitting Bull's notable victory over Custer's forces at the Battle of Little Big Horn on June 25. That victory, of course, was short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the government."[61]

Blackmun's Majority Opinion made an immediate shift from the Battle of Little Big horn to focus on Congress and their irritation with sending rations to the Lakota people. Congress had grown dissatisfied with Lakota's lack of self-sufficiency on the Great Sioux Reservation.[62] Had Congress been aware of the situation in the Great Sioux Reservation and the hunting grounds granted from the Fort Laramie Treaty of 1868, they would have known that the military's forced displacement caused this lack of self-sufficiency on the smaller reservations. Nevertheless, according to the Fort Laramie Treaty, subsistence rations expired in 1872.[63] In response, Congress appropriated over $1 million a year towards subsistence rations for reservations for the next two years.

The Majority Opinion, by Justice Blackburn, thus far had been transparent about how the government displaced the Lakota from treaty guaranteed hunting lands onto the Great Sioux Reservation. What the Majority Opinion had not stated, up to this point, was that the Great Sioux Reservation was divided into smaller reservations. By the early 1870s, the government set up four agencies within the Great Sioux Reservation for the Lakota bands. They set up the Red Cloud agency for the Oglala, the Standing Rock agency for the Hunkpapa, Sihasapa, and

[61] *United States v. Sioux Nation of Indians*, 379.
[62] *United States v. Sioux Nation of Indians*, 380.
[63] See Article X of Indian Treaties, 1789-1869.

Yanktonai, the Cheyenne River Agency for the Miniconjou, Sans Arcs, and Kettles, and the Spotted Tail Agency for the Brule. Justice Blackmun neglected this crucial information within the history of the Black Hills taking. The government had spread out the Lakota tribes across various agencies. The plural usage of "Indian agents" in the 1875 return edict is often overlooked. Multiple agencies deployed multiple agents to inform the different Lakota tribes to return to their agencies. These Indian agents were from the four smaller reservations (agencies) that were too small to sustain their current residents and expected more inhabitants due to strife with the military.[64] By spreading Lakota tribes across multiple reservations that were not sustainable, the government divided the Lakota people as colonial conquerors.

In further conquest, Justice Blackmun wrote that "in August of 1876 Congress enacted an appropriations bill providing that 'hereafter there shall be no appropriations made for the subsistence' of the Sioux, unless they first relinquish their rights to the hunting grounds outside their reservation, ceded the Black Hills to the United States, and reached some accommodation with the government that would be calculated to enable them to become self-sufficient."[65] Congress used the power of the purse to push for the abrogation of the Fort Laramie Treaty of 1868. The appropriations bill blatantly stated that "there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of permanent reservation established by the treaty of eighteen hundred and sixty eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude."[66] For a modern visual, the one

[64] "Deficiency of Indian Supplies," *The Baltimore Sun*, March 1, 1876, https://www.newspapers.com/image/371585408/, (accessed on 8/20/21).
[65] *United States v. Sioux Nation of Indians*, 381.
[66] *An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty-Stipulations with various Indian Tribes, for the year ending June thirtieth, Eighteen Hundred and*

hundred and third meridian of longitude is approximately the western edge of the current Pine Ridge Reservation extending northward. The appropriations bill of 1876 withheld subsistence from reservation Lakota if they not only "relinquish all right and claim" to their hunting grounds, but if they surrendered the Black Hills as well.

Congress quickly requested that the President send another commission to negotiate with the Lakota for the cessation of the Black Hills.[67] Headed by George Manypenny, the commission arrived in the Great Sioux Reservation in September 1876. Unfortunately, the commission only met with chiefs and headmen of the tribe and impressed upon them that the United States government no longer had an obligation to supply subsistence rations according to the Fort Laramie Treaty of 1878. After this explanation, the commission presented a treaty that forced the Lakota to "relinquish their rights to the Black Hills and other lands west of the one hundred and third meridian and their rights to hunt in the unceded territories to the north, in exchange for subsistence rations for as long as they would be needed to ensure the Sioux' survival."[68]

The Majority Opinion declared that the commission ignored Article XII of the Fort Laramie Treaty. Justice Blackmun wrote that "the commission ignored the stipulation of the Fort Laramie Treaty that any cessation of lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males."[69] Despite this provision, the treaty was only presented to chiefs and headmen of the tribes. Furthermore, when the commission had concluded, it only acquired ten percent of the adult, male Lakota population's

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Seventy-Seven, and for Other Purposes., 15 Stat. 640, U.S. Statutes at Large (1876): 192, https://babel.hathitrust.org/cgi/pt?id=inu.30000126280316&view=1up&seq=13&skin=2021, (accessed on 10/6/21).
[67] *United States v. Sioux Nation of Indians*, 381.
[68] *United States v. Sioux Nation of Indians*, 381.
[69] *United States v. Sioux Nation of Indians*, 381.

signatures. Congress overlooked these transgressions and enacted the 1876 Manypenny "agreement" (Agreement of 1876) into law on February 28, 1877. The Act of 1877 had the effect of abrogating the Fort Laramie Treaty of 1868 and implemented the terms of the Agreement of 1876. The Majority Opinion stated that Congress used the Act of 1877 to legitimize the settlers' invasion of the Black Hills.[70]

The Black Hills Case

The Act of 1877 ended the summation of Justice Blackman's historical chronology regarding the taking of the Black Hills. The Majority Opinion moved on to chronicle the history of the Black Hills case. As early as 1887, members of the Lakota nation came together to discuss non-military means of recovering the land, which was taken contrary to the terms of the Fort Laramie Treaty of 1868.[71] The initial 1887 meeting began a century-long battle that culminated in the *United States v. Sioux Nation* decision of 1980. In continuation of the Majority Opinion's chronology of Lakota resistance to governmental malfeasance, Justice Blackmun moved directly from writing about the Act of 1877 to discuss the Special Jurisdictional Act of June 3, 1920 (Act of 1920). The Act of 1920 authorized "the Sioux Nation to bring suit for the alleged Fifth Amendment taking of the Black Hills."[72]

In 1923, according to the Act of 1920, the Lakota filed suit in the Court of Claims alleging that the government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. It was not until 1942 that the Court of Claims dismissed the Black Hills claim. The Court of Claims stated that they did not have authorization according to the Act of

[70] *United States v. Sioux Nation of Indians*, 383.
[71] Lazarus, *Black Hills White Justice*, 122.
[72] United States Department of Justice, "Special Jurisdiction Acts," *Lead up to the Indian Claims Commission Act of 1946*, December 22, 2020, https://www.justice.gov/enrd/lead-indian-claims-commission-act-1946, (accessed on 10/7/21).

1920 to question whether the Lakota were adequately compensated by the Act of 1877. The court further ruled that the claim was a moral one not covered under the just compensation clause.[73] The *Sioux Tribes of Indians v. The United States* (1942) Court of Claims case relied heavily upon the Supreme Court decision of *Lone Wolf v. Hitchcock* (1903).

Lone Wolf v. Hitchcock (1903) was a case that was very much akin to the Black Hills claim. The *Lone Wolf* case centered on a claim that the United States illegally abrogated the Medicine Lodge Treaty. The Medicine Lodge Treaty was signed in 1867 near Medicine Lodge, Kansas, with the Kiowa, Comanche, Kiowa-Apache, Southern Cheyenne, and Arapaho tribes. The Medicine Lodge Treaty, much like the Fort Laramie Treaty of 1868, defined reservation boundaries for Indians. These treaties limited the land on which tribes could inhabit. Furthermore, the Dawes Act of 1887, the Agreement with the Cheyenne and Arapaho of 1890, and the Agreement with the Comanche, Kiowa, and Apache of 1892 further reduced the size of reservations by forcing allotment. In 1901, Lone Wolf, a Kiowa chief, filed suit that the government had illegally breached article VII of the Medicine Lodge Treaty requiring three-fourths of Indian male signatures for cessation of reservation land.

The *Lone Wolf* ruling gave full plenary authority with assumed "good faith" practices to be conferred upon the United States Congress. Justice White, writing on behalf of the Majority Opinion regarding *Lone Wolf*, ruled that Congress has the power to "abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do

[73] *United States v. Sioux Nation of Indians*, 384.

so."[74] Justification for the governmental abrogation of treaty provisions gave the Judicial Branch considerable room for interpretation in the *Lone Wolf* ruling. Three times in the *Lone Wolf* ruling, the Supreme Court presumed that Congress was acted in good faith when passing Indian legislation.[75]

Furthermore, the *Lone Wolf* ruling solidified Congress's plenary power over tribal sovereignty when it stated that "plenary power over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[76] By stating that Congress had plenary power over tribal sovereignty and a presumption of good faith in its Indian legislation, the *Lone Wolf* ruling set a precedent that would plague Indian litigation for almost a century. The editors of the *University of Pennsylvania Law Review* wrote that "*Lone Wolf* was a significant addition to the earlier treaty abrogation cases because it addressed for the first time a deprivation of tribal property rights previously recognized under a treaty, and not the terms of the government-to-government relationship between the United States and an Indian nation."[77]

The Court of Claims granted a lengthy explanation in their unanimous decision to dismiss *Sioux Tribes*. Citing *Lone Wolf*, the Majority Opinion of *Sioux Tribes* stated that "in light of the established principles governing the rights and privileges of the Indians and the power and authority of the government in its dealings with said Indians leads to the conclusion that as a

[74] Edward Douglass White and Supreme Court Of The United States, U.S. Reports: Lone Wolf v. Hitchcock, 187 U.S. 553n, 1902, Periodical, 566, https://www.loc.gov/item/usrep187553/, (accessed on 8/22/21), hereafter cited *Lone Wolf v. Hitchcock*.
[75] *Lone Wolf v. Hitchcock*, 554, 566, 568.
[76] *Lone Wolf v. Hitchcock*, 565.
[77] *Lone Wolf v. Hitchcock*, 245.

matter of law the plaintiff tribe is not entitled to recover from the United States as for a 'taking' or 'for the misappropriation of any land of said tribe.'"[78] The court further explained that "there was no misappropriation of the land by the government and the court may not go back on the acts of 1876 and 1877," further stating that the case was a moral one that belonged in the halls of Congress not in the courts.[79] The Court of Claims gleaned from the *Lone Wolf* ruling that Congress had full legal rights to abrogate any Indian treaty due to its plenary power over Indian affairs. The court further stated that courts had no jurisdiction in treaty suits against the government.

The Lakota were left with little recourse after the dismissal of *Sioux Tribe* until Congress passed the Indian Claims Commission Act in 1946. Justice Blackmun wrote that "prior to 1946 Congress had not enacted any mechanism of general applicability by which Indian tribes could litigate treaty claims against the United States."[80] The Indian Claims Commission (ICC) was set up due to Public Law 79-726 (P.L. 79-726) in August of 1946 to resolve all long-standing treaty issues. According to P.L. 79-726, the ICC could only hand out monetary awards for claims filed by Indians against the government.[81]

Pursuant to P.L. 79-726, Lakota counsel resubmitted the Black Hills claim to the ICC in 1950. The ICC ruled that the Lakota had failed to prove their case.[82] Lakota leaders started to

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[78] "Cases Decided in the Court of Claims – July 1, 1942, to January 31, 1943," Court of Claims, Reports 97 (1943): 614, https://heinonline.org/HOL/Page?collection=usfed&handle=hein.usfed/coclaim0097&id=631&men_tab=srchresults#, (accessed 10/7/21).
[79] "Cases Decided in the Court of Claims," Court of Claims, 615.
[80] *United States v. Sioux Nation of Indians*, 384.
[81] *To Create an Indian Claims Commission, to Provide for the Powers, Duties and Functions thereof, and for other Purposes*, Public Law 79-726, U.S. Statutes at Large (1946): 1054, https://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/$2fapp-bin$2fgis-publiclaw$2f7$2f8$2f3$2f9$2fpl79-726.pdf/entitlementkeys=1234%7Capp-gis%7Cpubliclaw%7C79_pl_726., (accessed on 10/8/21).
[82] *United States v. Sioux Nation of Indians*, 385.

take another look at their legal alternatives with the dismissal of the ICC case. After speaking with Helen Peterson, executive director for the National Congress of American Indians, Lakota leaders asked for the resignation of their attorney, Ralph Case.[83] With new counsel selected, the Lakota filed a motion with the Court of Claims to vacate the ICC judgment of affirmance alleging that the ruling was "based on a record that was inadequate, due to the failings of the Sioux' former counsel."[84] The motion was granted, and the Court of Claims directed the ICC to consider whether the case should be reopened.

On November 19, 1958, the ICC entered an order to reopen the case and announced that it would reconsider its prior judgments on the merits of the Lakota claim.[85] After the ICC reopened the Black Hills claim, Lakota lawyers filed suit and added an amended petition. The amended petition contended that the Act of 1877 constituted a taking of the Black Hills for which just compensation had not been paid. A lengthy period of legal sparring between the government and the Lakota ensued. "Finally, in October 1968, the Commission set down three questions for briefing and determination: (1) What land and rights did the United States acquire? From the Sioux by the 1877 Act? (2) What, if any, consideration was given for land and those rights? (3) If there was no consideration for the government's acquisition of land and rights under the 1877 Act, was there any payments for such acquisition?"[86] The ICC asked these questions to end a long period of turmoil that consisted of procedural infighting between Lakota and governmental attorneys.

[83] Lazarus, *Black Hills White Justice*, 212-215.
[84] *United States v. Sioux Nation of Indians*, 385.
[85] *United States v. Sioux Nation of Indians*, 385.
[86] *United States v. Sioux Nation of Indians*, 385

The sparring between the Lakota and governmental attorneys stemmed from the original Black Hills claim of 1942. Attorneys from the government alleged that further Black Hills claims were barred by res judicata. Res judicata is a legal term that means a competent court had already adjudicated an issue, and it may not be pursued any further by the same parties in the court system. In 1974 the ICC concluded that the 1942 ruling did not bar the Black Hills claims on the grounds of res judicata. Furthermore, the ICC concluded that the 1942 Court of Claims dismissed the earlier claim without determining the merits of the case. In essence, the ICC ruled that the 1942 Court of Claims was not acting as a "competent court" when it dismissed the original Black Hills case.

The ICC ruling of 1974 found that the "Congress, in 1877, had made no effort to give the Sioux full value for ceded reservation land."[87] Instead, the only obligation the government assumed in the Act of 1877 was a promise to provide subsistence rations. The government did not tie subsistence rations to the evaluation or purchase regarding land taken from the Lakota nation. Therefore, the ICC ruled that Congress acted according to its power of eminent domain when it passed the Act of 1877 and that the government must pay just compensation for the taking of treaty guaranteed land.

The ICC applied a 1968 precedent set forth by the *Three Tribes of Fort Berthold Reservation v. United States* in *Sioux Tribes v. United States* case and ruled that Congress utilized eminent domain power. The *Three Tribes of Fort Berthold* precedent used in the *Sioux Tribes* (74) case became known as the *Fort Berthold* test. In short, the *Fort Berthold* test stated that the government could not act with legislative authority while still claiming administrative

[87] *United States v. Sioux Nation of Indians*, 386.

authority as trustee-to-ward. Therefore, when the United States implemented the Agreement of 1877, they wielded legislative power. According to the Court of Claims, this legislative authority fell under eminent domain and allowed the Lakota nation to seek compensation under the just compensation clause. As a result, over $17.1 million-plus interest dating back to 1877 was awarded to the Lakota nation with additional liabilities to be held against the government with further investigations.[88]

The government appealed the ICC ruling arguing that the Fifth Amendment claim brought by the Lakota to the ICC was barred by res judicata and collateral estoppel. Collateral estoppel is a sub-genre of res judicata. Where res judicata is directed towards plaintiffs bringing the same case to courts that have already been brought to a decision by a competent court, collateral estoppel is directed towards plaintiffs bringing the same case against the same defendant in a different judicial venue. The government alleged that the Black Hills claim was barred by res judicata as the 1942 Court of Claims dismissed the case. Therefore, the government counsel contended that it should be dismissed due to collateral estoppel because the same plaintiff sued the same defendant in a different judicial venue, the ICC.

In 1975 the Court of Claims granted the government's appeal stating that the Black Hills claim to a Fifth Amendment taking was barred by res judicata due to the 1942 dismissal. The appeal removed the additional interest from the ICC's ruling of $17.1 million awarded to the Lakota nation. The flat financial award was kept intact "due to the government's failure to appeal the Commission's holding that it had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages without interest."[89] The

[88] *United States v. Sioux Nation of Indians*, 386.

[89] *United States v. Sioux Nation of Indians*, 387.

court remarked on Grant's duplicity in breaching the Fort Laramie Treaty to keep trespassers out of the Black Hills. In its remarks, the court wrote that the government was accountable for creating the duress of starvation responsible for starving the Lakota into signing the Agreement of 1876.[90] "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history," wrote the Court of Claims.[91]

Res judicata was only upheld for the Fifth Amendment taking as that was the stance taken in the 1942 Black Hills claim. Since the creation of the ICC, Lakota attorneys have had the option to file a claim that fell under a different statute to resolve treaty claims. The matter at hand was one of interest on the award rather than the flat-rate settlement itself. If the award fell under the just compensation clause, then interest could be applied from the date of the taking. Regardless, the Court of Claims found that res judicata was an issue due to the original Black Hills claim. Therefore, the Court of Claims held that the Lakota were entitled to an award of $17.5 million and recommended the case back to the ICC to determine further awards for right-of-way. On the grounds of res judicata, the Court of Claims stated that "Congress could correct this situation, the courts could not."[92]

Lakota attorneys petitioned the Supreme Court for a writ of certiorari, but they were denied. The Court of Claims returned the case to the ICC. The ICC determined that the rights-of-way obtained by the government were $3,848. Governmental attorneys moved to award the Lakota nation $17.5 million without interest. However, the ICC decided to defer their ruling in light of pending legislation that would affect the Black Hills claim.[93]

[90] *United States v. Sioux Nation of Indians*, 388.
[91] *United States v. Sioux Nation of Indians*, 388.
[92] *United States v. Sioux Nation of Indians*, 388.
[93] *United States v. Sioux Nation of Indians*, 389.

On March 13, 1978, Congress passed a statute that allowed the Court of Claims to review the merits of the ICC judgment regarding the Black Hills claim without regard to res judicata or collateral estoppel. The statute authorized the Court of Claims to review the merits of the case de novo, like new. Pursuant to this statute, after sitting en banc, the Court of Claims confirmed the ICC's holding that the Act of 1877 affected a taking of the Black Hills and right-of-way across the reservation. The Court of Claims applied the *Fort Berthold* test and found that Congress exercised legislative power of eminent domain over Indian land. With an award of $17.1 million-plus five percent interest dating back to 1877, the Court of Claims stated that the unquestioned plenary power for Congress to take Indian land without recourse was granted from the *Lone Wolf* case was not applicable. The government applied to the Supreme Court for a writ of certiorari, and it was granted.

Justice Blackmun's Majority Opinion documented several indictments against Congress that proved malfeasance towards the Lakota people in the illegal taking of the Black Hills. The Court wrote that Congress was growing dissatisfied with the self-sufficiency of the Lakota People.[94] Grant's military withdrawal that allowed whites to flood the Black Hills created the conflict necessary for Congress to push legislation. Congress acted by passing their "sell or starve" appropriations statute of 1876. The "sell or starve" statute of 1876 culminated from the Allison Commission, which was signed by only about ten percent of Lakota males, contrary to the Fort Laramie Treaty of 1868. Congress followed up on the Allison Commission's Agreement of 1876 by passing the Act of 1877. The Act of 1877 stripped the treaty guaranteed hunting grounds and lands west of the one hundred and third meridian away from the Lakota

[94] *United States v. Sioux Nation of Indians*, 379.

people with only the promise of subsistence rations. Both the ICC and the Court of Claims found that the Act of 1877 was a violation of Lakota Fifth Amendment rights and that the government owed monetary damages plus interest to the Lakota people. Also, The Court of Claims in 1942 and 1975 referred to Congress as having the power to rectify the Black Hills claim rather than the courts.

Congress's plenary power over Indian sovereignty had been made clear. Congress created the Court of Claims. Nonetheless, Congress did not allow Indians to sue the United States until 1873. Even though Congress allowed Indians to sue the United States, they still had to seek Congressional permission through a Special Jurisdictional Act. These Special Jurisdictional Acts were not easily obtainable as they were brokered through the OIA. Even when a Special Jurisdictional Act was received, it was difficult to sue the United States for an illegal Fifth Amendment taking. Congress also created the ICC. Congress took the Black Hills through the Act of 1877, and Congress created the courts that could only rule for financial restitution. Congress made an amendment possible for Lakota attorneys to sue under a Fifth Amendment taking. All roads lead through Congress. Nonetheless, as the Supreme Court granted the government's appeal to the 1978 Court of Claims ruling in favor of the Lakota, the Black Hills claim faced another day in court.

CHAPTER II: *SIOUX NATION* ORAL ARGUMENTS AND RULING

It was a mostly cloudy day with the temperature in the mid-50s on March 25, 1980, when attorneys for the Lakota nation and the government stood before the United States Supreme Court to argue the case regarding *United States v. Sioux Nation*. Over sixty years of legal wrangling would culminate with just over an hour of litigation before Supreme Court Justices.[95] After studying the merits of the Court of Claims holdings, along with oral arguments and submitted briefs, the Court ruled 8-1 in favor of awarding $17.1 million-plus interest to the Lakota nation for the unconstitutional taking of the Black Hills.[96] This ruling totaled over $105 million in restitution for land taken by the United States from the congressional Act of 1877 without any restoration of seized land. The justices closely examined the legal precedents used by the Court of Claims and the historical context behind the taking of the Black Hills. Finding these aspects of jurisprudence to be in order, all but one of the justices concurred with the Court of Claims. The Supreme Court ruling codified not only congressional malfeasance in the Act of 1877 but also congressional abdication to the judicial system for monetary awards rather than restoration of land to the Lakota nation.

Although Congress was not a Supreme Court judge or an attorney during the proceedings of *Sioux Nation*, it was an active participant. Using oral arguments from *Sioux Nation*, this chapter will show that Congress made substantial efforts to pave the way for the Supreme Court to rule in the financial favor of the Lakota. Where Chapter I used the Supreme Court Majority Opinion to give historical context, Justice Blackmun's writing will be used to show the ruling in conjunction with the oral arguments and how Congress strongly influenced the case.

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[95] Oyez, "United States V. Sioux Nation," https://www.oyez.org/cases/1979/79-639, (accessed on 8/22/21).
[96] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 225-226.

This chapter will prove that this case did not need to exist in a judicial setting. Congress had abdicated their plenary power by forcing a pseudo justice upon the Lakota by creating additional courts within the Judicial Branch to handle claims against the government, like the Court of Claims and the ICC, to award only a financial means of restitution for taking the Black Hills and other Indian lands. By the start of the Black Hills claim, the Lakota people may have been divided over a desire to see financial restitution and reclamation of the Black Hills. In general, the Lakota always wanted the return of their land. However, evidence cannot be found of Lakota unity for returned land in the Black Hills claim until sometime after the Wounded Knee occupation of 1974. By the mid-1970s, most Lakota people were united by the slogan that the "Black Hills are not for sale!"

Congressional Creations

A brief history of Congress's creation of the Court of Claims is vital to understanding the failures to fulfill a measure of justice regarding Indian claims, in general, and the Lakota's claim in particular. Legal professor William M. Wiecek described the congressional transfer of claims powers to the judiciary in three phases. Before 1789, Congress handled claims against the government on a case-by-case basis.[97] From 1789 to 1820, Congress utilized an "executive-administrative phase."[98] This phase used the Treasury Department to oversee all claims due to the rise of claims and because of the War of 1812. From the 1820s to 1855, Congress entered into a "legislative phase" of handling claims through committees and tribunals.[99] John Quincy Adams wrote that "a deliberative assembly is the worst of all tribunals for the administration of

[97] William M. Wiecek, "The Origin of the United States Court of Claims," *Administrative Law Review*, April 1968, vol 20, no 3, 388, http://www.jstor.com/stable/40708610, (accessed on 1/16/21).
[98] Wiecek, "The Origin of the United States Court of Claims," 388.
[99] Wiecek, "The Origin of the United States Court of Claims," 388.

justice" and that "it is judicial business and legislative assemblies ought to have nothing to do with it."[100] Finally, from 1855 to 1866, Congress entered the "judicial phase" of claims whereby they set up and transferred claims powers to the Judicial Branch.[101] The Court of Claims was authorized to grant only financial restitutions, regardless of whether the suit was due to loss of land, assets, or even life.

The creation of a Court of Claims in the United States government waived rights to Sovereign Immunity from citizens regarding specific claims. Sovereign Immunity simply means that the government cannot be sued without its consent. Since most Indians were not granted citizenship until 1924, they had to approach Congress to receive Special Jurisdictional Acts to file suit in the Court of Claims. In 1920 the Lakota were given a Special Jurisdictional Act to file a lawsuit against the government for the illegal taking of the Black Hills due to the congressional Act of 1877. Over twenty years later, in 1942, the Court of Claims dismissed the Black Hills claim ruling that the Special Jurisdictional Act did not grant the court proper jurisdiction over the case.

In 1946, Congress created the Indian Claims Commission. By constructing the ICC, Congress waived its Sovereign Immunity to Indian tribes granting permission to file claim suits without the need for Special Jurisdictional Acts. Where the Court of Claims was set up to oversee individual claims brought forward from past wars and disputes against the government, the ICC was intended to present claims based on entire groups of Indian peoples. The Court of Claims was set up to preside over individual claims. The ICC was created to preside over Indian

[100] John Quincy Adams, *Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1975 to 1845,* ed. Charles Francis (Philadelphia: J.B. Lippincott & Co., 1874-1877), vol. VIII, 480, https://heinonline.org/HOL/Page?collection=presidents&handle=hein.forrel/mejqad0008&id=486&men_tab=srchresults#, (accessed on 1/16/21).
[101] Wiecek, "The Origin of the United States Court of Claims," 388.

nations that had their entire culture put in disarray by the government. The disparity between the two courts was in the mentality that financial compensation could be considered justice for the individual as well as an entire nation of people.

The Lakota saw direct involvement by Congress as the Black Hills claim moved back and forth from the ICC and the Court of Claims and finally to the Supreme Court. On March 13, 1978, Congress approved Public Law 95-243 (Act of 1978). Specifically passed for the Black Hills claim, the Act of 1978 waived governmental rights to res judicata and collateral estoppel and paved the way for the Claim to continue. The Act of 1978 declared that "notwithstanding any other provision of law," the Court of Claims "shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment [sic], and shall enter judgment accordingly."[102] After the passage of the Act of 1978, the Court of Claims upheld the ICC ruling that the Black Hills was taken in violation of the Fifth Amendment awarding the Lakota Nation $17.1 million-plus interest. The attorneys for the government argued that the "Court of Claims decision rests on the '74 Act and the '78 Act, more recently the '78 Act."[103]

The Acts of 1974 and 1978 were examples of short legislative paragraphs in which Congress quickly rectified judicial hurdles during the Black Hills claim. In these short

[102] *To Amend the Indian Claims Commission Act of August 13, 1946, and for other purposes*, Public Law 95-243, 92 Stat. 153, U.S. Statutes at Large (1978), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg153.pdf, (accessed on 11/2/21).
[103] Supreme Court Of The United States, Oral Arguments: Arguments Transcripts, 10, https://www.supremecourt.gov/pdfs/transcripts/1979/79-639_03-25-1980.pdf, (accessed on 8/22/21), hereafter cited *Oral Arguments-Transcripts*.

legislative acts, Congress showed it had the power to influence and even assist Indian tribes without extreme bureaucracy. However, when it came to taking accountability for Indian claims, Congress chose a different path. First, Congress created the Court of Claims but barred Indians from filing suit against the United States. Second, Congress allowed Indians to sue the government in the Court of Claims but mandated that they obtain a Special Jurisdictional Act before filing suit. Third, Congress constructed the ICC and allowed Indians to sue the government without a Special Jurisdictional Act, but the courts were only allowed to grant financial rulings. Finally, Congress stood on the side and issued legislation ensuring that the court process proceeded to keep the claims out of their halls. Congress had made it extremely difficult for the Lakota people to legally fight for their treaty guaranteed land.

The Lakota people had no choice but to work within the constricting bounds of congressional bureaucracy. Therefore, upon receiving their Special Jurisdictional Act in 1920, the Lakota filed suit against the government for the illegal taking of the Black Hills. After over twenty-two years, in 1942, the Court of Claims dismissed the Black Hills claim. The 1942 Court of Claims declared that "the claim in the instant suit is moral, rather than legal, and before the court can adjudicate or render judgment upon it, the court must have from Congress clear authority to do so … which was not conferred by the jurisdictional act."[104] In 1946, four years after the Court of Claims dismissed the Black Hills claim; Congress created the Indian Claims Commission (ICC).

[104] Court of Claims, "Cases Decided in the Court of Claims – July 1, 1942, to January 31, 1943," Reports 97 (1943): 615, https://heinonline.org/HOL/Page?collection=usfed&handle=hein.usfed/coclaim0097&id=631&men_tab=srchresults#, (accessed 10/7/21).

In 1956 Lakota attorneys were allowed to refile the Black Hills claim with the ICC. From the refiling of the Black Hills claim until the early 1970s, Lakota and government experts were arguing over procedural matters and the value of the over seven million acres of land that the United States seized by the Act of 1877. As a compromise, both parties agreed to an evaluation of $17.1 million for the Black Hills.[105] The ICC ruled in favor of the Lakota and granted a settlement of $17.1 million-plus interest. According to the Indian Claims Commission Act of 1946, the government could deduct food, rations, and provisions.[106] Using this allowance, the government claimed expenditures that added up to almost $25 million.[107] Governmental expenses would wipe out the initial award for the Lakota nation. Therefore, in 1974 Congress passed the Act of 1974, which was a short paragraph that forbade the use of food, rations, and provisions to be used as offsets for Indian claims. When *Sioux Nation* ran into another hurdle in 1978 concerning res judicata and collateral estoppel, Congress answered with the Act of 1978, another short paragraph paving the way for the Black Hills claim to continue.

Oral Arguments

Chief Justice Warren E. Burger opened arguments for *Sioux Nation* on March 24, 1980, and called upon the government's lead attorney, Louis F. Claiborne, to begin. Claiborne summed the case up by referring to the Court of Claims ruling in favor of the Lakota nation. According to Claiborne, the verdict awarded $105 million, of which $88 million of interest should be negated, and $17.1 million should be adjudicated towards the Lakota as that was the

[105] John R. White, "Barmecide Revisited: The Gratuitous Offset in Indian Claims Cases," *Ethnohistory* 25, no. 2 (Spring 1978): 188, https://jstor.org/stable/481039, (accessed on 10/28/21).
[106] *To Create an Indian Claims Commission, to Provide for the Powers, Duties and Functions thereof, and for other Purposes*, Public Law 79-726, U.S. Statutes at Large (1946):, 1050, https://uscode.house.gov/statviewer.htm?volume=60&page=1050#, (accessed on 11/2/21).
[107] White, "Barmecide Revisited," 188.

value of the over seven million acres of "severed" land from the Great Sioux Reservation from the Act of 1877.[108] After Claiborne's summation, Justice Potter Stewart stated that the only issue at hand was the matter of interest.[109] Claiborne attempted to agree with Justice Stewart but was quickly cut off. Justice Stewart added that the point of interest depended on "whether or not there was a taking of condemnation."[110] Claiborne spun the phraseology from a "taking of condemnation" to a "taking in the Fifth Amendment sense."[111]

The quick exchange between Claiborne and Justice Stewart is of the utmost importance. Justice Stewart's phraseology of "taking of condemnation" is not even listed in the official transcript. Justice Stewart was quoted in the official transcript as using the word "taking" rather than "taking of condemnation."[112] The phrase "taking of condemnation" can only be found by listening to the audio transcripts.[113] Also, Claiborne's use of "taking in the Fifth Amendment sense" appears to be the vocabulary used by the majority opinion as well as government and Lakota attorneys throughout *Sioux Nation*. The term "taking of condemnation" is a legal term used to denote a taking regarding eminent domain. In Fifth Amendment legal takings, the usage of "condemnation" is not often used due to its negative connotation. To condemn is to express disapproval or to sentence someone to punishment. In the case of *Sioux Nation*, perhaps Justice Stewart's phraseology was the best context when referring to the taking of the Black Hills. The Supreme Court would indeed find it a "taking of condemnation."

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[108] *Oral Arguments-Transcripts,* 3.
[109] *Oral Arguments-Transcripts,* 3.
[110] Oyez, "United States v. Sioux Nation of Indians," Media: Oral Argument – March 25, 1980 (PART1), 2'25", https://www.oyez.org/cases/1979/79-639, (accessed on 8/22/21).
[111] Oyez*, "United States v. Sioux Nation of Indians,"* (PART1) 2'30".
[112] *Oral Arguments-Transcripts,* 3.
[113] Oyez, "United States V. Sioux Nation of Indians," (PART1), 2'30".

Nonetheless, for the government to win their case against the Lakota, they would have to prove that the prior Court of Claims ruling was errant. In doing so, Claiborne set out to show that the Court of Claims incorrectly applied the *Fort Berthold* test and that Congress was using its plenary power rather than eminent domain power with the Act of 1877. Claiborne was putting the pieces in place to liken *Sioux Nation* to *Lone Wolf* by claiming that the government acted in good faith by providing food rations for the "benefit" of the Lakota people.

Much of the oral arguments between the Court's justices and both sets of attorneys centered on the definition of the term "taking." *Sioux Nation* was argued about the definition of two types of "takings." What was being determined was whether the Black Hills was taken due to Congress's plenary power over Indian affairs or if they utilized eminent domain power.[114] If the Supreme Court ruled that Congress used its eminent domain authority, then the Lakota nation would be entitled to interest on their award of $17.1 million under the just compensation clause of the Fifth Amendment. However, if the Court utilized the *Lone Wolf* precedent of congressional plenary power over Indian affairs, then interest for the award would be removed. If the interest were deducted, the flat rate of $17.1 million would be awarded under the Indian Claims Commission Act.

The case itself came down to semantics. If Claiborne could prove that the government took the Black Hills with "good faith" using plenary power for the benefit of the tribes, then *Lone Wolf* precedent would be applicable negating interest on $17.1 million in awards towards the Lakota. Furthermore, should Claiborne succeed in convincing the Court to rule in this fashion, then $17.1 million would be awarded to the Lakota as the government did not contest

[114] Wilkins, *American Indian Sovereignty and the U.S. Supreme Court,"* 226.

that ruling. However, the lack of contestation on the ICC ruling marked the Black Hills as a "dishonorable dealing" on the part of the United States. Therefore, if the Court ruled for the government, the justices would admit to a lower court verdict stating that the United States had "acted in good faith" but "dealt dishonorably" by taking the Black Hills. Still, the Lakota would get a lower financial award of $17.1 million without interest.

Justice John Paul Stevens asked Claiborne about the $17.1 million settlement during oral arguments. Justice Stevens asked if the "source of the obligation is a finding by the Commission (ICC) pursuant to statute that there was dishonorable dealings by the United States?"[115] Claiborne answered in the affirmative but "that the Commission found no such findings because instead, the Commission found that there had been a taking in the Fifth Amendment sense."[116] Regardless, Claiborne admitted that prior to the Act of 1978, the government was willing to consent to the Court of Claims ruling of $17.1 million without interest that declared that the government had taken the Black Hills in a less than honorable fashion.[117]

In the *Sioux Nation* oral arguments, all parties agreed that Congress had the power to settle the case. When referring to the Acts of 1974 and 1978, Chief Justice Warren E. Burger asked Claiborne if Congress had the authority to declare that this case should "be treated under the terms of the Fifth Amendment Taking."[118] "Mr. Chief Justice," replied Claiborne, "I think Congress could have of course simply awarded the Sioux Nation $100 million or whatever sum in the discretion of Congress it was thought to be fair."[119] From the very beginning of the government's opening arguments, there was much discussion between Claiborne and the Justices

[115] *Oral Arguments-Transcripts,* 7.
[116] *Oral Arguments-Transcripts,* 7-8.
[117] *Oral Arguments-Transcripts,* 8.
[118] *Oral Arguments-Transcripts,* 10.
[119] *Oral Arguments-Transcripts,* 10.

over what Claiborne was attempting to construe as a taking in the sense of congressional plenary power. To clear up this confusion, Justice Burger pointed to Congress. Chief Justice Burger asked a question that may appear to have been more of a statement. "If the Indian Claims Commission and the Court of Claims, each of which is a creature of the Congress, couldn't declare this was a taking," Chief Justice Burger asked, "why couldn't Congress have resolved that question in the '74 and '78 Acts?" To this, Claiborne replied, "perhaps they could have. Clearly, they did not."[120]

Lead Counsel for the Lakota, Arthur Lazarus Jr., was questioned along the same lines as Claiborne. Chief Justice Burger asked Lazarus if Congress could have also declared that the Court of Claims should proceed as if the Black Hills claim was a taking in the Fifth Amendment sense in either the Act of 1974 or 1978. Lazarus stated that Congress had the authority to instruct the Court of Claims to proceed in that manner. Nonetheless, Lazarus informed Congress that they only needed to remove the res judicata and collateral estoppel barriers, and the Lakota would win their case. When asked further as to why Lazarus did not urge Congress to come to a financial conclusion on this case, Lazarus stated that the amount of the award was so tremendous that he did not believe he could have "gotten the committee to go that far."[121]

The line of questioning during oral arguments about Congressional involvement stemmed from the potential constitutionality of the Act of 1978. The government raised two objections. The first objection was that Congress "impermissibly had disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments, in this case, mere opinions." The second objection stated that Congress overstepped the bounds regarding separation of powers.

[120] *Oral Arguments-Transcripts,* 11.
[121] *Oral Arguments-Transcripts,* 21.

The government could have brought these objections to the attention of the Court of Claims. Regardless, the Supreme Court remarked that the government failed to object at the previous trial and even acknowledged that the Act of 1978 was "not beyond the limits of legislative power."[122]

The Act of 1978 and its effect on the Supreme Court opinion could not be overstated. On February 9, 1978, Wyoming Representative Teno Roncalio took to the floor of the House of Representatives to speak regarding the bill. His speech appears to be what makes up the first parts of the Supreme Court Majority Opinion ruling.[123] Roncalio's speech began with a historical account that Blackmun repeated in the Majority Opinion ruling of *Sioux Nation*. After declaring that "Congress unilaterally took the Black Hills, comprising 7,345,157 acres, from the Sioux, in direct violation of the treaty provision requiring the consent of three-fourths of the adult members of the Sioux," Roncalio proceeded to give a historical account of the Black Hills claim.[124] Similarly, Blackmun included this section in the Majority Opinion ruling directly after the historical outline of the taking of the Black Hills.

Roncalio's speech mentioned two Acts of Congress that ostensibly waived their rights to res judicata and collateral estoppel while giving the judicial system authority to try Indian cases *de novo*. While speaking of res judicata and estoppel, Roncalio said that "in two cases, Congress waived the defense with respect to Indian claims against the United States; Act of March 3, 1881 and Act of February 7, 1925."[125] The Act of March 2, 1881 stated that the "Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty

[122] *United States v. Sioux Nation of Indians*, 391.
[123] Congress.gov, "Congressional Record," November 6, 2021, https://www.congress.gov/bound-congressional-record/1978/02/09/house-section, (accessed on 11/6/21) pages 2953-2955 in conjunction with *United States v. Sioux Nation of Indians*, 372-394.
[124] Congress.gov, "Congressional Record," 2954.
[125] Congress.gov, "Congressional Record," 2954.

stipulations with the Choctaw Nation, and to render judgment thereon; power is hereby granted the said court to review the entire question of differences de novo, and it shall not be estopped by any action had or award mad by the Senate of the United states in pursuance of the treaty of eighteen hundred and fifty-five."[126] In like manner, the Act of February 7, 1925 allowed the Delaware tribe of Indians to file suit and instructed the courts to consider all such claims de novo, upon a legal and equitable basis and without regard to any decisions, finding, or settlement heretofore had in respect of any such claims.[127]

The Court returned to the topic of what constituted a taking when Justice Steward asked how the amount of $17.1 million was derived. Claiborne answered that "the $17.1 million is the value of the Black Hills area as found by the Indian Claims Commission, as affirmed by the Court of Claims and not disputed by the United States." Justice Steward asked if these facts did not constitute a taking. Claiborne stated that it did not constitute a taking in the Fifth Amendment sense as the government provided subsistence rations that should be considered in the proceedings.[128] By associating the years of rations supplied by the government after the Act of 1877 as payment for the Black Hills, Claiborne was trying to put the *Sioux Nation* case in the same vein as *Lone Wolf*.

The government's case against the Lakota being granted interest on the $17.1 million settlement was predicated on the *Lone Wolf* decision. Claiborne stated that the Act of 1877 was "an exercise of the power of Congress to deal with Indian affairs for the benefits of the tribes,"

[126] *An Act for the Ascertainment of the Amount Due the Choctaw Nation*, Stat. III, U.S. Statutes at Large (1881): 504, https://tile.loc.gov/storage-services/service/ll/llsl/llsl-c46/llsl-c46.pdf, (accessed on 11/6/21).
[127] *An Act to Refer the Claims of the Delaware Indians to the Court of Claims, with the Right to Appeal to the Supreme Court of the United States*, Stat. II, U.S. Statutes at Large (1924-1925): 812-813, https://tile.loc.gov/storage-services/service/ll/llsl/llsl-c68/llsl-c68.pdf, (accessed on 11/6/21).
[128] *Oral Arguments-Transcripts*, 5.

much like the *Lone Wolf* case.[129] In 1903, during *Lone Wolf*, the Supreme Court ruled that Congress has exercised "plenary authority over tribal relations of the Indians from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[130] Not only did the *Lone Wolf* decision set a judicial precedent for absolute congressional power over Indian affairs, but it granted Congress a complete assumption of good faith deportment regarding Indian legislation. The *Lone Wolf* decision stated that the Court "will presume that Congress acted in perfect good faith" and that the "judiciary cannot question or inquire into the motives which prompted such legislation."[131]

While basing their case on *Lone Wolf* precedent, the attorneys for the government claimed that food rations provided to the Lakota people should be considered as a sign of good congressional faith towards the Lakota stemming from the Act of 1877. Therefore, the government only owed the Lakota nation $17.1 million, according to the Indian Claims Commission Act. *Lone Wolf* was dismissed as a Fifth Amendment taking due to the government giving some payment in the form of land allotments for land taken. During *Sioux Nation*, the government had attempted to liken food rations to the Lakota people after the Act of 1877 as a type of payment for the Black Hills, linking *Sioux Nation* to *Lone Wolf*.

In short, Claiborne relied on Article 5 of the Act of 1877, which laid out contingencies such as provisions of education and foodstuffs rather than a set price for land taken from the Lakota people.[132] Nonetheless, the government gave a promise rather than a payment for the

[129] *Oral Arguments-Transcripts*, 6.
[130] *Lone Wolf v. Hitchcock*, 565.
[131] *Lone Wolf v. Hitchcock*, 554.
[132] *An Act to Ratify an Agreement with Certain Bands of the Sioux Nation of Indians and also with the Northern Arapaho and Cheyenne Indians*, U.S. Statutes at Large (1877), 256. https://babel.hathitrust.org/cgi/pt?id=chi.68289909&view=1up&seq=51&skin=2021&q1=%22George%20W.%20Manypenny%22.

Black Hills. According to the Act of 1974, the government was prohibited from offsetting the value of the Black Hills because they gave food rations or provisions to the Lakota people.[133] If the government could not deduct expenditures for food rations or provisions for the payment of any claims, then perhaps they could use the expenditures as a sign of good faith on behalf of Congress regarding the Act of 1877.

Lazarus made a firm rebuttal to Claiborne's good faith claim regarding subsistence rations. Lazarus testified that "there is not, and our brief shows, a bit of credible evidence that the government spent 5 cents for rations on the Sioux."[134] Moreover, regardless of what the government claimed to have spent on subsistence rations, "the Act of 1877 makes no payment" only conditional promises.[135] Justice Blackmun wrote that "the only new obligation assumed by the government in exchange for the Black Hills was its promise to provide the Sioux with subsistence rations, an obligation that was subject to several limiting conditions."[136]

Congressional racial animus came out regarding the Black Hills claim while Claiborne and Lazarus sparred on another issue. The issue was how different this case would have proceeded should Congress have taken the Black Hills from a white man. Lazarus testified that "the government will concede that under the circumstances of the 1877 Act there would be a taking if that property were owned by a white man. All they are saying is it is not a taking because it was owned by an Indian tribe."[137] Claiborne rebutted by saying that "it ill behooves the Sioux Nation who have a least since 1920 been very much the special favorites of the laws to

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[133] *To Authorize the Appropriations for the Indian Claims Commission for the Fiscal Year 1975*, Public Law 93-494, U.S. Statutes at Large (1974): 1500, https://www.govinfo.gov/content/pkg/STATUTE-88/pdf/STATUTE-88-Pg1499.pdf, (accessed on 11/6/21).
[134] *Oral Arguments-Transcripts,* 34.
[135] *Oral Arguments-Transcripts,* 34-35.
[136] *United States v. Sioux Nation of Indians*, 386.
[137] *Oral Arguments-Transcripts,* 24.

put themselves in the shoes of a white claimant who would not be here, having been barred by limitations, res judicata, and estoppel by the admission of counsel."[138] Lazarus stated that the white claimant would not be here because payment would be made instead of a promise of rations.[139] White claimants would have been offered the full value of their land, where the Lakota were given a promise. Governmental contracts may mean very little to the Lakota. First, the Fort Laramie Treaties of 1851 and1868 were supposed to guarantee their land and much more. However, the Government broke those treaties and forced the Lakota to surrender their land through starvation. Secondly, since the *Lone Wolf* verdict, the courts have upheld that Congress can unilaterally terminate federal contracts with Indians.

Justice Byron R. White asked Claiborne questions that exposed the racial divide in how Congress would have treated whites if they owned the Black Hills. "What if a group of white people had owned the Hills and the government had done this to them," asked Justice White, "that would have been a taking?"[140] "I think not," answered Claiborne, "in light of the actual payment that was made."[141] "Well really," questioned Justice White, "the government can take property and say 'We don't need to pay you over the present value of it, we can just pay $100 a year and sooner or later we will get to the value.'?"[142] Claiborne answered that "in the case of a white person in which the obligations are different this might have been a taking. But there would have been no recovery."[143]

[138] *Oral Arguments-Transcripts,* 42.
[139] *Oral Arguments-Transcripts,* 40.
[140] *Oral Arguments-Transcripts,* 44.
[141] *Oral Arguments-Transcripts,* 44-45.
[142] *Oral Arguments-Transcripts,* 45.
[143] *Oral Arguments-Transcripts,* 45.

Chief Justice Burger entered the dialogue with Claiborne regarding the differences between white and Indian land seizure cases. Chief Justice Burger asked if there was "any relationship of sovereign to sovereign between the United States and any group of white people within our boundaries ... and the United States is not and never has been a trustee for any category of white people, have they … comparable to the Indian relationship?"[144] Claiborne replied that "the trustee relationship carries both obligations, but also unusual powers, the power to dispose against the will and without exercising the power of evident [sic] domain."[145] "There is no such power comparable over any white category," argued Chief Justice Burger.[146]

While investigating *Sioux Nation* or any part of the Black Hills claim, it is essential to recognize which power structure of the United States government is acting and the context to which that party belongs within the three branches of government. In this instance, the power that took the Black Hills refers to Congress and their Act of 1877. The "power to dispose against the will" refers to Congress's authority over Indian affairs upheld by the *Lone Wolf* precedent. When Claiborne testified that a white man would have been barred by res judicata and would have been paid a flat amount without interest, he spoke of the Acts of 1974 and 1978 passed by Congress. Claiborne assumed that Congress was acting benevolently on behalf of the Lakota people. In fact, if Congress desired to act as a trustee-to-ward towards the Lakota people, they would have sought direct representation to that subsection of people and what was in their best interest other than forced displacement and continued economic oppression. Nonetheless, Congress had a steady hand in the Black Hills Claim to keep it away from their halls.

[144] *Oral Arguments-Transcripts,* 45-46.
[145] *Oral Arguments-Transcripts,* 46.
[146] *Oral Arguments-Transcripts,* 46.

The Ruling

As usual, the Supreme Court ruled favorably toward Congress regarding the Act of 1978. Though attorneys for both parties in *Sioux Nation* agreed that Congress had the authority to waive res judicata, the Majority Opinion used *Cherokee Nation v. United States* (1926) as the basis of their ruling. Blackmun wrote that "the holding in *Cherokee Nation* that Congress has the power to waive the res judicata effect of a prior judgment entered in the government's favor on a claim against the United States is dispositive of the question considered here."[147] The Supreme Court overruled the motion on the government's objection regarding Congress's overreach of separation of powers. The Majority Opinion ruled that "we conclude that the separation-of-powers question presented in this case has already been answered by *Cherokee Nation*."[148]

Concerning the subsistence rations, the Supreme Court agreed with Lazarus. The Majority Opinion declared that "neither the Manypenny Commission, nor the congressional committees that approved the 1877 Act, nor the individual legislators who spoke on its behalf on the floor of Congress, ever indicated a belief that the government's obligation to provide the Sioux with rations constituted a fair equivalent for the value of the Black Hills and the additional property rights the Indians were forced to surrender."[149] Speaking to the conditions set in Article 5 on the disbursements of rations, Blackmun agreed with the Court of Claims that it was an act of coercion toward the Lakota rather than a financial evaluation of the Black Hills.[150]

[147] *United States v. Sioux Nation of Indians*, 397.
[148] *United States v. Sioux Nation of Indians*, 402.
[149] *United States v. Sioux Nation of Indians*, 418-419.
[150] *United States v. Sioux Nation of Indians*, 418-419.

Furthermore, the Supreme Court declared that the *Lone Wolf* precedent was not applicable in this case. The government's claim of subsistence rations as a change in the form of investment for tribal property was promptly dismissed. Justice Blackmun wrote that "we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property … Rather, the 1877 Act effected a taking of tribal property, which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid."[151] By handing down this verdict, the Supreme Court upheld Congressional plenary power to take the Black Hills but to do so under eminent domain. The Supreme Court may have ruled in favor of the Lakota's counsel, but the Lakota people were still without their treaty-promised land.

Though this case came down to semantics and the question of interest applied to a principal sum of money, its contents prove historically invaluable. Governmental attorneys admitted that Congress treated the Lakota people differently from whites. Supreme Court Justices recognized the settler-colonialism of the government by forcibly displacing the Lakota. The Majority Opinion further stated that Congress dealt dishonorably with the Lakota when they issued the "sell or starve" rider to forcibly displace and remove the Lakota from the Black Hills. Therefore, the Supreme Court ruled in favor of the Lakota Nation on June 30, 1980. The ruling stated that taking the Black Hills by the Act of 1877 violated the Lakota people's Fifth

[151] *United States v. Sioux Nation of Indians*, 423-425.

Amendment rights. The Supreme Court granted an award of $17.1 million-plus interest dating back to the taking.

Though Congress may have appeared to be an ally to the Lakota during the Black Hills claim, it could have provided a more comprehensive means of justice than just that of financial recovery. The Acts of ’78 and ’74 proved that Congress had the ability to work together for the Lakota. Congress could have taken the Black Hills claim into further consideration rather than deferring to the courts to grant financial restitution. An admission of guilt from a few members of Congress is not justice. Likewise, an award of financial reimbursement for the disturbance of an entire way of life is not justice. Nonetheless, *Sioux Nation* reached its final ruling, but the battle to reclaim the Black Hills was far from over.

CHAPTER III: LAKOTA RESISTANCE IN THE WAKE OF *SIOUX NATION*

Much had transpired between the time Congress confiscated Lakota land in 1877 to the *Sioux Nation* verdict of 1980. The Lakota people had fallen on economic oppression due to being segregated from their treaty guaranteed land onto smaller reservations scattered mostly around the state of South Dakota. Though the reservations were under financial distress, the Lakota people were sincere in the government honoring the Fort Laramie Treaty of 1868. When the Black Hills claim began, Lakota leaders were optimistic about a financial award with hopes that the government would return some, if not all of the Black Hills. However, sometime during the mid-1970s a majority of the Lakota people turned away from the prospect of a financial award to hopes of regaining their treaty promised land.

When the *Sioux Nation* verdict was handed down to a financial only award, Lakota resistance was almost immediate. Monetary compensation was never in doubt in *Sioux Nation*. The only battle being waged during the Supreme Court proceedings was whether the government would be forced to pay interest on the initial $17.1 million ICC ruling. Reclamation of any illegally taken land was never put on the table as a path for justice for the Lakota people. Though comprising some of the poorest counties in the nation, most of the Lakota people rejected the monetary award from *Sioux Nation*. The Lakota people wanted their treaty-guaranteed land returned. With this in mind, more court battles ensued to return the Black Hills. Lakota activists took to the Hills with protest encampments to inform the nation that the land was sacred and not for sale. Furthermore, reservation leaders formed a committee to draft legislation and bring it before Congress. This chapter will show that Lakota resistance proved that even though Congress had the plenary authority to restore federally owned lands back to the Lakota people, Congress refused to act.

In the last forty years, respected scholars like Vine Deloria Jr., Nick Estes, and Jeffry Ostler have challenged the narratives of past white historians to illuminate us to Lakota resistance. Newspaper articles aid in spotlighting Lakota voices that were silenced by the judicial process created by Congress. Furthermore, governmental bodies indict themselves through their own congressional and government documents.

Lakota Land, Economics, and Settlement Stance

When the *Sioux Nation* ruling was handed down, the Lakota reservations faced economic distress. The 1979 census showed that counties containing Lakota reservations were some of the poorest counties in the United States. Of the eight reservations in South Dakota during the 1979 census, five reservations were located in seven counties that could be found on the list of one hundred poorest counties in the country. Ranked at number 21, Carson County contained most of the Standing Rock Reservation with a poverty rate of 41.5 percent. Cheyenne River Reservation expanded across Ziebach and Dewey Counties. Dewey County was ranked 59th poorest county with a poverty rate of 35.4, while Ziebach County was ranked 12th with a 43.7 percent poverty rate. Crow Creek Reservation was housed within Buffalo County with a ranking of 18th poorest in the nation with a poverty rate of 42.5 percent. Ranking 13th in the country, Todd County housed the Rosebud Reservation with a poverty rate of 43.5. Pine Ridge Reservation encompassed all of Shannon County and parts of Jackson County. Jackson County ranked as the 56th poorest county in the nation with a poverty rate of 35.6. With a poverty rate of 44.7, Shannon County was ranked as the 8th most impoverished county in the United States.[152]

[152] United States Census Bureau, "The 100 Poorest Counties in the United States: 1979 and 1989," *The 100 Poorest Counties in the United States*, https://www.census.gov/data/tables/time-series/dec/cph-series/cph-l/cph-l-184.html, (accessed on 11/6/21).

After the 1980 ruling of *Sioux Nation*, outside observers believed that the Lakota people would have been happy to receive the financial award of over $105 million. However, most Lakota wanted their homeland returned rather than the money. The *Bangor Daily News* quoted Rosebud reservation delegate John King Jr. saying, "We don't want the money, we want the land."[153] Oglala Lakota attorney Mario Gonzalez was quoted in the *Santa Fe New Mexican* saying that "over 80 percent of the people (Lakota) don't want the money."[154] The *Daily Sentinel* reported that "despite the poverty of the Pine Ridge Reservation, tribal leaders say they would rather have the land they hold sacred than have the award."[155] Despite the financial hardship that was felt on reservations, most of the Lakota people were united in a desire to see the return of their sacred, treaty guaranteed land.

Regardless of Lakota's desire to see the return of their stolen land, there was non-Lakota pressure for the people to take the award. Lawyer Edward Lazarus claimed that if the Lakota took the monetary award, they could invest it, make a considerable return, and become politically powerful.[156] Berl Akers, a jobs manager for the State Department of Labor, stated that there was "little chance of a land transfer."[157] Akers further declared that "the Sioux should take the money. On a reservation virtually without private enterprise, the award might finance new businesses and create jobs."[158] But, the same article within the *Daily Sentinel* appeared to

[153] "Carter Aid Fails to Gather with Sioux on Black Hills Claim," *Bangor Daily News*, August 10, 1979, https://www.newspapers.com/image/664768556/, (accessed on 11/6/21).
[154] "Wounded Knee II Not Forgotten After 10 Years," *Santa Fe New Mexican*, May 8, 1983, https://www.newspapers.com/image/582389841/, (accessed on 11/12/21).
[155] "Court Gives Indians Cash, but Some do Not want it," *Daily Sentinel*, July 19, 1984, https://www.newspapers.com/image/538126911/, (accessed on 11/12/21).
[156] Lazarus, *Black Hills White Justice*, 432-433.
[157] "Court Gives Indians Cash, but Some do Not want it," *Daily Sentinel.*
[158] "Court Gives Indians Cash, but Some do Not want it," *Daily Sentinel.*

contradict the rationale of both Lazarus and Akers. While shedding light on remarks both for and against taking the settlement, the *Daily Sentinel* wrote:

> Businesses do not take root easily on the reservation, and management experience and credit are not easily found. The federal government protects the Sioux by holding the land in trust. This means that banks cannot foreclose on the land for bad debt and, therefore, will not make loans that consider the land as collateral.[159]

Considering that starting a business takes quite a bit of capital, it appears that most sources pushing for Lakota people to take the award were looking at the total figure rather than individual payouts. With an estimated eighty thousand people entitled to the *Sioux Nation* award, the personal payment would be over thirteen hundred dollars per claimant.[160]

Distribution of the *Sioux Nation* award would be another matter entirely. The distribution of claim settlements is controlled by the Distribution of Judgment Funds Act of 1973. The Act of 1973 mandated the Secretary of the Interior to prepare a distribution plan with tribal input within a year that the judgment was entered. The distribution plan required a floor award of up to twenty percent for tribal needs, and up to eighty percent may be allotted for per capita disbursement.

Considering the complex nature of claims disbursements and the harsh reality that the small individual payout would not promote industrial growth on the reservation, there was a greater purpose for not taking the award. Historian Vine Deloria Jr. best summarized the problem with giving monetary awards. "The basic idea behind claims," he wrote, "is that a politically superior entity can injure a person, group, or smaller political entity without

[159] "Court Gives Indians Cash, but Some do Not want it," *Daily Sentinel.*
[160] Deloria Jr., "Reflections on the Black Hills Claim," 36.

punishment but that in so doing it can cancel the effect of that injury by offering a money payment in compensation."[161] Historian David Treuer agreed with Deloria, stating that the Claims Commission monetized damages with a "finish line in sight."[162] Treuer further wrote that "it required a very narrow sense of reparations to think that the loss of land, which was at the heart of the Claims Commission, was only an economic loss and could be adequately addressed by cash payments."[163] Echoing Treuer's statements, Deloria wrote that "if a settlement is made without making any changes in the manner in which federal laws are applied to the Sioux people and administered by the Bureau of Indian Affairs, no possible sum of money will solve their problems."[164]

Though burdened by economic stress, the Lakota people resisted taking the award and would not sell the Black Hills. Soon after the *Sioux Nation* verdict, members of the Lakota leadership filed a lawsuit to stop the distribution of the claim. Historian Nick Estes wrote that "in 1980, the US Supreme Court confirmed the Oceti Sakowin's claim that the Black Hills had indeed been stolen. … As a result, the court awarded a $106 million settlement. The Oceti Sakowin responded nearly unanimously under a popular slogan: 'The Black Hills are not for sale!'"[165] The settlement was delayed and has not been disbursed to this day. Frank Pommersheim, a professor specializing in Indian law, wrote that the "1980 judgment of the Supreme court for $17.1 million-plus interest remains undistributed, gathering dust (plus continuing interest) in the United States Treasury."[166]

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[161] Deloria Jr., "Reflections on the Black Hills Claim," 34.
[162] Treuer, *The Heartbeat of Wounded Knee*, 253.
[163] Treuer, *The Heartbeat of Wounded Knee*, 254.
[164] Deloria Jr., "Reflections on the Black Hills Claim," 37.
[165] Estes, *Our History is the Future*, 242.
[166] Pommersheim, "The Black Hills Case," 21.

In conjunction with their refusal to take the award, Lakota resistance turned again to the courts to garner attention from Congress. In July of 1980, the Oglala Sioux Tribe (OST) filed suit in U.S. District Court. The OST asked for recognition of title to the Lakota for the Black Hills and $11 billion in damages. The OST claimed Fifth Amendment violation and that the government had done so for private use for mining claims rather than public benefit. The U.S. District Court dismissed the case claiming that it lacked jurisdiction and that Congress only provided such through the ICC.[167] Several other lawsuits were filed and appealed as high as the Supreme Court. These lawsuits were quickly dismissed due to lack of jurisdiction. By January 1982, the "end of the line" had been reached regarding any Black Hills claims.[168] Jurisdiction was clearly in the hands of Congress. The *Lead Daily Call* quoted U.S. Attorney Terry Pechota as saying that if the Lakota wanted the land back, "it will have to make its case before Congress because the courts have done nearly all they can do in the case."[169]

Precedents for Returning Indian Lands

Historian Jeffrey Ostler believes that court cases of the early 1980s were a part of a "broader political strategy."[170] If the Lakota could use the court cases to bring public pressure to Congress, perhaps they could get the Black Hills, or even a part of their land returned. The idea had merit. This legal tactic was used to reclaim land by the Taos Pueblos, Alaskan natives, and the Passamaquoddy and Penobscot tribes in Maine.

[167] Ostler, *The Lakotas and the Black Hills*, 177.
[168] "Court Rejects Black Hills Lawsuit," *Sioux City Journal*, January 19, 1982, https://www.newspapers.com/image/337555505/, (accessed on 11/6/21).
[169] "Tribal Members Split on Settlement," *Lead Call Daily*, July 1, 1980, https://www.newspapers.com/image/93976095/, (accessed on 11/6/21).
[170] Ostler, *The Lakotas and the Black Hills*, 178.

On December 15, 1970, Congress gave back approximately 48,000 acres of land to the Pueblo de Taos Indians of New Mexico by signing Public Law 91-550 (P.L. 91-550). Holding in trust for the Taos de Pueblos, P.L. 91-550 gave back lands where the "Indians depend and have depended since time immemorial for water supply, forage for their domestic livestock, wood and timber for their personal use, and as the scene of certain ceremonials."[171] P.L. 91-550 showed the plenary power of Congress over Indian affairs and illustrated that Congress recognized the value of land to people and their culture. However, as explained in the *Honolulu Advertiser*, Congress needed some prodding to return Indian land. The *Honolulu Advertiser* reported that the "Taos Indians have just won a 65-year fight to persuade Congress to give them full possession of the high Blue Lake area that is both a scared ground and a source of water for the Taos pueblo."[172] Congress granted the Taos Pueblo their land, but it took 65 years to accomplish this goal.

One year after Congress used its plenary power over Indian affairs to return the land to the Taos people, they created the Alaska Native Claims Settlement Act (ANCSA). In an unprecedented move by signing the ANCSA into law, Congress recognized over forty-four million acres worth of land in title to Alaskan Indigenous nations. The ANCSA declared that:

> (a) There is an immediate need for fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;
>
> (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum

[171] *To Amend Section 4 of the Act of May 31, 1933*, Public Law 91-550, U.S. Statutes at Large (1970): 1437, https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg1437-2.pdf, (accessed on 11/2/21).
[172] "Indians: Our Early Ecologists," *Honolulu Advertiser*, February 10, 1971, https://www.newspapers.com/image/261599557/, (accessed on 11/6/21).

> participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States and the State of Alaska.[173]

While paying attention to the "immediate need for fair and just settlements," the ANCSA endorsed "maximum participation by Natives" without pursuing a scope that was burdened by the content of race. Also, the ANCSA retained the same tax exemption properties as most reservations and, for the most part, allowed Alaska's Indigenous nations to allot their own communal areas.[174]

During the creation of the ANCSA the Passamaquoddy and Penobscot tribes of Maine also fought to reclaim lands lost over two hundred years ago. Attorney John M.R. Paterson wrote that the origin of the Passamaquoddy land claim is somewhat of a mystery that potentially saw its first suit filed in 1968.[175] Nonetheless, by the early 1970s, the Penobscot and Passamaquoddy tribes filed suit against Maine and the United States. The filed lawsuit brought into question approximately two-thirds of Maine's landmass and about half of its land titles.[176]

In 1974 the United States District Court ruled that the federal government should have protected the Passamaquoddy and Penobscot tribes in a trust relationship. Up to this time, both

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[173] *To Provide for the Settlement of Certain Land Claims of Alaska Natives, and for other Purposes*, Public Law 92-203, U.S. Statutes at Large (1971): 688-716, https://www.govinfo.gov/content/pkg/STATUTE-85/pdf/STATUTE-85-Pg688.pdf, (accessed on 11/6/21).
[174] Public Law 92-203, Land Selections is covered under §12, Taxation is covered under §21
[175] John M.R. Paterson, "The Maine Indian Land Claim Settlement: A Personal Recollection," *Maine History* 46, no. 2, (2012), 201, https://digitalcommons.library.umaine.edu/mainehistoryjournal/vol46/iss2/5, (accessed on 11/22/21).
[176] Paterson, "The Maine Indian Land Claim Settlement," 195-196.

tribes were not federally recognized Indian tribes. The government appealed the 1974 District Court ruling, but it was upheld in 1975 by the Court of Appeals. The Court of Appeals stated that the federal government is responsible for the trust relationship and not the state of Maine.[177]

As the Court of Appeals ruled that Congress abdicated its plenary power to maintain trust relationships with the Passamaquoddy and Penobscot tribes to the state of Maine, a public relations battle ensued. The State argued that "if a settlement was to occur, it was unjust for the federal government to require the state to make a contribution, given that the federal government had provided no assistance or programs at all to the tribes for 200 years. The federal government had repeatedly denied any recognition of or responsibility for the Maine tribes for 200 years, and the entire burden of financial support for the tribes had fallen on the state of Maine."[178] Tribal officials also put out a message stating that it would be "unjust, dishonorable, and unconstitutional for Congress to unilaterally extinguish the claims without fair compensation"[179]

After negotiations between the tribes, State, and governmental officials, the Maine Indian Claims Settlement Act was signed by the Maine state legislature. The Act was then introduced to the United States Congress, where it was passed and signed by President Jimmy Carter. The Maine Claims Settlement Act included the following:

> (1) the federal government would appropriate $81.5 million for the settlement, (2) of that amount, $54.5 million could be used to buy up to 300,000 acres of land for the benefit of the tribes, (3) the balance of $27 million would be held in trust by the Department of the Interior for the use and benefit of the tribes, (4) the lands acquired

[177] "Brennan's Position Paper on Indian Claims," *Bangor Daily News*, February 19, 1977, https://www.newspapers.com/image/664427725/?terms=Passamaquoddy&match=1, (accessed on 11/22/21).
[178] Paterson, "The Maine Indian Land Claim Settlement," 210.
[179] Paterson, "The Maine Indian Land Claim Settlement," 210.

by the tribes would be protected against voluntary or involuntary alienation, (5) the selling landowners would have their sales treated as if they were forced sales (i.e., accomplished through eminent domain), thereby avoiding capital gains taxes, (6) the federal enacting legislation would finally extinguish all Indian land claims in Maine, (7) the federal enacting legislation would ratify any jurisdictional arrangement reached between the state of Maine and the Penobscot and Passamaquoddy tribes and permit the tribes and state to amend that jurisdictional arrangement by mutual agreement in the future and without the need to return to Congress for approval, and (8) the Maine tribes would be officially recognized by the federal government and afforded all the same federal economic benefits as other federally-recognized tribes.[180]

The Act also included a good faith section that projects an air of paternalism. Section 2, part 7 declares that "This Act represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation, and Houlton band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine."[181]

The Encampment Movement

In the cases of the Passamaquoddy and Penobscot tribes, the Native Alaskans, and the Taos Pueblo, Congress used its plenary power to grant financial and land restitution to Indian

[180] Paterson, "The Maine Indian Land Claim Settlement," 217

[181] *To Provide for the Settlement of Land Claims of Indians, Indian Nations and Tribes and Bands of Indians in the State of Maine, Including the Passamaquoddy Tribe, and Penobscot Nation, and Houlton band of Maliseet Indians, and for other Purposes*, Public Law 96-420, U.S. Statutes at Large (1980): 1785-1786, https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg1785.pdf, (accessed on 11/10/21).

nations. OST attorney Mario Gonzalez may have wanted congressional attention by continuing the Black Hills claim within the court system. But, while the OST worked to keep the Black Hills claim alive, Gonzalez had an idea of proving good land stewardship to Congress with an encampment strategy.[182] This idea made it to Russell Means, an American Indian Movement (AIM) activist, and Stanley Looking Elk, president of the OST. Russell Means was on parole at the time, so he contacted his brother Bill Means regarding the concept. The result was the founding of Yellow Thunder Camp by Bill Means and Wind Cave Camp by Stanley Looking Elk in 1981.

Located about twelve miles south of Rapid City, the Dakota branch of AIM founded Yellow Thunder Camp in April 1981. From its inception, Yellow Thunder Camp made it clear that its members stood against any further litigation on behalf of the Black Hills by the OST. The *Argus-Leader* reported that leaders from the camp issued a statement "calling for a halt to litigation by tribal governments over the Black Hills claim."[183] Along with resistance to the continuation of litigation, Yellow Thunder Camp leaders petitioned the government to build permanent dwellings on approximately 800 acres of national forest land surrounding Lake Victoria in the Black Hills.[184] Yellow Thunder Camp was intended to be a permanent resistance by establishing a settlement in the Black Hills. "I'm home, and I intend to live out my life here,"

[182] James Giago Davies, "Violence, Alcohol, and Jealousy," *Indian Country Today*, February 12, 2021, https://indiancountrytoday.com/opinion/violence-alcohol-and-jealousy, (accessed on 11/22/21).
[183] "Russell Means to Join Hills Occupation," *Argus-Leader*, April 14, 1981, https://www.newspapers.com/image/239347427/, (accessed on 11/11/21).
[184] "AIM Applies for Permit to Build on Forest Land," *Rapid City Journal*, April 21, 1981, https://www.newspapers.com/image/351925959/, (accessed on 11/10/21).

said Russell Means to the *Argus-Leader*.[185] Camp resident Two Bulls also was quoted as saying that he had waited for this camp all his life and that he "will probably die here."[186]

Unlike Yellow Thunder Camp, Wind Cave Camp was established in June 1981 as a temporary form of resistance by Oglala president Stanley Looking Elk.[187] Looking Elk declared that the camp was a result of being fed up "with a federal court system which had refused to hear the tribe's claim to the land after granting the Sioux $105 million in compensation for breaking the Fort Laramie Treaty of 1868 and confiscating the Black Hills."[188] "The basic thing we're trying to establish here," Looking Elk said, "is a symbol of protest that the Black Hills are not for sale and never will be."[189] Though Wind Cave Camp was not a protest of OST litigation against the United States, it shared the common goal of protesting the federal government's illegal taking of the Black Hills.

By September 1981, the government ordered Yellow Thunder and Wind Cave occupants to vacate the premises. Occupants at Yellow Thunder refused to leave, while occupants at Wind Cave exited the area but left behind quite a bit of trash. The government took the approach of filing lawsuits rather than using force to remove occupants at either camp. Wind Cave occupants left their camp in late August of 1981 while the number of Yellow Thunder residents dwindled in number but lingered for several more years.

After the departure of both sets of camps, trash left behind became a source of controversy that hampered the legal battles pursued by other Lakota. In September of 1981, the

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[185] "AIM Camp has Urban Flavor," *Argus-Leader*, July 13, 1981, https://www.newspapers.com/image/239550923, (Accessed on 11/22/21).
[186] *Argus-Leader*, "AIM Camp has Urban Flavor."
[187] "AIM Camp has Urban Flavor," *Argus-Leader.*
[188] "Quiet Indian Protest Continues at Two Indian Camp Sites," *Rapid City Journal*, July 3, 1981, https://www.newspapers.com/image/350413607, (accessed on 11/11/21).
[189] "AIM Camp has Urban Flavor," *Argus-Leader*.

government sent a bill for $4,202 to the OST to recoup expenses for cleaning up the Wind Cave Camp after the Lakota occupants left.[190] According to the *Rapid City Journal*, "four truckloads of garbage was hauled away."[191] During this time, Gonzalez had filed suit against the government for $11 billion in damages and the return of the Black Hills. Concern was raised that should the courts hear this case, "the government would try to show that the Indians insincere in their religious beliefs because of the trash they left behind."[192] Lakota's concerns were well placed. Wind Cave Park Superintendent Lester McClanahan reported to the *Lead Daily Call* that "garbage strewn all over."[193] McClanahan further stereotyped the entire culture and associated the trash at Wind Cave with how all Lakota treat their land. The *Lead Daily Call* reported that McClanahan said, "The condition of the site lets the public know just how the Indians regard the land, which they say they would not leave until the Black Hills was returned to the Sioux."[194] This type of stereotyping was typical in the media.

According to Edward Lazarus, the Wind Cave Occupation failed miserably due to the trash left behind and the poor media coverage that it caused.[195] Regardless, this had little effect on the OST trial taking place. The Court of Appeals dismissed the case for $11 billion and title to the Black Hills on the grounds of res judicata. The court ruled that the OST case was already adjudicated and ruled upon, with *Sioux Nation* concluding the matter. In 1982 Gonzalez and the OST filed suit against the Homestake Mining Company for title to its mining company and $6

[190] "Interest Piling Up on Wind Cave Cleanup Bill," *Rapid City Journal*, October 8, 1981, https://www.newspapers.com/image/350388876/, (accessed on 11/23/21).
[191] "Interest Piling Up on Wind Cave Cleanup Bill," *Rapid City Journal.*
[192] "Gonzales Says Tribe Should Pay for Wind Cave Cleanup," *Rapid City Journal*, January 7, 1982, https://www.newspapers.com/image/350396972/, (accessed on 11/23/21).
[193] "Sioux Indians Move Encampment from Wind Cave to Sheridan Lake," *Lead Daily Call*, August 28, 1981, https://www.newspapers.com/image/93954248/, (accessed on11/23/21).
[194] "Sioux Indians Move Encampment from Wind Cave to Sheridan Lake," Lead Daily Call.
[195] Lazarus, *Black Hills White Justice*, 412.

billion in damages and more than $1 billion for the illegal extraction of gold. The courts quickly dismissed this case and all appeals on the same ground as they felt that the matter of title and minerals were dealt in finality with *Sioux Nation*.

The Bradley Bill

After legal measures had been exhausted to reclaim the Black Hills, the Lakota turned their attention to Congress for redress. By mid-1982, Gonzalez and Lakota leaders began discussing a strategy to reclaim all the Black Hills or some federally owned Black Hills land.[196] In September of 1982, representatives from Pine Ridge, Standing Rock, Rosebud, and Crow Creek agreed to create the Black Hills Steering Committee (BHSC).[197] The BHSC would contain one member from each Lakota reservation responsible for drafting and promoting a bill to present to Congress that would lead to the return of the Black Hills. Lakota Reporter Nawica Kjici, also known as Tim Giago, reported that the "Black Hills Steering Committee would seek the return of federal lands in lieu of the monetary settlement awarded by the U.S. Supreme Court in 1980."[198] Kjici further wrote that "all the federally recognized tribes of the Great Sioux Nation have voted not to accept the money. They stand on the premise that the 'Black Hills are not for sale.'"[199] "Right now we're setting up a steering committee for the overall lobbying effort," Gonzalez told the *Lincoln Journal Star*.[200]

On January 20, 1983, the BHSC held its first public meeting. The BHSC acknowledged the refusal of Lakota tribes to accept a financial award from *Sioux Nation* for the Black Hills

[196] Lazarus, *Black Hills White Justice*, 414.
[197] Lazarus, *Black Hills White Justice*, 414.
[198] "Notes from Indian Country," *Rapid City Journal*, February 8, 1985, https://www.newspapers.com/image/351089890/, (accessed on 11/23/21).
[199] "Notes from Indian Country," Rapid City Journal.
[200] "Sioux Discuss Black Hills," *Lincoln Journal Star*, February 11, 1983, https://www.newspapers.com/image/312234807/, (accessed on 11/23/21).

through congressional abrogation of the Fort Laramie Treaty of 1868 by the Act of 1877. The BHSC also informed the public that each tribe would draft its own version of a bill. After the BHSC compiled all tribal drafts of the bill, the best aspects were written into one piece of legislation and presented to Congress.[201]

Between January and September of 1983, much had changed within the BHSC. First, Gerald Clifford was named as legislative head of the BHSC. Native to the Pine Ridge Reservation, Clifford would become the driving force and mouthpiece of the BHSC. Second, the BHSC changed its stance on a return of the entire Black Hills. Total reclamation of the Black Hills would mean a transfer of title to the Lakota of over 7 million acres. When the BHSC first started, they announced a push to draft a bill to return all the Black Hills. However, by September 1983, the BHSC had modified its position. The BHSC's new position was to seek title to federally owned land that was taken from the Fort Laramie Treaty of 1868. The *Alliance-Times Herald* reported that eleven tribes voted to "launch a lobbying campaign to ask Congress to give them nearly 2 million acres of federal land in western South Dakota."[202] Only a little over one million acres that the BHSC wanted returned lay within the Black Hills. The *Bismarck Tribune* reported that "the Sioux won't seek ownership of the entire 7.3 million acre area, which includes Rapid City and is the home to thousands of white residents."[203] Clifford claimed that the modified stance was because "tribes don't want to evict people from their land and realize that Congress wouldn't take such action."[204] Kjici reported that the BHSC was quick to point

[201] "Sioux Discuss Black Hills," *Lincoln Journal Star*.
[202] "112 Sioux Tribes Vote to Ask for 2 Million Acres in SD," *Alliance-Times Herald*, https://www.newspapers.com/image/669788457/, (accessed on 11/23/21).
[203] "Legislation Urged to Get Land Back," *Bismarck Tribune*, September 28, 1983, https://www.newspapers.com/image/346307679/, (accessed on 11/23/21).
[204] "Legislation Urged to Get Land Back," *Alliance-Times Herald.*

out that no private landowners in the Black Hills need to worry and that all that the Lakota were looking for was the return of some federal land.[205]

By 1985 the BHSC had finally completed the revisions on their bill and looked for a congressional sponsor. The BHSC approached New Jersey Senator William (Bill) Warren Bradley to introduce the bill to Congress. Bradley agreed to sponsor the bill. The Senator was a former professional basketball player for the New York Knicks. *The Atlanta Constitution* reported that "Bradley was asked to introduce the bill because of the friendships with Sioux Indians while serving as a basketball tutor at the Pine Ridge Reservation in South Dakota in the early 1970s."[206]

Legislation drawn up by the BHSC became known as the Bradley Bill. In the "Findings" section of the Bradley Bill the BHSC firmly made its case. The bill declared that "the Black Hills are the sacred center of aboriginal territory of the Sioux Nation and as such hold deep religious for the Sioux Nation" and that such lands were affirmed by the Fort Laramie Treaties of 1851 and 1868.[207] Declaring that the "Sioux Nation" views the Black Hills as inalienable, the bill states that the land was never voluntarily surrendered, and all tribes had resolved not to accept money in exchange for land.[208] The BHSC placed the lack of justice at the feet of Congress when writing the bill. The bill applauded the Supreme Court for ruling that the taking of Lakota land was unconstitutional. But, "the constitutionality of the Black Hills taking has not

[205] "Notes from Indian Country," *Rapid City Journal.*
[206] "Battle for Black Hills Comes to Congress," *Atlanta Constitution*, October 19, 1986, https://www.newspapers.com/image/399721467/, (accessed on 11/23/21.
[207] United States Senate, Sioux Nation Black Hills Act: Hearing Before the Select Committee on Indian Affairs, Ninety-Ninth Congress, Second Session, July 16, 1986, 3, https://heinonline.org/HOL/Page?public=true&handle=hein.cbhear/fdsysabqe0001&div=2&start_page=i&collection=congrec&set_as_cursor=0&men_tab=srchresults#, (accessed on 10/14/21), hereafter cited *Black Hills Act Hearing*.
[208] *Black Hills Act Hearing, 3.*

been fully adjudicated because Congress has not provided a court with the jurisdiction to provide for the return of land as a remedy for an 'unconstitutional taking.'"[209]

The Bradley Bill presented a comprehensive list that involved returning approximately 1.3 million acres of federal land to the Lakota tribes. The bill would create a new Lakota governing agency to oversee land reclamation called the Sioux National Council.[210] Land reacquisition would not include private land but would grant the Sioux National Council the right of first refusal.[211] According to the bill, post offices, military facilities, courthouses, warehouses, and cemeteries were excluded from land reclamations. However, national parks, national forests, and national monuments (with the exception of Mount Rushmore) may be included in land reclamation.[212] According to the bill, all water rights on any land reclaimed would be under the control of the Sioux National Council.[213] Also, all hunting and fishing control over reclaimed lands would fall under the legislature of the Sioux National Council.[214]

In all, the Bradley Bill contained seventeen sections. One of the most telling sections came at the end of the bill and struck at the heart of the Act of 1877. Section 19 stated:

> All treaties formerly entered into between the United States and the Sioux Nation, to the extent not inconsistent with the Act, are continued in full force and effect, and any other claims which the Sioux Nation or its bands may have against the United States are neither extinguished nor prejudiced. All rights and exemptions, both political or territorial, which

[209] *Black Hills Act Hearing*, 4.
[210] *Black Hills Act Hearing*, "SEC. 13. THE SIOUX NATIONAL COUNCIL," 21-22.
[211] *Black Hills Act Hearing*, "SEC. 8. STATUS OF PRIVATE LANDS," 14.
[212] *Black Hills Act Hearing*, "SEC. 10. COMPENSATION," 15-17.
[213] *Black Hills Act Hearing*, "SEC. 6. WATER RIGHTS," 11-13.
[214] *Black Hills Act Hearing*, "SEC. 17. HUNTING AND FISHING," 25.

are not expressly delegated to the federal or state governments by this Act or any prior treaty or agreement is hereby reserved to the Sioux Nation and any bands thereof.[215]

The use of the words "continued in full force and effect" implied that the Fort Laramie Treaty of 1868 was not abrogated by the Act of 1877. In the eyes of the Lakota people, the 1868 treaty could not be unilaterally absolved. The very Congress in which this bill was introduced worked on the premise that the treaty was, in fact, no more. Also, *Sioux Nation* ruled that "in 1877 Congress passed an Act (1877 Act) implementing this 'agreement' and thus, in effect, abrogated the Fort Laramie Treaty."[216] If the Lakota succeeded in getting the Bradley Bill passed, they would be back on equal footing as sovereign-to sovereign governments with the United States.

Senator Bradley introduced his bill in July 1985. The bill sat for twelve months before a hearing was called before the Senate Select Committee on Indian Affairs in July 1986. Senator Bradley opened the proceedings with a brief historical overview of how the United States took the Black Hills from the Lakota and that the Supreme Court upheld this taking as illegal with the Act of 1877.[217] Not only did Senator Bradley expound on the legal problems that Congress caused, but he also drove home the moral imperative that the Black Hills were sacred to the Lakota people. "The Black Hills have a deep religious significance for the Sioux Nation," Senator Bradley said, "they call the Black Hills 'the heart of everything that is.'"[218] Keith Jewett of the Cheyenne River Sioux Tribe testified that "generations yet unborn depend on you (Congress) to protect the heart of everything that is."[219] Clifford submitted a prepared statement on behalf of the BHSC, which stated that "the Black Hills are central and indispensable to the

[215] *Black Hills Act Hearing*, 26.
[216] *United States v. Sioux Nation of Indians*, 371.
[217] *Black Hills Act Hearing*, 30-31.
[218] *Black Hills Act Hearing*, 31.
[219] *Black Hills Act Hearing*, 51.

practice of our religion and it is the Heart of Everything That Is."[220] To help Congress understand why the Black Hills are "the heart of everything that is," Charlotte A. Black Elk prepared a series of translated oral histories of Lakota legends surrounding the Black Hills. Black Elk informed Congress that "I hope that you will review them and that they will help you to know why the Black Hills are the most important place on earth to us – and why we will never sell the Heart of Everything That Is."[221]

Regardless of the moral implications of the Bradley Bill, South Dakota's Governor and the congressional legislators were in complete opposition to the bill. Senator Jim Abdnor had hoped that the Lakota would accept the *Sioux Nation* decision and the money as a final solution.[222] Representative Tom Daschle, who replaced Senator Jim Abdnor in 1987, stated that the bill was "completely unrealistic."[223] Representative Daschle further contended that the only way he could support it was "if an overwhelming majority in the Black Hills, support it as well, and I don't think they will."[224] Representative Daschle was most likely speaking of non-Lakota constituents when referring to voters that would not support the Bradley Bill. Governor George S. Mikleson wrote to Senator Bradley saying that "it is the view of the State of South Dakota that the Supreme Court judgment constitutes a fair and just resolution of the problem which fulfills the United States' obligation."[225] Senator Larry Pressler, an ardent supporter of the 1978 Act, believed that the "U.S. Supreme Court had settled the issue in 1980 when it ruled the Sioux

[220] *Black Hills Act Hearing,* 181.
[221] *Black Hills Act Hearing,* 187.
[222] "Bradley Proposes Giving BH Federal Lands to Indians," *Lead Daily Call*, July 17, 1985, https://www.newspapers.com/image/94133438/, (accessed on 11/23/21).
[223] "Bradley Proposes Giving BH Federal Lands to Indians," *Lead Daily Call*
[224] "Bradley Proposes Giving BH Federal Lands to Indians," *Lead Daily Call.*
[225] George S. Mikleson, "Governor's Letter," *Wicazo Sa Review* 4, no. 1, (Spring 1988): 26-27, https://www.jstor.com/stable/1409079, (accessed on 10/8/21).

Tribes had no territorial claims to the Black Hills."[226] Senator Pressler's words speak to the finality of claims rulings while granting Congress the ability to abdicate their trustee-to-ward relationship to the Indian nations of the United States.

While in the subcommittee hearing for the Bradley Bill, Senator Bradley was asked several questions about his feelings regarding the Black Hills claim and the *Sioux Nation* ruling. Testifying that the ICC could only hand out monetary awards, Senator Bradley stated that he did not feel that the settlement was sufficient because "the Supreme Court found that this was an illegal taking and the Congress participated in that illegal taking" by passing the Act of 1877.[227] Furthermore, Senator Pressler was partially correct when he said that the Supreme Court ruled that the Lakota did not have territorial claims on the Black Hills. However, the *Sioux Nation* ruling found that Congress unilaterally took the Black Hills from the Lakota without compensation under the Fifth Amendment. Therefore, the illegal element leaves open the potential right for land reclamation on behalf of the Lakota people.

The Bradley Bill was not a claim, but rather it was a request for Congress to begin repatriating some of the stolen lands back to the Lakota people. While presenting a peace pipe to the subcommittee, Hunkpapa Lakota Aljoe Agard testified that the Bradley Bill "gives us the opportunity to put this sorry history behind us."[228] Phyllis Young from the Standing Rock Reservation testified that "our ancestors allowed other people to come to this land to live in peace and to prosper. We respectfully request that we be accorded the dignity to do likewise."[229] Numerous Lakota men and women testified on the moral imperative of passing the Bradly bill.

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[226] "Indian Leaders Renew Their Support for Bradley Bill," *Rapid City Journal*, February 24, 1987, https://www.newspapers.com/image/351936532/, (accessed on 11/23/21).
[227] *Black Hills Act Hearing*, 36.
[228] *Black Hills Act Hearing*, 45.
[229] *Black Hills Act Hearing*, 48.

Regardless of the testimonies, the Bradley Bill was shelved without a subcommittee vote in 1986. In 1987 the bill was presented again but was met with more vigorous opposition. Both South Dakota Senators still strongly opposed the bill. Governor George S. Mikleson also continued to oppose the bill. Mikelson wrote to Senator Bradley with multiple issues regarding the bill. First, Governor Mikleson rejected the bill's claim that the Lakota occupied the hills from ancient times. He wrote that it was "well documented" that the Lakota did not cross the Missouri River until sometime between 1776 and 1800 and that they never actually occupied the Black Hills proper.[230] Governor Mikleson further explained that returning land to Lakota because it was sacred was against the First Amendment as "one of the express aims of this bill is to in the establishment, maintenance, and preservation of traditional Sioux religion."[231] Harold Shunk, a Lakota of Yankton descent, was quoted as believing the Bradley Bill was "crazy" because the Lakota "originally wrested the Black Hills from the Arikaras and Crows."[232] The concept that the Black Hills was a holy place for the Lakota was "a fairly recent invention created by tourists by Black Hills publicists after the first World War," wrote historian Watson Parker.[233] However, Black Elk hits on a truth regarding indigenous history. Black Elk reported that the "problem with the academic community is that they go back only to what the first white man wrote."[234] Furthermore, Ostler wrote that "the government's confiscation of the Hills in 1876-77 was established by the Supreme Court to have violated the 1868 treaty regardless of the religious significance the Lakotas ascribed to the land at that time."[235]

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[230] Mikleson, "Governor's Letter," 26.
[231] Mikleson, "Governor's Letter," 26-27.
[232] "Battle for Black Hills Comes to Congress," *Atlanta Constitution*, October 19, 1986, https://www.newspapers.com/image/399721491, (accessed on 11/23/21).
[233] "Battle for Black Hills Comes to Congress," *Atlanta Constitution.*
[234] "Battle for Black Hills Comes to Congress," *Atlanta Constitution.*
[235] Ostler, *The Lakotas and the Black Hills*, 184-185.

In the fall of 1987, opposition to the Bradley Bill also rose from segments of the Lakota nation. The Grey Eagle Society (GES) had always felt that the bill asked for too little land back. Therefore, when Phil Stevens, a self-made millionaire from California, arrived in the Black Hills with promises to help the Lakotas get all they deserved, they jumped at the opportunity.[236] Stevens became a member of the GES and received the votes necessary from the eight tribes to overthrow Clifford for control of the BHSC.[237] However, Stevens's reign was short-lived. After being put as a single point of contact for the Bradley Bill in September 1987, the very next month, Stevens proposed an amendment to raise the award from *Sioux Nation* to $2.7 billion and increase the land reclamation to 1.7 acres of land.[238] Senator Daschle reacted by stating that the "Stevens' plan was an outrage. It added insult to injury and further damaged the credibility of those seeking this legislation."[239] Senator Daniel Inouye, Chair of the Senate Select Committee on Indian Affairs, announced three days later that he would not move forward with the Bradley Bill without Tom Daschle's support. "Chairman Inouye … has now publicly said that he will not allow the bill to move forward without my approval, even though he knows that I am vehemently against it," Senator Daschle said.[240] Senator Daschle added that the "Black Hills bill cannot pass."[241] After lingering for almost a year, the Bradley Bill died in the subcommittee of the Senate.

[236] Ostler, *The Lakotas and the Black Hills*, 185.
[237] "Sioux Tribe Backs Plan to Reclaim Black Hills," *Argus-Leader*, September 19, 1987, https://www.newspapers.com/image/240045454/, (accessed on 11/23/21).
[238] "Oglalas Want Increase in Bradley Bill Award," *Rapid City Journal*, October 21, 1987, https://www.newspapers.com/image/351973098/, (11/23/21).
[239] "Extra Request Blamed for Bill's Setback," *Argus-Leader*, October 27, 1987, https://www.newspapers.com/image/239997650/, (accessed on 12/2/21).
[240] "Black Hills Bill Doomed, Daschle Announces," *Argus-Leader*, October 24, 1987, https://www.newspapers.com/image/239997421/, (accessed on 11/23/21).
[241] "Black Hills Bill Doomed, Daschle Announces," *Argus-Leader.*

The Resistance Continues

Despite this loss, resistance continued. In 1990, Representative Matthew Martinez of California presented another Black Hills bill. This bill was very similar to the Bradley Bill and suffered the same arguments against it. An editorial from the Argus-Leader was against Martinez's bill stating that "for better or worse, the Black Hills issue has been resolved by the U.S. Supreme Court."[242] Congress answered Martinez's bill by sending it straight to a committee where it died without a hearing. At the same time the bill failed, the Lakota suffered another setback. Senators Daschle and Pressler worked out a deal with the Homestake mine to transfer approximately twelve thousand acres of Black Hills land into federal hands rather than Lakota titleship.[243]

Martinez's bill was the last bill entered into Congress within the twentieth century. After *Sioux Nation*, the Lakota people rose in resistance to Congressional justice being deemed as a financial award. Congress had set up a judicial system within the Court of Claims and ICC that only allowed American Indian nations to seek reparations with monetary settlements. The paradox of the system Congress created was that they pointed to the judicial system as the final solution for Indian problems that Congress created over a century ago. Regardless, the judicial system continually pointed to Congress as having plenary power over Indian affairs and that Congress can right their own past wrongs. The ICC and the Court of Claims were creations of Congress. Though using these courts and any upheld rulings by the Supreme Court may be

[242] "Returning Hills is not the Answer," *Argus-Leader*, September 25, 1990, https://www.newspapers.com/image/240159061/, (accessed on 12/2/21).
[243] "Homestake could Trade Land for Colo. Tract," *Argus-Leader*, April 21, 1990, https://www.newspapers.com/image/239978951, (accessed on 12/2/21).

brilliant political stratagems on the part of Congress, it does not abdicate Congress their role as ward-to-trustee towards American Indians.

The Bradley Bill may not have been perfect. Nonetheless, nothing hindered Congress from engaging the Lakota tribes to seek a monetary award and a land reclamation settlement that would benefit all parties of South Dakota. Unfortunately, the fact remains that in the twentieth century, Congress did not engage Lakota tribes to seek a resolution that included land reclamation. Instead, congressional delegates continued to point towards *Sioux Nation* as an act of finality.

After *Sioux Nation*, the Lakota people refused to accept the financial award and began a legal and political strategy to engage Congress. With non-violent efforts, the Lakota pursued court battles, encampment strategies, and congressional legislation in attempts to reclaim even parts of the Black Hills. All efforts were met with the response that *Sioux Nation* had settled the matter with a financial award. Congress conveniently overlooked the Court's denunciation of congressional past action in the Act of 1877. Furthermore, Congress ignored the courts' many rulings of congressional plenary power over Indian affairs. These rulings dictated that Congress has the authority to make right the wrongs of the past rather than point to their own judicial creations, such as the ICC and the Court of Claims, as a political way not to remedy the past. Unfortunately, however, Congress failed to resolve the past with the Lakota people. For the rest of the twentieth century, Congress was quiet on returning land to the Lakota people.

CONCLUSION

By the start of the twenty first century, Tom Daschle (D-SD) was the majority leader of the United States Senate. His ardent opposition to returning native land dashed any hopes the Lakota had about reclaiming their Black Hills.[244] Regardless of this deadlock in Congress, Indians, with international support, continued to fight for the return of the Black Hills. The Black Hills claim had lacked of Lakota voices. The silencing of Lakota voices was mainly because only lawyers and judges were allowed to comment during trial once a case entered the legal system. The only time Lakota voices could be heard was during the initial ICC trial if they were called as potential witnesses, which was a rarity. The judicial system for claims cases mostly shut out Lakota voices and placed dependence on attorneys that spoke for the tribes. However, Indian activists refused to remain quiet. Lakotas, along with an international coalition, brought pressure and awareness to the ongoing colonialism by nation-states in the modern age. This resistance support Lakota efforts to work on regaining parts of their treaty guaranteed homeland in the wake of *Sioux Nation*.

During the Black Hills claim, AIM was a vocal entity for resistance. One of the lesser-known contributions of AIM was the creation of the International Indian Treaty Council (IITC) in 1974. In the wake of the Wounded Knee Siege, approximately one thousand American Indians met to contemplate how to attain their treaty rights from the United States government. The *Los Angeles Times* reported that "a treaty conference sponsored by the American Indian Movement ended in Mobridge, S.D., with the establishment of an international body that is to

[244] "Sen. Bill Bradley's Efforts to Return the Black Hills to the Sioux Show the Issue's Divisiveness," *Santa Fe New Mexican*, August, 19, 2001, https://www.newspapers.com/image/583498020/, (accessed on 2/28/22).

apply for United Nations membership on behalf of all Indians."[245] At the organization of the IITC, the *Declaration of Continuing Independence* was drafted and accepted. The *Declaration* condemned the U.S. government of gross violations of Indian treaties. It rejected "all executive orders, legislative acts, and judicial decisions of the United States related to Native Nations since 1871 when the United States unilaterally suspended treaty-making relations with the Native Nations."[246] For three years, the IITC lobbied the United Nations as a sovereign entity to be recognized on behalf of the Oglala nation of American Indians and failed. Finally, in 1977, seeking a different path to be heard within the international community, the IITC sought and gained a category II non-governmental (NGO) with consultative status with the United Nations Economic and Social Council. The IITC was the first indigenous NGO to achieve such status and would aid in creating the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

Before the creation of the IITC, the United Nations (U.N.) drafted and adopted the *Universal Declaration of Human Rights* (UDHR) in 1948. The UDHR is the modus operandi by which all international human rights are held. Though necessary and positive in nature, the UDHR lists all human rights in a singular fashion without regard to a collective people. UDHR rights are individual rights, not collective rights. The UDHR was intended to be a positive force for ensuring human rights but can be used to continue colonial purposes within nation-states. In this regard, former human rights officer for the General Secretariat of the United Nations, Augusto Willemsen Diaz, wrote:

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[245] "New Indian Group to Seek U.N. Membership," *Los Angeles Times*, June 17, 1974, https://www.newspapers.com/image/382026429/, (accessed on 4/29/21).
[246] International Indian Treaty Council, "For the Continuing Independence of Native Nations," in *Say We are Nations: Documents of Politics and Protest in Indigenous America Since 1887*, ed. Daniel M. Cobb (Chapel Hill: University of North Carolina Press, 2015), 170.

> The need for specific indigenous people's rights became particularly apparent to me when I learnt that ILO two texts, one a convention and the other a recommendation on indigenous peoples and others, referred to indigenous peoples as "populations". The terms and content of these instruments were not favourable to indigenous peoples as they referred to "integration" and "protection", evoking different and, in practice, contradictory ideas to those being advocated by indigenous peoples, at least those in my country and others that I knew of. I knew that in daily life (at least where I came from), integration was more akin to ideas and practices of assimilation and disappearance. I thought that protection would, in all probability, imply a continuation of the colonialist or neocolonialist tutelage of the nation states in which these peoples lived, as they remained settled on their ancestral territories, now within the jurisdiction of those independent states. These ideas were contradictory to what we knew full well indigenous peoples were fundamentally seeking.[247]

Though the UDHR was meant to help with human rights to end colonialism worldwide, it did little to end colonialism within existing countries.

Diaz stated that indigenous representatives were lacking at the U.N. Many of the indigenous peoples he attempted to recruit to help were too busy struggling with their local governments to take an interest in international affairs.[248] Indigenous communities fighting their own government was taxing enough, but fighting a coalition of oppressive governments was beyond their interests.

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[247] Augusto Willemsen Diaz, "How Indigenous People's Rights Reached the UN," in *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, ed. Clair Charters and Rodolfo Stavenhagen (Copenhagen: Transaction Publishers, 2009), 19.
[248] Diaz, "How Indigenous People's Rights Reached the UN," 19.

Knowing that there was little to be done without U.N. recognition of Indigenous entities, Diaz approached the U.N. Subcommittee on Decolonization and against Racism, Racial Discrimination, and Apartheid for possible solutions. In 1974 Diaz began working with the subcommittee, representatives of the World Council of Churches, and the IITC to gain non-governmental organizational (NGO) status with the U.N. so that Indigenous organizations could have formal recognition and speaking rights.[249] By 1977 the U.N. approved NGO status to Indigenous organizations.

That same year the International Conference of NGOs on Discrimination against the Indigenous Populations in Americas was held in the Palace of Nations, in Geneva, Switzerland, from September 20-23. *The Gazette* wrote that "for the first time in history, an international audience will have the opportunity to hear Indian leaders from almost every country in the Americas present their own struggles, and aspirations, with documentation concerning the genocide and colonial policies of federal governments of the Western hemisphere."[250]

Indigenous nations from the U.S. sent thirteen delegates plus staff to the Conference in Geneva. The IITC held plenary hearings on various topics ranging from multinational corporations taking indigenous lands to genocide through female Indian sterilization. A resolution was passed by the end of the conference that contained many action items. One action item was to set aside October 12th as an International Day of Solidarity with the Indigenous Peoples of America. Furthermore, the resolution recommended "that the conference findings be

[249] Diaz, "How Indigenous People's Rights Reached the UN," 21.
[250] "Indian Plight Topic of Conference," *The Gazette*, September 21, 1977, https://www.newspapers.com/image/550970726/, (accessed on 4/29/21).

presented to the U.N. Secretary-General and to submit the conclusions and recommendations of the Conference to the appropriate organs of the U.N."[251]

The IITC firmly controlled the 1977 conference, and in order to integrate more indigenous populations from other continents, another forum was called. In September 1981, the Conference of NGOs on Indigenous Peoples and Land was held. Before 1981, the IITC held firm to the belief that there was "one color of mankind in the world who are not represented in the United Nations … the indigenous Redman of the Western hemisphere."[252] This belief was not accurate, and the 1981 conference opened the eyes of the IITC to the plight of indigenous peoples around the world. The 1981 conference also spurred more UN-sponsored studies of Indigenous issues, which was taken up by the Economic and Social Council (ECOSOC) of the United Nations.

ECOSOC probably took up the issue of Indigenous problems due to work authorized to be done in the early 1970s. On May 21, 1971, ECOSOC approved resolution 589, allowing a sub-commission to "conduct a general and complete study into the problem of discrimination against indigenous populations and suggest the necessary national and international measures by which to eliminate this."[253] The report was headed by José Ricardo Martínez Cobo and became known as the Cobo Indigenous Populations Report. Cobo left the report preparations to Diaz, who presented it in chapters to the sub-commission meetings in 1982, 1983, and 1984.[254]

[251] "Cheyenne's Seek U.N. Help," The Billings Gazette, October 12, 1977, https://www.newspapers.com/image/412096408/, (accessed on 4/30/21).
[252] "Sanity in Wisconsin," Rutland Daily Herald, February 7, 1975, https://www.newspapers.com/image/611055951/, (accessed on 4/30/21).
[253] Diaz, "How Indigenous People's Rights Reached the UN," 23.
[254] Diaz, "How Indigenous People's Rights Reached the UN," 23.

Finally, in 1985 the sub-commission approved the entirety of the report and recommended it to the Commission on Human Rights, who accepted it with Decision 1985/137 on May 30, 1985.

The first chapter of the Cobo Indigenous Populations Report opened the eyes of ECOSOC to the need to address Indigenous issues. In response, on May 7, 1982, ECOSOC passed resolution 1982/34, which created the Working Group on Indigenous Populations (WGIP). According to the U.N., the WGIP had "two formal tasks: to review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples, and to develop international standards concerning the rights of indigenous peoples, taking account of both the similarities and differences in their situations and aspirations throughout the world."[255] Accordingly, the WGIP met up to five days before the subcommittee's slated meeting to discuss and organize their report.

In 1985 the WGIP formally decided to produce a document that would detail the rights of indigenous peoples. In 1993, a year set aside by the U.N. to be the Year of Indigenous Peoples; the WGIP finished the *Declaration on the Rights of Indigenous Peoples* (UNDRIP). However, it was not until 1995 that the Commission on Human Rights passed Resolution 1995/32 that established an open-ended inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (WGDD).[256]

For the next decade, the WGDD met to work out the language of the UNDRIP with Indigenous representatives and member nations. Some nations strongly opposed the term "self-determination" within the UNDRIP, and wanted it changed to "self-management." In February

[255] United Nations, "Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples," OHCR.org, https://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf, (accessed on 4/29/21).
[256] Andrés Del Castillo, "Indigenous Peoples' Contribution to Multilateral Negotiations on Their Rights to Participation, Consultation, and Free, Prior and Informed Consent," United Nations, OHCHR, 10, https://www.ohchr.org/Documents/Issues/IntOrder/GlobalGovernanceSpaces/DOCIP.pdf, (accessed on 4/30/21).

of 2003, the IITC submitted a written statement to the Commission on Human Rights stating, "Our rights for self-determination is not up for negotiation. It must be clear that Indigenous Peoples must be recognized as peoples with the same fundamental rights as all other peoples."[257] Self-determination was an original statement from UNDRIP, and indigenous representatives were unwilling to waver their initial *Declaration* regarding rights.

Another right in which Indigenous representatives refused to waiver was free and prior informed consent (FPIC). In the same vein as self-determination, FPIC ensured Indigenous involvement and agreement before member-states exerted dominance. A representative from the Dayak-iba group from Malaysia clarified the meaning of FPIC:

> Free prior and informed consent means: 1. All members of the communities, who are affected, consent to the decision. 2. Consent is determined in accordance with customary laws, rights, and practices. 3. Freedom from external manipulation, interference, or coercion. 4. Full disclosure of the intent and scope of the activity. 5. Decisions are made in a language and process understandable to the communities. 6. Indigenous Peoples' customary institutions and representative organizations must be involved at all stages of the consent process. 7. Respect for the right of Indigenous Peoples to say NO.[258]

The FPIC was a significant sticking point for Canada, Australia, New Zealand, and the United States. These countries were accused of illegally taking lands due to treaty violations from their Indigenous peoples. Therefore, any FPIC stipulations in the UNDRIP would cause great consternation to member-states with possible indigenous treaty violation situations.

[257] Del Castillo, "Indigenous Peoples' Contribution to Multilateral Negotiations," 11.
[258] Del Castillo, "Indigenous Peoples' Contribution to Multilateral Negotiations." 12.

After twenty-two years in the making and much deliberation between indigenous representatives and member-states, the UNDRIP was approved on September 13, 2007. The vote was 143 in favor, 11 abstentions, and 4 against (United States, Canada, Australia, and New Zealand). In April of 2009, Australia changed its policy and backed the UNDRIP. New Zealand approved UNDRIP in April of 2010, with Canada and finally the United States following suit later the same year. To this date, the United States Senate has yet to ratify the UNDRIP in the halls of Congress.

In 2008 the WGIP was disbanded and replaced with the Expert Mechanism on the Rights of Indigenous Peoples (EMPIP). Comprising of seven independent experts, the EMPIP provides the Human Rights Council with expertise and advice on the rights of Indigenous peoples. The Human Rights Council selects the EMPIP. The disbanding of the WGIP and the creation of the EMPIP significantly diminished the role of other indigenous NGOs and representatives to voice their concerns.

While Indigenous representatives were working on the UNDRIP, in 2001, the Commission on Human Rights decided to appoint a Special Rapporteur on the rights of indigenous peoples. The mandate was created to:

> Promote good practices, including new laws, government programs, and constructive agreements between indigenous peoples and states, to implement international standards concerning the rights of indigenous peoples; make recommendations and proposals on appropriate measures to prevent and remedy violations of the rights of indigenous

peoples; report on human rights situations of indigenous peoples around the world; address specific cases of alleged violations of indigenous peoples' rights.[259]

The Commission on Human Rights has renewed the mandate for the Special Rapporteur since its inception.

Though established in 2001, the Special Rapporteur on the rights of indigenous peoples was given a further mandate with the passage of the UNDRIP in 2007. This mandate was extended by the acceptance of the UNDRIP by the four dissenting countries by 2010. Evidence of the Special Rapporteur's influence can be seen by media reports in as early as 2008. For example, a dispute was heard by the Supreme Court of Brazil between indigenous peoples and ranchers. Special Rapporteur, James Anaya, former staff attorney for the National Indian Youth Council (NIYC), arrived when a decision was about to be made by the Supreme Court. Newspapers reported that perhaps he came to sway the judgment in favor of the indigenous peoples.[260] Though the U.N. denied attempting to participate in Brazil's Supreme Court decision, politics works in such fashions that behaviors may change when nations are aware that the international community is paying attention.

More evidence of behaviors changing due to the Special Rapporteur's influence may also be found in 2012, when a large plot of sacred indigenous land came up for auction in what was once the Great Sioux Reservation. Special Rapporteur James Anaya came to the United States to report on the affairs of its indigenous peoples. Anaya presented to the President and Senate that an area of land in the Black Hills known as Pe'Sla should be removed from auction and restored

[259] United Nations Human Rights Office of the High Commissioner, "Special Rapporteur on the Rights of Indigenous Peoples," https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx, (accessed on 4/30/21).
[260] "UN Denies Attempt to Influence Brazil," *Pacific Daily News*, August 20, 2008, https://www.newspapers.com/image/610644242/, (accessed on 3/25/21).

to the Lakota people.[261] Just days before the auction was to occur, the owners took the land off the market without explanation. By the end of that year, Lakota tribes were able to purchase Pe'Sla for the cost of nine million dollars. The injury of this purchase was that these tribes consisted of the poorest counties in the United States.[262] The insult of the purchase of Pe'Sla was that it was theirs already by treaty rights from the Fort Laramie Treaty of 1868. This insult was further acknowledged by the *Sioux Nation* verdict when a majority of Justices ruled that the Great Sioux Reservation was illegally taken from the Lakota.[263] Regardless of insult or injury, the Lakota secured Pe'Sla by purchasing the land from the white owners and having the land placed in federal trust for protection.

As a further result of Anaya's trip, a special report titled *The Situation of Indigenous Peoples in the United States of America* was written and published for the international community in August of 2012. Anaya met with tribal leaders, the President, and members of the Senate to discuss the implementation of the UNDRIP.[264] In his report, Anaya congratulated the U.S. on its advancements regarding indigenous peoples' governance but noted severe deficiencies in the restoration of treaty rights and implementation of self-determination policies. After the publication of Anaya's report, the federal government boosted indigenous financial backing for the next fiscal year.

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[261] United Nations, "UN Human Rights Expert Calls on US to Consult with Indigenous People Over Land Sale," news.un.org, https://news.un.org/en/story/2012/08/417992, (accessed on 3/25/21).
[262] Ryan Lengenrich, "Nation's Top Three Poorest Counties in Western South Dakota," *Rapid City Journal*, rapidcityjournal.com, https://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html, (accessed on 3/25/21).
[263] Jessica Shoemaker, "Transforming Property: Reclaiming Indigenous Land Tenures," *California Law Review* 107, no. 5 (October 2019): 1536-1537, https://doi.org/10.15779/Z383R0PT7K.
[264] "U.N. Envoy on Tribal Rights Wraps Up Visit," *Arizona Republic*, May 5, 2012, https://www.newspapers.com/image/121363906, (accessed on 3/25/21).

In November 2016 the buy-back of land continued when in November 2016 when the Rosebud Lakota Reservation partnered with the Northern and Southern Cheyenne and Arapahoe tribes to purchase land near the sacred site of Bear Butte. Twenty-one other bidders were out-bid with the tribes purchasing the land for over $1 million to purchase back their treaty guaranteed land. The land totaled 270 acres. Northern Cheyenne tribes already owned 500 acres of ground on the northwest corner of Bear Butte.[265]

The purchase of lands back like Pe' Sla and parts of Bear Butte along with Anaya's report has raised awareness and a renewed commitment for the return of the Black Hills to the Lakota. When President Donald Trump wanted to hold fireworks at Mount Rushmore in 2020 for the July 4th celebration of Independence Day, he faced strong protests to return the Black Hills. Several protestors were arrested, but only the leader Nick Tilsen was charged. Tilsen is the head of the LandBack movement that is currently committed to working for the return of the Black Hills to the Lakota. Most of the Black Hills is owned by the federal government. Much like the Bradley Bill, LandBack's commitment regarding the reclamation of the Black Hills does not involve the removal of white owners. Tilsen reported that the LandBack movement is not about removing people or perpetuating the injustices inflicted on their people.[266]

Failed by Congress and being silenced in their roles during the Black Hills claim, Lakota leaders have continued their resistance to reclaim the Black Hills to this very day. The Lakota have been forced to rely on unorthodox methods of depending on pressure from the international community and purchasing lands that were previously theirs to see any advancement on land

[265] "3 Native American Tribes Buy Bear Butte Land," Green Bay Press-Gazette, November 26, 2016, https://www.newspapers.com/image/246743297/, (accessed on 2/8/22).
[266] "Native Americans Renew Decades-Long Push to Reclaim Millions of Acres in the Black Hills," PBS.org, November 27, 2020, https://www.pbs.org/newshour/show/native-americans-renew-decades-long-push-to-reclaim-millions-of-acres-in-the-black-hills, (accessed on 2/28/22).

reclamation on what should have been guaranteed by governmental treaties. As of February 2022, the UNDRIP has not been ratified by the United States Senate, while the restitution offered by *Sioux Nation* is at approximately $1.5 billion and accruing interest.[267] Lakota's resistance to the financial only justice provided by the United States Congress through judicial organs continues today.

The twentieth century saw a flurry of court cases and decisions on the Black Hills claim that culminated in the *Sioux Nation* ruling. *Sioux Nation* ruled in favor of the Lakota people with only a financial settlement. *Sioux Nation* serves as an example of Congress's abdication of plenary power over Indian affairs to the judicial system. Congress created the Court of Claims and the ICC with the functions of hearing claims brought forward against the government with the finality of only financial compensation in mind. While empowering the judicial creations to rule only financial restitution, Congress could escape their responsibility of upholding past treaties and neglecting suing tribes the possibility of restoration of land or any other lost assets due to treaty violations. The power to restore land lies at the congressional level, and never has a judicial branch of the government restored land to an Indian tribe. Knowing this, Congress abdicated their responsibilities to Indian nations, specifically the Lakota people, by creating judicial bodies to hear claims cases and dispense financial only rulings as a form of justice.

Chapter I followed a timeline set forth by the Majority Opinion of *Sioux Nation*. In this chapter, the assenting Supreme Court Justices indicted the Executive branch for misconduct in their military advancements that displaced the Lakota people onto smaller reservations and broke the Fort Laramie Treaty of 1868. Furthermore, the timeline gave historical accuracies to the

[267] Brandon Ecoffey, "The Black Hills are NOT FOR SALE," *Lakota Times*, October 12, 2017, https://www.lakotatimes.com/articles/the-black-hills-are-not-for-sale-2/, (accessed on 2/8/22).

illegal abrogation of the Fort Laramie Treaty of 1868 by the single act of Congress that took the Black Hills, the Act of 1877.

Chapter II followed the oral arguments of *Sioux Nation*. Admissions bolstered these oral arguments from both sets of attorneys that Congress was the proper governmental organ to dispense justice in the Black Hills claim. Not only did both attorneys agree that Congress abdicated their authority, but the Supreme Court Justices concurred as well. Though the Supreme Court case was a matter of interest on the principle sum of money in the settlement claim, this chapter proved that even though the Lakota won both interest and principle for the illegal taking of the Black Hills, they lost any entitlements to their treaty guaranteed land.

Chapter III showed Lakota resistance in the wake of the *Sioux Nation* ruling. The Lakota were not given a voice during the proceedings. Therefore, once the verdict was passed down, Lakota leaders worked to acquire back some of the lands that were ruled illegally taken. Congress failed to act and relied on the *Sioux Nation* ruling as an act of finality. The Supreme Court ruling merely upheld the lower Court of Claim's ruling. The Court of Claims ruling was upholding the ICC's verdict. Seeing that both the Court of Claims and the ICC were creations of Congress and not the Constitution, nothing prohibits Congress from working with the Lakota people to restore their land further or working on a better form of justice from the illegal abrogation of the Fort Laramie Treaty of 1868.

Into the twenty-first century, Lakota and other indigenous activists continued to resist the financial-only ruling from *Sioux Nation*. Though the international work from activists and purchase of Black Hills land from auctions were not directly related to the *Sioux Nation* case, they were indicative of the methods currently being deployed for the Lakota people to achieve

their goals of land restoration. These methods would not be necessary if Congress would work with the Lakota people to rectify past wrongs.

The Supreme Court Justices in *Sioux Nation* could have restored land to the Lakota people. However, that would have made the Justices judicial activists in which Congress could enact legislation to inhibit Lakota advances. This thesis proved the deep history of the judicial system ruling that Congress has plenary power over Indian affairs. Congressional abdication of their duties towards the Lakota directly reflects the hardship that the people suffer today. Congressional pointing towards any judicial source, even if they created said source, as a form of finality is but a political smokescreen. Treaty violations are a national issue. The Black Hills may be in South Dakota, but bringing justice and some form of restoration to the Lakota people should be a national issue that Congress takes seriously and does not abdicate to other branches of the government with limitations.

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