Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation

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RESCUING PAHA SAPA: ACHIEVING ENVIRONMENTAL JUSTICE BY RESTORING THE GREAT GRASSLANDS AND RETURNING THE SACRED BLACK HILLS TO THE GREAT SIOUX NATION

JOHN P. LAVELLE

History, despite its wrenching pain, 
Cannot be unlived, but if faced  
With courage, need not be lived again.

I. The Proposal for Establishing the Greater Black Hills Wildlife Protected Area

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My colleague Professor John Davidson has invited me to comment on a unique proposal of the Conservation Alliance of the Great Plains for establishing a “Greater Black Hills Wildlife Protected Area” in the Northern Plains region. I am grateful for Professor Davidson’s invitation, especially in

1. Associate Professor of Law, the University of South Dakota School of Law. J.D. Boalt Hall School of Law, the University of California at Berkeley; A.B. Harvard University. Member of the Santee Sioux Tribe of Nebraska. Special thanks to my colleague Professor John H. Davidson for inviting me to write this Article, and to Kirsten Jasper, J.D. 2001, the University of South Dakota, for providing research assistance. I also extend gratitude to Wilmer Stampede Mesteth and Lisa Standing Elk Mesteth (Oglala Lakota and Sicangu Lakota/Kiowa, respectively) of Pine Ridge, South Dakota; Darrell Standing Elk and Carole Eastman Standing Elk (Sicangu Lakota and Sisseton Dakota, respectively) of Concord, California; and Fern Eastman Mathias (Sisseton Dakota) of Los Angeles, California, for moral and spiritual guidance over the years and for their continuing leadership in the struggle for the return of Paha Sapa and the advancement of Indian rights.

2. Tyler Sutton & Joel Sartore on behalf of the Conservation Alliance of the Great Plains.
view of the proposal’s potential impacts on the continuing efforts of the Sioux tribes of this region to secure the return of the sacred Black Hills to sovereign tribal ownership.

I. THE PROPOSAL FOR ESTABLISHING THE GREATER BLACK HILLS WILDLIFE PROTECTED AREA

The Conservation Alliance proposes an innovative strategy for reversing the degradation of the great grasslands of the Northern Plains. The proposal observes that past federal policies, or the lack thereof, have resulted in “desertification of the land and decimation of the wildlife” of this region, and indeed have rendered the region “one of the most degraded ecosystems in the United States.” The proposal urges a new policy initiative for “achieving the uncommon goods of land conservation and wildlife protection” through the adoption of federal legislation designed to facilitate “a public-private partnership” in preserving and restoring the region’s biological and ecological diversity.

This “public-private partnership” will not constitute “another Federal land grab,” the proposal insists, but instead will comprise “a unique management regime” involving “significant local control” of the protected area:

Indeed, appropriate local control is crucial to the proposal’s success. Even more important, there would not need to be, nor would we support, the condemnation of any significant amount of private land, though some private land may need to be acquired to consolidate existing government land holdings. Although it is true that the design cannot be implemented unless some land is acquired from willing sellers, the land so acquired need not be transferred to government ownership. Rather, a public-private partnership could be used, with much of the funding coming from private sources.

The proposal envisions the protected area as encompassing “the Greater Black Hills region,” with a “core area” of “at least one million acres” most likely “situated in Sioux County, Nebraska.” According to the proposal, this “core area” might be designated a national park, and the design of the protected area generally “should take advantage of land already in the public domain.” Because “[t]here is already a significant amount of public domain land in northwestern Nebraska and western South Dakota,” the selection of the Black Hills as a “vast laboratory” in conservation makes eminent good sense, in the opinion of the proposal’s authors.


3. Id. at 2.
4. Id. at 3, 5.
5. Id. at 5.
6. Id. at 4-5.
7. Id. at 5.
8. Id.
Notwithstanding its commendable devotion to "the principles of conservation biology" in advocating for the establishment of this "Greater Black Hills Wildlife Protected Area," the Conservation Alliance's proposal should sound an alarm among the Sioux tribes of South Dakota, North Dakota, Nebraska, and Montana. For well over a century, these tribes have fought long and hard—on the battlefield, in the courts, and in the halls of Congress—for a return of Paha Sapa, the sacred Black Hills, to the ownership and control of the Great Sioux Nation. That fight is far from over; and to the extent the Conservation Alliance's proposal for "[r]enewing" the Black Hills region undermines tribal efforts to recover Paha Sapa, "the heart of everything that is," the Great Sioux Nation must oppose and defeat it.

This is not to say that the Conservation Alliance's dream of restoring the great grasslands of the Northern Plains cannot be realized except by obstructing the return of Paha Sapa to the Great Sioux Nation. The authors of the proposal welcome "discussion of the means to [the proposal's] realization," and, to their credit, they specifically insist on Indian involvement in that discussion:

One group which must be consulted throughout the process would be those Native Americans whose traditional and current territory might be involved. Native American participation should be
encouraged as a way to open the door to a broader discussion about
the past and a common future on the Great Plains.'

If elaborated with respect for, and deference to, Lakota/Dakota/Nakota values
concerning the Black Hills, and hence with an orientation toward justice, this
proposal may prove beneficial in achieving a breakthrough in realizing the
inseparable goals of restoring the grasslands ecosystem of the Northern Plains
and returning Paha Sapa to the Great Sioux Nation. Indeed, such respect and
defference are "crucial to the proposal's success," for without them, the
proposal inevitably would degenerate into a device of environmental
colonialism and ethnocide, reinforcing and prolonging the dispossession of
Paha Sapa and further endangering the political, cultural, and spiritual
survival of the Great Sioux Nation.

Because development and implementation of the Conservation Alliance's
proposal could prove either helpful or harmful, it is crucial that ambiguities be
clarified to assure the Lakota, Dakota, and Nakota people that the proposal's
advancement will not interfere with or jeopardize efforts to secure the return
of Paha Sapa. For instance, the authors must clarify what they mean when
they state that the proposal's implementation would entail "significant local
control" of the protected area, as distinguished from predominantly federal
control. If this means that the federal lands of the Black Hills region that are
embraced within the Sioux tribes' longstanding and continuing legal,
equitable, and moral claims would be transferred from federal to state or
private ownership, or to some hybrid of federal, state, and private ownership,
then the "significant local control" contemplated by the proposal obviously
would have the unconscionable effect of obstructing the return of these
confiscated, sacred lands. If, on the other hand, the proposal intends to
facilitate "significant local control" only of the lands of the region not
implicated in the Sioux tribes' land claims, then the proposal may merit tribal
support, provided that (1) the proposal also entails the return of Paha Sapa,
and (2) the "significant local control" of the adjacent lands includes significant
tribal control and manifests the enhanced conservational values of the region's
Indian tribes.

II. A HARVEST OF SORROW AND BLOOD: THE DISPOSSESSION
OF PAHA SAPA

To proceed responsibly in developing its proposal for restoring the great
grasslands of the Northern Plains, the Conservation Alliance must impress
upon its own constituents and all interested parties the preeminent religious,
cultural, moral, and political significance of the Black Hills to the
Great Sioux Nation. This educational effort must include a conscientious

13. Sutton & Sartore, supra note 2, at 5.
14. Id.; supra text accompanying note 5.
15. See infra notes 91-164 and accompanying text.
16. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 5.
examination of the “ripe and rank case of dishonorable dealings”9 that resulted in the present forced alienation of Paha Sapa, the wellspring of the Sioux tribes’ survival as Indian nations, from the Great Sioux Nation. The infamous story of the United States government’s confiscation of Paha Sapa has been told and retold by numerous historians and other scholars;10 indeed, the Supreme Court itself has provided a helpful summary of this “tragic[ ] chapter in the history of the Nation’s West” in Justice Blackmun’s opinion for the Court in United States v. Sioux Nation.11

As Justice Blackmun points out, in 1868 the Sioux Nation and the United States concluded a treaty in the aftermath of the Powder River War, a war in which the Sioux Nation had “fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.”12 This treaty—the Fort Laramie Treaty of 1868—established the boundaries of the Great Sioux Reservation, embracing the sacred Black Hills along with all the additional lands west of the Missouri River in what today is the State of South Dakota “save for a narrow strip in the far western portion.”13 In the express terms of the treaty, “the United States ‘solemnly agree[d]’ that no unauthorized person ‘shall ever be permitted to pass over, settle upon, or reside in [this] territory.’”14

20. Id. (footnote omitted).
21. Id. at 374-75 & n.2.
22. Id. at 375 (quoting Fort Laramie Treaty of Apr. 29, 1868, 15 Stat. 635, 636) (alterations in
Despite this solemn treaty promise—a promise made in exchange for the Sioux Nation's cession of lands outside the reservation's boundaries and consecrated with the smoke of the Lakota sacred pipe—the United States soon breached the agreement by permitting the invasion of the Black Hills by mining prospectors. The means by which this illegal invasion was "authorized" is revealed in recently discovered correspondence exchanged among top officers of the United States Army. In a letter dated November 9, 1875, and marked "Confidential," Lieutenant General Philip H. Sheridan, commander of the Military Division of the Missouri, wrote to Brigadier General Alfred H. Terry, commander of the Department of Dakota:

At a meeting which occurred in Washington on the 3rd of November, at which were present, the President of the United States, the Secretary of the Interior, the Secretary of War and myself, the President decided that while the orders heretofore issued forbidding the occupation of the Black Hills country, by miners, should not be rescinded, still no further resistance by the military should be made to the miners going in; it being his belief that such resistance only increased their desire and complicated the troubles.

Will you therefore quietly cause the troops in your Department to assume such attitudes as will meet the views of the President in this respect?

A few days later, on November 13, 1875, Sheridan wrote to William Tecumseh Sherman, Commanding General of the Army: "The enclosed copy of Confidential letter to Terry will best explain the present status of the Black Hills. The whole thing has gone along about as I had


24. Professor Tsosie observes:
From the perspective of the Sioux people... the Fort Laramie Treaty was a sacred promise, and the treaty itself was signed by several of the most prominent Sioux leaders and sealed, according to Sioux tradition, with smoke from the sacred pipe, which bound the signers to its terms forever.

Tsosie, supra note 12, at 1643; see also Father Peter John Powell, The Sacred Treaty, in THE GREAT SIOUX NATION, supra note 18, at 106 ("[W]hites rarely, if ever, have understood the sacredness of the context in which treaties were concluded by Lakota people.... [T]he smoking of the pipe sealed the treaty, making the agreement holy and binding.

25. See Sioux Nation, 448 U.S. at 376-78.


expected. The Terry letter had best be kept confidential."* Sherman responded to Sheridan in a letter dated November 20, 1875:

Your letter of Nov-13 with enclosure was duly received, and would have been answered immediately. Only I know that the matter of the Black Hills was settled at all events for this year. In the Spring it may result in Collision and trouble. But I think the Sioux Indians are all now so dependent on their rations, that they will have to do whatever they are required to do. My own idea of their Treaty is that settlements may now be made all along up the Western Boundary. And if some go over the Boundary into the Black Hills, I understand that the President and Interior Department will wink at it for the present."

As Justice Blackmun reiterates, President Ulysses S. Grant’s surreptitious decision to “wink at” the miners’ invasion of the Black Hills, and the United States Army’s complicity in the President’s decision, violated “the

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29. App., supra note 27, at 60 (reprinting letter from Gen. William Tecumseh Sherman, Commanding Gen. of the Army, to Lt. Gen. Philip H. Sheridan, commander of the Military Div. of the Missouri, Nov. 20, 1875). For a prescient discussion concerning President Grant’s secret meeting with military commanders—prescient because it was written years before the discovery of the “smoking gun” correspondence reprinted supra at text accompanying notes 27-29—see Harry H. Anderson, A Challenge To Brown’s Sioux Indian Wars Thesis, in THE GREAT SIOUX WAR 1876-77: THE BEST FROM MONTANA THE MAGAZINE OF WESTERN HISTORY 39, 46-52 (Paul L. Hedren ed., 1991) (republication of 1962 article). Of particular interest is Anderson’s explanation of how the military concealed the true nature of the meeting and contrived a pretext for initiating war with the Sioux hunting bands:

[I]t was these hunting bands... who were the subject of that important meeting at the White House during the first week in November. By turning the hunting bands over to the Army for punishment, the major source of opposition to the Black Hills cession would be removed. The calling in of military patrols from the route to the gold fields would permit the prospectors to enter in force. By the following spring the agency Sioux would be presented with a fait accompli—the Hills would be full of miners and the Indians would have to accept whatever terms the government presented to them.

... Inspector E.C. Watkins, in a report to the Commissioner of Indian Affairs in the fall of 1875, stressed the hostile activities of the Sioux and called for their punishment by the military authorities. In their annual reports for 1876, both Generals Sherman and Sheridan stated that the Watkins report was the basis for the ultimatum [to come on to the reservation by January 31, 1876, or be considered hostile] and the subsequent military movement against the Sioux. What is especially interesting about these explanations is the fact that the Watkins report is dated November 9, 1875, six days after the meeting at the White House at which... the President ordered the Army to go out and whip the Sioux! Something, obviously, is wrong here.

None of the military commanders—Sherman, Sheridan or Crook—made any mention of the White House conference in their reports. All preferred, instead, to cite the statements of Inspector Watkins and the Interior Department as grounds for the opening of hostilities with the Sioux. Yet it was the meeting with President Grant that marked the turning point in government policy towards both the Sioux and the Black Hills. The greater voice given the military department in Indian affairs resulted in the decision to go to war against the Sioux hunting bands. Orders were given to Crook to prepare for a campaign even before the Interior Department came up with that scheme of sending an ultimatum to the Indians.

Id. at 47-48.
Nation's obligation to preserve the integrity of the Sioux territory." Yet even before Grant confided his illegal orders, the commanding personnel of the Army were hardly predisposed to enforcing the terms of the Fort Laramie Treaty. For instance, in a report to Congress dated September 15, 1875, Brigadier General George Crook, commander of the Department of the Platte, expressed empathy for the invading prospectors, opining that "the settlers who develop our mines and open our frontiers to civilization are the nation's wards no less than their more fortunate fellows, the Indians." As Justice Blackmun explains,

[w]ith the Army's withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of white settlers into the Black Hills increased. The Government concluded that the only practical course

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30. Sioux Nation, 448 U.S. at 378; see also Respondent's Brief, supra note 23, at 12 (noting that "[t]his major policy change... was... kept secret to forestall opposition from those members of Congress and interested citizens who supported a peaceful solution to the issue" of the miners' illegal invasion of the Black Hills).

31. Indeed, military documents dating from the early days of the Powder River War reveal the conviction of United States Army leaders that the Sioux tribes should be exterminated. See, e.g., HANS, supra note 18, at 499 (quoting letter from then-Lt. Gen. William Tecumseh Sherman to Ulysses S. Grant, then-Commanding Gen. of the Army, Dec. 28, 1866, S. EXEC. DOC. No. 15, 39th Cong., at 4 (2nd Sess. 1867)) ("We must act with vindictive earnestness against the Sioux, even to their extermination, men, women and children. Nothing less will reach the root of the case."); ROBERT WOOSTER, THE MILITARY & UNITED STATES INDIAN POLICY 1865-1903 49 (Bison Books 1995) (1988) (footnote omitted) (second alteration in original) (quoting report of Lt. Gen. Philip H. Sheridan, commander of the Military Div. of the Missouri, U.S. SECRETARY OF WAR ANN. REP. 12, Sept. 26, 1868) ("[T]hese Indians require to be soundly whipped, and the ringleaders... hung, their ponies killed, and such destruction of their property as will make them very poor."). Such sentiments were shared by officers conducting contemporaneous military campaigns against Indians elsewhere in the United States. See, e.g., HANS, supra note 18, at 509 (quoting report of Brig. Gen. E.O.C. Ord, commander of the Dep't of Texas, U.S. SECRETARY OF WAR ANN. REP. 121-22, Sept. 27, 1869) (Hans's emphases omitted) ("I have encouraged the troops to capture and hunt [the Indians] as they would wild animals. This they have done with unrelenting vigor. Since my last report over two hundred have been killed, generally by parties who have trailed them for days and weeks, into the mountain recesses, over snows among gorges and precipices; laying in wait for them by day and following them by night. Many villages have been burned, large quantities of supplies, and arms and ammunition, clothing, and provisions have been destroyed, a large number of horses have been captured, and two men, twenty-eight women, and thirty-four children taken prisoners. Many of the border men regard all Indians as vermin to be killed whenever met. There seems to be no settled policy, but a general idea to kill them wherever found. I am a believer in that, if we go for extermination."); cf. WOOSTER, supra, at 141 (footnote omitted) ("[T]otal war against an Indian enemy was not new to the United States.... [C]ommonly known to nineteenth century men were the Second (1835-42) and Third (1856-58) Seminole wars.... Only by applying the principles of total warfare, in which enemy leaders were taken prisoner under flags of truce, women and children killed and captured, and crops, homes, and possessions ruthlessly destroyed, did the army force the Seminoles into submission. Among the junior officers receiving firsthand experience in the conflicts were Sherman... and Ord.").

32. H. EXEC. DOC. NO. 1, 44th Cong., at 69-70 (1st Sess. 1875) (annual report of Brig. Gen. George Crook, commander of the Dep't of the Platte, Sept. 15, 1875), reprinted in OLSON, supra note 18, at 200-01; see also Respondent's Brief, supra note 23, at 9-10 n.7 (quoting telegram from Adj.-Gen. E.D. Townsend to Gen. William Tecumseh Sherman, Commanding Gen. of the Army, Mar. 16, 1875, reprinted in App., supra note 27, at 79-80) ("[A]s early as March 16, 1875, and thus long before the difficulty of excluding miners from the Great Sioux Reservation had become evident, the Adjutant-General, at the request of the President, instructed General Sherman to publicize the fact that "[e]fforts are now being made to arrange for the extinguishment of the Indian title' to the Black Hills country.").
was to secure to the citizens of the United States the right to mine the Black Hills for gold.\textsuperscript{33}

Having thus determined to wrest ownership of the Black Hills from the Great Sioux Nation, the United States government pursued a policy of confrontation and coercion to achieve its goal of dispossessing the Sioux tribes of Paha Sapa. Deploying this policy entailed both a military strategy and a political one. Justice Blackmun summarizes the United States’ military strategy as follows:

In the winter of 1875-1876, many of the Sioux were hunting in the unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty. On December 6, 1875, for reasons that are not entirely clear, the Commissioner of Indian Affairs sent instructions to the Indian agents on the reservation to notify those hunters that if they did not return to the reservation agencies by January 31, 1876, they would be treated as “hostiles.” Given the severity of the winter, compliance with these instructions was impossible. On February 1, the Secretary of the Interior nonetheless relinquished jurisdiction over all hostile Sioux, including those Indians exercising their treaty-protected hunting rights, to the War Department. The Army’s campaign against the “hostiles” led to Sitting Bull’s notable victory over Custer’s forces at the battle of the 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.\textsuperscript{34}

\textsuperscript{33} Sioux Nation, 448 U.S. at 378; see also Respondent’s Brief, supra note 23, at 12-13 (citing App., supra note 27, at 312) (“Of course, the miners noted the evacuation of the troops and, as the Army withdrew, promptly flocked into the Black Hills in ever-increasing numbers.”).

\textsuperscript{34} Sioux Nation, 448 U.S. at 379 (footnote omitted). Historian Fred Hans attests that when Crazy Horse agreed to surrender in the spring of 1877, the Oglala chief made the following statement concerning the military campaign against the Lakota people:

“I love my people. I desire to protect them. I am afraid, if we go to the agency, after the authorities have taken all of our ponies and our guns from us they will starve us. In the treaty good promises were made. We thought well of it, but the government has not kept its promises. The government is responsible for the suffering condition of our people at the agencies. If supplies are sent to the agencies for our people, and the agents sell them to the miners infesting our country, and tell our people that theirs has not come yet, it leaves the starving Indians just as destitute as they would be if none had been sent.

“Our friends and relatives down at the agencies have told us that they don’t get enough, and that the agents say ‘that is all’ they have. They are half starved. If we go down there, the supplies would have to be divided again. We would not have enough, and our friends would have still less. It may be true that the goods are sent, but it is also true that my relatives at the agencies have not received but a very small portion of what belongs to them. The government commissioners, in their treaty with my people, also promised us protection from invasion by the white people upon our hunting grounds which have not been sold; but instead of sending troops to protect us, the army has come to our own country and has massacred us in our own homes—and in our beds. The government has simply cheated the Indians out of their lands, because it does not give them the goods which have been bought with our own money, in payment for the lands; and, when our people have refused to sell certain portions of their lands, the government sends the army to our homes to kill us, and take the lands anyhow. The army officers say the Indians are bad because
By branding Lakota, Dakota, and Nakota families exercising their treaty-protected hunting rights as "hostiles," the Grant Administration, without waiting for action by Congress, precipitated relations with the Sioux into a crisis.

In military operations against Indian tribes, the Army generally destroyed the Indians' homes, food supplies, and other resources, and the so-called "hostiles"—men, women and children—were to be shot on sight. The Army commenced such a war of attrition against the Sioux in the spring of 1876.35

HANS, supra note 18, at 532-34 (quoting speech of Oglala Lakota Chief Crazy Horse, Apr. 27, 1877). Hans adds that "[t]he last words of his speech were poured forth in shrieks with most terrific force." Id. at 534. Shortly after surrendering, Crazy Horse was assassinated by the United States Army. See id. at 534-35; see also, e.g., ANDRIST, supra note 18, at 299-300 (recounting the arrest and killing of Crazy Horse); SUSAN BORDEAUX BETTELYOUN & JOSEPHINE WAGGONER, WITH MY OWN EYES: A LAKOTA WOMAN TELLS HER PEOPLE'S HISTORY 106-10 (Bison Books 1999) (Emily Levine ed., 1988) (same); BROWN, supra note 18, at 310-13 (same); HYDE, supra note 18, at 296-98 (same); ROBERT W. LARSON, RED CLOUD: WARRIOR-STATESMAN OF THE LAKOTA SIOUX 213-15 (1997) (same); LARRY MCMURTRY, CRAZY HORSE 125-31 (1999) (same); MARI SANDOZ, CRAZY HORSE: THE STRANGE MAN OF THE OGLALAS 396-413 (1942) (same). See generally EDWARD KADLECEK & MABELL KADLECEK, TO KILL AN EAGLE: INDIGN VIEWS OF THE LAST DAYS OF CRAZY HORSE (1981); THE KILLING OF CHIEF CRAZY HORSE: THREE EYEWITNESS VIEWS BY THE INDIAN, CHIEF HE DOG, THE INDIAN-WHITE, WILLIAM GARNETT, THE WHITE DOCTOR, VALENTINE MCGILLYCUDDY (Bison Books 1988) (Robert A. Clark ed., 1976).

35. Respondent's Brief, supra note 23, at 14, 15 (citation omitted) (citing App., supra note 27, at 313). In its report to Congress, the commission subsequently charged with obtaining the relinquishment of the Black Hills described in greater detail the circumstances attending the United States government's branding of off-reservation hunters as "hostiles":
As with its military strategy, the defining element of the United States’ political strategy for dispossessing Paha Sapa was coercion. The Fort Laramie Treaty guaranteed subsistence rations to the Sioux until 1872, as well as the right to hunt outside the reservation’s boundaries. However, soon after the treaty was signed, the United States restricted and then eliminated the Sioux

December 6, 1875, the late Commissioner of Indian Affairs sent instructions to the several agents to notify the Indians in the unceded territory to come to the agencies before the 31st of January, 1876, or that they would be regarded as hostile. This letter reached the Cheyenne River agency on the 22d. Agent Bingham says, under date January 26, 1876, that “the Indians have never been so quiet or friendly-disposed as they are now, and the intimation of a renewal of hostilities was a surprise not only to me but to all of the Indians under my charge.” The runner who was sent by Agent Bingham to notify the Indians to return to the agency was not able to return himself until February 11, 1876. He brought back word that “the Indians received the invitation and warning in good spirit and without any exhibition of ill feeling. They answered that they were then engaged in hunting buffalo and could not accept the invitation at present, but would return to the agency early in the spring.”

It does not appear that any one of the messengers sent out by the agents was able to return to his agency by the time which had been fixed for the return of the Indians. It is very easy to understand why the most friendly Indians should hesitate to traverse a pathless country without fuel or shelter, at a time of year when fearful storms endanger human life, and with the knowledge that they would find a limited supply of provisions at the agency. In General Sheridan’s report of November 25, 1876, we find that he states that on account of the terrible severity of a Dakota winter the Army were compelled to suspend operations. If our soldiers were frost-bitten and unable to remain in the field even with their comfortable clothing and supply-train, we can judge whether it was practicable for women and children to cross this inhospitable wilderness in the dead of winter.

S. EXEC. DOC. NO. 9, 44th Cong., at 13 (2nd Sess. 1876) (report of the Manypenny Commission); see also id. at 88 (letter from Gen. H.H. Sibley to Commission Chairman George W. Manypenny, Dec. 4, 1876) (“I have characterized the order [directing that all Indians found outside of their reservations be treated as hostile] as unfortunate. It was far worse than that; it was outrageous and cruel, for it exacted what was physically impossible of the Indians, who were in no condition to travel hundreds of miles over pathless and snow-covered prairies in midwinter with their ill-clad families. ... [The effect of the order] was to force very many friendly Sioux to band together for mutual protection against attacks by the military forces. To this fact is to be attributed the sad and melancholy fate of General Custer and his immediate command, and the obstinate and determined resistance of the Indians in all other engagements who were fighting to protect their families.”); id. at 39 (journal of proceedings of the Manypenny Commission) (speech of Spotted Tail of the Sicangu Lakota) (“The Great Father and his children are to blame for this trouble. We have here a store-house to hold our provisions the Great Father sends us, but he sends very little provision to put in our store-house. When our people become displeased with their provisions and have gone north to hunt in order that they might live, the Great Father’s children are fighting them. It has been our wish to live here in our country peaceably, and do such things as may be for the welfare and good of our people, but the Great Father has filled it with soldiers who think only of our death. Some of our people who have gone from here in order they may have a change, and others who have gone north to hunt, have been attacked by the soldiers from this direction, and when they have got north have been attacked by soldiers from the other side, and now when they are willing to come back the soldiers stand between them to keep them from coming home.... It seems as if the wish of the Great Father was that my people should go into the ground....”); MARK DIEDRICH, SITTING BULL: THE COLLECTED SPEECHES 116 (1998) (citation omitted) (quoting speech of Hunkpapa Lakota Chief Sitting Bull, June 16, 1879) (“Do you know of anything we did to bring the Long Hair upon us at the Little Bighorn River? No, you don’t. We were assembled there in a peaceable camp, hunting for meat to feed our families. What stories did your people hear that they sent the Long Hair upon us? Who told you these stories? If you were ever told that we were hostile, it is a lie. Whoever told you so is a liar. It was a hunting camp. We had attacked nothing but the buffalo.”).

36. See Sioux Nation, 448 U.S. at 380-81.
tribes’ off-reservation hunting rights in response to “the inevitable clashes between off-reservation hunting parties and whites.”

Thus, after the expiration of the treaty subsistence rations in 1872, and because of the government’s failure to assimilate the Lakota, Dakota, and Nakota people to yeoman farming culture, the Sioux tribes remained dependent on

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38. The journal of proceedings of the Manypenny Commission contains numerous complaints about the United States government’s failure to provide the Lakota, Dakota, and Nakota people with the means of succeeding in the tribes’ agricultural efforts. For instance, Charger of the Cheyenne River Sioux asserted:

   We try to do everything that the Great Father wishes us to do; but there is one drawback—we never have sufficient provisions to carry out the rules and regulations that he makes. We want to farm; the Great Father asks us to farm; we know farming is the main thing, and if we learn to do it and do it right hereafter it is the best thing for us; but when we are doing this and cultivating the ground we do not have sufficient provisions to live on. When we undertake to plow the ground with a span of small horses they cannot pull the plow. We can only plow a small piece of ground with them.

   S. EXEC. DOC. No. 9, 44th Cong., at 62 (2nd Sess. 1876) (journal of proceedings of the Manypenny Commission) (speech of Charger of the Cheyenne River Sioux). White Bear of the Crow Creek Sioux provided more pointed criticism:

   My people have been told that any of them who would go to farming, plowing the ground and fencing it in, would be assisted by the Great Father. They have done it, wearing the skin from their hands in doing so, but they have received nothing and are poorer than they were before.... They were also told that they would receive mowing-machines and scythes to cut hay, but they have not received them. If they had mowing-machines, such as they could ride upon, to ride around their country and cut hay, they would be able to earn something; but the agent considers that the country belongs to him personally and cuts all the hay. My friends, I would like to have our agent, before the sun goes down, climb up into the second story of the warehouse and take down all the teepee cloths and blankets that he has there and divide them among the people. Then, in regard to the harnesses for horses that were sent here by the Great Father to be given to the chiefs, they are obliged to work for them and buy them. I do not know whether the Great Father is ashamed of this, but my people are ashamed of it.

   *Id.* at 75 (speech of White Bear of the Crow Creek Sioux). In a similar tone, Mad Bear of the Standing Rock Sioux stated:

   If we had had the implements of all descriptions that the Great Father has to work with we probably could have supported ourselves.... A great many of these things have not been given to us. The white men living on the agency now know what has become of these things.... Men, civilians, that we have had for agents would steal our food, steal things that were sent to us, and when they were likely to be caught in the act and be brought to justice for their misdeeds they used the money that they had accumulated by these thefts to clear themselves.... Of the cattle that have been purchased for the Indians by the Government and sent out here, they were counted by a man on horseback riding at a gallop, and he made two hundred out of one hundred, and then they grabbed for the money.... It is the fault of the white men that this is done. They select men that belong to the ring, that have been used as clerks at agencies, &c. When one agent is removed they select his friend to succeed him, and so the stealing still goes on.

   *Id.* at 50-51 (speech of Mad Bear of the Standing Rock Sioux); see also *id.* at 42 (speech of Standing Elk of the Sicangu Lakota) (“What are we to do if you simply go on feeding us without giving us cattle and other animals and implements?”); *id.* at 58 (speech of Long Mandan of the Cheyenne River Sioux) (“Probably, my friends, you have heard of people farming without tools to farm with and nobody to help them.”); *id.* at 60 (speech of Swift Bird of the Cheyenne River Sioux) (“I also would ask to have all the necessary tools for farming. Sometimes in plowing our ground they do not plow a large enough piece for us; they are anxious to get pay for plowing and they hoe up and plow only a small piece.”); *id.* at 66 (speech of Swan of the Cheyenne River Sioux) (“[M]any things the Great Father sends out for us we never reach us.”); *id.* at 70-71 (speech
government rations to avoid mass starvation.” After Indian warriors led by Lakota Chiefs Sitting Bull and Crazy Horse defeated Lieutenant Colonel George Armstrong Custer’s forces at the battle of the Little Big Horn in June 1876, Congress decided to exploit this reservation dependency by enacting a “sell or starve” ultimatum to step-up the government’s efforts to dispossess the Sioux tribes of the Black Hills:

In August 1876, Congress enacted an appropriations bill providing that “hereafter there shall be no appropriations made for the subsistence” of the Sioux, unless they first relinquished their rights to the hunting grounds outside the 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-supporting. Toward this end, Congress requested the President to

of White Ghost of the Crow Creek Sioux) (“[N]obody has tried very hard to teach us how to plant. If we had any one to teach us how to farm and plant corn, I think before this time we would have been able to raise a great deal, and because we have not had proper assistance the corn we raise now amounts to nothing at all toward our support.... My people think that the flour that is sent here is for them to eat, and they are not pleased that it is fed to the pigs about the agency.... I have for a long time known the ways of your people in dealing with us and taking away our country, and I know that they have been such as to make us miserable.”); id. at 78 (speech of Iron Nation of the Lower Brule Sioux) (“I want a yoke of oxen and a wagon—they were promised me long ago—and horses and mares.... I also want a cow and a bull so that we can raise cattle; also chickens, hogs, and sheep.... It is now eleven years since these things were promised, but we have not seen anything of them yet. It was said then that before ten years passed we would see all these things, but we have been looking and waiting for them in vain.”); id. at 83 (speech of Hakewaste of the Santee Sioux) (“[T]here are many of us who have nothing to do anything with.... There are a great many people that will go and look at a piece of land and say, ‘I wish I had something to cultivate this piece of land with.’ We all have the desire in our hearts, but we are not able to cultivate it, and for that reason we cannot do anything without the assistance of the President.”).

39. See Sioux Nation, 448 U.S. at 380-81. In the brief it filed in the Supreme Court, the Sioux Nation rebutted an argument of the government which blamed the Sioux tribes for the United States’ failure to fulfill its treaty obligations respecting the tribes’ self-sufficiency.

Petitioner [United States] alleges that the 1868 Treaty “contemplated that the Sioux would become self-supporting on the reservation” and blames the Sioux for a “failure to achieve self-sufficiency” within four years. These statements are not based upon any finding of fact by the court below and are contrary to the record. The Sioux, for example, were self-sufficient before the United States acquired 48 million acres of their homeland under the 1868 Treaty. Moreover, contrary to the Government’s thesis, the Sioux did not undertake any treaty commitment to shift from subsistence hunting to a farming economy in four years or any other fixed period of time. Indeed, under Articles 11, 15 and 16 of the 1868 Treaty, the Sioux expressly reserved their hunting rights outside the Great Sioux Reservation and, under Article 10, the United States agreed to pay $10 per person per year for up to 30 years to the Sioux “while such persons roam and hunt.”


40. 133 CONG. REC. 5267 (1987) (statement of Rep. Udall) (referring to the “rider to the Indian Appropriations Act of 1876 which cut off all rations promised in the treaty to the Sioux unless they... ceded the Black Hills to the United States” as “the so-called sell or starve provision”); Black Hills Hearing, supra note 10, at 265 (prepared statement of the Native American Task Force of the Rural Coalition) (decrying the 1876 appropriations rider as a “‘sell or starve’ scheme” and “a blatant, reprehensible act of blackmail to force the Sioux to sign away lands”).
appoint another commission to negotiate with the Sioux for the cession of the Black Hills.\textsuperscript{44}

In conformity with Congress’s intent to starve the Sioux tribes into submission, the commission appointed by the President—the Manypenny Commission—aggressively pressed for the cession of \textit{Paha Sapa} to the United States.\textsuperscript{42} The Manypenny Commission threatened the Lakota, Dakota, and Nakota people with a discontinuation of rations unless the tribes surrendered their treaty-protected rights to the Black Hills.\textsuperscript{43} The commissioners brought with them the prepared text of a proposed “treaty” in an effort to obtain the Sioux tribes’ consent to the relinquishment of the Black Hills.\textsuperscript{44} The commissioners promised that in exchange for the surrender of \textit{Paha Sapa}, the United States government would continue providing enough rations to prevent the Lakota, Dakota, and Nakota people from starving to death.\textsuperscript{45}

\textsuperscript{41} \textit{Sioux Nation}, 448 U.S. at 381 (quoting Act of Aug. 15, 1876, 19 Stat. 176, 192) (citation omitted); see also Respondent’s Brief, \textit{supra} note 23, at 13 (quoting Report of the Commissioner of Indian Affairs, 1875, Sioux Exhibit F-22, Indian Claims Commission Docket 74-B, \textit{reprinted in App.,} supra note 27, at 152) (noting that “the Commissioner of Indian Affairs in 1875 candidly conceded that the Sioux were being ‘compelled to surrender’ the Black Hills ‘for the sake of promoting the mining and agricultural interests of white men’”).

\textsuperscript{42} See, e.g., \textit{S. EXEC. DOC. No. 9, 44th Cong.,} at 31-32 (2nd Sess. 1876) (journal of proceedings of the Manypenny Commission) (remarks of Commissioner Henry B. Whipple, Episcopal bishop of Minnesota, to the Oglala Lakota) (“[T]he Great Father . . . selected this commission of friends of the Indians that they might devise a plan, as he directed them, in order that the Indian nations might be saved, and that, instead of growing smaller and smaller until the last Indian looks upon his own grave, they might become, as the white man has become, a great and powerful people. . . . [Y]ou cannot find an instance on the earth where a people without government, without education, without labor, have ever failed to go down into the grave and become extinct.”); \textit{id.} at 42-43 (remarks of Commissioner Whipple to the Sicangu Lakota) (“You say these are very hard words; but they are very kind words. They are kind words that will tell any people the way to life instead of death. . . . I believe there are two ways open to you: one leads to peace, happiness, and life; and I believe the other way is the path of sorrow. As I know the Indian loves his children as I love my children, I ask them to act as wise men.”); \textit{id.} at 56 (remark of Commissioner H.C. Bulis to the Cheyenne River Sioux) (“If you refuse to accept [this agreement], death and starvation stare you in the face.”).

\textsuperscript{43} See \textit{Sioux Nation}, 448 U.S. at 381. The duress to which the Sioux tribes were subjected is evidenced by response by Standing Elk of the Sicangu Lakota to the Commission’s negotiation tactics. In a meeting at Spotted Tail Agency in September 1876 to coerce signatures for the cession of the Black Hills, Commissioner A.S. Gaylord announced that “the Great Council [U.S. Congress] has made a law stating the things which must be done by you in order that more food shall be given you.” \textit{S. EXEC. DOC. No. 9, 44th Cong.,} at 42 (2nd Sess. 1876) (journal of proceedings of the Manypenny Commission) (remark of Commissioner Gaylord), \textit{quoted in VIRGINIA IRVING ARMSTRONG, I HAVE SPOKEN: AMERICAN HISTORY THROUGH THE VOICES OF THE INDIANS} 106 (1971) (alteration in original). To this, Standing Elk replied:

\begin{quote}
[It] seems that hard words are placed upon us and bend down our backs. Whatever the white people say to us, wherever I go, we all say “Yes” to them—“Yes,” “Yes,” “Yes.” Whenever we don’t agree to anything that is said in council, they give the same reply—“You won’t get any food;” “You won’t get any food.”
\end{quote}

\textit{S. EXEC. DOC. No. 9, 44th Cong.,} at 42 (2nd Sess. 1876) (journal of proceedings of the Manypenny Commission) (speech of Standing Elk of the Sicangu Lakota), \textit{quoted in ARMSTRONG,} supra, at 107.

\textsuperscript{44} See \textit{Sioux Nation}, 448 U.S. at 381; see also \textit{S. EXEC. DOC. No. 9, 44th Cong.,} at 21-22 (2nd Sess. 1876) (report of the Manypenny Commission) (reprinting proposed articles of agreement with various bands of the Sioux Nation).

\textsuperscript{45} See \textit{Sioux Nation}, 448 U.S. at 381. In relevant part, the “treaty” provision provided:

\begin{quote}
In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the
While the United States' "sell or starve" ultimatum was indeed a sharp device for forcing tribal people to sign the government's "agreement," an even more deadly weapon of coercion was the Manypenny Commission's threat of removing all the Sioux tribes from their homelands in the Northern Plains to "Indian Territory"—what today is the State of Oklahoma—if the tribes failed to cooperate. This threat took the form of a provision of the proposed "agreement," which the Commission ordered to be translated at each of the seven agencies it visited:

Article 4. The Government of the United States and the said Indians, being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory under the guidance and protection of suitable persons to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the Government may provide for them in the selection of a country suitable for a permanent home, where they may live like white men.47

A companion provision of the proposed "agreement" proved equally threatening to the Oglala and Sicangu Lakota, whose communities were situated in areas remote from the Missouri River:

Article 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all

United States does agree to provide all necessary aid to assist the said Indians in the work of civilization . . . . Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. . . . [N]o rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick, and infirm excepted.) . . . .

S. Exec. Doc. No. 9, 44th Cong., at 21 (2nd Sess. 1876) (report of the Manypenny Commission) (reprinting Art. 5 of proposed articles of agreement with various bands of the Sioux Nation).

46. Cf. DIEDRICH, supra note 35, at 124 (citation omitted) (quoting speech of Hunkpapa Lakota Chief Sitting Bull, Apr. 1881) ("'I have never been afraid of an enemy, but I tremble at the sight of our children crying from hunger.'").

47. S. Exec. Doc. No. 9, 44th Cong., at 21 (2nd Sess. 1876) (report of the Manypenny Commission) (reprinting Art. 4 of proposed articles of agreement with various bands of the Sioux Nation).
subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.\textsuperscript{46}

Surrounded by federal soldiers and under duress of the Commission's reiteration "that you . . . must go to one place or the other,"\textsuperscript{49} some members of the Oglala and Sicangu bands responded that they would "go down there and take a look at [the Indian Territory],"\textsuperscript{50} but strictly on the understanding that their people would be allowed to remain permanently on the Northern Plains if they were dissatisfied with the proposed relocation. Thus, Fast Bear of the Oglala Lakota stated:

You are here also to ask me to take a journey to look at a country, and I also answer yes to that question. I will select some good young men to go down there. I consent for my young men to go down there and see that country; but they must look at it in silence, and come back in silence. After they come back we will consider the matter. They are not to commit themselves on the journey. When they have seen the country I will consider it. If it is good I will consider it so; if bad, I will consider it is bad. Do you understand, my friends, what I last said to you? We do not agree to go there to live before we have seen the country.\textsuperscript{51}

Other tribal members expressed anger and despair at being required to journey to Indian Territory to guard against a forced removal of the Oglala and Sicangu Lakota to the Missouri River.\textsuperscript{52} Young-Man-Afraid-of-His-Horses of the Oglala Lakota stated:

\textsuperscript{48} Id. (reprinting Art. 3 of proposed articles of agreement with various bands of the Sioux Nation).
\textsuperscript{49} Id. at 35 (journal of proceedings of the Manypenny Commission) (remark of Commissioner H.B. Whipple).
\textsuperscript{50} Id. at 39 (speech of Spotted Tail of the Sicangu Lakota).
\textsuperscript{51} Id. at 33 (speech of Fast Bear of the Oglala Lakota); see also id. at 34 (speech of Red Dog of the Oglala Lakota) ("The country that you have asked us to go and see, the young men will go there and see it with these interpreters that have been named. If it is a bad country, we will not consent to go there and live, but if it is good we will go through the country and visit it, consider it, and when they get back here all our people will consider the matter of going. If it is bad, it is not possible for me to go down there and live. We were not raised in that country. Have you heard all that I have said to you—you that have come to see me?").
\textsuperscript{52} Historian George Hyde explains this dread of being removed to the Missouri River:

During the summer of 1876 the Oglalas at Red Cloud Agency were very uneasy and worried, and many of them were clearly frightened. . . . The squawmen read the papers and told the Indians of the doings in the great council in Washington, and it appeared that some of the white chiefs in the great council were very angry and were saying hard things about the Sioux. They were threatening to starve all the Sioux, and were talking of compelling the tribe to move, either to the Missouri or to a strange land in the south called Indian Territory. All of this worried the Oglalas. Not many of them had been at the old Whetstone Agency on the Missouri in 1868-1871; but the BruléS and Loafers had told them of the privations they had suffered there. Many people had died in that land, old people and little children who could not endure the hunger and cold, and the Oglalas hated the very name of the Missouri River country.

HYDE, supra note 18, at 277.
My father [i.e. the Indian agent at Red Cloud Agency] shook hands with the [L]akotas peacefully on the Platte River. He told me that this country belonged to the [L]akota people. I have been brought up here from a boy until I got to be a chief. The soldiers have no business in this country at all, and since I have been here I have always tried to do right. I wish to tell you plainly that I have been very much ashamed ever since the soldiers came here. This is my country, and I have remained here with my women and children eating such things as the Great Father has sent us.  

Similarly, Little Wound of the Oglala Lakota declared:

[T]he words that I heard from the Great Father and from the commissioners from the Great Council made me cry. The country upon which I am standing is the country upon which I was born, and upon which I heard that it was the wish of the Great Father and of the Great Council that I should be like a man without a country. I shed tears.  

Spotted Tail of the Sicangu Lakota was adamant in opposing removal of his people to the Missouri River:

[Y]ou have come to me to-day, and mentioned two countries to me. One of them I know of old—the Missouri River. It is not possible for me to go there. When I was there before we had a great deal of trouble. I left, also, one hundred of my people buried there. The other country you have mentioned is one I have never seen since I was born, but I agree to go and look at it. . . .

. . . .

. . . You have asked me to go down and see the country with some of my people, and I intend to go there. I only wish now that my name shall be attached to that paper without my signing it. When I come back after seeing the country I will go and tell the Great Father what I wish done, and when the paper is spread before us then I am ready to touch the pen, but until that I only wish you to sign my name. It has been said to us that there is no deceit in touching the pen to sign a treaty, but I have always found it full of deceit.  

Blue Teeth likewise implored the Commission to refrain from demanding the removal of the Sicangu Lakota from their homeland, stressing the significance of this land to the Lakota people and their future generations:

It is not possible for you to hide this mountain that is north of us, or to make it small. If we should go to the country the Great Father has suggested, still we wish to see it, and expect our children and our children’s children to look upon it still and be well off. The

54. Id. at 36 (speech of Little Wound of the Oglala Lakota).
55. Id. at 39, 41 (speech of Spotted Tail of the Sicangu Lakota); see also Hyde, supra note 18, at 286 (noting that Spotted Tail “went to the Indian Territory with no thought of advising the people to move there, but only to obtain information to use in resisting the government’s attempt to take the Sioux from their own land”).
Great Father told me to select a place where I wished to live. I selected this place. . . . Tell him this is my country, and for him to have pity on me and not move me away from it. I want to live here always."

Clearly, preventing the forced removal of the Oglala and Sicangu bands from their homelands was as urgent a concern as avoiding mass starvation for those tribal members who were coerced into "touching the pen"57 of the Manypenny Commission's "agreement."58

56. S. EXEC. DOC. NO. 9, 44th Cong., at 41 (2nd Sess. 1876) (journal of proceedings of the Manypenny Commission) (speech of Blue Teeth of the Sicangu Lakota).

57. Id. (speech of Spotted Tail of the Sicangu Lakota); supra text accompanying note 55.

58. The Manypenny Commission's report to Congress describes the subsequent journey of members of the Oglala and Sicangu Lakota bands to Indian Territory following "[a] delay [that] was required, as the military authorities would not allow the Indians to leave until Red Cloud and seventy lodges of his people had been deprived of their property and imprisoned." Id. at 19 (report of the Manypenny Commission) (reprinting letter from Commissioners J.W. Daniels & A.G. Boone to Chairman G.W. Manypenny, Dec. 13, 1876). The two commissioners who accompanied the Oglala and Sicangu parties reported:

Red Cloud could not accompany the delegation, as he did not feel that he ought to leave his people in the condition they were when released from confinement. The Indians reported many lodges destroyed by the troops. In the case of these people the assurances of the commission seemed to have been entirely disregarded by the authorities in charge.

While traveling through the Territory, Spotted Tail took special pains to inform us that he was not pleased with anything that came within his observation, and his part of the delegation, with but few exceptions, were not disposed to express themselves in any other way.

Id.; see also supra note 55. In concluding their report concerning the journey, the commissioners wrote:

Inasmuch as the country now occupied by the Sioux Indians does not possess lands on which they can ever expect to become self-supporting, we would respectfully recommend, providing these people decide after they get home to move down, that steps be taken at as early day as possible looking toward the removal of those Indians represented by this delegation to the Indian Territory, believing that the best interests of Government and the Indians require their being placed where they may be able to support themselves.


For informative discussions of the United States government's subsequent forced removal of the Sicangu and Oglala bands from Spotted Tail Agency and Red Cloud Agency in northwestern Nebraska to locations near the Missouri River in late 1877, and the tribes' successful efforts the following year to relocate to respective sites at the mouth of Rosebud Creek and along Big White Clay Creek (Pine Ridge) in the present-day State of South Dakota, see OLSON, supra note 18, at 247-63; GEORGE E. HYDE, A SIOUX CHRONICLE 3-25 (1956). Concerning Congress's deliberations about the fate of the Sicangu and Oglala Lakota, Hyde writes:

That august body was half minded to . . . order the Sioux to be held permanently at agencies on the Missouri. The talk of removing the whole Sioux nation to Indian Territory was being kept up. No one who has written about this tribe has ever realized how near the Sioux came in 1877-78 to being uprooted and sent to Indian Territory. Even if the tribe escaped from such a disastrous decision, there was another proposal before Congress that might have affected the Sioux almost as fatally as removal to the south. That was the plan to put the tribe permanently under military control. General Sheridan was still furious with the Sioux, and he and other army officers spoke bluntly for military control. Many members of Congress backed up this proposal. Their theory was that the Indians were incurable savages who could not be taught to support themselves by civilized methods, such as farming, and that the only sensible method for dealing with people like the Sioux
With respect to the remaining Sioux bands visited by the Commission, whose established communities were located along the Missouri River, tribal members were similarly distressed by the threat of removal to Indian Territory. Addressing the commissioners at Standing Rock Agency, John Grass stated:

The Great Spirit made this earth for me and He raised me on it. . . . You come here from the Great Father to inquire of me about my land. I will never find another land better than the one I have. I cannot look upon my land as cheap and valueless. You speak to us about a strange country. We want you to strike that out. . . . Our grandfathers, our fathers, and all of our kindred were raised on the Missouri River. I told my grandfather that I would never leave the land on the Missouri River. . . . [W]e are pleased with the country on the Missouri River, and consequently we wish to remain here. . . . I desire to know whether the commissioners are willing to erase that part of the propositions where you ask the Indians to go to a strange country?"

To this, Chairman Manypenny responded:

It was not the intention of your Great Father to compel you to go to a country without your consent, and without your being satisfied with it. He was of the opinion, however, that neither you nor your children could ever make a living on the Missouri River by cultivating the soil, and it was in kindness to you that this suggestion was put in the treaty, that you should go to a country that he would designate, where you could cultivate the soil. If, however, you think that you could not give up this country and it is necessary that you should consummate this agreement in relation to the other matters, the commission will modify that clause so as to relieve you from sending any delegation to see the new country."

By leveraging this latent reassurance that the United States would refrain from carrying out its threat of removing the Standing Rock Sioux from the tribe’s Missouri River homeland, the Manypenny Commission pressured additional Sioux Indians into “touching the pen.”

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was to confine them closely on reservations under strict army control and keep them there until their numbers dwindled away and they became extinct.

Id. at 9.


60. Id. (remark of Chairman G.W. Manypenny). Illustrative of the duplicity manifest in its negotiation tactics, the Manypenny Commission a few weeks earlier had declared to the Oglala Lakota: “We came here to bring a message to you from your Great Father. and there are certain things we have given to you in his exact words; we cannot alter them, even to the scratch of a pen.” Id. at 31 (remark of Commissioner H.B. Whipple to the Oglala Lakota); see also id. at 42 (remark of Commissioner A.S. Gaylord to the Sicangu Lakota) (“[The Great Council] have sent us to you to tell you their words, and we cannot change them.”).

61. Id. at 41 (speech of Spotted Tail of the Sicangu Lakota); supra text accompanying note 55; see id. at 54-55 (speech of Two Bears of the Standing Rock Sioux) (“[W]e are going to sign this paper with the understanding . . . that we are not deceiving each other; and that you have taken out that article which refers to our going to live in or visit that country which does not please us, and that we are going to remain here.”); id. at 55 (speech of Big Head of the Standing Rock Sioux) (“In signing this agreement I understand that I can always live in this
The commissioners encountered similar opposition to the government’s threat of removal as announced at Cheyenne River, Crow Creek, Lower Brule, and Santee agencies.\footnote{See, e.g., id. at 60 (speech of Swift Bird of the Cheyenne River Sioux) (“In regard to any people changing their country. This is where we were raised, where the Great Spirit has taken care of us during our existence; we only would like to change from one bend of the river to another with our agency, that would be all.”); id. at 61 (speech of Crow Feather of the Cheyenne River Sioux) (“I make the request of you not to mention moving to another country; this country is mine, I was raised in it; my forefathers lived and died in it; and I wish to remain in it.”); id. at 64-65 (speech of Swan of the Cheyenne River Sioux) (“This country that the Great Father talks about moving us to—he has told us about that a great many times, and we have always told him that we do not wish to go there, and we tell you the same to-day.... I have no other country except this, and I do not want to go to another country; I do not want to go to the Indian Territory. This is my country here, and there are many streams and little creeks here, and whichever one I select I will live upon.”); id. at 69, 72 (speech of White Ghost of the Crow Creek Sioux) (“I have always supposed that when a treaty has been made with a people, and they have observed it, that their country would be theirs forever.... [W]hen you have spoken to me about a different country, a country where we were not brought up, a country that is far away, my chiefs and my soldiers are very much displeased, and they desire me to say that they are dissatisfied with the mention of another country.... They do not wish to go there.... I hope that you will never mention that country to us again.”); id. at 73 (speech of Running Bear of the Crow Creek Sioux) (“You spoke to us about a country that is very bad, a country where it is not possible for us to live, and we do not like it at all.... We have never done anything wrong, and for [the Great Father] to take us up and carry us away by force, without any provocation, to another country would be very wrong.”); id. at 78, 80 (speech of Iron Nation of the Lower Brule Sioux) (“My friends, as to the country to the south that you tell us is a good country. We have been raised here and lots of our people are buried here, and on that account we do not wish to leave it, but want to live here forever. I asked you to make my heart glad, but this is the word that I want to tell the Great Father: that I want to stay here, and for him to take pity on me and let me remain.... I am going to sign this agreement .... Great Spirit, have mercy upon me. I desire to live, and this is the reason I do this. I understand that I am always to live in this country.”); id. at 81 (speech of Medicine Bull of the Lower Brule Sioux) (“I understand that my children are to live in this country....”); id. (speech of Little Pheasant of the Lower Brule Sioux) (“My understanding is that we are to remain in this country as long as we live.”); id. (speech of Standing Cloud of the Lower Brule Sioux) (“My understanding is that I and my young men are going to live in this country until we die.”); id. (speech of Only Man of the Lower Brule Sioux) (“My understanding is that I am going to live here for a long time.”); id. at 82-83 (speech of Wakute of the Santee Sioux) (“Old Wabashaw, who is dead, said this land belonged to us. When we went to Washington... we were told the same thing, that this land belonged to us. I was down in Wabashaw, Minnesota, this summer, and heard a great many people talk about the Indian Territory. They did not speak well of it, said it was sickly and was a very bad country. When I came back I related these facts about it. We do not want to go to that country; we do not like it.”); id. at 83 (speech of Hakewaste of the Santee Sioux) (“[W]e do not want to go to that territory to the south.”).}

\footnote{id. at 21 (report of the Manypenny Commission) (reprinting Art. 4 of proposed articles of agreement with various bands of the Sioux Nation); supra text accompanying note 47; see S. EXEC. DOC. NO. 9, 44th Cong., at 24 (report of the Manypenny Commission) (purporting to certify Standing Rock signatories’ acceptance of stipulations “with the exception of so much of article four of said agreement as relates to our visit and removal to the Indian Territory”); id. at 25 (purporting same for Cheyenne River signatories); id. at 27 (purporting same for Crow Creek signatories); id. (purporting same for Lower Brule signatories); id. at 28 (purporting to certify Santee signatories’ acceptance of stipulations “saving, reserving, and excepting all our rights, country.”); id. (speech of Wolf Necklace of the Standing Rock Sioux) (“I never want to leave this country; all my relatives are lying here in the ground, and when I fall to pieces I am going to fall to pieces here.”).} Indeed, the ubiquity of this opposition suggests that the threat of removal served as an even more effective tool of coercion than the specter of mass starvation. By strategically manipulating the Missouri River tribes’ horror of being forcibly removed from their beloved homelands—and, more precisely, by promising to exempt these tribes from the requirement to “visit the Indian Territory”—the
Manypenny Commission succeeded in extorting additional signatures for its "agreement." Yet, despite its brutal efforts, the United States government failed to obtain the Great Sioux Nation's surrender of the sacred Black Hills. In the terms of the Fort Laramie Treaty of 1868, "three fourths of the adult male Indians" of the Sioux tribes were required to consent before "the cession of any portion or part of the reservation... shall be of any validity or force against the said Indians." The Manypenny Commission did not even attempt

both collective and individual, in and to the said Santee reservation, in said Knox County and State of Nebraska, upon which we, the undersigned, and our people are now residing").

Notwithstanding the Manypenny Commission's reassurances, the question of whether the bill containing the "agreement" with the Sioux tribes would authorize their removal to Indian Territory was hotly contested in both Houses of Congress. In the Senate, the debate centered on a proposed amendment striking language from Article 6 of the "agreement" which provided that "if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling-house." 

5 CONG. REC. 1055 (1877) (statement of Sen. Ingalls of Kansas) (quoting bill to ratify agreement with certain bands of the Sioux Nation of Indians, S. No. 1185, Art. 6) (internal quotation marks omitted). One faction, led by Senators from states bordering the Indian Territory, argued passionately in favor of the amendment, while another faction, led by Senators from states bordering the Great Sioux Reservation, argued just as passionately against the amendment. See id. at 1055-58. Although each side disingenuously argued that its preference better reflected the tribes' understanding of the "agreement," the faction favoring the amendment prevailed by expressing more openly its "not-in-my-back-yard" hostility to the prospect of living in close proximity to the Sioux tribes. See, e.g., id. at 1057 (statement of Sen. Ingalls of Kansas) ("[A]ny movement that looks even by implication or that favors even by the remotest inference any policy that has for its object the removal and location of the Sioux into the Indian Territory will meet I believe practically with the unanimous opposition of the people and the representatives of those States."); id. at 1056 (statement of Sen. Bogey of Missouri) ("I, for one, am opposed to allowing the wild Indians of the prairies to go at any time to the Indian Territory; and I will oppose here and at all times any tendency in that way."); id. at 1057 (statement of Sen. Maxey of Texas) ("[I]f those people who now occupy that Territory are not loaded with this fearful fog of ignorance and savagery, they will increase in wealth, intelligence, and prosperity."). Exhibiting similar sentiments, an anti-removal faction in the House of Representatives successfully urged that the bill include additional language providing

[i]that nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory; and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted.

Id. at 1615 (statement of Rep. Mills of Texas) (quoting proposed amendment to bill to ratify agreement with certain bands of the Sioux Nation of Indians, S. No. 1185) (quotation marks omitted); see, e.g., id. at 1616 (statement of Rep. Mills of Texas) ("I feel my duty to my constituents requires I should oppose the passage of the bill without the utmost guarantee possible to be written by human hands against the transfer of the Sioux Indians to the Indian Territory."); id. at 1617 (statement of Rep. Throckmorton of Texas) ("We ask that these northern savages shall not be sent down on us."); see also OLSON, supra note 18, at 231 (footnote omitted) ("Congress, under pressure from railroad and other interests who wanted Indian Territory opened for white settlement, deleted that part of the agreement which provided for removal of the Sioux to the area.").

65. In subsequent years, the United States used similar threats of removal to Indian Territory in trying to obtain the Sioux tribes' "agreement" to the relinquishment of additional reservation lands. See, e.g., HYDE, supra note 58, at 115-26 (discussing threats of removal as among the tactics used by the Newton Edmunds Commission in 1882 to pressure Sioux Indians into selling "surplus" lands).


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
to comply with this treaty requirement, and instead departed from Sioux country purporting to have obtained the signatures of no more than ten percent of the adult male Sioux population. In an official report ostensibly entreaty Congress to uphold its end of this “agreement,” the Manypenny Commission ironically revealed its own ambivalence about the government’s duplicity and sharp tactics in confiscating the Black Hills:

We entered upon this work with full knowledge that those who had heretofore made treaties with these Indians had seen their promises broken.... If we sow broken faith, injustice, and wrong, we shall reap in the future, as we have reaped in the past, a harvest of sorrow and blood. We are not simply dealing with a poor perishing race; we are dealing with God....

... A great crisis has arisen in Indian affairs. The wrongs of the Indians are admitted by all. Thousands of the best men in the land feel keenly the nation’s shame.... Our country must forever bear the disgrace and suffer the retribution of its wrong-doing. Our children’s children will tell the sad story in hushed tones, and wonder how their fathers dared so to trample on justice and trifle with God."

In February 1877, Congress enacted the Commission’s “agreement” into law, lending a final, false “legitimacy” to the confiscation of Paha Sapa.

As Justice Blackmun points out in the Supreme Court’s Sioux Nation decision, the 1877 congressional act purporting to dispossess the Great Sioux Nation of Paha Sapa “has been regarded by the Sioux as a breach of this Nation’s solemn obligation to reserve the Hills in perpetuity for

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the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same.

Fort Laramie Treaty of Apr. 29, 1868, Art. XII, 15 Stat. 635, 639, quoted in Sioux Nation, 448 U.S. at 376.

66. See Sioux Nation, 448 U.S. at 381-82; see also Black Hills Hearing, supra note 10, at 242 (prepared statement of Suzan S. Harjo, executive director, National Congress of American Indians) (“Even this 10% figure is not accurate, as the names of children and deceased people appeared on the document.”).


68. See Sioux Nation, 448 U.S. at 382 (citing Act of Feb. 28, 1877, 19 Stat. 254). Historian George Hyde provides a fitting summary of the events leading to the dispossession of Paha Sapa:

[T]he object had been attained at last, and under the cloud of war the government had taken the Black Hills, the Powder River lands, and the Bighorn country. The pretense of formal agreement and fair payment which Congress had devised to veil this act of robbery did not even deceive the Indians. The chiefs knew that they were being robbed and that they were forced to sign away their lands. Here are beef, flour, and blankets (said the United States) for your lands in Laramie Plains and between the forks of the Platte, which we took from you before 1865; and here (said the United States) are the same beef, flour, and blankets for your lands in Nebraska which we took before 1870; and (said the United States with an air of vast generosity) here are the same beef, flour, and blankets for the Black Hills, the Powder River, and the Bighorn lands which we are now taking from you. In all fairness, that is very near the true meaning of the “agreement” of 1876, by means of which these last lands were taken from the Sioux.

HYDE, supra note 18, at 292-93.
In *Sioux Nation* itself, the Supreme Court decided—over the solitary dissent of then-Associate Justice Rehnquist—that after more than a century of a multitude of legal and political efforts by the Sioux tribes, the time had come to recognize the unconstitutionality and injustice of the United States government’s forced dispossession of *Paha Sapa* from the Great Sioux Nation. The Court rejected the United States’ argument that this dispossession required judicial deference because it was “within [Congress’s] plenary power to manage tribal assets” and indeed was a reasonable expression of Congress’s intent “to promote the welfare of the tribe.” The Court concluded that the 1877 congressional act dispossessing the Great Sioux Nation of the Black Hills 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.

69. *Sioux Nation*, 448 U.S. at 383. Before his arrest and murder by federal police at Standing Rock Agency in 1890, Hunkpapa Lakota Chief Sitting Bull expressed his people’s grievance over the taking of the Black Hills to writer J.W. Buel:

I need not tell you how we have been deceived by the white people.... The Black Hills country was set aside for us by the government; it was ours by solemn agreement, and we made the country our home; we realized how our lands had been taken, our reservations circumscribed, my people driven like so many wild beasts toward a common center to be shot down by encircling soldiery. Our homes in the Black Hills were invaded when gold was discovered there; we asked for protection, which was promised, but with all our importunities, the government refused to come to our aid. White thieves committed depredations and then accused my people of perpetrating the acts.


70. See infra note 72.


72. *Id.* at 423-24 (citation omitted) (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903)). Dissenting from the Court’s decision, then-Associate Justice Rehnquist embraced the belief “that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands—an exchange Congress believed to be in the best interests of the Sioux and the Nation.” *Id.* at 424 (Rehnquist, J., dissenting) (summarizing the 1942 ruling of the Court of Claims in the *Sioux Nation* litigation). Rehnquist gratuitously endorsed the assertion of Christopher Columbus biographer Samuel Eliot Morison that the Plains Indians “lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.” *Id.* at 437 (Rehnquist, J., dissenting) (citation omitted) (quoting SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 539-40 (1965)). Rehnquist concluded his dissenting opinion with a notorious, thinly veiled threat:

That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: “Judge not, that ye be not judged.”

*Id.* (Rehnquist, J., dissenting). For a provocative discussion placing Rehnquist’s dissenting opinion in *Sioux Nation* in the ignoble tradition of Supreme Court speech scorning
III. THE VITAL NEED FOR RETURNING PAHA SAPA TO THE GREAT SIOUX NATION

The Supreme Court’s decision in *Sioux Nation* recognizing the dispossession of the Black Hills as an uncompensated taking in violation of the United States Constitution arguably comprises an important doctrinal advancement for the field of Indian law. The decision prevents the United States from presuming judicial approval of any forced dispossession of Indian lands on the government’s bare assertion that such dispossession constitutes an exercise of Congress’s “plenary power” in Indian affairs.

disempowered litigants, see Richard Delgado and Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994). The authors state that in *Sioux Nation* Justice Rehnquist scorned the Indians, pure and simple, thinking his readers would do so as well . . . He misjudged his audience. He failed to persuade a majority of his fellow Justices. And, among Indians and Indian lawyers, at least, his opinion acquired instant infamy.

. . . The sharp tools of scorn and irony rarely, if ever, should be used against the weak and lowly. This rule acquires added force in the case of judges, because of the judiciary’s special role as countermajoritarian protector of minorities in our system of politics . . . [T]he Supreme Court today has been breaching this rule with increased frequency, treating powerful actors with exaggerated respect and deference and affording curt, sometimes scornful treatment to society’s out-groups. This trend is troublesome on a number of levels. It can tarnish the reputations of otherwise eminent justices, long after they leave the bench. It can injure particular litigants, demoralizing them and causing them to lose faith in the judicial system. And, if continued, it portends serious damage to the legitimacy of the Court as an institution.

*Id.* at 1077, 1099.

73. But see infra note 74.

74. *See Sioux Nation*, 448 U.S. at 409, 416-17 (describing and adopting the “good faith effort” test of *Three Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968), which requires that Congress make “a good faith effort to give the Indians the full value of the land” in order for a congressional appropriation of tribal property to be treated as an exercise of Congress’s power in Indian affairs rather than an exercise of eminent domain subject to the takings provision of the Fifth Amendment of the United States Constitution).

Although *Sioux Nation* advanced the field of Indian law from its prior condition by recognizing that some congressional appropriations of tribal land may be treated as constitutionally compensable takings, the decision has been criticized as leaving intact and perhaps reinforcing the view of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), that most such appropriations will be considered constitutionally valid, since “Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.” *Id.* at 565, quoted in *Sioux Nation*, 448 U.S. at 408 (alteration added by the *Sioux Nation* Court). Hence, Professor Bruce Duthu argues that despite the majority’s conclusion favoring the Tribe on the takings issue, the rationale adopted by the [*Sioux Nation*] Court is quite inimical to fair resolution of takings claims involving Indian lands. The Court’s “good faith” test arrogates to the trustee—i.e., Congress—a power to dispose of Indian lands without recrimination, as long as Congress provides (or attempts to provide) property of equivalent value. This removes Indian land claims from the general corpus of takings jurisprudence without clear justification. It also perpetuates the erroneous presumption in *Lone Wolf v. Hitchcock* that tribal lands are fungible assets.

However, because it authorized compensation strictly in the form of money rather than the return of Paha Sapa, the Sioux Nation decision failed to

A particularly ill-founded application of private fiduciary standards is found in United States v. Sioux Nation of Indians. There, the Supreme Court presumed that the government's confiscation of tribal land in violation of a treaty could be justified as an exercise of its fiduciary duty, relying upon the settled principle of private trust law that a fiduciary may alter the nature of the assets in the trust. Yet reliance upon a private fiduciary's standard of care relating to transmutation of property is singularly inappropriate for judging governmental action of this sort. Tribal land holdings such as the Sioux Nation's sacred Black Hills hardly equate with "liquid" private trust assets which a trustee may freely exchange for currency. Tribal lands are integral to native economies, culture, and religion, and therefore involve sovereignty interests which reach far beyond the interests of an individual beneficiary in the private trust context. By suggesting otherwise, Sioux Nation leaves an ugly scar on the landscape of Indian trust law and illustrates well the danger of importing private trust standards into the Indian trust context.


While the [Sioux Nation] Court dispensed with the good faith presumption of Lone Wolf, it essentially sanctioned the conversion of property out of Indian ownership. By examining fiduciary responsibility solely in terms of adequate compensation, the Court reduced the trust responsibility to an obligation that would arise in any event under the Fifth Amendment. A more robust application of the trust doctrine would have led the Court far beyond due compensation and into the propriety of transferring land out of Indian ownership in the first place.


The Sioux Nation rule...permits a successful government showing of good faith to defeat any Indian claim for just compensation. Admittedly, two conflicting principles must be accommodated in Indian land claims: the long-recognized congressional power to control and manage Indian land for the welfare of the tribe, and Indian rights to equal treatment in the enjoyment of their land. Unfortunately, the Court's accommodation in Sioux Nation once again has created a special rule for Indians that grants too much deference to assumed congressional powers and too little weight to Indian rights.

... Rules denoting some Indian land as "not property" and other land as property but not "taken" because of the government's power over Indian land, condition the non-Indian majority to accept confiscation the majority would protest if other landowners were involved. In turn, the knowledge that few will protest encourages even further assertions of federal power over Indians. The unique relationship of Indian tribes to the federal government should not be used to justify actions that would be confiscations in any other setting.

Id. at 250, 265; see also Nell Jessup Newton, Compensation, Reparations, & Restitution: Indian Property Claims in the United States, 28 GA. L. REV. 453, 472 (1994) ("[T]he [Sioux Nation] rule serves as a reminder that the American legal system still accepts rules of formal inequality dealing with Indian land.").

75. As a suit authorized by the Indian Claims Commission Act of 1946, 60 Stat. 1049 (omitted from 25 U.S.C. § 70 upon termination of the Commission on Sept. 30, 1978), the claim litigated in Sioux Nation was eligible for monetary relief only, since the Commission "viewed its remedial arsenal as restricted to money damages, a view that seems consistent with the legislative intent." Nell Jessup Newton, Indian Claims in the Courts of the Conqueror, 41 AM. U. L. REV. 753, 773 (1992). The Supreme Court addressed the dispute after the Court of Claims, pursuant to special congressional authorization, had held that the 1877 Act amounted to an
Indeed, the decision has been viewed by Lakota, Dakota, and Nakota leaders as legitimizing the confiscation of the Black Hills and thereby compounding the original injury and endangering the survival of the Sioux tribes. William Means, executive director of the International Indian Treaty Council and citizen of the Oglala Lakota Nation, tersely condemned the decision in testimony before the Senate Select Committee on Indian Affairs:

'[F]irst of all, the courts [in Sioux Nation] identified the thief of the Black Hills in 1877 as the U.S. Congress. The second thing the court did was allow the thief to keep what he had stolen. The third thing the court did was allow the thief to determine the value of the land. The fourth thing they did was allow the thief to impose or attempt to impose that monetary judgment upon our people in exchange for the land.'

Similarly, Professor Elizabeth Cook-Lynn, Crow Creek Dakota scholar and founding editor of Wicazo Sa Review, denounces federal efforts to confer monetary compensation for the taking of the Black Hills as "a tactic" deployed in "a kind of paper warfare that not only legalizes land theft but legalizes the death of the tribes." Professor Cook-Lynn and others also have emphasized the superficiality and hypocrisy of efforts in South Dakota to achieve "reconciliation" with the Sioux tribes in the face of the continuing forced alienation of Paha Sapa from sovereign tribal ownership. Because of unconstitutional taking and hence "that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of $17.1 million, dating from 1877." Sioux Nation, 448 U.S. at 389-90. The Supreme Court's review thus was confined to the issue of whether the Court of Claims was correct in concluding that an unconstitutional taking of the Black Hills had occurred which would require an award of simple interest, bringing the total award to more than $100 million. See id. at 390.


76. The fundamental inadequacy of an award of monetary compensation for the taking of the Black Hills has been acknowledged by congressional leaders. Representative James Howard, for instance, declared in 1986: "The solution that the courts have offered will not work. We cannot give the Sioux money and keep the Black Hills as if we had purchased them, for we did not purchase them, we seized them illegally. They are not ours to keep." Black Hills Hearing, supra note 10, at 255 (prepared statement of Rep. Howard); see also infra notes 206-216 and accompanying text.

79. See, e.g., id. at 110. Professor Cook-Lynn writes:

Before we can talk about reconciliation, South Dakotans, both Indian and white, have to understand this history of dispossession and its connection to present life. White South Dakotans who have benefited from this dispossession and continue to benefit have to be willing to return stolen lands to tribal title and jurisdiction. They must honor and respect old agreements before new ones can be made.

Id. Hunkpapa Lakota scholar Professor Vine Deloria, Jr., a citizen of the Standing Rock Sioux Tribe, provides a similar criticism of "reconciliation" efforts:

Nineteen ninety-one was a year of great schizophrenia and strange anomalies in South Dakota. Local whites shamelessly capitalized on the success of the movie [Dances With Wolves] at the same time they were frothing at the mouth over the continuing efforts of the Sioux people to get the federal lands in the Black Hills returned to them. Governor George Mickelson announced a "Year of
a widespread realization "that if they ever accept money damages in exchange for their claim to these sacred lands, they will forfeit their cultural identity as Lakota people," the Sioux tribes have rejected Sioux Nation's "remedy" of monetary compensation for the unconstitutional taking of the sacred Black Hills.⁵⁰

As Professor Rebecca Tsosie explains, this "legendary refusal" to abandon efforts to recover Paha Sapa stems from the Sioux tribes' recognition of the Fort Laramie Treaty of 1868 as a "sacred promise" that is "fundamental to the cultural survival of the people because [it] represent[s] the linkage between land and cultural identity."⁵¹ Similarly, Professor Frank Pommersheim observes:

For the Sioux Nation, land restoration is a cornerstone cultural commitment. Economic considerations are important, but not as central. The Black Hills land is of primary importance because of its sacredness, its nexus to the cultural well being of Lakota people, and its role as a mediator in their relationship with all other living things....

Land is inherent to Lakota people. It is their cultural centerpiece—the fulcrum of material and spiritual well being. Without it, there is neither balance nor center. The Black Hills are a central part of this "sacred text" and constitute its prophetic core.

Reconciliation" that simply became twelve months of symbolic maneuvering for publicity and renewal of political images. When some of the Sioux elders suggested that the return of Bear Butte near Sturgis would be a concrete step toward reconciliation, non-Indians were furious that reconciliation might require them to make good-faith effort to heal the wounds from a century of conflict.

VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 280 (2nd ed. 1994).

80. Tsosie, supra note 12, at 1644-45; see also Gonzalez, supra note 18, at 68-69 ("The Lakota tribes' rejection of the $100 million [Indian Claims Commission] award in 1980 has come to symbolize Native American resistance in North America.... [T]he long-term survival of the Lakota people depends on how the Black Hills claim is ultimately resolved.").

81. Tsosie, supra note 12, at 1641-42, 1643; see also Black Hills Hearing, supra note 10, at 51 (statement of Keith Jewett, tribal representative, Cheyenne River Sioux Tribe) ("[T]he Black Hills is the core of our existence."); id. at 65-66 (statement of Charlotte A. Black Elk, Black Hills Steering Committee) ("[E]verything that is Lakota centers around the Black Hills."); id. at 148 (prepared statement of Alex J. Lunderman, chairman, Rosebud Sioux Tribe) ("The Black Hills will always be sacred to us. It is part of the core of our culture and religion, a heritage that we must pass on to generations yet to come."); id. at 154 (prepared statement of Richard L. Kitto, representative, Santee Sioux Tribe) ("[T]he Black Hills is the core of our existence.").


It is these elements of legal sovereignty and deep spiritual commitment that make the Fort Laramie Treaty of 1868 the pinnacle from which contemporary Sioux history unfolds, often as a chronicle of loss, betrayal, and rebirth....

... All Lakota people and their respective tribes agree that the Black Hills are the core of their spiritual inheritance. For Lakota people, the guiding spirits are strongest there. The Black Hills hold their 'Mother's heart and pulse' with sustaining myth. They are the focal point of annual pilgrimage and rich ceremonies from before the days of the white man's presence. The Black Hills represent for many Lakota the last opportunity to restore the sacred hoop and to permit a heritage to flourish.
For the Lakota, Dakota, and Nakota people, *Paha Sapa* is “constitutive of cultural identity,” and the tribes’ “symbolic refusal to acquiesce to the immoral conduct of the United States [has] fueled the Sioux people’s struggle to reclaim the Black Hills and assert their sovereign rights.” As Professor Cook-Lynn attests, “[t]he Sioux Oyate believe they now walk with renewed pride in themselves instead of walking around with their heads hanging in defeat and shame, which would have been their fate if they had accepted the monetary award for the Black Hills.”

Other legal scholars and historians likewise have recognized the continuing struggle for the return of *Paha Sapa* as a matter of cultural, political, and spiritual life-or-death for the Lakota, Dakota, and Nakota people. Professor John Ragsdale observes that “sacred places in symbolic form and in reality can unify a group against other threats and problems,” and he cites the Sioux tribes as “vivid present examples of Indian nations under fierce economic pressures who have refused monetary substitutes, preferring to hold on to their spiritual, legal, and equitable claims on sacred lands.”

Professor Robert Clinton describes the United States’ taking of Indian lands as “a continuation in legal form of the colonial effort to exploit Indian resources by buying off the Indians with cash,” and he invokes the Black Hills case as a prime illustration of this process of enforced cultural destruction and territorial dispossession:

This vestige of the colonial process whereby the United States acquired land from Indians for Euro-American settlers and the Indians were bought off with cash annuity payments has been central to the century-old dispute between the Lakota Nation, the Sioux, and the United States over the unconstitutional and unilateral taking of the Black Hills from the Sioux....Although the Lakota tribes received a judgment now estimated to be worth over $315 million, the Lakota feel betrayed and have refused to take the money, demanding instead the return of the Hills or some significant portion thereof....What appeared to non-Indians as an expensive and generous settlement of an old land claim was viewed by the Lakota as just another colonial buyout of Indian title for which the legal system created a complex justification to legitimate the sale or expropriation.

As Dean Nell Jessup Newton intimates, the story of the dispossession of the Black Hills and the Sioux tribes’ continuing resistance to that dispossession is part of a larger story of “peoples who continue to struggle to maintain their right to exist separately in a world still waiting for them to

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Pommersheim, supra note 18, at 19-20; see also Cook-Lynn, supra note 78, at 108 ("[I]t is in the land that the native finds his morality and religion, his life and survival.").

83. Tsosie, supra note 12, at 1640, 1644.

84. COOK-LYNN, supra note 1, at 6-7.


assimilate." Similarly, Professor Philip Frickey describes the Sioux tribes' refusal to accept monetary compensation for the taking of the Black Hills as an instructive example of resistance to the "judicial colonization" of Indian lands:

The payment of money . . . does not begin to compensate when the taking involves aboriginal lands, with their extraordinary cultural significance. . . . In the context of Indian lands, . . . the just-compensation requirement . . . imposes the western, capitalist assumption that land and capital are fungible upon a nonwestern, noncapitalist culture in which they are not. It is, in short, a form of judicial colonization.

The long saga of the taking of the Black Hills confirms this conclusion about the nonequivalence of land and money. . . . The tribes argued that money was not an appropriate substitutionary remedy for the loss of lands of such cultural and religious significance, and that taking the money would dissipate the tribes' moral claims to an entitlement to the return of the lands. The money still sits in the federal treasury, earning interest, as the tribes hope for federal legislation returning some of the land.

By virtue of the spiritual bond linking Paha Sapa to the destiny of the Sioux tribes, the Lakota, Dakota, and Nakota people can never capitulate in the struggle for the return of the sacred Black Hills; for, in the words of Professor Robert Williams, "[w]ithout the land . . . there is no tribe."

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87. Newton, supra note 75, at 854.
89. Professor Cook-Lynn forcefully makes this point in her incisive critique of Edward Lazarus's controversial book Black Hills, White Justice:

Black Hills, White Justice claims to elucidate the ethical, moral questions posed by the Sioux Black Hills case, yet comes to an immoral, unethical conclusion. What is even more disappointing is that this privileged, wealthy American writer/lawyer (who "listened to this story at the dinner table" throughout his younger years) fails to tell his readers that the return of the homelands of the Sioux Nation is possible, that the return of the Sioux lands can be accomplished in this century with very minimal upheaval, that the Sioux defenders of their lands are intelligent, thoughtful, realistic people who understand their own political, historical, and spiritual condition, and that they are right in their resistance and will eventually be strengthened by it.

Though Lazarus rejects the hope that Americans have the will for a fair settlement of this case, which means the return of the lands, the Sioux continue to believe in the potential for American justice and, at this moment at least, do not seem to be giving up their demands for land reform in the Black Hills. . . .

What is sadly missing . . . from Lazarus's work . . . is an understanding of the warrior spirit of Oyate. Also missing is the faith that America can live up to its ideals.

90. Robert A. Williams, Jr., Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World, 96 W. VA. L. REV. 1133, 1153 (1994). Professor Williams invokes this enigmatic phrase in emphasizing the integral meaning of the natural environment for Indian tribes generally:
IV. THE DANGER AND DUTY AHEAD: SAYING NO TO ENVIRONMENTAL COLONIALISM AND ETHNOCIDE

In contemplating the possibility of establishing a "Greater Black Hills Wildlife Protected Area," the "treacherous history" of the dispossession of Paha Sapa should give the Conservation Alliance pause to consider carefully the political, moral, and ethical implications of how it chooses to proceed with its proposal. The advocates of the proposal must be willing to clarify and deepen their commitment to achieving justice through the proposal's development beyond the mere avowal that Indian people "must be consulted" and that "Native American participation should be encouraged." As Professor Pommersheim reminds us, "[j]ustice emanates from conversation rather than declaration," and with respect to Paha Sapa in particular there remains an urgent "need for enduring and honest dialogue." Hence, any

In many Indian belief systems, you will find an intimate relation between the spiritual world, the physical world, and the social world. These three dimensions of human experience are all closely integrated in most Indian belief systems, an integration which is totally alien to our environmental law. Indians have many ways to imagine and act upon this intimate relation between the spiritual, physical, and social worlds, but all of them basically boil down to a deep and abiding reverence for the land that sustains the interconnected worlds of the tribe. Without the land, in other words, there is no tribe. That is why tribal land is sacred land, because it has been given by the Creator to sustain the tribe. That is why tribal values seek to cultivate an attitude of respect for the land and the resources it yields.

Id; see also Black Hills Hearing, supra note 10, at 280 (prepared statement of Sinte Gleske College, Rosebud Sioux Reservation) ("Without the Black Hills, the people have no spiritual foundation. Without that spiritual foundation, self-determination is but a dream. Until the Black Hills situation is settled, the people will remain unfocused and unfulfilled."); Frank Pommersheim, Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence, 1992 Wis. L. REV. 411, 449 (1992) ("For people intimately connected with the land as a source of identity and spiritual strength, the loss has been much more than economic and political; it has been culturally devastating."); Maria Stavroupolou, Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?, 5 COLO. J. INT'L ENVTL. L. & POL'Y 105, 106 (1994) ("Unquestionably, the disruption of the relationship between indigenous peoples and their environment threatens their very existence as a people—not only their cultural existence, but also their physical well-being.").

91. Sutton & Sartore, supra note 2, at 1; supra text accompanying note 2.
92. COOK-LYNN, supra note 89, at 24.
93. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.
94. Pommersheim, supra note 82, at 351, 357 (footnote omitted). The "need for... honest dialogue" becomes painfully apparent when one considers the extent of false and misleading information about the Black Hills case propagated publicly by opponents of legislative redress for the dispossession of Paha Sapa. Former United States Senator Larry Pressler, for example, stated for the Congressional Record in 1988 that in the case of United States v. Sioux Nation, "[t]he Supreme Court held that the Government and Congress had acted correctly and within legal bounds" in dispospossessing the Great Sioux Nation of the Black Hills. 134 Cong. Rec. 16,019 (1988) (statement of Sen. Pressler). But as discussed previously, the Sioux Nation Court in fact had decried the Government's "duplicity" as a "ripe and rank case of dishonorable dealings" and held the 1877 Act that effected a taking of the Black Hills unconstitutional for failing to fulfill Congress's "obligation... to make just compensation to the Sioux Nation." United States v. Sioux Nation, 448 U.S. 371, 388, 424 (1980) (quoting United States v. Sioux Nation, 207 Ct. Cl. 234, 241, 518 F.2d 1298, 1302 (1975)); supra text accompanying note 17; supra text accompanying note 72.

Senator Pressler also stated that he "tend[ed] to agree with the Supreme Court that there were wrongs on both sides; that the Indian tribes at that time in the 1880's and 1890's violated parts of the treaty and perhaps the U.S. Government violated parts of them [sic]." 134 Cong. Rec. 16,019 (1988) (statement of Sen. Pressler). But in fact, the Sioux Nation Court made no such damning accusations about the conduct of the Sioux tribes during the late nineteenth
“conversation” or “dialogue” about our “common future on the Great Plains” must begin by acknowledging that the dispossession of the Black Hills from the Great Sioux Nation is a present and ongoing injustice, and not simply a doleful moment in a “broader discussion about the past.”

What the Conservation Alliance must conscientiously avoid—and what the Sioux tribes must vigilantly guard against—is the prospect of advancing a policy scheme that charts a course toward a “common future” in which the intolerable and continuing injustice of the dispossession of Paha Sapa is further “legitimized” under the guise of “protecting” or “restoring” or “renewing” the environment. If that were to happen—if the Lakota, Dakota, and Nakota people’s aspirations for the return of the sacred Black Hills were to be sacrificed once again under the edict that the invaders “simply need that country . . . [as] part of the geography of hope”

—then the plan for
century; indeed, the Court did not discuss historical events of the 1880s and 1890s at all. See Sioux Nation, 448 U.S. at 374-84 (discussing relations between the United States and the Great Sioux Nation during the period 1866 to 1877). Senator Pressler’s accusatory remarks are consistent not with the views of the Sioux Nation Court, but rather with the infamous dissenting view of then-Justice Rehnquist reflected in the statement that “the Indians did not lack their share of villainy either,” id. at 435 (Rehnquist, J., dissenting); see also supra note 72; Sioux Nation, 448 U.S. at 421-22 n.32 (denouncing “the view of the history of the cession of the Black Hills that the dissent prefers to adopt, largely, one assumes, as an article of faith”).

A final illustration of political hyperbole distorting public perceptions about the Black Hills case is another statement of Senator Pressler’s that the proposed “Sioux Nation Black Hills Act” as introduced by Senator William Bradley “essentially would give back to the Sioux a major area in the western part of South Dakota, which is now owned by thousands of private owners and has been for over 100 years.” 134 CONG. REC. 20,709 (1988) (statement of Sen. Pressler). However, the bill to which Senator Pressler referred—the “Bradley bill,” S. 705—specifically would have exempted private lands from reconveyance to the Sioux tribes. See Sioux Nation Black Hills Act, S. 705, 100th Cong. § 8(a) (1987), reprinted in 133 CONG. REC. 5162 (1987) (introduced by Sen. Bradley) (“Privately held lands within the re-established area shall not be disturbed, and may be held and used or occupied for the same purposes as prior to this Act . . . .”); see also infra notes 206-216 and accompanying text.

95. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.

96. Wallace Stegner, quoted in Sutton & Sartore, supra note 2, at 1 (no citation to Stegner provided). For a superb and provocative discussion of Wallace Stegner’s influence on writers of the American West and on “the politics of possession and dispossession,” see ELIZABETH COOK-LYNN, WHY I CAN’T READ WALLACE STEGNER AND OTHER ESSAYS, supra note 89, at 29, 40. Professor Cook-Lynn writes:

There is, perhaps, no American fiction writer who has been more successful in serving the interests of a nation’s fantasy about itself than Wallace Stegner, and there are few of us who have not read his works.

The experiences of Stegner are those of a vast portion of the American public. His experiences, one supposes, are broadly accepted as the events and feelings known to second-, third-, and fourth-generation European immigrants to the land. As they did, Stegner simply claims indigenousness and begins to set down the new myths and stories of those newcomers stepping off boats and, in the process, continues the personalization of history and setting that is so dear to the hearts of the so-called regional American writers. This personalization takes place in the imagination, thus the claim to identity needs only acclamation. . . .

Since Stegner wrote of a sorrowful past as it concerned Indians, his work has served to give regional and American literature of the West a cloak of respectability. . . . Claiming ignorance, Stegner can say that the final curtain has fallen, no handprints of any human perpetrator can be found, criminal action requires no reprimand. The concern for all of us who put pen to paper should be that such a position has the potential to cut off dialogue and condemn to oblivion or absurdity Indian writers who want to continue the drama.
“renewing the Great Plains” will have failed to help realize “the dream of dwelling on an earth made whole.” Instead, the Conservation Alliance will have opened yet another “tragic chapter in the history of the Nation’s West” by effectively deploying environmental colonialism to exacerbate the ethnocide manifested in the dispossession of Paha Sapa.

The danger of spreading colonialism by means of a project intended to advance environmental interests is by no means unique to the task that lies ahead of the Conservation Alliance, of course. Many commentators have addressed the clash of values that frequently arises in the course of implementing environmental protection efforts in Indian country, and they have invoked a variety of terms to capture the essence of this clash. As noted previously, Professor Clinton characterizes the Black Hills case as raising the specter of an attempted “colonial buyout” that recreates the historic “colonial process” of the United States forcing Indians to cede their lands for cash annuity payments. Professor Clinton’s definition of “colonialism” is particularly useful in casting light on the dispossession of Paha Sapa:

[Colonialism can be understood to consist of the involuntary exploitation of or the annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the involuntary expansion of political hegemony over them, often displacing, partially or completely, their prior political organization. In essence, colonialism of one people over another represents the antithesis of the legal notion of self-determination for all peoples.]

Clearly, the abrogation of the Fort Laramie Treaty of 1868 and the unconstitutional taking of the Black Hills comprise a stark illustration of colonialism in operation, expanding the United States’ hegemony by seriously...
undercutting the Great Sioux Nation’s rights of cultural, religious, political, and national self-determination and survival. The award of monetary compensation in *United States v. Sioux Nation* is no less a part of this colonialis system process; it is, rather, an example of “judicial colonization,” as Professor Frickey aptly has observed. The pressing moral task for the Conservation Alliance is to avoid propagating this colonialism in pursuing its environmental “renewal” agenda, and to choose instead to help “end a dark period of blatant, colonizer-styled disregard for the human, legal and religious rights of indigenous people.”

Other legal scholars likewise use the term “colonialism” to describe the historic and contemporary exploitation of tribal lands, including exploitation of sacred places by environmentalist interests. In an inspired meditation on the desecration of the Apache tribes’ sacred Mt. Graham by the University of Arizona and “a consortium of foreign astronomers,” Professor Williams explains “how our environmental law has been colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples.” Professor Williams admonishes that “any efforts aimed at decolonizing our environmental law must first identify and confront this perverse value system” and warns further that “[t]he price we pay for maintaining our dying colonialism is to dismiss the decolonization potential of . . . Indian visions of environmental justice.”

In a somewhat different context, Professor Tsosie discusses the culturally disintegrative impact of what she calls “value colonialism” in Indian country, “the systematic displacement of traditional values by those of the majority society.” Professor Tsosie discerns this corrosive process of “value colonialism” functioning when tribal governments, in response to “harsh realities,” “depart from traditional norms to engage in nontraditional economic development” on Indian reservations, such as permitting mining or waste disposal operations. However, a more “benevolent”—and hence more

101. See supra notes 17-90 and accompanying text.
102. Frickey, supra note 88, at 82; supra text accompanying note 88.
104. Williams, *supra* note 90, at 1134.
105. *Id.* at 1135, 1164.
107. *Id.* Although the internalizing of nontraditional values through “value colonialism” undoubtedly jeopardizes the maintenance and expression of traditional tribal values, a more imposing threat to tribal sovereignty emanates from what might be considered the flip side of the “value colonialism” coin—what Kevin Gover and Jana Walker aptly advert to as “environmental paternalism”:

For tribes considering developing commercial waste projects on their reservations, the major issue they face will not be an environmental one, but instead one of power and racism. Much of the environmental community seems to assume that, if an Indian community decides to accept such a project, it either does not understand the potential consequences or has been bamboozled by an unprincipled waste company. In either case, the clear implication is that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests. This is clearly a racist assumption; the same assumption
insidious—face of "value colonialism" may be detected in efforts to compromise and supplant traditional Indian religious and cultural values with the "antithetical" values of dominant society environmentalists. 108

Professor Sandi Zellmer provides an incisive analysis of this "benevolent" variety of "value colonialism" operating, for instance, in the cavalier designation of portions of Indian reservations as critical habitat under the Endangered Species Act. 109 Professor Zellmer explains:

Designation can severely restrict a tribe’s ability not only to govern, but also to conserve and utilize its land, diminishing the reservation’s character as the single most important tribal resource. In turn, designation flies in the face of the United States’ solemn promises to preserve tribal homelands for the undisturbed use of Indian Nations and to protect tribal sovereignty from external incursions. 110

Professor Zellmer urges that "tribal interests... be given the highest priority in the designation of critical habitat" and insists that "any formulation of a standard for reviewing development proposals on Indian lands must eradicate the vestiges of colonialism and respect tribal sovereignty and self-determination." 111 A similar commitment to respecting tribal interests and obviating colonialism must be at the top of the agenda in discussions between the Conservation Alliance and the Great Sioux Nation concerning our "common future on the Great Plains." 112

A number of academic observers have discussed the threat to tribalism posed by the reckless imposition of environmentalist values in Indian country as a type of "environmental racism." 113 Professor Gerald Torres cautions that "racism has been and should be a term of special opprobrium" and that "[w]e risk having the term lose its condemnatory force by using it too often or inappropriately." 114 However, he notes further:

that guided the federal policies that very nearly eradicated Indian people in the late nineteenth and early twentieth centuries. It is "environmental racism," and ultimately every bit as destructive as the open hostility to Indian people that we experience in many parts of this country.

We need the support and understanding of the environmental community, not its protection. Indian people are uniquely qualified to protect their own interests. Left to apply their own intelligence, beliefs, and values to a situation, they will make the right decision. The environmental community must respect that decision—whatever it may be—rather than attacking the decision and a tribe’s right to make it.


108. Williams, supra note 90, at 1134; supra text accompanying note 104.
110. Id. at 382.
111. Id. at 416, 421-22.
112. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.
113. See, e.g., supra note 107.
The term racism draws its contemporary moral strength by being clearly identified with the history of the structural oppression of African-Americans and other people of color in this society.... I count as racism those activities which support or justify the superiority of one racial group over another. When seeking to determine whether an activity is racist, the one characteristic that must be present is one of domination and subordination."

Professor Torres suggests that environmental policies can be analyzed "from the perspective of their subordinating impact on racial groups," and that environmental racism is discernible when "the predictable distributional impact of [an environmental] decision contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country." 

By these criteria, environmental racism may be seen as inherent in the "vestiges of colonialism" that pervade much of contemporary United States Indian policy, including policy concerning the environment. Both Professor Tsosie and Professor Williams note the connection between colonialism and racism in the implementation of federal Indian law and policy. Professor Tsosie observes:

The legacy of race and racism in the United States is inseparably linked to the history of conquest and colonialism that undergirds the treaty claims of American Indians.... Thus, the discourse of treaty rights has been employed ... in their quest to achieve justice within the dominant American society. Their claims for group rights, including self-determination, represent a call for recognition of the history of conquest and colonial domination that has characterized their relationship with the United States.

Professor Williams specifically equates racism and colonialism in the struggle to protect Indian cultures from the elaboration of conventional environmental policy, noting "how our environmental law perpetuates the legacy of European colonialism and racism against American Indian peoples" and how it "dismisses [Indian] visions [of environmental justice] through various mechanisms which have institutionalized environmental racism against Indian peoples at the deepest levels of our society."

115. Id. at 839-40 (footnote omitted).
116. Id. at 840.
117. Zellmer, supra note 109, at 422; supra text accompanying note 111.
118. Tsosie, supra note 12, at 1655.
119. Williams, supra note 90, at 1157, 1162. Similarly, Professor Catherine O'Neill discerns environmental racism operating when environmental policymakers reject the validity of tribal ecological knowledge:

[R]acist assumptions undergird a view that suspects the conclusions of a Native scientist to be unreliable, unsubstantiated or useless, simply because they are the conclusions of a Native scientist. When federal, state, or local environmental agencies whose decisions affect tribal resources dismiss Native knowledge or suspect the conclusions of tribal scientists on these bases, this is properly viewed as an instance of environmental racism.

In a philosophically penetrating examination of "[t]he deliberate silencing of indigenous voices in environmental reform," Professor Williamson Chang describes how the implementation of environmentalist projects often "promotes the denial of sovereignty to indigenous persons." Professor Chang vigorously denies that "racism" is a legitimate concept for capturing the essence of the threat to the survival of indigenous peoples posed by majoritarian schemes of environmental "protection":

The denial of rights to Native peoples is accomplished in the Americas by overlooking the conquest and taking of their lands. . . .

By asserting that race and not nationalism is the domestic problem of Native peoples, the distinction between the immigrants from Europe who settled the Americas and the Native peoples, is minimized. By treating the plight of indigenous persons as the result of racism, nations, such as the United States, rule out any true sovereignty or self-determination for its indigenous people. . . .

. . . Most of the incidents of environmental racism are really examples of environmental nationalism, or environmental imperialism.

How does a dominant society gain from reframing these incidents as "racist"? . . . [T]he implication that the harm is "racist" in its essence requires acceptance, particularly by the victim, of the assumption that the legal harm is a denial of equality not of sovereignty.

. . . .

[T]he term "environmental racism" reaffirms a framework in which there may be token gains and monetary relief, but at the price of acquiescence in the continuing refusal to deal with these issues in terms of the rights of nations whose people never consented to their forced acceptance of American citizenship.®

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121. Id. at 866-67 (footnotes omitted). Professor Chang's concerns about attacks on indigenous sovereignty being deployed under the banner of "equality," coupled with his repeated references to Native Hawaiians' struggle for sovereignty to illustrate this danger, are quite prophetic in the aftermath of the United States Supreme Court's recent decision in Rice v. Cayetano, 528 U.S. 495 (2000). In Rice, the Court struck down as a violation of the Fifteenth Amendment—which prohibits states from denying United States citizens "the right . . . to vote . . . on account of race," U.S. CONST. amend. XV, § 1—a statute of the State of Hawaii limiting eligibility for voting for trustees for the Office of Hawaiian Affairs to Native Hawaiians as defined under state law. See Rice, 528 U.S. at 498-99. Denouncing the majority's use of "glittering generalities" and its "wooden approach" for condemning the statutory definition of Native Hawaiians as a constitutionally forbidden racial classification, Justice Stevens observed in dissent:

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks—a consensus determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii.
Professor Chang's concerns about the inadequacy of the term "environmental racism" for conveying the essence of the harm that results when indigenous peoples are denied territorial sovereignty in the name of environmental policy are particularly applicable to the case of the dispossession of Paha Sapa from the Great Sioux Nation. To the extent that a proposal impacting the environment of the Black Hills region rests upon, and thus presumes to "validate," the attempted "colonial buyout"4122 manifested in the case of United States v. Sioux Nation,123 that proposal amounts to an assault on the cultural autonomy and sovereignty of the Lakota, Dakota, and Nakota people that is more egregious than the harm denoted by the term "racism" alone. To borrow Professor Chang's words, such a proposal reinforces and exacerbates "environmental colonialism" by tacitly "reaffirm[ing] a framework" that accepts "token gains and monetary relief" as "just compensation" for the dispossession of sacred tribal lands.124

In emphasizing the repression of indigenous sovereignty as distinguishing "environmental colonialism" from "environmental racism," Professor Chang underscores a related concern that is highly relevant in discussing the possible establishment of "a unique management regime for a portion of the Great Plains,"125 namely, that with respect to environmental policy, "[i]t is the left, more than the right, which has abandoned native indigenous people."126 Professor Chang elaborates:

[T]he left... must confront the possibility that they are using indigenous people, particularly the moral claims of such groups, to achieve their own assimilatory ends...

... [T]he appalling economic conditions of native people in the United States is used, frequently by the left more than the right, to restructure claims for sovereignty—the return of lands and self-

Id. at 527, 546, 547 (Stevens, J., dissenting) (citation omitted).

For additional, provocative criticism of efforts to address the needs of Indian tribes in terms of fighting "racism," see Robert B. Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples, 15 HARV. BLACKLETTER L.J. 107, 138-39, 154-58. Professor Porter writes:

Fundamentally, when Indian tribal leaders talk about American "racism" toward reservation Indians, a large part of what they are really... referring to is "xenophobia"—a fear of foreigners. When Indians are attacked personally by Whites... the discrimination is driven by a cocktail of hatred, jealousy and cultural supremacy spawned by generations of conflict over land, life and way of life. This kind of discriminatory treatment might more properly be thought of as national origin, rather than race discrimination.... [W]hen Whites attack Indians because of assertions of treaty rights, for example, accusations of racism only confuse the underlying facts associated with what are fundamentally nation-to-nation political conflicts.

Because of the success thus far in transforming conceptions of separate political status to merely conceptions of race, there will most likely continue to be an erosion of the perception of Indigenous people as citizens of separate sovereigns.

Id. at 158.

122. Clinton, supra note 86, at 156; supra text accompanying note 86.
124. Chang, supra note 120, at 867; supra text accompanying note 121.
125. Sutton & Sartore, supra note 2, at 4.
126. Chang, supra note 120, at 861 (footnote omitted).
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determination as to cultural practices—as welfare claims. Such a reformulation fundamentally undermines native sovereignty movements for the reframing of these claims as welfare rights must be premised within a structure which attributes all poverty of "persons of color" to racial discrimination (both individual and institutional).127

In the context of discussing the fate of the Black Hills, the danger identified by Professor Chang is that in their pursuit of "a new deal for rural residents,"128 well-meaning environmentalists might disparage or ignore the Sioux tribes' sovereignty-based demands for the return of Paha Sapa.129 Instead of redressing the ongoing legacy of environmental colonialism saturating the Black Hills case, these "progressive" environmentalists might presume that by simply inviting "Native American participation" in "a broader discussion about the past and a common future on the Great Plains,"130 all moral and ethical obligations to the Sioux tribes of the region thereby will be discharged. Consistent with Professor Chang's warning, these environmentalists then will have blinded themselves to the tribes' compelling sovereignty claims through an inordinate focus on promoting "equality" in discussions about the future of the Black Hills region.131 The inevitable result will be greater injustice and injury to the Sioux tribes through the "legitimization" of the dispossession of Paha Sapa in the name of environmental "renewal."

Acknowledging the forced dispossession of the Black Hills from the Great Sioux Nation as an ongoing manifestation of both racist and colonialist policy thus is crucial if justice is to be advanced, and "environmental injustice"132 avoided, in the elaboration of any proposal for "[r]enewing the

127. Id. at 862-63 (footnotes omitted).
129. In a vein similar to Professor Chang's criticism of the "environmental agenda" of "the liberal left," Chang, supra note 120, at 860, Professor Pommersheim addresses the problem of "Indian law liberalism" as manifested in Edward Lazarus's controversial book Black Hills, White Justice. Pommersheim, supra note 82, at 338, 342. Describing "Indian law liberalism" as "the arrogance of many well-meaning people whose naive attempt to support Native American sovereignty only inhibits these endeavors," Professor Pommersheim writes:

Indian law liberalism, despite its benevolent intention to "help" Indians, has often lapsed into a harmful and hurtful arrogance. The liberalism to which I refer is the kind of liberalism practiced by one who inherently "knows" what is best for others, particularly those who are situated outside mainstream, middle-class America. Mr. Lazarus' book is clearly cut from this cloth.

Id; see also COOK-LYNN, supra note 89, at 22 (denouncing Lazarus's "arrogant condemnation of the positions of resistance taken by the Lakota/Dakota people" and his "contempt for Sioux leadership" in belittling the tribes' refusal to accept monetary compensation for the unconstitutional taking of the Black Hills).

130. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.
131. That the concept "equality" is susceptible to a perverse reductionism in political discourses addressing injustices suffered by Indian tribes is illustrated in former United States Senator Larry Pressler's condemnation of a proposal for returning federally held lands in the Black Hills to the Sioux tribes as one that "has heightened racial tension" and "is viewed as a setback for equality." 134 CONG. REC. 16,019 (1988) (statement of Sen. Pressler).
132. Zellmer, supra note 109, at 427 (discussing some of the "many compelling examples of distributive and environmental injustice in Indian Country").
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It is not enough that environmentalists conform to a conventional principle of “equality” in pursuing plans for the future of the Black Hills region; they also must embrace the restoration of tribal sovereignty and cultural integrity as an indispensable remedial norm to be realized through the proposal’s development and implementation.Indeed, as Professor James Anaya persuasively argues, a policy that promotes “equality” while failing to value the integrity of indigenous cultures is incapable of achieving true equality, since “the effective realization of equality requires in many instances differential treatment of ethnic groups in ways not necessary for, or even relevant to, other types of groups.” Professor Anaya elaborates that in the context of policymaking affecting indigenous peoples, the advancement of true equality entails two crucial normative tasks: (1) the eradication or avoidance of exclusionary discrimination; and (2) the eradication or avoidance of cultural discrimination based on race or ethnicity,” governmental policy impacting American Indians and Native Hawaiians ignores a more egregious harm typically suffered by indigenous peoples, namely, “the destruction of the cultural self.” Chang, supra note 120, at 865.

In my view, federal Indian policy is and always has been infected with powerful strains of both racism and colonialism. Professor Williams profiles this same observation in his seminal writings exploring the genesis of federal Indian law, especially in his elucidations of the racist and colonialist essence of the European doctrine of “discovery,” which saturates the field’s foundational cases. See, e.g., DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 41-72 (4th ed. 1998). See generally ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990). Moreover, it is imperative, in my view, to identify and analyze the continuing dual problems of racism and colonialism that warp Indian law and policy in the modern era, especially as manifested in the projections of prejudice in the opinions of the modern Supreme Court. See, e.g., United States v. Sioux Nation, 448 U.S. 371, 436-37 (1980) (Rehnquist, J., dissenting) (quoting MORISON, supra note 72, at 539-40) (endorsing Samuel Eliot Morison’s description of the Plains Indians as “fine physical specimens” who, inter alia, “lived only for the day,... robbed or killed anyone if they thought they could get away with it, [and] inflicted cruelty without a qualm’’); supra note 72; see also Oliphant v. Suquamish Tribe, 435 U.S. 191, 208, 212 (1978) (quoting Oliphant v. Schiele, 544 F.2d 1007, 1009 (1976) (decision below) (emphasis added by the Supreme Court)) (holding that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians” because such jurisdiction is “inconsistent with their [inferior] status’’).

For additional commentary criticizing “rejection of the ‘racism’ categorization” in the struggle for Indian rights, Porter, supra note 121, at 138, see the discussion titled “The Race Against Ignorance” in John P. LaVelle, Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter, 10 KAN. J.L. & PUB. POL’Y (forthcoming summer 2001).

133. Sutton & Sartore, supra note 2, at 1.

Although the issue is debatable, I do not read the objections of Professor Chang—or of Professor Porter, see supra note 121—to conventional use of the term “racism” in characterizing governmental policy affecting indigenous groups as absolutely foreclosing acknowledgment of a close connection between “racism” and what Professor Chang refers to as “nationalism, or... imperialism.” Chang, supra note 120, at 866-67; supra text accompanying note 121. Rather, Professor Chang seems concerned—justifiably so—that by addressing solely the problem of “discrimination based on race or ethnicity,” governmental policy impacting American Indians and Native Hawaiians ignores a more egregious harm typically suffered by indigenous peoples, namely, “the destruction of the cultural self.” Chang, supra note 120, at 865.

In my view, federal Indian policy is and always has been infected with powerful strains of both racism and colonialism. Professor Williams profiles this same observation in his seminal writings exploring the genesis of federal Indian law, especially in his elucidations of the racist and colonialist essence of the European doctrine of “discovery,” which saturates the field’s foundational cases. See, e.g., DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 41-72 (4th ed. 1998). See generally ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990). Moreover, it is imperative, in my view, to identify and analyze the continuing dual problems of racism and colonialism that warp Indian law and policy in the modern era, especially as manifested in the projections of prejudice in the opinions of the modern Supreme Court. See, e.g., United States v. Sioux Nation, 448 U.S. 371, 436-37 (1980) (Rehnquist, J., dissenting) (quoting MORISON, supra note 72, at 539-40) (endorsing Samuel Eliot Morison’s description of the Plains Indians as “fine physical specimens” who, inter alia, “lived only for the day, ... robbed or killed anyone if they thought they could get away with it, [and] inflicted cruelty without a qualm’’); supra note 72; see also Oliphant v. Suquamish Tribe, 435 U.S. 191, 208, 212 (1978) (quoting Oliphant v. Schiele, 544 F.2d 1007, 1009 (1976) (decision below) (emphasis added by the Supreme Court)) (holding that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians” because such jurisdiction is “inconsistent with their [inferior] status’’).

For additional commentary criticizing “rejection of the ‘racism’ categorization” in the struggle for Indian rights, Porter, supra note 121, at 138, see the discussion titled “The Race Against Ignorance” in John P. LaVelle, Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter, 10 KAN. J.L. & PUB. POL’Y (forthcoming summer 2001).


135. Anaya, supra note 134, at 222-23.
discrimination. While exclusionary discrimination seeks “to exclude groups from full participation in the political and social life of the state,” cultural discrimination “seeks actively to suppress the cultural bonds and expressions of nondominant or minority groups, upon the premise that the dominant culture is superior.” Professor Anaya observes that cultural discrimination “has occurred even (or in many cases especially) at the same time efforts have been made to enhance participation of minorities in the larger society,” and he notes that “Native Americans stand out as victims of pervasive patterns of cultural discrimination.”

This important conceptual distinction between two types of discrimination in the implementation of governmental policy helps illuminate a deficiency in the Conservation Alliance’s present proposal for restoring the environment of the Northern Plains. Although the proposal implicitly acknowledges the need for avoiding exclusionary discrimination by inviting the input of Indian people “whose traditional and current territory might be involved,” it fails to address the need for avoiding the cultural discrimination which would result if the proposal were to negatively affect the Sioux tribes’ efforts to secure the return of the sacred Black Hills. Granted that the proposal is in its preliminary stages of development, this deficiency nevertheless is a glaring one, and it must be corrected. Failure to do so could give rise to justifiable fears that the resulting environmental “renewal” initiative will in fact reduce to an elaboration of environmental racism, environmental colonialism, cultural discrimination, and, ultimately, ethnocide.

Indeed, the ongoing dispossession of Paha Sapa from the Great Sioux Nation is a paradigmatic illustration of the forces of ethnocide in action. Succinctly stated, “ethnocide” may be defined as “a dislocation of indigenous people from their homeland, destruction of their way of life, and denial of their culture and language.” The term receives a more comprehensive, operational definition in the Draft United Nations Declaration on the Rights of Indigenous Peoples, a product of the United Nations.

136. See id. at 227-29.

137. Id. at 227, 228. Other commentators have recognized that the need for remedying the problem of cultural discrimination in order to achieve true equality is manifest in the emerging norms of international law. See, e.g., Erica-Irene A. Dae, Equality of Indigenous Peoples Under the Auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples, 7 S. THOMAS L. REV. 493, 495, 498 (1995) (footnotes omitted) (“Specific reference is made in the United Nations Draft Declaration on the Rights of Indigenous Peoples to self-determination, not because it is a right of indigenousness, but as a right of all peoples, of which indigenous peoples cannot be denied.... In Part I..., the Draft Declaration affirms the equality of indigenous peoples with other peoples. The remaining parts of the Draft Declaration simply explain this equality.”); see also infra text accompanying notes 190-202.

138. Anaya, supra note 134, at 228.

139. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.

Nations Working Group on Indigenous Populations. Article 7 of the Draft Declaration reads as follows:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

In another important United Nations document for redressing international human rights violations, the Declaration of San José, "ethnocide" is elaborated in the following terms:

Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity...

Clearly, the massive cultural trauma suffered by the Sioux tribes as a result of the abrogation of the Fort Laramie Treaty of 1868 and the unconstitutional taking of the Black Hills qualifies as "ethnocide" within the meaning of any of these definitions. Reflecting on tribal efforts to


143. Declaration of San José, adopted by the UNESCO Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San José, Dec. 11, 1981, UNESCO Doc. FS 82/WF.32 (1982) [hereinafter Declaration of San José], reprinted in ANAYA, supra note 141, at 192. For a concise summary and discussion of "the current international legal structure regarding the displacement of indigenous peoples from their lands," see Stavropoulou, supra note 90, at 105.

144. As the director of the International Indian Treaty Council points out, in discussions within "the international community, the Black Hills has come up as a very detrimental facet of American treatment toward the Indian people. It has been listed by many human rights organizations throughout the world as a gross violation of human rights to deny people their sacred homelands." Black Hills Hearing, supra note 10, at 77 (statement of William Means, executive director, International Indian Treaty Council).
secure the return of Paha Sapa, Oglala Lakota attorney Robert Grey Eagle observes:

The whole of the United States government's policy has been the forced assimilation of Indians in the name of God, gold and glory. . . .

They took our land and put us in prisons called reservations. They tried to exterminate us. Next came ethnocide when they tried to take our language and religion from us. They tried to strip us of our identity. It has amounted to the genocide of our culture, and the results have been disastrous.145

As the Conservation Alliance contemplates developing its proposal for "[r]enewing the Great Plains," it bears an enormous moral obligation to "say no" to ethnocide by, at the very least, refusing to countenance the establishment of political or legal obstacles to the Great Sioux Nation's eventual recovery of Paha Sapa. Discharging this duty certainly will be as challenging as it is imperative, moreover, because of the intractability of ethnocide in the normal political processes of western nation-states like the United States. In a brilliant meditation on the nature of ethnocide in western societies, the political anthropologist Pierre Clastres incisively examines this intractability, shedding valuable light on the difficulties that lie ahead.147

Clastres begins his analysis by noting that as employed by western nations, "[e]thnocide shares with genocide an identical vision of the Other; the Other is difference, certainly, but it is especially a wrong difference." Beyond this commonality, however, the "attitudes" associated with genocide and ethnocide

145. Robert Grey Eagle, quoted in John Carlson, South Dakota Indians Want Their Land Back, DES MOINES REG., Jan. 26, 1992, at 1. In discussing the extent of federally imposed ethnocide on Indian tribes generally during the late nineteenth century era of "allotment and assimilation," Professor Dean Suagee writes:

The policy of cultural genocide against Indian tribes was carried out by all three branches of the federal government. The executive branch outlawed tribal religious ceremonies and took children away from their families and communities to be raised by non-Indians in far-off boarding schools. Congress passed a number of statutes aimed at destroying tribal cultures (or, conversely, "civilizing" Indians), including the General Allotment Act of 1887, the statute by which that era of federal Indian policy has come to be known. The Supreme Court played its part as well, upholding acts of Congress intended to destroy tribes as self-governing entities, including statutes taking tribal land without tribal consent and without compensation.

Dean B. Suagee, Clean Water and Human Rights in Indian Country, 11-FALL NAT. RESOURCES & ENV'T 46, 48 (1996) (citations omitted); see also Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, 1990 DUKE L.J. 660, 692 & n.113 (collecting authorities documenting the United States government's "genocidal and ethnocidal initiatives" in the form of "the destruction of Indian religious sites and practices, suppression of traditional forms of tribal government, forced removal of Indian children from their homes, uncompensated seizure of treaty-protected resources, and involuntary sterilization of Indian women").

146. Sutton & Sartore, supra note 2, at 1.
148. Id. at 44.
are divided on the kind of treatment that should be reserved for difference. The genocidal mind, if we can call it that, simply and purely wants to deny difference. Others are exterminated because they are absolutely evil. Ethnocide, on the other hand, admits the relativity of evil in difference: others are evil, but we can improve them by making them transform themselves until they are identical, preferably to the model we propose and impose. The ethnocidal negation of the Other leads to self-identification.\footnote{Clastres observes that “the practitioners of ethnocide”—with Christian missionaries “[f]irst in rank”—typically pursue their occupation of “attack[ing] people’s souls” with an “attitude” of benevolence; that ethnocide thus might properly be classified as a “perverse form[ ] of . . . optimism”; and indeed that “[t]he spirituality of ethnocide is the ethics of humanism.”\footnote{Id. at 44-45. This discernment of a causal relationship between “ethnocidal negation” and “self-identification” would appear to animate Professor Cook-Lynn’s concerns about the influence of Wallace Stegner’s “personalization of history and setting” on the “attitude of white midwesterners” toward Indian lands—a “claim to identity” that “needs only acclamation” because it “takes place in the imagination.” COOK-LYNN, supra note 96, at 30, 33; supra note 96.} Thus, “[f]rom its agents’ perspective” ethnocide is viewed as “a necessary task, demanded by the humanism inscribed at the heart of western culture.”\footnote{Clastres goes on to distinguish ethnocide from ethnocentrism, the “vocation to measure differences according to the yardstick of one’s own culture.”\footnote{Id. at 46.} He posits that western societies do not “hold the monopoly on ethnocentrism” since “ethnocentrism as a formal property of all cultural formations” is “inherent to culture itself.”\footnote{Id. at 46.} But while “every culture is ethnocentric,” Clastres observes, “only western culture is ethnocidal.”\footnote{Id. at 45.} He continues:}}
as a class from "the western world," namely, that "the former includes all societies without a State, the latter is composed of societies with a State." From this observation, Clastres is prompted to examine why "societies with a State" appear to be inherently ethnocidal, and his provocative analysis is worth quoting at length:

Ethnocide, it is said, is the suppression of cultural differences deemed inferior and bad; it is the putting into effect of principles of identification, a project of reducing the Other to the Same.... In other words, ethnocide results in the dissolution of the multiple into One. Now what about the State? It is, in essence, a putting into play of centripetal force, which, when circumstances demand it, tends toward crushing the opposite centrifugal forces. The State considers itself and proclaims itself the center of society, the whole of the social body, the absolute master of this body's various organs. Thus we discover at the very heart of the State's substance the active power of One, the inclination to refuse the multiple, the fear and horror of difference. At this formal level we see that ethnocidal practice and the State machine function in the same way and produce the same effects: the will to reduce difference and alterity, a sense and taste for the identical and the One can still be detected in the forms of western civilization and the State.

... To each development of central power corresponds an increased deployment of the cultural world.... This process of integration obviously involves the suppression of differences.

....

... [E]thnocide, as a more or less authoritarian suppression of sociocultural differences, is already inscribed in the nature and functioning of the state machine, which standardizes its rapport with individuals: to the State, all citizens are equal before the law. In Clastres's dynamic, then, ethnocide is intrinsic to the perpetual consolidation and expansion of the power and dominion of western nation-

156. Id. In his foundational work of political anthropology Society Against the State, Clastres dispels the prejudicial view of orthodox ethnologists that as societies without a state, Indian tribes are deficient, that they "are missing something—the State—that is essential to them." PIERRE CLASTRES, SOCIETY AGAINST THE STATE 189 (Robert Hurley & Abe Stein trans., Zone Books 1987) (1974). Rather, Clastres argues that tribalism "asserts itself as positivity, as a mastery of the natural milieu and the social project, as the sovereign will to let nothing slip outside its being that might alter, corrupt, and destroy it." Id. at 198-99. Western societies, on the other hand, are associated with "political power... manifested within a relation that ultimately comes down to coercion" and with "hierarchical authority, the power relation, the subjugation of men—in a word, the State." Id. at 11, 203. In Clastres's view, by deliberately rejecting the formation of a "relationship of command-obedience" that signals the advent of "the State," tribal societies uphold a structure of self-government "beyond coercion and violence" which is distinguished from western societies by an intrinsic "prohibition... of inequality." Id. at 11-12, 199; see also infra note 228.

157. CLASTRES, supra note 147, at 47-49; cf. Lawrence Rosen, The Right to be Different: Indigenous Peoples and the Quest for a Unified Theory, 107 YALE L.J. 227, 259 (1997) ("If non-natives can resist the urge... to render [natives] identical to themselves we may be able to avoid the application of philosophical or legal paradigms that assume justice and difference to be incompatible.").
states. Ethnocide eliminates all cultural differences by enforcing a norm of monolithic "equality" as an expedient to instituting and strengthening the State's regime of "hierarchized and authoritarian relations of command and obedience." And although in theory there are built-in limits on the ethnocidal capacity of a State—since "ethnocidal practice ... ceases once the State's strength no longer runs any risk"—the ascendancy of capitalism in the West effectively has neutralized this self-braking feature of ethnocide:

What does western civilization contain that makes it infinitely more ethnocidal than all other forms of society? It is its system of economic production, precisely a space of the unlimited, a space without a locus in that it constantly pushes back boundaries, an infinite space of permanent forging ahead. What differentiates the West is capitalism, as the impossibility of remaining within a frontier, as the passing beyond of all frontiers; it is capitalism as a system of production for which nothing is impossible, unless it is not being an end in itself. Industrial society, the most formidable machine of destruction. Races, societies, individuals; space, nature, seas, forests. subsoils: everything is useful, everything must be used, everything must be productive, with productivity pushed to its maximum rate of intensity.

In capitalist nations like the United States, "the ethnocidal capacity is limitless, unbridled." For such nations, "the non-exploitation of immense resources [is] intolerable," and "[t]he choice left to [tribal] societies raise[s] a dilemma: either give in to production or disappear; either ethnocide or genocide." Clastres concludes his essay with a haunting reflection on the impact of ethnocide on the Indian tribes of the Northern Plains in the nineteenth century:

Produce or die, this is the motto of the West. The North American Indians learned this in the flesh, killed almost to the last to allow for production. One of their executioners, General Sherman, ingenuously declared it in a letter addressed to a famous killer of Indians, Buffalo Bill: "As far as I can estimate, in 1862, there were around nine and a half million buffalo in the plains between Missouri and the Rocky Mountains. All of them have disappeared, hunted for their meat, skins, and bones. [...] At this same date, there were around 165,000 Pawnee, Sioux, Cheyenne, Kiowa, and Apache, whose annual food supply depended on these buffalo. They also disappeared and were replaced by double and triple the number of men and women of the white race, who have made this land a garden and who can be counted, taxed and governed according to the laws of nature and civilization. This was a wholesome change and will be carried out to the end."

158. CLASTRES, supra note 156, at 16.
159. CLASTRES, supra note 147, at 50.
160. Id.
161. Id.
162. Id.
The general was right. The change will be carried out to the end; it will end when there is no longer anything left to change.  

If Clastres's compelling examination of ethnocide in western societies is accurate—if it is true that “ethnocide is the normal mode of existence of the State” —then Indian tribes must view with heightened suspicion any policy deployed by the government that affects the tribes in any way. Because environmental racism, environmental colonialism, cultural discrimination, and ethnocide are real, pervasive, menacing, and present dangers for Indian tribes generally and for the Sioux tribes in particular, the Conservation Alliance must take every precaution to avoid harming the tribes in developing its policy proposal for the future of the Great Plains. An innovative approach is crucial, of course, since “normal” methods of creating and deploying environmental policy can be expected to take little or no account of the cultural and sovereignty needs of the tribes. But although the road ahead clearly is fraught with peril, it is encouraging to note not only that the Conservation Alliance is committed to innovation and dialogue, but also that numerous scholars of environmental law and Indian law have provided helpful conceptual tools and normative models for navigating a course against the tide of history and toward the advent of environmental justice on the Northern Plains.

V. RETURNING PAHA SAPA AND RESTORING THE GREAT GRASSLANDS: AN OPPORTUNITY FOR ENVIRONMENTAL JUSTICE

To avoid “acquiescing in an injustice of breathtaking scope and cynicism,” the Conservation Alliance’s plan for “[r]enewing the Great Plains” must be harmonious with the Great Sioux Nation’s aspirations for the return of Paha Sapa. To put the matter another way, the Conservation Alliance must manifest an attitude of respect for the sacred promises made to the Sioux tribes by the United States in the Fort Laramie Treaty of 1868, and it must conduct itself at all times in a manner consistent with the ardently sought fulfillment of those obligations. The adoption of such an attitude of respect, coupled with a commitment to transforming that respect into concrete action through the development and implementation of tribally sensitive environmental policy, will provide an orientation toward

163. Id. at 51 (citation omitted) (alteration in original).
164. Id. at 49; see also Robert N. Clinton, The Rights of Indigenous Peoples As Collective Group Rights, 32 ARIZ. L. REV. 739, 746 (1990) (“Cultural genocide emerged from western notions of the nation-state and efforts to create the cultural homogeneity that it required through either forced assimilation or extermination.”).
165. Black Hills Hearing, supra note 10, at 261 (prepared statement of Tim Langley, executive director, South Dakota Peace and Justice Center).
166. Sutton & Sartore, supra note 2, at 1.
167. Cf. Torres, supra note 114, at 848 (“Being sensitive to the lived reality of all affected groups... means that those who would construct environmental policy must take account of the distributional impacts environmental remedies will have as well as the decisionmaking process by which the impacts are distributed.”).
environmental justice that is essential if "the dream of dwelling on an earth made whole" is to be realized on the Northern Plains.

By respecting the "sacred obligations" embodied in the Fort Laramie Treaty, and hence by voluntarily conforming to what Professor Tsosie describes as an ideal of "intercultural justice," the Conservation Alliance will be positioning itself to set new standards for establishing environmental restoration policy that reflects an abiding and ethics-based commitment to environmental justice. Professor Alyson Flournoy observes that "the [environmental] restoration process... forces us to make... choices with ethical dimensions"; that "value-laden questions" "inhere in restoration"; and that "the occasion provided by restoration projects for grappling with... moral issues is itself a benefit and an important dimension of the restoration process."

Professor Flournoy elaborates:

[W]e should embrace the ethical questions posed by restoration and recognize them as part of the important, ongoing process of our ethical development. Since restoration raises significant and difficult value questions, for which there are no easy answers, we should maintain a keen awareness of the value choices that accompany the decision to restore and the choices made in pursuing restoration. Cataloging the values affected, and identifying who is affected and how, should be central in the restoration process... By resolving not to ignore or shy away from the moral implications of developing environmental policy for the Black Hills region, the Conservation Alliance can help establish an innovative and useful model of ethics-based environmental policymaking that takes full and accurate account of "the moral relations between human beings and the natural environment."

In thus valuing and affirming the Sioux tribes' deepest aspirations respecting Paha Sapa, the Conservation Alliance also will accrue the benefits of embodying the philosophical and spiritual principle of reciprocity.

168. Sutton & Sartore, supra note 2, at 6; supra text accompanying note 97.
169. Tsosie, supra note 12, at 1620 ("Indian nations believed that treaties created sacred obligations between the groups involved... ").
170. Id. at 1615, 1617 (describing Indian treaties as "instruments of intercultural justice").
171. Professor Cook-Lynn emphasizes the need for a commitment to ethics in environmental policy affecting the Sioux tribes in South Dakota:

What we need here is land reform in the state of South Dakota, and that means the return of stolen land to its rightful owners. If governmental strategies can be used to steal the land, they can just as well be used to return the land. We need a land and Indian rights reform movement coupled with economic development, not a reconciliation movement that simply asks that we "get to know each other," or "cease opposition," or "accept something not desired." And we need to have a state government that is based on ethics and history rather than on greed, racism, and tourism.

Cook-Lynn, supra note 78, at 104.
173. Id. at 204-05 (footnote omitted).
174. Tsosie, supra note 106, at 243 (discussing the utility of "environmental ethics").
Professor Ragsdale describes this "central tenet in the world-view of many North American Indian Tribes" in the following terms:

Under the theory of reciprocity, an individual who fulfills a commitment to a person or place can expect, in some sense, a return. This forms, in effect, a linkage between our concepts of obligation and desire; a fulfillment of obligation can lead to a fulfillment of desire. More specifically, if a human should choose to complete an obligation of protection to a special or sacred place..., then there would or should be a reciprocal return.

Reciprocity is not only basic to concepts of obligation and return, but also to the idea of community. Within the reciprocal interrelationship there is a unification or bonding between the constituent elements, and the strengths of each flow to the others. In particular, we can find that a fulfillment of the obligation of preservation can facilitate communities with both the land and the people of the land. Furthermore, these communities could offer a return that may prove transcendent.

As a result of the United States government's abrogation of the Fort Laramie Treaty of 1868, the spiritual and communal blessings that might have flowed from treaty-based reciprocity have been absent from the Black Hills for well over a century. Only by reviving a commitment to the fulfillment of the sacred obligations consecrated in the treaty can reciprocity and intercultural harmony be restored to the region. And surely, environmentalist allies who assist in hastening the return of Paha Sapa can themselves expect to realize "a return that may prove transcendent."

Another conceptual tool for developing an innovative and ethically sound model of environmental policymaking in the Black Hills region is the notion of "eco-cultural restoration." Adverting to Dennis Martinez's original elucidation of the term, Professor Catherine O'Neill explains that "eco-cultural restoration" conveys the conviction that "[i]n the context of restoration affecting tribal homelands, environmental restoration cannot be separated from tribal cultural flourishing." To ensure the efficacy of eco-cultural restoration in facilitating tribal cultural flourishing, the involvement of tribal people in the development of environmental policy is crucial, since

[i]deas about what restoration is and how (indeed, whether) one ought go about it are likely to reflect one's culture and values.

...Only Native people themselves can properly articulate what would be required to ensure their cultural flourishing and to attend

175. Ragsdale, supra note 85, at 470.
176. Id. at 471-72 (footnote omitted).
177. Id. at 472; supra text accompanying note 176.
178. O'Neill, supra note 119, at 344 (relying on Dennis Martinez, Presentation, Indigenous Ecology and Cultural Restoration Workshop (Sept. 21, 1999)).
to eco-cultural issues in decisions affecting their particular resources.  

Hence, Professor O'Neill prescribes "an intercultural approach to restoration... with the framework for the conversation... set in the first place by the various affected peoples in an atmosphere of mutual respect and equality."  

To manifest a commitment to eco-cultural restoration on the Northern Plains, the Conservation Alliance's proposal for environmental renewal must reserve a decisive role for the Sioux tribes concerning all matters affecting the Black Hills. In this way, the proposal will accommodate and support the tribes' cultural flourishing, lending the proposal an intercultural legitimacy that otherwise would be missing. Professor Charles Wilkinson suggests that such intercultural legitimacy is essential to developing "an ethic of place" that "respects equally the people of a region and the land, animals, vegetation, water, and air," noting that "the ethic of place is founded on the worth of the subcultures of the West and thereby promotes the diversity that is the lifeblood of the region."  

Expanding on the importance of developing "an ethic of place" for strengthening intercultural relations in Indian country, Professor Pommersheim observes that in South Dakota the key... to generating a long-term coming together is the development of a story or an ethic. There are complex issues aplenty—for instance, those concerning... the status of the Black Hills—to bring Indians and non-Indians together, but the development of a greater ethic or story, beyond the particularis of any issue, is needed to hold us together.  

Professor Pommersheim imparts a steadfast faith that through educational exchanges characterized by "legitimacy and humanity," Indians and non-Indians are capable of transcending differences to witness and experience "the emergence of a precious ethic of common understanding and respect."  

179. Id.  
180. Id. at 375. Professor O'Neill credits Professor Tsosie with inspiring this notion of "an intercultural approach to restoration," adverting to Professor Tsosie's observation about the importance of an "'intercultural exchange'" in environmental policymaking affecting Indian tribes. Id. at 344 (quoting Rebecca Tsosie, Presentation, Environmental Restoration: Challenges for the New Millennium (Nov. 12, 1999)). Professor O'Neill adds that "[w]hile restorative efforts in a variety of contexts would surely benefit from intercultural exchange, an intercultural approach is indispensable for the numerous decisions that affect Native resources, but that at present are made by federal, state, and local environmental managers." Id. at 423.  
181. Charles F. Wilkinson, Law and the American West: The Search for an Ethic of Place, 59 U. COLO. L. REV. 401, 405, 407 (1998). Professor Wilkinson elaborates that "in no sense" does "the ethic [of place] tend[ ] toward a homogenous society." Id. at 407. On the contrary, "[t]he single greatest ally of those who would wreck the West is the idea that the West is homogenous." Id. at 423.  
183. Id. at 33.
The advent of such an ethic through "intercultural conversation[s]" about restoring the environment and returning Paha Sapa to the Great Sioux Nation will be the polestar for advancing toward "a common future on the Great Plains" that truly values the political survival and cultural flourishing of the Lakota, Dakota, and Nakota people. By heralding the approach of this ethic, the Conservation Alliance can help surmount the "[d]istrust between Indians and environmentalists" that too often has poisoned environmental protection efforts in Indian country. As Professor Dean Suagee points out, "[i]t can be challenging to work through the distrust to find the common ground that many of us think we know is there." And although "Indians have learned to be cautious about making alliances," tribes can join alliances with enthusiasm when environmentalists commit irrevocably to ensuring that "our public policies for environmental protection... better reflect Indian cultural values," especially through "the enactment of legislation to protect places that have religious importance for Indian tribes." As Professor Suagee notes, "[t]he need to enact such legislation... [is] an environmental justice issue...." The Conservation Alliance will find crucial guidance for achieving environmental justice on the Northern Plains by studying the work of indigenous rights advocates who have identified and carefully elaborated the culture- and sovereignty-based needs of tribal peoples. One important source of such advocacy work is the body of developing international human rights law adverted to previously.

The Draft United Nations Declaration on the Rights of Indigenous Peoples, for example, contains a number of highly instructive provisions:

184. O'Neill, supra note 119, at 344 (quoting Rebecca Tsosie, Presentation, Environmental Restoration: Challenges for the New Millennium (Nov. 12, 1999)).
185. Sutton & Sartore, supra note 2, at 5; supra text accompanying note 13.
187. Id.
188. Id. at 465, 484, 496. The enormity of the task facing the Conservation Alliance certainly would not be lost on Professor Suagee, who notes the difficulty of achieving intercultural environmental protection "in a state like South Dakota, which has a record of challenging tribal jurisdiction at every turn." Id. at 466 n.16.
For a decidedly more pessimistic view of the potential for mutually advantageous tribal-environmentalist alliances, see James L. Huffman, An Exploratory Essay on Native Americans and Environmentalism, 63 U. COLO. L. REV. 901 (1992). Professor Huffman writes:
  Ironically, a major threat to Native American communities is orthodox environmentalism which shamelessly sings the praises of peoples it would destroy.

  ... By joining forces with environmentalists, Native Americans might increase their political influence in a system where political influence is everything. Unfortunately the temptation for Native Americans to ally politically with environmentalists is powerful, notwithstanding that Native Americans are unlikely to gain anything more than flattery.

Id. at 905, 909 (footnote omitted). But see infra note 228.
189. Suagee, supra note 186, at 484.
190. See supra notes 135-143 and accompanying text.
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands... they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Indigenous peoples have the right to own, develop, control and use the lands... which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Indigenous peoples have the right to the restitution of the lands... which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. . . .

Indigenous peoples have the right to the conservation, restoration and protection of the total environment... as well as to assistance for this purpose from the States and through international cooperation. 191

Another important document of international law, the Declaration of San José, includes the following helpful provisions:

For the Indian peoples, the land is not only an object of possession and production. It forms the basis of their existence, both physical and spiritual, as an independent entity. Territorial space is the foundation and source of their relationship with the universe and the mainstay of their view of the world.

The Indian peoples have a natural and inalienable right to the territories they possess as well as the right to recover the land taken away from them. This implies the right to the natural and cultural heritage that this territory contains . . . . 192

By conforming to the norms of intercultural justice expressed in these evolving documents of international law, the Conservation Alliance’s proposal for environmental policymaking on the Northern Plains will comprise an important experiment in what Professor Frickey terms “the domestication of federal Indian law” through “internationalizing the way we think about the field.” 193 As Professor Frickey explains, the current prevailing theory of broad federal power in Indian affairs originally “arose from conceptions of the inherent sovereignty of nations under international law,” and hence “the existence and nature of . . . constitutional limits” on that power “should be informed by international law, including the evolving component of it.

192. Declaration of San José, nos. 6-7, reprinted in ANAYA, supra note 141, at 192.
193. Frickey, supra note 88, at 36.
concerning the rights of indigenous peoples."  Professor Frickey observes further that

the emerging catalogue of norms concerning the treatment of indigenous peoples provides a highly useful checklist of possibilities for consideration in bringing federal Indian law into the mainstream of public law. Because of the shared international experience of colonization, these norms, rather than being foreign jurisprudential interlopers, may well resonate with our history, legal traditions, and current context.  

In light of Professor Frickey's insights concerning the role that international law always has played in the field of federal Indian law, the reason the Supreme Court's otherwise relatively progressive decision in United States v. Sioux Nation failed to deliver justice is clarified: the Court neglected to "interpret the Constitution against the backdrop of international law" in deciding what constitutes "just compensation" for the illegal taking of the Black Hills. Indeed, as noted previously, Professor Frickey discusses the taking of the Black Hills as demonstrating why it is essential that courts consult "international norms about the treatment of indigenous persons" as "a relevant and worthwhile backdrop against which to consider constitutional... claims." For, as Professor Frickey reiterates,

Indian lands are not ordinary lands: they are not sufficiently fungible to make the payment of fair market value an acceptable equivalent to the land, and the fear of a governmental taking rooted in prejudice or selective cultural indifference is substantially greater for Indian lands than for the lands of others. At a minimum, then, no taking of Indian land should be allowed without a strong justification in public values that outweighs the hardship to the Indians and that cannot be well served by other means.  

It is not possible, of course, for the Conservation Alliance to secure a new and just adjudication of the Black Hills case. However, what the Conservation Alliance can and must do is help instill the enlightened, evolving norms of international law respecting the rights of indigenous peoples in policymaking affecting the Northern Plains. By thus catalyzing an environmental restoration paradigm that supports the survival and flourishing of the Great Sioux Nation, the Conservation Alliance will be exhibiting "the moral courage to help heal this wound that... has international

194. Id. at 37.
195. Id. at 75.
197. Frickey, supra note 88, at 74.
198. See supra text accompanying note 88.
199. Frickey, supra note 88, at 79.
200. Id. at 85-86 (footnote omitted).
consequences" by building toward a future in which environmental law and Indian law are "cleansed of [their] colonialist roots."

In addition to consulting the efforts of indigenous rights advocates in the field of international law for guidance on how to proceed with its proposal for "[r]enewing the Great Plains," the Conservation Alliance also must look to the crucial work of the Sioux tribes themselves in seeking to recover Paha Sapa. After the Supreme Court's Sioux Nation decision in 1980, tribal leaders and advocates acted quickly to stop the United States from extinguishing the Black Hills claim through a distribution of the monetary award to the tribes. Seizing the initiative was Oglala Lakota attorney Mario Gonzalez, who "for months... worked sixteen-hour days with Oglala Sioux leadership to prevent the General Accounting Office from paying the Black Hills judgment award." This successful strategy of resistance developed into a strong movement calling for congressional action to return federally held lands in the Black Hills to the Great Sioux Nation. Responding to this movement, Senator William Bradley introduced a congressional bill in 1985 titled the "Sioux Nation Black Hills Act," better known as the "Bradley bill." The Senate Select Committee on Indian Affairs held a hearing on the proposed legislation in 1986, and Senator Bradley reintroduced the bill in the subsequent session of Congress. In 1990, Congressman Matthew Martinez introduced a modified version of the bill in the House of Representatives, which then became known as the "Martinez bill."

Although neither the Bradley bill nor the Martinez bill was reported out of committee, and despite differences among tribal and grassroots leadership as to which bill better addressed the needs of the Lakota, Dakota, and Nakota people, the two legislative proposals share features which should inform the development of environmental policy in the Black Hills region. As attorney

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202. Clinton, supra note 86, at 158.
203. Sutton & Sartore, supra note 2, at 1.
204. See COOK-LYNN, supra note 1, at 3-7 (describing tribal strategies that successfully prevented distribution of the Sioux Nation award).
205. Id. at 5.
207. See generally Black Hills Hearing, supra note 10.
210. Professor Pommersheim observes that with respect to both bills, "[t]he uniform opposition of the three-person South Dakota congressional delegation... effectively stymied any movement in Congress." Pommersheim, supra note 82, at 349.
211. See GONZALEZ & COOK-LYNN, supra note 1, at 36-37, 136-38, 152 (describing differences among, and controversies involving, supporters of the Bradley bill and supporters of the Martinez bill).
Mario Gonzalez, who drafted both documents, explains, "[b]oth bills propose to reconvey federally held lands in the Black Hills to the Sioux tribes."

Upon introducing their respective bills in Congress, both Senator Bradley and Representative Martinez emphasized the need to return lands to the Sioux tribes to remedy the cultural and political devastation wrought by the illegal dispossession of Paha Sapa. Senator Bradley described his bill as one that "is about respect for the land, a spiritual culture, and what happens to any people when a great violence is done to their very identity." Representative Martinez stated that his bill was designed "to correct... [a] human rights violation that was committed by our own Government" by redressing harm "inflicted upon a people as a result of the illegal confiscation [of the Black Hills] and the subsequent plundering of the land's natural resources."

In endorsing the Bradley bill, Senator Daniel Inouye observed that "Congress has an opportunity to respond to the aspirations of the Sioux Nation to see that justice is done in this matter and in a way which does not infringe on the rights of other private parties or the public interest as it relates to the Black Hills." Representative Martinez emphasized a similar feature of accommodation in his bill, pointing out that the Sioux tribes were seeking the return of "unoccupied land, which is only about 18 percent [of what was taken], of which 80 percent... will be turned into a national park for all Americans to enjoy." By using these important legislative proposals as a reference, the Conservation Alliance can begin to lay the foundation of a policy of environmental restoration that avoids undermining the Sioux tribes' aspirations for the return of Paha Sapa.

In thus ensuring that true respect for the Sioux tribes is an enduring part of its proposal, the Conservation Alliance must be prepared to join efforts to educate non-Indian residents of the Northern Plains about the proposal's indispensable embrace of principles of environmental and intercultural justice. This task likely will be further complicated by the meddling of those who would obstruct the intercultural educational process by propagating misinformation to engender ignorance, fear, and distrust. South Dakotans

212. Id. at 136.
215. 133 CONG. REC. 5164-65 (1987) (statement of Sen. Inouye). At the hearing before the Senate Select Committee on Indian Affairs conducted upon the first introduction of his bill, Senator Bradley emphasized the accommodation struck by the bill's substantive provisions:

Of the 7.3 million acres taken from the Sioux in 1877, this bill would return up to 1.3 million acres. The bill would cede to the Sioux Nation only those portions of the Black Hills region that are still federally owned and not all Federal lands would be ceded... No private or State-owned lands would be transferred.

217. See, e.g., supra note 94; see also Black Hills Hearing, supra note 10, at 73 (statement of Marvin Kammerer, Farmers for Peace, Rapid City, South Dakota) ("Naturally, there are people who have fears because of misinformation. Our congressional people, I am sorry to say, haven't helped too much in that they haven't explained this potential bill or explained that there are possibilities... .")
are especially vulnerable to such mischief, moreover; for, as the Reverend Carl Kline of Brookings, South Dakota, eloquently attested in 1986,

[t]here is an awareness among South Dakota people, just below the surface, that they are in the state and living well, at the expense of those who went before, to poverty or death. . . .

The unease many white South Dakotans feel about the breaking faith with Indian people and their claims, often gets acted out in racial prejudice and discrimination, which further fuels Indian distrust and bitterness, generating hostility to the point of random irrational violence. The racial problems of South Dakota are grounded in white guilt, legitimate guilt, that the federal government caused and must correct. It is the single most important and difficult moral issue that we face.\textsuperscript{218}

Undoubtedly, the educational task that looms will be challenging, but it will not be insurmountable. Much headway has been made as a result of past efforts of Indian rights advocates and congressional leaders to secure passage of land reform legislation in the Black Hills region. At the 1986 congressional hearing on the Bradley bill, for example, a number of witnesses expressed optimism about the attendant educational process. Oglala Lakota advocate Gerald Clifford of the Black Hills Steering Committee emphasized that the bill did not “threaten the non-Indian community” but “provide[d] an opportunity for dialog, for healing, and for a positive economic impact on the Black Hills community in the State of South Dakota.”\textsuperscript{219} Hunkpapa Lakota attorney Alan Parker of the Standing Rock Sioux Tribe likewise stressed that the proposed legislation portended “an extremely positive development for the State of South Dakota, as well as the Sioux Nation,” presenting an “opportunity to not only resolve a difficult problem, but to go forward with a solution that will benefit all of the parties concerned.”\textsuperscript{220} Senate Select Committee on Indian Affairs Staff Director Peter Taylor, who presided over a portion of the hearing, observed that the hearing itself promoted “the kind of dialog and communication that legislation of this nature really requires to bring about full comprehension and understanding and to dispel fear that people have. . . . [T]his is a first step along the road.”\textsuperscript{221} And Oglala Lakota

\textsuperscript{218} Black Hills Hearing, supra note 10, at 258-59 (prepared statement of Rev. Carl E. Kline).
\textsuperscript{219} Id. at 65 (statement of Gerald M. Clifford, coordinator, Black Hills Steering Committee).
\textsuperscript{220} Id. at 225 (prepared statement of Alan R. Parker, American Indian National Bank).
\textsuperscript{221} Id. at 73 (remark of Peter S. Taylor, staff director, Senate Select Committee on Indian Affairs); see also id. at 37 (statement of former Rep. Lloyd Meeds) (“This bill is not cast in concrete but is a malleable piece of legislation . . . .[I]t is the beginning of a dialog toward the resolution of a longstanding national inequity.”). Senator Bradley himself noted the effectiveness of education and dialogue in dispelling fear and ignorance:

[W]hen people . . . hear the first information about the bill, they think that this is a taking of private land, and they naturally become quite upset. When they realize that there is no taking of any private land or any State land, that this is simply a disposition of existing Federal lands, when they are aware that all of the existing rights will be preserved, many of the objections disappear.

Id. at 33 (statement of Sen. Bradley).
traditionalist Charlotte Black Elk spoke at length about the difficult but inspiring challenge of advancing the educational process:

I have done many of the visits with the non-Indian community in South Dakota. I have found that once people understood our history, understood what was in the [bill], the people were supportive.

It is a slow process. It is a process of talking to small groups, spending a lot of time talking to them...

...[W]e have people in South Dakota who want to be fair, who want to set behind themselves the whole black time of stealing Indian lands. I think there is a great movement toward justice and fairness in South Dakota.

...[W]e need to look at how hard the struggle has been for us to even reach a point where we are speaking at a hearing before the Senate. We have documents where people were persecuted and prosecuted for even speaking of the Black Hills...

...Today, the struggle is ours. It belongs to the generations that are here. We hope that our children and our grandchildren will not have to continue this fight. We hope that we can see justice in our lifetimes.

By learning from, and building upon, the efforts of Lakota, Dakota, and Nakota leaders in the movement for the return of Paha Sapa, the Conservation Alliance can expect to achieve steady progress in educating non-Indians of the Northern Plains about the importance of “right[ing] a wrong so that we can proudly stand up and say finally, finally, justice is done.”

222. Id. at 66 (statement of Charlotte A. Black Elk, Black Hills Steering Committee); see also id. at 73 (statement of Marvin Kammerer, Farmers for Peace, Rapid City, South Dakota) ("You are going to get some negative reaction. I will guarantee that, but you get old rusty wheels turning, and you work on the moral issue.").

223. Id. at 72 (statement of Marvin Kammerer, Farmers for Peace, Rapid City, South Dakota).

Although educating the region’s non-Indian residents about the dispossession of Paha Sapa is important, the United States government as a whole shoulders the obligation to remedy this ongoing injury. As Suzan Harjo explains,

Indian dealings were nationalized in the U.S. Constitution and not left to the purview of the States. Often, Congress forgets this and permits Indian dealings to be addressed as a backyard matter of the Members whose States border the Indian territory involved, leaving the final outcome up to the border town mentality and racial bias that we cannot pretend does not exist in this day and age.

All of America, and subsequently much of the world, has benefited from the gold stolen from the Black Hills and have a share in the resultant deprivation and current situation, economy, and health of the Sioux people today.

Id. at 85 (prepared statement of Suzan S. Harjo, executive director, National Congress of American Indians). In a similar vein, the testimony of International Indian Treaty Council director William Means emphasizes that the dispossession of Paha Sapa requires national attention, likening this crisis to the repression of civil rights in the South:

[Y]ou must remember the history of the civil rights struggle in this country. The Civil Rights Act that was passed, growing out of that massive struggle of sit-ins,
Lastly, the Conservation Alliance will find courage and inspiration in advancing environmental justice on the Northern Plains by anticipating the nurturing ecological values that will flow from the Great Sioux Nation’s recovery of Paha Sapa. Indeed, this is one of the blessings of *reciprocity* alluded to previously; it is “the dream of dwelling on an earth made whole” realized in the revitalization of “a relational, rather than hierarchical, land ethic” which “situates the human being in a kinship role with respect to other aspects of the natural universe.” Many commentators have noted the high solicitude for conservational values and ecological balance manifested in traditional American Indian tribal societies. While one should avoid endorsing conventional stereotypes about Indians and the environment, one

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marches, burnings, and finally the death of the honorable Martin Luther King—none of that legislation was authored in Alabama, was authored in Georgia or in the South. This legislation had to be drafted and put together by the majority of the U.S. citizens.

It has been our experience that any time the issues of Indian people are put forth to the majority of American people, they will stand behind what is right.

*Id.* at 76 (statement of William Means, executive director, International Indian Treaty Council).

224. See supra text accompanying notes 175-177.

225. Sutton & Sartore, supra note 2, at 6; supra text accompanying notes 97 & 168.

226. Tsosie, supra note 106, at 279.


228. Professor Tsosie observes that an obstacle to identifying traditional tribal beliefs concerning the environment is “the tendency of non-Indians to glorify Native Americans as existing in ‘perfect harmony’ with nature (the ‘Noble Savage’ resurrected), or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the ‘Bloodthirsty Savage’ resurrected).” Tsosie, supra note 106, at 270. Professor Lawrence Rosen suggests that “government programs . . . that seek to freeze native cultures in a form acceptable to the interests of government and business” may amount, ironically, to a perpetuation of ethnocide in the name of its “prohibition,” noting that “[t]he appropriation by non-natives of the imagined ecological superiority of native peoples . . . may serve to justify policies that force natives to choose between specific types of economic development and maintaining their legal protections as native peoples.” Rosen, supra note 157, at 255; see also supra note 107. And American Indian Law Center director Philip S. Deloria, a member of the Standing Rock Sioux Tribe, warns about the general threat to the protection of Indian rights posed by the conventional “romanticizing” of Indian culture and values:

[M]any scholars—who note the romantic view of Indians in earlier stages of Euro-American history—have themselves been blinded by the same romantic tradition today and deny us our political life and our humanity. The modern romantic tradition in Indian scholarship imposes on us a cultural ethic that serves as a
condition on the political help we can expect from the scholarly community and other traditional sources of support and, implicitly, on our right to exist. This romanticism does not help us deal with complex problems. . . . Above all we would like to have the confidence that our rights do not depend on our satisfying the emotional needs of a romantic tradition.


Professor James Huffman also warns about the threat to Indian communities that exists when “[e]nvironmental orthodoxy homogenizes Native American culture as consisting of a single idea about the relationship between humans and nature.” Huffman, supra note 188, at 905; see also supra note 188. Unfortunately, Professor Huffman’s analysis embraces an alternative—and equally unrealistic and objectionable—extreme perspective of tribal societies as traditionally and essentially uncommitted to an ethic of conservation, characterizing tribal societies instead as “technologically primitive peoples” whose aspirations consist almost exclusively of struggling to accumulate “adequate wealth to meet their basic needs”:

To the extent that Native Americans identified themselves as an intricate part of nature, it no doubt reflected their dependence upon nature and their inability to control nature. When they could control nature they did, and when they could not do so, they appealed to nature to control itself. Their appeals were for nature’s delivery of those things necessary and important to their lives, not for those things necessary and important to nature. For technologically primitive peoples, there will often be a coincidence of human interests and nature’s abundance, but there are only anthropocentric reasons to conclude that natural abundance is necessarily the ecologically correct circumstance.

Huffman, supra note 188, at 918-19. For an interesting discussion “puncturing the ‘scientific’ conceit of the concept of the subsistence economy,” see CLASTRES, supra note 156, at 13-21, 190-96. Clastres writes:

[A]rchaic societies do not live, they survive; their existence is an endless struggle against starvation, for they are incapable of producing a surplus because of technological and—beyond that—cultural deficiency. Nothing is more persistent than this view of primitive society, and at the same time nothing is more mistaken.

. . . .

. . . . The idea of a subsistence economy purports to be a factual appraisal, but it involves a value judgment about the societies to which the concept is applied. Thus, the evaluation immediately destroys the objectivity that is its sole claim. The same prejudice—for finally it is that—perverts and dooms the attempt to evaluate political power in these societies. . . .

. . . . It is imperative to accept the idea that negation does not signify nothingness; that when the mirror does not reflect our own likeness, it does not prove there is nothing there to perceive. . . .

. . . . Here one recognizes ethnocentrism’s other face, the complementary conviction that history is a one-way progression, that every society is condemned to enter into that history. . . . [A]rchaic societies are almost always classed negatively, under the heading of lack: societies without a State, societies without writing, societies without history. The classing of these societies on the economic plane appears to be of the same order: societies with a subsistence economy. . . . Now, the notion of a subsistence economy conceals within it the implicit assumption that if primitive societies do not produce a surplus, this is because they are incapable of doing so, entirely absorbed as they are in producing the minimum necessary for survival, for subsistence. The time-tested and ever serviceable image of the destitution of the Savages. And, to explain that inability of primitive societies to tear themselves away from the stagnation of living hand to mouth, from perpetual alienation in the search for food, it is said they are technically under-equipped, technologically inferior.

What is the reality? If one understand by technics the set of procedures men acquire not to ensure the absolute mastery of nature (that obtains only for our world and its insane Cartesian project, whose ecological consequences are just beginning to be measured), but to ensure a mastery of the natural environment suited and relative to their needs, then there is no longer any reason whatever to
also must recognize that environmental stewardship and reverence for nature are central, pervasive, and normal attributes of tribal societies. As Professor Tsosie explains, traditional Indian worldviews generally exhibit a number of interrelated traits that distinguish tribal societies as profoundly devoted to protecting and nurturing the natural environment; these traits include

- a perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people; and a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world.229

Obviously, these features of “a relational... land ethic”230 are eminently compatible with the “principles of conservation biology”231 at the heart of the Conservation Alliance’s proposal.

More specifically, the Conservation Alliance can anticipate that the most exacting conservational standards will pervade the Great Sioux Nation’s loving stewardship of the sacred Black Hills. As Gerald Clifford explained at the Black Hills hearing in 1986, “[w]e... have a moral imperative to care for the resources of the Earth. We express it in different ways and... we use the principle of respect for the Earth.”232 He elaborated:

The principle of “respect for the earth” comes from the oral traditions of the Lakota and must govern management of the most special place on earth for us. We say that the earth is our mother and we must treat her with [respect] that we, and her other children, may live well altogether. It is the intent of the Sioux Tribes that we will use this principle in developing management strategies and procedures for the Black Hills.233

Id. at 13-14, 16, 20, 190-91.

229. Tsosie, supra note 106, at 276. In identifying these common traits, Professor Tsosie relies on a model of “traditional Indian world views” developed by Professor Ronald Trosper and “affirmed by other scholarship.” Id. at 275-76 (citing, inter alia, Trosper, supra note 227, at 67, 72).

230. Id. at 279; supra text accompanying note 226.

231. Sutton & Sartore, supra note 2, at 3; supra text accompanying note 9.


233. Id. at 178 (prepared statement of Gerald M. Clifford, coordinator, Black Hills Steering Committee). In additional written testimony, Charlotte Black Elk describes the immanence of “respect for the earth” in Lakota beliefs and practices:

The conceptual context of the Lakota philosophical principle of “respect for the earth” is found in a number of legends and cultural practices. Basically, this principle defines the relationship between the Lakota and the earth, and is founded upon the belief that the earth—Maka—is the first and real mother of all life. This is, then, further defined and refined through a series of legends and practices. Each
Clearly, Lakota, Dakota, and Nakota people will take great care in protecting and managing the Black Hills ecosystem.\(^\text{234}\) As another witness at the hearing declared, “we believe that the ‘respect for the earth’ concept must be brought into effect immediately. We have been waiting 118 years for this ‘respect for the earth’ to happen again within our sacred Paha Sapa.”\(^\text{235}\)

With an abundance of innovative normative models, state-of-the-art conceptual tools, and the hard-won experience of Lakota, Dakota, and Nakota people at hand, and with a commitment to educating the public about the importance of culturally sensitive environmental restoration, the Conservation Alliance will be well-positioned to realize its goal of “[r]enewing the Great Plains”\(^\text{236}\) in a way that simultaneously respects the survival and flourishing of the Great Sioux Nation. In moving forward with this project in consultation with Sioux tribal leadership, the Conservation Alliance necessarily will “develop an Indian/non-Indian coalition”\(^\text{237}\) in support of achieving environmental justice in the Northern Plains region, discovering along the way how “[d]ialog with Sioux philosophy and religion holds promise for a truly harmonious ecosystem.”\(^\text{238}\) As Professor Pommersheim notes, “the building of . . . a coalition [supporting legislation for returning lands in the Black Hills to the Sioux tribes] [is] a difficult task, but it is the challenge of a commitment to justice and the democratic process.”\(^\text{239}\) Such a coalition is crucial, moreover, for bringing an end to more than a “century of mourning for the loss of this holy place”\(^\text{240}\) and for “rising above the legacy of cultural destruction and paternalism”\(^\text{241}\) that is as tragic and intolerable a part of the ethos of the Northern Plains as the “desertification of the land and decimation of the wildlife”\(^\text{242}\) that the Conservation Alliance seeks to redress.

\(^{234}\) Although it is important to recognize that strong ecological values pervade the religious beliefs and cultural practices of the Lakota, Dakota, and Nakota people, it is neither necessary nor desirable—indeed it may not be possible—for non-Indians to fully appreciate exactly how these values are expressed and affirmed in the particular intricate and private religious ceremonies of traditional Sioux tribal life. As Representative Howard wisely counseled the Senate Select Committee on Indian Affairs in 1986, “[w]e may not fully understand the intimate religious and cultural connection of the Sioux to the Black Hills, but this does not mean that we cannot respect it.” \(\text{Id. at 256 (prepared statement of Rep. Howard).}\)

\(^{235}\) \(\text{Id. at 233 (prepared statement of Reginald Bird Horse).}\)

\(^{236}\) Sutton & Sartore, \(\text{supra note 2, at 1.}\)

\(^{237}\) Pommersheim, \(\text{supra note 82, at 349.}\)

\(^{238}\) \(\text{Black Hills Hearing, supra note 10, at 259 (prepared statement of Rev. Carl E. Kline).}\)

\(^{239}\) Pommersheim, \(\text{supra note 82, at 349.}\)

\(^{240}\) \(\text{Black Hills Hearing, supra note 10, at 85 (prepared statement of Suzan S. Harjo, executive director, National Congress of American Indians).}\)

\(^{241}\) Suagee, \(\text{supra note 145, at 49.}\)

\(^{242}\) Sutton & Sartore, \(\text{supra note 2, at 2; supra text accompanying note 3.}\)
VI. CONCLUSION

Professor Vine Deloria has observed that the deep bond between Indian people and tribal homelands—even lands that have been "lost"—reflects an undying conviction that "[t]he land itself must be seen to have a measure of respect and when it does not receive these accommodations, human beings who live on the land are accordingly incomplete."\(^{243}\) Professor Deloria discerns that if non-Indians can come to "understand[] that beneath everything else lies this basic demand of respect," they "will see the outlines of another way of living, the way of life that stood in opposition to the relentless invasion of these lands."\(^{244}\) Today, with the courage and spirit of the great chiefs Crazy Horse and Sitting Bull, the Lakota, Dakota, and Nakota people continue to stand in opposition to the invasion and dispossession of \textit{Paha Sapa}, demanding that the United States government return these sacred lands to the Great Sioux Nation so that the people may live. As a modern-day Lakota champion testified to Congress fifteen years ago, "our soul, our spirit, the heart of a people was imprisoned from the moment the Black Hills was taken from us . . . . [W]ith the return of the Black Hills, the bond of imprisonment [will] be broken."\(^{245}\)

In developing its proposal for environmental restoration and land reform in the Black Hills region, the Conservation Alliance of the Great Plains has an opportunity to help unshackle the Lakota, Dakota, and Nakota people from this continuing bondage. To assist in this emancipation effort, the Conservation Alliance in one sense need only abide by the simple adjuration that "our laws and policies should support the survival of Indian tribes as distinct cultures."\(^{246}\) In a deeper sense, however, the proponents of this proposal must accept the fact that any advancement toward environmental justice on the Northern Plains will require great personal fortitude and moral resolve—a "willingness . . . to confront the past, perceive an historical injustice, and have the courage and integrity to set it right."\(^{247}\) Facilitating the return of \textit{Paha Sapa} is not going to be an easy task, but it is going to be a necessary one; for there is no other course of action capable of escaping the dual evils of environmental colonialism and ethnocide.\(^{248}\) The

\(^{244}\) \textit{Id.}
\(^{245}\) \textit{Black Hills Hearing}, supra note 10, at 68-69 (statement of 1964 Olympic gold medalist Billy Mills).
\(^{246}\) Suagee, \textit{supra} note 145, at 49.
\(^{247}\) Pommersheim, \textit{supra} note 18, at 23.
\(^{248}\) Professor Suagee offers some wise, cautionary advice on using the term "cultural genocide"—a synonym of "ethnocide"—in political discourses addressing the repression of Indian rights:

One can characterize the breaking of treaty promises and the taking of tribal land without consent or just compensation in a variety of ways for purposes of American law. . . . One can call it cultural genocide, although I recognize that this is an inflammatory charge. I also recognize that raising this charge does not, in itself, tell us what we should do now. . . . But whether or not we can derive specific and
Conservation Alliance must be vigilant in its work to avoid colluding in what Alexis de Tocqueville in the early nineteenth century astutely detected as America’s singular vocation of “exterminating the Indian race” while displaying “the most chaste affection for legal formalities,” committing ethnocide, as it were, “with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity.”

Through the Conservation Alliance’s proposal, the United States government again may have “an opportunity . . . to end an infamous episode and begin a new, constructive relationship” with the Sioux tribes of the Northern Plains. The most powerful nation on earth again may have the chance to show the world that “[s]tealing [Indian] land, starving [Indian people] into submission—this is not what America stands for.” But whether the Conservation Alliance’s proposal succeeds or fails, the Great Sioux Nation’s struggle for liberation and justice will continue. Grandparents will still teach our grandchildren “to stand with [our] heart[s] turned toward the Black Hills,” and parents will continue to teach our children that crimes, just like the rivers that have been exploited and stolen, do carry footprints. Those footprints are what have kept the Sioux people from sharing in the abundance of their own lands, but they are also the footprints of our ancestors who fought wars and signed treaties so that we could live.

. . . [I]t is time for all of us to examine those footprints. They are the footprints of history.